National Electric Power Regulatory Authority
Islamic Republic of Pakistan

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

Registrar

No. NEPRA/Advisor(CTBCM)/RFP-04/ 3115-21 February 29, 2024

Chief Executive Officer,
K-Electric Limited (KEL),
KE House, Punjab Chowrangi,
39 – B, Sunset Boulevard, Phase-II,
Defence Housing Authority
Karachi.

Subject: **Decision of the Authority in the matter of Review motion filed by K-Electric Limited against the Decision of the Authority Dated October 14, 2022 in the matter of Request for Proposal for Three Solar Projects in Winder and Bela sites, in the Province of Balochistan**

Enclosed please find herewith the subject Decision of the Authority alongwith Additional note of Mr. Mathar Niaz Rana (nsc), Member (NEPRA) and Additional note jointly signed by Mr. Rafique Ahmed Shaikh and Mr. Maqsood Anwar Khan, Members (NEPRA) and Mr. Waseem Mukhtar Chairman (NEPRA) (total 19 Pages) in the matter of Review motion filed by K-Electric Limited against the Decision of the Authority Dated October 14, 2022 in the matter of Request for Proposal for Three Solar Projects in Winder and Bela sites, in the Province of Balochistan.

Enclosure: As above

(Engr. Mazhar Iqbal Ranjha)

Copy to: (alongwith Copy of Subject Decision)

1. Secretary, Ministry of Energy (Power Division), 'A' Block, Pak Secretariat, Islarnabad.
2. Secretary, Cabinet Division, Cabinet Secretariat, Islamabad.
3. Secretary, Ministry of Finance, 'Q' Block, Pak Secretariat, Islamabad.
4. Secretary, Ministry of Inter Provincial Coordination, (Secretariat of Council of Common. Interests), Government of Pakistan, Cabinet Block, Cabinet Secretariat, Islamabad
5. Chief Executive Officer, Central Power Purchasing Agency Guarantee Limited (CPPA-G), Shaheen Plaza, 73-West, Fazl-e-Haq Road, Islamabad
6. Managing Director, National Transmission & Despatch Company Limited 414-WAPDA House, Lahore.

DECISION OF THE AUTHORITY IN THE MATTER OF REVIEW MOTION FILED BY K-ELECTRIC LIMITED AGAINST THE DECISION OF THE AUTHORITY DATED OCTOBER 14, 2022 IN THE MATTER OF REQUEST FOR PROPOSAL FOR THREE SOLAR PROJECTS IN WINDER, AND BELA SITES, IN THE PROVINCE OF BALOCHISTAN

1. K-Electric Limited ("KEL" or "the Petitioner"), under the relevant provision of the NEPRA Competitive Bidding Tariff (Approval Procedure) Regulations, 2017 (the "NCBTR"), submitted a single Request for Proposal ("RFP") for approval of the National Electric Power Regulatory Authority ("NEPRA" or "the Authority") on April 23, 2021. This RFP was designed to carry out separate bidding for three solar PV projects, each having a capacity of 50MW, to be developed in Winder, Uthal, and Bela sites, in the province of Baluchistan. Later, KEL informed that due to the unavailability of land in Uthal, two projects shall be established in Bela, on the sites being adjacent to each other, and one project shall be located in Winder. The Authority approved the aforementioned RFP vide its decision dated October 14, 2022, whereby a benchmark tariff of Rs. 7.50/kWh (@Rs. 190/USD) with an annual indexation cap of 2.5% was approved ("Impugned Decision").

2. Being aggrieved with the above decision of the Authority, KEL vide its letter dated November 14, 2022, submitted a motion for leave for review ("Review Motion") under NEPRA (Review Procedure) Regulations, 2009, and other applicable documents. In the Review Motion, KEL requested to review the Authority's decisions on the matters of (i). KEL's equity stake in the project's Special Purpose Vehicle ("SPV"), (ii). benchmark tariff in the event of non-availability of State Bank of Pakistan ("SBP") financing, (iii). criteria for technical evaluation. KEL further requested approval of the same incentives the Federal Government gave in the Framework Guidelines for Fast Track Solar PV Initiatives, 2022 (the "Framework Guidelines"). Moreover, KEL sought clarifications on the evaluation criteria of financial bids. A brief of the decisions taken by the Authority on the above matters and grounds for review/requests, as submitted by KEL, are as follows:

