



National Electric Power Regulatory Authority
Islamic Republic of Pakistan

NEPRA Tower, Attaturk Avenue (East), G-5/1, Islamabad.
Ph: +92-51-9206500, Fax: +92-51-2600026
Web: www.nepa.org.pk, E-mail: registrar@nepa.org.pk

No. NEPRA/TRF- SCCPECPP-2017/11463-11465
July 17, 2018

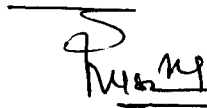
Subject: Decision of the Authority in the matter of Motions for Leave for Review filed against Decision of the Authority in the matter of Induction of Security Cost for CPEC Projects in the Power Tariff to Ensure Security Sustainability

Dear Sir,

Please find enclosed herewith the subject Decision of the Authority along with Annex-I (10 pages) regarding Motions for Leave for Review filed against Decision of the Authority in the matter of Induction of Security Cost for CPEC Projects in the Power Tariff to Ensure Security Sustainability.

2. The Decision is being intimated to the Federal Government for the purpose of notification in the official gazette pursuant to Section 31(7) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997.
3. The Order of the Authority along Annex-I is to be notified in the official Gazette.

Enclosure: As above


17 07 18
(Syed Safer Hussain)

Secretary
Ministry of Energy (Power Division)
'A' Block, Pak Secretariat
Islamabad

CC:

1. Secretary, Cabinet Division, Cabinet Secretariat, Islamabad.
2. Secretary, Ministry of Finance, 'Q' Block, Pak Secretariat, Islamabad.

**DECISION IN THE MATTER OF MOTIONS FOR LEAVE FOR REVIEW FILED AGAINST
DECISION OF THE AUTHORITY IN THE MATTER OF INDUCTION OF SECURITY COST
FOR CPEC PROJECTS IN THE POWER TARIFF TO ENSURE SECURITY SUSTAINABILITY**

1. BACKGROUND


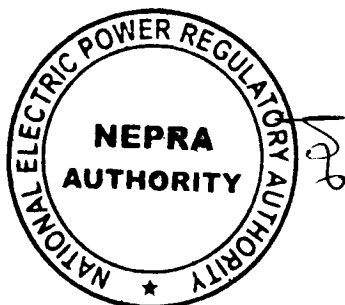
- 1.1. MW&P vide its letter No. IPPs-1(12)2016 dated 10th October 2016 intimated the decision of the ECC of the Cabinet under Case No. ECC-117/19/2016 dated 23rd September 2016 to NEPRA for implementation. The decision of the ECC is reproduced hereunder:

"the Economic Coordination Committee of the Cabinet considered the Summary dated 22nd September 2016, submitted by the Ministry of Water and Power regarding "Induction of security Cost for the CPEC Projects in the Power Tariff through NEPRA to ensure the Security Sustainability" and approved the proposal contained in Para-4 of the Summary."

- 1.2. Para 4 of the Summary is reproduced hereunder:

"CPEC Projects which have achieved Financial Close and for the CPEC early harvest projects where Financial Close is still pending as well as new addition to the CPEC Projects under Implementation Agreement, ECC of the Cabinet may approve and allow issuance of a policy directive to NEPRA to allow 1% of the Capital Cost net of aforementioned US\$ 150,000/- amount on account of security to be distributed annually starting from the construction period till the term of the Power Purchase Agreement."

- 1.3. The Authority decided to initiate suo moto proceedings in the matter. Notice of proceedings was published in the newspaper on 18th March 2017 inviting comments from the stakeholders. Individual notices were also sent to various stakeholders on 22nd March 2017. Hearing in the matter was held on 4th April 2017.
- 1.4. The Authority vide its decision No. NEPRA/TRF-SCCPECPP-2017/13566-13568 dated August 3, 2017 ("impugned decision") approved security cost in respect of each CPEC project on the basis of 1% of capital cost of the project reduced by US\$ 150,000/annum (subject to 3% indexation for each year after the 1st year from COD) and the same shall be treated as pass-through item. The decision also provides a payment mechanism for the same.



Two handwritten signatures are present in the bottom right corner of the page.

2. MOTION FOR LEAVE FOR REVIEW

2.1. Being aggrieved of the impugned decision, the following CPEC projects filed Motion for Leave for Review against the Authority's subject decision:

- Zonergy Company Limited on behalf of its subsidiaries:
 - Appolo Solar Development Pakistan Limited
 - Best Green Energy Pakistan Limited
 - Crest Energy Pakistan Limited
- HydrochinaDawood Power (Pvt) Limited
- UEP Wind

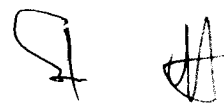
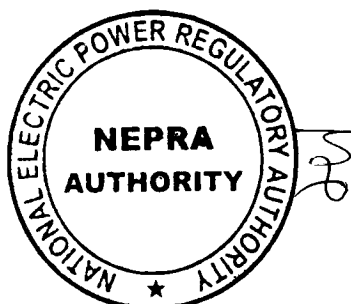
2.2. The Authority admitted the Review Motions filed by Zonergy, Hydrochina and UEP Wind on September 13, 2017, October 3, 2017 and October 12, 2017 respectively and decided to provide an opportunity of hearing to the Petitioners.

3. GROUNDS OF REVIEW MOTION

3.1. The grounds on which the reviews were sought are summarized hereunder:

1) Zonergy Company Limited

- The Impugned Decision provides dual standard that "In case the annual security cost of a project is less than US\$ 150,000/subject to applicable indexation, IPPs shall not include it in capacity charge invoice and CPPA shall not pay any amount on account of it.
- It is unclear yet which law enforcement agency and ministry will demand or receive this security cost.
- The Petitioners have spent huge amount on their internal security arrangements and outside of the solar park, the entire responsibility lies on the Government. Therefore, security cost may be borne by the Government or USD 150,000 may be removed and any expense in lieu of the security cost may be declared as pass through.
- The Petitioners have also been directed to build a check-post at link road leading towards QASP and make several other security arrangements. Whereas, this is not investor's responsibilities, however, we have tried hard to facilitate. Therefore, USD



Two handwritten signatures are present in the bottom right corner of the page.

150,000 may be removed and any expense in lieu of the security cost may be declared as pass through.

- In the interest of investors, especially for CPEC projects, preference shall be given by declaring USD 150,000 null and void. Any kind of expense in lieu of the security cost may be declared as pass through.
- The legal aspects of this issue have not been considered by NEPRA. Instead, the Impugned Decision is against the rules of natural justice.
 - a. It is settled law that executive action cannot operate retrospectively so as to destroy vested rights of Petitioners.
 - b. The Impugned Decision is ultra vires and illegal because it is contrary to the Article 25 of the Constitution of Islamic Republic of Pakistan.
 - c. The benchmark of USD 150,000 may be removed, declared as void ab initio and any expense in lieu of the security cost under CPEC may be declared as pass through.

2) Hydrochina Dawood Power (Pvt) Limited (HDPPL)

Cost on Actual

- Section 5.4 of HDPPL's IA only demands reasonable out of pocket expenses against additional security to be provided by the GOP on Seller's request. These out of pocket expenses are limited up to USD 150,000 per year. No figures have been provided for additional security to ascertain the actual costs for HDPPL.

Additional Security is conditional upon request by HDPPL

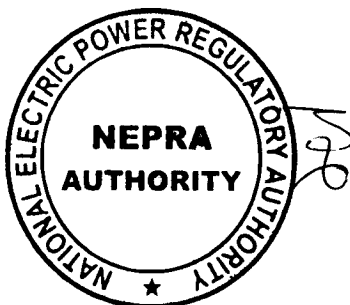
- Costs for additional security are only payable in the event of such request by HDPPL as per Section 5.4 of the IA. Since no request has been made by HDPPL to the GOP for any additional security, HDPPL is not liable to pay for any sum.

GOP responsibility for Security Protection

- According to the Article 9, Article 18, Article 24 and Article 38 of the Constitution of Pakistan, GOP is also responsible for the security of persons within its jurisdiction. The security clause 5.4 also reiterates this responsibility of the GOP.

Change in Law

- A material change in cost affecting the revenue has been caused by this Decision for which either the GOP or CPPA is liable to compensate the Seller for any additional security cost if applicable. The Decision is therefore effectively a



"Change in Law" on all three counts as defined in Article 1 of the IA signed between GOP and HDPPL.

Discrimination

- The Authority, by only placing the financial burden on foreign investors particularly Chinese investors, is violating Foreign Private Investment (Promotion & Protection) Act 1976 and Protection of Economic Reforms Act of 1992.
- The security division is being raised not only for CPEC power projects but also other CPEC projects as well as national projects not in CPEC. However, the financial burden is only being placed on CPEC power projects.
- The GOP has partially denied the Seller of the benefits of the IA. The GOP has through this policy directive to NEPRA applied a discriminatory policy.