Sr. No	Issue and Decision by the Authority	Grounds for Review by KEL
1.	**KEL's stake in the Project's SPV** The Authority in the Impugned Decision disallowed KEL to hold equity shareholding in the SPV.	KEL submitted that the said decision of the Authority undermines its ability to make investments and set up generation facilities to cater to the demand of its consumers, which is its fundamental obligation being a Vertically Integrated Utility ("VIU"). The Petitioner also referred to the decision of the Authority in the matter of Datang Pakistan Karachi Power Generation (Pvt.) Limited (a coal-based power project) wherein KEL was allowed to

NEPRA AUTHORITY
NATIONAL ELECTRIC POWER REGULATORY AUTHORITY

		participate as an equity shareholder. KEL also submitted that it will invest in the SPV after the competitive bidding, and it will be a non-controlling shareholding, with up to 25%.
2.	**benchmark tariff in the event of non-availability of the SBP's financing** The Authority computed and approved the benchmark tariff in the Impugned Decision using terms of financing of the SBP scheme.	KEL submitted written confirmations from different banks on the non-availability of the SBP concessionary scheme and requested the approval of benchmark tariff on commercial financing.
3.	**Criteria for technical evaluation** The Authority decided to include the mechanism for the evaluation of EPC and O&M contractors in the technical evaluation criteria. Additionally, KEL was instructed to ensure that the equipment to be installed fulfilled the technical standards as stipulated in the Grid Code 2023. It was also directed to introduce the provisions in the RFP for the evaluation of the sponsors on their plan regarding the local economic development in the country.	KEL submitted that the evaluation of EPC and O&M contractors will discourage the bidders from developing the projects under self-EPC and O&M mode, which will restrict them from achieving the lower tariffs. Regarding the compatibility of the complex and equipment with the technical standards of the Grid Code, KEL requested to include it in the knockoff criteria. For the ability to contribute to local economic development, KEL agreed to include that criteria but requested to provide specific requirements for the evaluation of this condition.
4.	**Application of the same incentives as given by the Federal Government through the Framework Guidelines**	KEL requested the Authority to consider the concessions and incentives being offered by the Federal Government while deciding the instant review motion, so that a level playing field may be provided to all the investors.
5.	**Clarifications on the evaluation of financial bids**	KEL seeks clarification on the evaluation mechanism of the financial bids as approved in the Impugned Decision.

NEPRA AUTHORITY
NATIONAL ELECTRIC POWER REGULATORY AUTHORITY

3. The Authority admitted the Review Motion and decided to hold a hearing in the matter, which was conducted on April 06, 2023. The hearing was attended by KEL, Central Power Purchasing

2/19

Agency Guarantee Limited ("CPPAGL"), the Government of Sindh ("GOS"), and others. During the hearing, CPPAGL highlighted certain observations with regard to the equity participation of KEL and communicated the same vide its letter dated April 10, 2023. Those comments were forwarded to KEL for its rejoinder/response. The Petitioner through its letter dated May 18, 2023, and later RIAA Barker (a law firm) on behalf of KEL vide letter dated June 05, 2023, responded to the submissions of CPPAGL, which will be discussed in succeeding relevant paragraphs of this decision.

4. Subsequently, KEL vide its letter dated July 14, 2023, received on July 18, 2023, proposed benchmark tariffs of US Cents 4.3303/kWh and US Cents 4.3525/kWh for 50 MW Winder and 100 MW Bela solar projects, respectively. In the said letter, the Petitioner also requested USD indexation on 100% of the proposed benchmark tariffs. KEL explained this indexation request has been made due to the ongoing economic and financial challenges in the country, which has resulted in a significant surge in country risk premiums. According to KEL, the said indexation is likely to attract maximum interest from the prospective bidders for the development of projects, which will ultimately result in competitive tariff bids.

5. Later, KEL through its letter dated October 16, 2023, requested the Authority to allow open competitive bidding by providing relaxation under Regulation 14 (2) of the NCBTR. Additionally, the Petitioner requested to allow the same concessions and incentives being offered by the Federal Government to upcoming solar projects, which has also been approved by the Authority vide its decision dated September 06, 2023, in case of RFP for the development of 600 MWp solar power project, to be set up at Muzaffargarh. Essentially, KEL asked for 80% of the tariff to be linked with the value of the USD during the operations of the projects. It also requested variations in SOFR and KIBOR to be applied on a certain percentage of the tariff, to be decided by the Authority. Additionally, the Petitioner requested a one-time exchange rate adjustment for the remaining 20% of the tariff at the Commercial Operation Date ("COD") of the projects.

6. In justification of its request for open competitive bidding, KEL submitted that this method would be a more prudent approach in current challenging circumstances. This would present an opportunity for investors to themselves assess the market conditions and accordingly make representations about the expected cost/returns, which according to KEL, will lead to greater participation. KEL emphasized that in current times of diminishing investment in Pakistan, the open bidding mechanism would be the befitting approach to attract investors, and also to ensure fast-track implementation of the projects.

7. The Authority considered the request of KEL and decided to conduct another public hearing on the matter, which was held on November 14, 2023. This hearing was attended by various stakeholders both in-person and online via Zoom, including representatives of KEL, National Transmission and Despatch Company Limited ("NTDCL"), the Energy Department of GoS, and the public at large. The advertisement for the hearing was published on November 04,

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA
AUTHORITY

2023, and separate notices of hearing were sent on November 06, 2023. In addition to the grounds raised by KEL in the Review Motion, the following additional issues were framed by the Authority for public hearing:

i. Whether the proposed open competitive bidding is justified and can be allowed under the NCBTR?
ii. What would be the mechanism for the assessment and approval of prudent tariff for the projects after processing the project under open competitive bidding?
iii. Whether the proposed indexation mechanism is justified?
iv. Any other issue with the approval of the Authority.

8. The Following paragraphs detail the submissions of the Petitioner, relevant comments of stakeholders, discussion, directions, and decisions of the Authority on the grounds raised in the Review Motion by KEL as well as on additional issues of the proceedings.

KEL's equity stake in the Projects

9. KEL in the RFP had stated that upon issuance of the Letter of Intent ("LOI"), the successful bidders shall form the SPVs, and KEL, at its sole discretion, will participate as a shareholder in the SPVs, either through its affiliate or its subsidiary, that may hold up to 49% shareholding in the SPVs. Later, KEL vide its letter dated November 11, 2021, proposed to invest in the SPVs through its recently formed subsidiary in the name of KE Venture Company (Pvt.) Limited (KEVCL). KEL submitted that it will hold up to 25% of the equity in the SPVs (instead of up to 49% as earlier stated in the RFP), only after the notification of the successful bidder.

10. However, in the Impugned Decision, the Authority did not allow KEL to hold any shareholding in the SPVs. the relevant extracts stating the reason for refusal are given hereunder:

"The Authority considered the viewpoint of KEL and the commentators. The Authority agrees with the submission of the commentators that participation of KEL in the shareholding of the SPV will be a conflict of interest. It is apprehended that KEL, being the purchaser, is likely to dictate the terms of the agreements in its favor or may absolve the SPV from performing its obligations under the EPA. Therefore, the Authority decided not to allow KEL to hold any shareholding in the SPV and therefore directs KEL to amend the RFP by omitting the said term."

11. KEL in its Review Motion submitted that the decision of the Authority for not allowing equity holding in the SPVs undermines its ability to invest in generation facilities, which is a fundamental obligation of KEL as a VIU. It added that previously the Authority had allowed KEL for equity participation in the case of Datang Power Project. KEL submitted that it will invest in the SPVs after the completion of the bidding process. The bid evaluation process will be overseen by an Independent Consultant, and it will only commence discussion on potentially acquiring ownership (by way of cash equity) in the SPVs, once the successful bidder has been

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA
AUTHORITY

notified, based on the least cost tariff and subsequent negotiations. KEL further submitted that it will be a non-controlling shareholder, with up to 25% equity in the SPVs, and any investment in the SPVs will be made after obtaining requisite regulatory approvals. It stated that KEL's equity stake in the SPVs will have a positive impact on the overall activities of the projects, as KEL will be able to supervise key project milestones and ensure their timely completion.