One size fits all

- A coal power project of 1,320 MW is 26 times the size of HDPPL, yet HDPPL is required to pay the same USD 150,000 per annum for security. This is unfair and inequitable and against the rules of natural justice for a small project. One size does not fit all and costs need to be more equitably distributed.

Construction Period

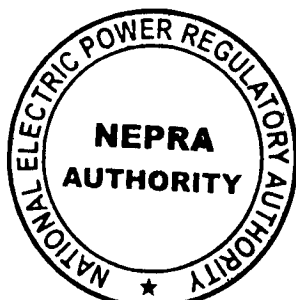
- There is no clarification whether the decision shall also be applicable on projects that have achieved commercial operations. No security division existed at the time of HDPPL's construction stage and no security costs were expended and therefore no costs can be claimed in arrears from HDPPL.
- NEPRA may kindly clarify that the Decision is not applicable to CPEC power projects which have passed the construction stage.

Non Speaking & Arbitrary Nature of Decision

- The Decision is arbitrary and non-speaking in nature. The interveners and commentators including HDPPL had opposed the decision and submitted that it would unfairly impact CPEC power projects. The Authority, simply construed a request from HDPPL, applied a uniform amount on all power projects irrespective of size, provided no substantive reason for discrimination and the entire Decision is vague and contradictory.

Vested Rights, Estoppel, Legitimate Expectations & Retrospectively

- Through the Determination dated April 23, 2014, HDPPL has now obtained a vested right upon which reliance was made while negotiating financing terms and the repayment schedule was drafted keeping the cost and expected revenue



streams in mind. Thus it is a legitimate expectation that HDPPL's tariff would not be changed retrospectively. This additional lump payment will affect the repayment ability.

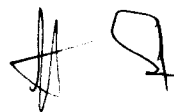
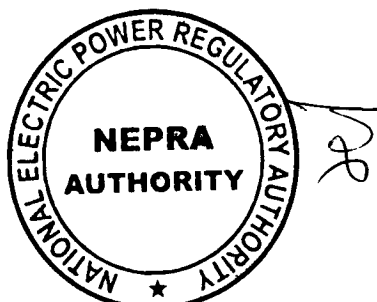
- There is also a clear element of retrospective legislation being attempted here. HDPPL's tariff Determination is notified under the power delegated to NEPRA by Parliament. Subordinate legislation having been notified, vested rights have accrued, and the current Decision, passed 3 years subsequent to the earlier final HDPPL Determination, is an attempt to alter the same. It is a clear principle of law that legislation is not applicable retrospectively unless it very clearly and unambiguously stated to be so. There is no wording which states that this new legislation is retrospective and therefore it has no applicability to the Petitioner.

Prayer

- HDPPL requested the Authority that the decision may be recalled and set aside on the basis of the forgoing grounds stated in this motion for leave to review and that the GOP as envisaged under its Constitutional duty be held responsible to provide security for all projects including CPEC power projects.

3) UEP Wind

- The decision of the ECC only allows NEPRA to approve a 1% capital cost net of US\$ 150,000 that the Company may spend on additional security as per the IA. It is therefore, unreasonable for NEPRA to assume that the ECC has given it the mandate of imposing such costs, when all ECC has allowed is only a reimbursement mechanism.
- Neither ECC required the Company to incur additional costs on security, nor does NEPRA have the jurisdiction to require the Company to incur costs based on its interpretation of the IA. NEPRA is not a party to the IA and therefore may not enforce the provision of the IA based on its interpretation.
- Article 10 of the CPEC Agreement states that the "Pakistani Party" i.e. the GOP shall take the necessary measures to ensure the safety of the Chinese personnel and projects. By imposing an additional cost of security, the government is requiring the counterparty to fulfil the Pakistani Party's obligations. Therefore, NEPRA cannot unilaterally impose security costs on the Company from a payment mechanism taken out-of-context from an agreement that NEPRA is not even party to.
- According to Para 5.3 of the Impugned Decision all reasonable out-of-pocket expenses shall be borne by the IPPs subject of maximum of US\$ 150,000/annum.



However, according to Section 5.4 of the IA, the Seller may request additional security for which reasonable out-of-pocket expenses incurred by the GOP shall be reimbursed to the GOP (through the AEDB) by the Seller within twenty one (21) Days of such expenditure having been notified by the AEDB, up to US\$ 150,000.