12. With respect to the Energy Purchase Agreement ("EPA"), as mentioned in the Impugned Decision, KEL submitted that the agreement to be signed between KEL and SPV will be on an arm's length basis, which will also be submitted to the Authority for approval. It further highlighted that the established SPVs, as independent entities, will have their own Board of Directors, and all corporate decisions or business transactions will be subject to requisite board approvals, as required under the Companies Act, 2017. To this effect, any transaction between KEL and the SPV will be subject to the terms of the Companies Act, 2017 which regulates related party transactions and excludes interested directors from being involved in the decision-making process. KEL emphasized that the transactions are not disallowed on the basis of any potential conflict of interest; instead, a framework is implemented under the law which governs and regulates any conflicts.

13. CPPAGL submitted that the equity holding of KEL in the SPVs may raise the conflict of interest situation regarding the processing of the financial invoices. It added that KEL may consider itself in an awkward situation to decide the matters specifically related to the calculations of Forecasting Error and Non-Project Missed Volume ("NPMV") in the EPA. CPPAGL stated that KEL, being the equity holder, will watch its rights and avoid any Forecasting Error Rebate that may be triggered under the EPA, rather than passing its benefits to the consumers. Likewise, the NPMV mechanism can also be mishandled during the projects' operations, when the claimant is the verifier.

14. KEL in response to the concerns raised by CPPAGL submitted that NEPRA, being the Regulator, shall approve the EPA to be signed between KEL and power producers. It explained that all the costs paid to power projects are claimed by KEL in its consumer end tariff, which are reviewed and verified by the Authority, before allowing the same for the recovery. This eliminates all the risks of any expensive claims by KEL. About the Forecasting Error and NPMV calculations, KEL responded that these computations shall be done following the standard mechanism as given in the EPA.

15. RIAA Barker, on behalf of KEL, has provided comments on the equity participation of KEL in SPVs. The brief of these comments is summarized below:

    i. There is no absolute prohibition on KEL on conducting the competitive bidding process and having equity shareholding in the project, and/or for KEL to have equity shareholding in the Project and be the power purchaser at the same time.

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA
AUTHORITY

ii. There are no restrictions in the Companies Act, 2017 which out rightly restrict KEL from having equity interest in the Project. It further submitted that investments in associated companies and related party transactions are envisaged in the Companies Act.

iii. In terms of the potential conflict of interest of KEL arising from the dual role of holder of direct shareholding in the SPV to be formed by the Projects and as the power purchaser for the Projects, it presented detailed arguments addressing why KEL should be allowed to hold equity in the Project including the mechanisms presented in the Companies Act which KEL is bound to follow to regulate the organizational affairs and governance of the SPV to avoid conflict.

16. During the hearing held on November 14, 2023, it was also discussed the equity share of KEL should be clearly defined upfront so that the prospective bidders would have a clear idea regarding how much equity amount they have to arrange. Secondly, it was debated whether it should be left to the discretion of the investors to get the participation of KEL in the equity share, or it should be on the demand of KEL. The representative of Bridge Factor submitted that the participation of KEL in the SPVs should be at the discretion of the successful bidders. He further added that in case the Authority decides to allow KEL, at its discretion, for equity participation, then a percentage should be decided upfront rather than allowing it to negotiate the same at the time of formation of SPVs. This will give a clear picture to the prospective bidders regarding the amount of equity to invest and would also help them to negotiate better indicative term sheets with the financial institutions, commercial banks, etc. One of the commentators namely Mr. Arif Bilwani said that equity participation of KEL should be allowed as it may lead to better cost of capital.

<u>Observations/Findings and Decision of the Authority</u>

17. The Authority noted that this issue was deliberated in detail during the processing of the Impugned case. It is important to mention that the Authority found no legal restrictions on KEL's equity participation in the SPVs under the NCBTR, or any other laws and related NEPRA regulatory framework. Additionally, the Competition Commission of Pakistan or the Public Procurement Regulatory Authority did not object to KEL's proposal, subject to requisite approvals. The only basis for rejecting this proposal of KEL was the concern about the conflict of interest. That is, the Authority considered that KEL, being both the shareholder of the SPVs and power purchaser, would implement certain terms of the EPA in its favor, instead of passing on the benefits thereof to the consumers. CPPAGL during the proceedings has also advanced its comments highlighting the concerns of conflict of interest.

18. KEL responded that the conflict of interest should be managed, instead of disallowing the transactions on this basis. Further, KEL talked about the verification and approvals of the Authority for EPAs and quarterly adjustments, to negate the point that it can somehow benefit itself with the equity participation in the SPV.

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA AUTHORITY

6/19

19. The Authority considered the above submissions and further noted that KEL is a VIU and possesses the Generation License, and therefore it can set up its own generation facilities. This means that KEL is not barred from establishing plants with 100% equity of its own. The issues (invoicing, NPMV, etc.), being also highlighted by CPPAGL under the pretext of conflict of interest with KEL's equity participation (up to 25% in SPV), would be manifold with plants developed on 100% equity of KEL. Since the establishment of KEL's own generation plants is not prohibited, therefore, it is considered that this matter of non-controlling equity participation actually requires management of possible conflicts, instead of rejecting this proposal. In this relation, the Authority considers that the approvals of EPA and then verifications of quarterly adjustments by NEPRA shall reduce the possibility for KEL to benefit itself from this arrangement. With respect to specific contentions of CPPAGL, the Authority is of the opinion that the claims of NPMV and Forecasting Error (or any other issue pertaining to EPA), shall be approved subject to verification from NEPRA. If necessary, the Authority may consider appointing an Independent Auditor for this purpose, with the decision to be made while approving the EPA. In view thereof, the Authority considers that the submission of KEL with respect to managing the conflict of interest and explaining the methods of how that conflict can be managed, provide sufficient reasons to review the Impugned Decision in this regard. Therefore, the Authority decides to allow KEL to hold equity in the SPVs. This participation of KEL in SPVs shall be up to 25%, non-controlling, and the terms and conditions thereof shall be specified in the Share Purchase Agreement ("SPA"). The SPA will be included as part of RFP documents when they are floated to the potential bidders. Further, KEL shall seek approval of the Authority for this transaction, as required under its licenses and relevant provisions of the applicable documents.

20. Notwithstanding the above, it was also deliberated whether the discretion for equity participation should be vested with the successful bidder or KEL. The Petitioner submitted that it intends to participate as a shareholder in the SPV, at its sole discretion, with a potential holding of up to 25% equity. Few pre-qualified bidders and commentators opposed the discretion of KEL and submitted that this option should be left with the successful bidders. Given that the responsibility of constructing, operating, financing, etc. of the projects is with the successful bidder, the Authority found it appropriate that this option should also rest with them. The bidders should take this decision while considering the value KEL participation is going to bring for project execution, financing, and other aspects. The Authority also considers that with more bidders (including both who shall have the intent of KEL's equity share and who shall not) participating in the competitive bidding, this arrangement will foster healthy competition, which would ultimately lead to competitive rates. For the purpose of clarity, KEL is directed to communicate upfront, while floating the RFP, its desired level of equity participation percentage (a fixed number) with a maximum limit of 25%. This will enable the bidders to have certainty regarding the remaining amount they have to arrange, in case they plan for a share of KEL's equity participation.

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA AUTHORITY

Whether the proposed open competitive bidding justified and allowed under NEPRA Competitive Bidding Tariff (Approval Procedure) Regulations, 2017?

21. KEL in its latest communication requested NEPRA to allow open competitive bidding, rather than the earlier proposed reverse auction with benchmark tariff. The Petitioner submitted that any benchmark tariff fixed by the Authority may not adequately reflect the rapidly changing market conditions, and could lead to minimal participation in the bidding process. KEL mentioned the significant global disruptions, including economic, financial, geopolitical, and COVID-related challenges, particularly the economic fallout from the Russian-Ukraine war and the Pandemic to support its request. KEL explained that these factors have caused an unprecedented increase in commodity prices, heightened volatility, and unpredictability in the global market. Talking about the local situations, KEL pointed out that the drastic devaluation of the local currency and rising inflation in the last couple of years have increased uncertainty for investors. In view thereof, KEL submitted that adopting open competitive bidding would be a more prudent approach, which will allow investors to factor in the prevailing uncertainties of global and local market conditions, and make a more informed representation of different parameters of tariff. In this regard, KEL also referred to the decision issued by the Authority whereby the RFP in respect of the 600 MW solar PV project was approved, wherein the open competitive bidding was allowed by NEPRA.