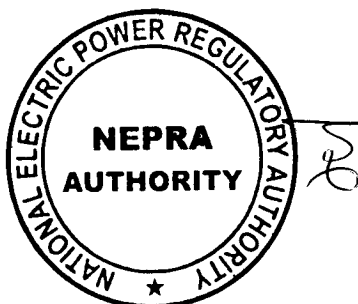
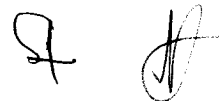
- It is hereby clarified that as per the Section 5.4 of the IA, the incurrence of such costs by the Company are only subject to the Company making a request from the government and the Company is not liable for any such costs based on the government's unilateral assumption.
- UEP Wind by referring Para 5.4 of the Impugned Decision "the more important aspect of the issue is that 10 out of 19 projects have zero financial impact" submitted that it is not factually correct. The mechanism under the Determination would push the Company to incur a fixed cost to the extent of US\$ 150,000.
- Finally the Company requested the Authority to kindly review the determination and allow 100% security cost as a pass through item irrespective of any adjustment to the 1% of the capital cost, or grant any other relief that does not adversely impact the Company.

4. HEARING

- 4.1. Hearing in the matter was fixed for 17th October 2017 which was postponed. Subsequently, the hearing was held on January 11, 2018, at NEPRA Tower. Individual notices were sent to all the stakeholders. The hearing was attended by representatives of all three review Petitioners, PPIB and other stakeholders.

5. ANALYSIS OF THE ISSUE

- 5.1. After carefully going through the grounds raised in the Review Motions and having heard the aggrieved parties, it became evident that all of the grounds raised by the Petitioners primarily pertain to the payment of US\$ 150,000/ annually by IPPs. Para 7(i) of the Impugned Decision provides that "IPPs of CPEC projects shall pay US\$ 150,000/annum, subject to 3% indexation for each year after the 1st year from COD, as required under security protection clause of the IA directly to the relevant Ministry/Agency designated for the purpose during the construction period as well as during the operation period." It was made obligatory for the IPPs to pay US\$ 150,000/ annum.





5.2. The Authority's above decision was based on the following two factors:

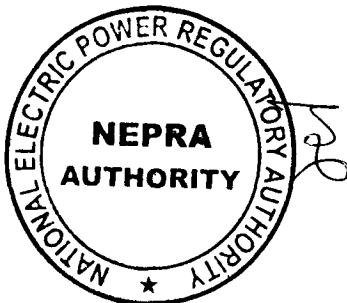
- i) The approved summary of the ECC which states as "*CPEC Projects which have achieved Financial Close and for the CPEC early harvest projects where Financial Close is still pending as well as new addition to the CPEC Projects under Implementation Agreement, ECC of the Cabinet may approve and allow issuance of a policy directive to NEPRA to allow 1% of the Capital Cost net of aforementioned US\$ 150,000/- amount on account of security to be distributed annually starting from the construction period till the term of the Power Purchase Agreement.*"
- ii) Security protection clause of the IA which demands reasonable out of pocket expenses against additional security to be provided by the GOP on Seller's request from time to time. These out of pocket expenses are limited up to USD 150,000 per year (increased by 3% every year after 1st year from COD).

5.3. The Petitioners while offering comments in the proceedings of the Impugned Decision objected the inclusion of US\$ 150,000/annum on part of IPPs. M/s Zonergy submitted that it never requested for additional security and was not liable to pay US\$ 150,000/annum. M/s UEP Wind submitted that additional security under Article 5.4 of IA is a separate matter and it should not be factored in while calculating the security cost. UEP Wind submitted that NEPRA has no jurisdiction to require the company to incur any additional cost based on its interpretation of the IA. According to UEP, NEPRA is not party to the IA, therefore, may not enforce the provision of the IA based on its interpretation. HDPPL submitted that the burden of the Security Cost should not be on the shoulders of the projects.

5.4. The Ministry of Energy (Power Division), PPIB and CPPA(G) vide letter dated March 16, 2018 were requested to submit comments in the matter of above motions for leave for review. However, no comments were received in the matter.

6. DECISION OF THE AUTHORITY

6.1. In the light of the submissions made by the Petitioners in the motions for leave for review, ECC decision was revisited and noted that the approved summary of the ECC required NEPRA to allow 1% of the Capital Cost net of aforementioned US\$ 150,000/- amount on account of security to be distributed annually starting from the construction period till the term of the Power Purchase Agreement. The ECC summary did not require NEPRA to devise payment mechanism for collection of US\$ 150,000/annum under the security protection clause of the IA.