Observations/Findings and Decision of the Authority

22. The Authority noted that although Regulations 4(4) and 8(3) of the NCBTR mandates the approval of a benchmark tariff for the competitive bidding. However, Regulation 14(2) of NCBTR empowers the Authority to relax the requirements as stipulated in the Regulations, for reasons to be recorded in writing and subject to such conditions as it may deem fit. It is noted that the Authority also relaxed the requirement of competitive bidding with benchmark tariff in the case of the 600 MWp solar PV project, and allowed the relevant agency to carry out open competitive bidding in that case. The basis of that relaxation was the prevailing economic and financial challenges being faced both globally and locally. Given that KEL has also raised similar contentions, the Authority has decided to relax the requirement of NCBTR and hereby allow KEL to hold open competitive bidding (without benchmark tariff) in the instant cases. However, with open competition, the Authority has decided that it shall have the power to reject the bids if considered imprudent. KEL is directed to make this condition a part of RFP documents, before floating the same to prospective bidders.

What would be the mechanism for assessment and approval of prudent tariff for the project after processing the project under open competitive bidding?

23. KEL during the hearing explained that all bids received will be initially evaluated as per the related technical criteria. Then the financial bids of technically qualified bidders will be opened for evaluation. The bidder having the lowest tariff will be declared as successful. It further added that the selection of the successful bidder will be subject to the approval of the

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA
AUTHORITY

8/19

Authority of the Bid Evaluation Report. KEL emphasized that competitive bidding mechanism is generally considered to be the most effective mode for price exploration, and the completion of an effective and independent competitive bidding process with sufficient participants, will itself ensure prudency of tariff and price competitiveness.

24. KEL also submitted that in its capacity as the Auction Administrator for the projects, it will be including the following assessment in its Bid Evaluation Report for consideration of the Authority:

An independent assessment of the lowest bid received which will be based on the then prevailing market prices and macro-economic conditions.

Reduction in the generation cost of KEL by the addition of projects through the expected displacement of generation on expensive fuel.

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA
AUTHORITY

Observations/Findings and Decision of the Authority

25. The Authority noted that while approving the RFP for the 600 MWp solar PV power project of PPIB at Muzaffargarh, it had outlined the following conditions to assess the prudency of the tariff;

"...in case of open competitive bidding, the Authority has decided that for this purpose the bid evaluation report submitted by the Petitioner will include analysis on whether the lowest bidder's tariff aligns with the government's given Framework Guidelines and objectives of other applicable documents in consultation with CPPA-G and NTDC for displacement of expensive based on a current or fresh iteration of the IGCEP by NTDC. The declaration of Successful Bidder after fulfilment of condition in the bid evaluation report may be approved by relevant government forum(s)."

26. Approval of the 600 MWp solar PV power project was approved in light of the Framework Guidelines, for which the Government Agency, i.e. Private Power & Infrastructure Board ("PPIB") approached NEPRA. One of the primary objectives of these Framework Guidelines was the displacement of expensive fuel. Consequently, the Authority established specific criteria for the evaluation of the prudency of tariff. That is, it was required that a current or fresh iteration of the Indicative Generation Capacity Expansion Plan ("IGCEP") be carried out, to ascertain whether the ultimate objective (displacement of expensive electricity) shall be fulfilled on the successful bid tariff. In order to have an additional layer of scrutiny, the declaration of the successful bidder was also required to be approved by the relevant Government Forum(s).

27. On the other hand, KEL is a private utility, hence, the requirement for the declaration of successful bidders by any relevant Government Forum (as specified in the 600 MWp case) may not be applicable in this instance. The Authority further noted that the current generation basket

price of KEL is relatively more expensive than that of CPPAGL, therefore, the sole criterion of displacement of expensive fuel would not suffice the purpose, as any bid lower than the energy purchase price of KEL would make the case for procurement.

28. In view thereof and given the submissions of KEL, the Authority decided that KEL shall conduct a comprehensive assessment of the successful bid, considering the then prevailing macroeconomic and market conditions. This shall include assessing the successful bid while considering the prevailing cost of modules and other equipment. The **cost of funds** and other parameters, as considered appropriate, shall also be considered for that purpose. Additionally, the assessment and analysis of displacement of expensive electricity shall also be carried out, to essentially check and confirm the basis on which this capacity was optimized in the IGCEP and included in the Power Acquisition Program ("PAP"). It is important to mention here that the lowest number yielded by any of the above criteria shall be considered as a reference tariff. KEL shall be having powers for the rejection of that bid in case it is found imprudent. In the event of a successful check of prudency, the above assessments shall made a part of the Bid Evaluation Report, which is to be submitted to the Authority for approval.

Whether the proposed indexation mechanism is justified?

29. KEL in its latest submission dated October 16, 2023, has requested the Authority to approve the following mechanism for tariff indexation:

$$\text{Revised AT} = \text{AT} * \text{Kx\%}\left[\frac{\text{Rev KIBOR}}{\text{Ref KIBOR}} - 1\right] + \text{AT} * \text{Sx\%}\left[\frac{\text{Rev SOFR}}{\text{Ref SOFR}} - 1\right] + \text{AT} * 80\% * \left[\frac{\text{ER Rev}}{\text{ER Ref}} - 1\right] + \text{AT} * 20\% * \left[\frac{\text{ER Rev (one time)}}{\text{ER Ref}} - 1\right] + \text{AT}$$

30. The exchange rate adjustment has been claimed on 80% of the tariff, with 20% of the tariff to be adjusted one-time at the time of COD due to the change in parity. It has also been requested to allow SOFR and KIBOR variations on certain percentages of tariff, which are to be specified by the Authority. In essence, the indexation mechanism as approved by the Authority in the matter of PPIB's RFP for 600 MW solar PV power project has been requested by KEL.

31. It can be seen that the above-mentioned mechanism considers the tariff based on commercial financing. In this relation, it is vital to discuss the issue of SBP financing, as raised in the Review Motion also by KEL. In the Impugned Decision, the Authority computed the benchmark tariff using the terms of the SBP scheme on a certain portion of the financing. It was stated that in the event of non-availability of said financing, KEL may consider filing the petition before the Authority as per applicable documents, requesting the Authority to compute and approve the benchmark tariff only on commercial financing terms. For such application, KEL was asked to prove the non-availability of said financing through documentary evidence, to the satisfaction of the Authority. KEL in its Review Motion stated that the SBP concessionary financing is not available, and requested to approve the benchmark tariff on the terms of commercial financing. In relation thereof, KEL submitted written confirmations from

10/19

Bank of Alfalah, Habib Bank Limited, Allied Bank Limited, United Bank Limited, and Meezan Bank, on the non-availability of SBP concessionary financing.

32. This matter was also discussed during the hearing held on November 14, 2023, wherein the Authority informed KEL that the SBP, in response to NEPRA's letter dated April 26, 2023, has confirmed that concessionary SBP financing is indeed available. In response, the representative of KEL said that they have obtained written confirmation from commercial banks that the SBP is no longer providing financing under the said facility. In this respect, the Authority shared the SBP's letter dated May 30, 2023, with KEL and instructed the Petitioner to submit the written confirmation from the SBP/commercial banks that the concessionary financing is not available. In response, KEL on November 29, 2023, shared an email from Faysal Bank which, inter alia, states the following:

"However, while the concessionary Renewable Energy Facility is operative till June 30th 2024, there is no room in the same with respect to the allocation granted to us by the State Bank of Pakistan. It is also our understanding that fresh allocations are no longer made under this facility due to an overall cap on the funding set aside for this and any fresh disbursals are purely through repayments from existing obligors. Considering the amounts that you would require, it seems difficult, in our opinion, that any Bank (or maybe even a collection of Banks) would have that quantum available in the next 12-18 months. Even if they did, we believe it would be counterproductive to assume that the scheme will remain valid post June 2024 (in the absence of any instructions to the contrary) especially if your drawdowns fall after that date. Hence, the advisable route is to consider all project funding at non-concessionary rates."