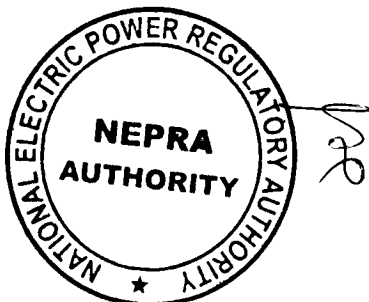


6.2. The Authority agrees with the contention of the Petitioners that the matter of US\$ 150,000/- under security protection clause of IA is between GOP/PPIB/AEDB and IPP and should be dealt with by GOP/PPIB/AEDB under the IA. Accordingly the Authority has decided to replace the text contained in Para 7(i) of the decision dated August 3, 2017 in the matter of Induction of Security Cost for CEPC Projects in the Power Tariff to Ensure Security Sustainability with the following:

"The matter of US\$ 150,000/annum shall be dealt with by GOP/PPIB/AEDB under the relevant Clause(s) of Implementation Agreement."

7. ORDER

- I. The Authority has decided to allow 1% capital cost of the project reduced by US\$ 150,000/annum (subject to 3% indexation for each year after the 1st year from COD) as security cost in respect of each CPEC power project in accordance with the approved payment mechanism and the same shall be treated as pass-through item.
- II. The approved payment mechanism is as under:
 - i. The matter of US\$ 150,000/annum shall be dealt with by GOP/PPIB/AEDB under the relevant Clause(s) of Implementation Agreement.
 - ii. During the operation period, IPPs of CPEC projects shall include in the monthly capacity invoice a separate charge on account of security cost. The capacity charge for security cost shall be calculated on the basis of determined annual security cost of the respective project, reduced by US\$ 150,000/annum for the 1st year from COD and thereafter @3% indexation for each succeeding year, divided by net annual output in kilowatt hours assuming reference exchange rate of Rs. 105/US\$. The subject security cost component of capacity charge shall be indexed on the basis of exchange rate of the last available day of the preceding quarter. The IPPs shall seek its approval from NEPRA quarterly in accordance with other tariff components of the capacity charge. IPPs shall pay the invoiced amount immediately to the relevant Ministry/Agency designated for the purpose.
 - iii. CPPA shall pay the invoiced amount in accordance with the other components of capacity charge.
 - iv. In case the annual security cost of a project is less than US\$ 150,000/ subject to applicable indexation, IPPs shall not include security cost in the capacity charge invoice and CPPA shall not pay any amount on account of security cost for the respective project.

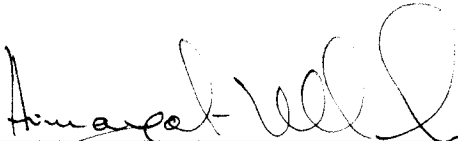


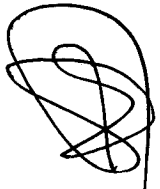


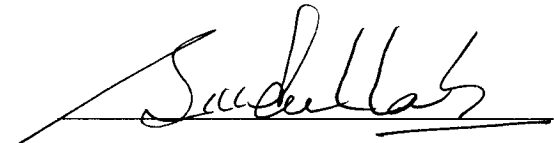
- v. The determined security cost for each year of the construction period in lump sum with arrears, if any, shall be paid by the IPPs to the relevant Ministry/Agency designated for the purpose and the same shall be included in the capital cost of the project at the time of COD adjustment.
- vi. In case the agreed construction period under the PPA is less than the allowed construction period under the tariff determination, IPPs shall ensure that the total amount paid to relevant Ministry/Agency on account of security cost during the construction period is equal to the total amount for the construction period assessed under the tariff determination.
- vii. In future, if the overall security situation improves and GOP considers that special security arrangement is no longer needed and the special security force/division is released from this responsibility, no payment shall be made by the power purchaser on account of special security arrangement.
- viii. CPPA(G) shall submit a report every five (5) years regarding the status and implementation of the decision in the matter.

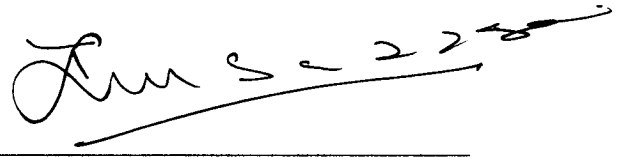
7.1. The above Order along with Annex-I is to be notified in the official gazette in accordance with the provisions of Section 31(7) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997.

AUTHORITY

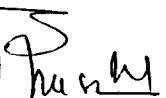

13.7.18.
(Himayat Ullah Khan)
Member


16/07/18
(Rehmatullah Baloach)
Member


(Saif Ullah Chattha)
Member 13.7.2018

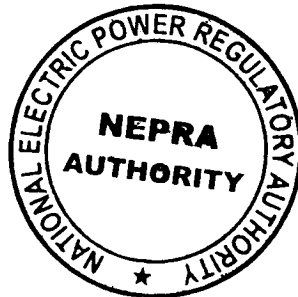

(Brig (R) Tariq Sadozai)
Chairman




17 07 18

DETAILS OF ANNUAL SECURITY COST

| Sr. No. | Project Name | Gross Capacity | Type | Construction Period as per Tariff Determination | Operational Period as per Tariff Determination | Capital Cost | 1% of Capital Cost as Security Cost | Annual Security Cost |
|---------|---|----------------|--------------|---|--|--------------|-------------------------------------|----------------------|
| | | MW | | Years | Years | Million US\$ | Million US\$ | Million US\$ |
| 1 | Huaneng Shandong Ruyi (Pakistan) Energy (Pvt) Limited | 1320 MW | Coal | 4.00 | 30.00 | 1,597 | 15.97 | 0.47 |
| 2 | Port Qasim Electric Power Company (Pvt) Limited | 1320 MW | Coal | 4.00 | 30.00 | 1,597 | 15.97 | 0.47 |
| 3 | China Power Hub Generation Company Limited | 1320 MW | Coal | 4.00 | 30.00 | 1,597 | 15.97 | 0.47 |
| 4 | Thar Coal Block-I Power Generation Company (Pvt) Ltd. | 1320 MW | Coal | 4.00 | 30.00 | 1,597 | 15.97 | 0.47 |
| 5 | Engro Powergen Thar (Pvt) Limited | 660 MW | Coal | 3.33 | 30.00 | 849 | 8.49 | 0.25 |
| 6 | ThalNova (Pvt) Limited | 330 MW | Coal | 3.33 | 30.00 | 424 | 4.24 | 0.13 |
| 7 | Thar Energy Limited | 330 MW | Coal | 3.33 | 30.00 | 424 | 4.24 | 0.13 |
| 8 | Karot Power Company (Pvt) Limited | 720 MW | Hydro | 5.00 | 30.00 | 1,439 | 14.39 | 0.41 |
| 9 | S. K. Hydro (Pvt) Limited | 870 MW | Hydro | 6.00 | 30.00 | 1,455 | 14.55 | 0.40 |
| 10 | Kohala Hydro Power Project | 1100 MW | Hydro | 6.00 | 30.00 | 1,973 | 19.73 | 0.55 |
| 11 | Mitiari-Lahore Transmission Line Project | 4000 MW | Transmission | 2.25 | 25.00 | 1,513 | 15.13 | 0.56 |
| 12 | Appolo Solar Development Pakistan Limited | 100 MW | Solar | 1.00 | 25.00 | 145 | 1.45 | 0.06 |
| 13 | Best Green Energy Pakistan Limited | 100 MW | Solar | 1.00 | 25.00 | 145 | 1.45 | 0.06 |
| 14 | Crest Energyt Pakistan Limited | 100 MW | Solar | 1.00 | 25.00 | 145 | 1.45 | 0.06 |
| 15 | UEP Wind Power (Pvt) Limited | 99 MW | Wind | 1.50 | 20.00 | 228 | 2.28 | 0.11 |
| 16 | Sachal Energy Development (Pvt) Limited | 49.5 MW | Wind | 1.50 | 20.00 | 118 | 1.18 | 0.05 |
| 17 | Hydrochina Dawood Power (Pvt) Limited | 49.5 MW | Wind | 1.50 | 20.00 | 114 | 1.14 | 0.05 |
| 18 | Three Gorges Second Wind Farm (Pvt) Limited | 49.5 MW | Wind | 1.50 | 20.00 | 100 | 1.00 | 0.05 |
| 19 | Three Gorges Third Wind Farm (Pvt) Limited | 49.5 MW | Wind | 1.50 | 20.00 | 100 | 1.00 | 0.05 |



NR

[Handwritten mark]

[Handwritten mark]