33. Justifying its proposed tariff indexation mechanism, KEL reiterated the current financial and economic challenges being faced both locally and globally. The Petitioner additionally presented the statistics that PKR has witnessed devaluation at an annual rate of 32% against USD since 2021, while the inflation rate stands at 31.4% over 2022. Stating these contentions, KEL submitted that it believes that the approval of an appropriate indexation mechanism is very critical to maximize investor participation in the bidding process and to safeguard the investor returns during project execution and operations.

Observations/Findings and Decision of the Authority

34. As earlier mentioned, KEL has requested a tariff indexation mechanism similar to one approved by the Authority in the RFP of the 600 MW solar PV project. The Federal Government rectified the said mechanism while approving the Framework Guidelines. It is worth noting here that earlier the Federal Government opted for parity variations on the lesser percentage of tariff, which did not work out. According to PPIB, the investors, among other reasons, did not opt to bid under the earlier scheme due to prevailing economic conditions. That is, the investors would have felt that the prevailing risk profile outweighed the corresponding benefits given in the Guidelines, leading them to opt out of bidding. As a result, the Federal Government later decided to introduce a relatively incentivized scheme instead.

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY NEPRA AUTHORITY

KEL has also presented arguments revolving around financial and economic challenges to justify its request for the said tariff indexation mechanism. The Authority considered these points in detail and found the request of KEL justified.

35. Nevertheless, unlike the 600 MWp project, the instant projects are eligible to secure financing under the SBP Scheme, therefore, it is important to discuss whether the provision of SBP financing should be included in these cases or not. Though KEL has provided written confirmations from different commercial banks about the non-availability of financing under the SBP scheme, however, the letter from the SBP acknowledges the possibility of obtaining financing under the said scheme. If the sponsors can secure SBP financing, it would not be justified to replicate the proposed formula as such in that case. Accordingly, with SBP financing, it would be essential to re-determine the percentage of tariff to be linked with USD, as well as the linking of a certain percentage of tariff with change in KIBOR shall also not be needed. Based on these considerations, the Authority has decided to approve this RFP stating the mechanism with and without the provision of financing under the SBP Scheme, which is detailed in the Order part of this decision. Additionally, the Authority hereby directs KEL and the potential bidders to make concerted efforts to avail of the SBP financing.

36. Another related consideration was regarding what size each project should be established. While processing the Impugned Decision, it was informed by KEL that due to the unavailability of land in Uthal, two projects now shall be developed in Bela, on the sites being adjacent to each other, and 01 project shall be located in Winder. The Authority decided that in case the SBP financing is available, 03 projects of 50MW each, shall be established. However, in case of non-availability of the financing under the SBP Scheme, the proposed 150 MW shall be developed as 02 projects under 02 SPVs, i.e. 01 project of 50 MW in Winder and the other project of 100 MW in Bela, and the bidding processes shall be carried out accordingly. The Authority decided to maintain the said decision. KEL shall specify in the RFP that the bidders shall bid for 03 projects (50 MW each) in case they manage to obtain SBP financing, and if not, a bid shall be offered for two projects.

37. Under this issue, it is also pertinent to discuss the clarifications sought by KEL in the Review Motion regarding the tenor of debt servicing. KEL argued that the option to submit different tariff values for each year of the tariff control period, as allowed by the Authority in the Impugned Decision, may lead to a significant front-loading of the tariff, which in turn shall burden the consumers noticeably. To avoid putting too much burden on consumers in the initial years, KEL requested the Authority for setting some limits on the debt servicing period. The Authority noted that the Impugned Decision was approved on the reverse auction scheme with benchmark tariff. However, upon the request of KEL, the Authority now has decided to allow KEL to carry out open competitive bidding, with a standardized tariff indexation mechanism. It is also important to explain here the tariff scheme, which is being approved in this decision. The bidders submitting the financial bids shall only state a single tariff number, which shall be considered for the purpose of financial evaluation. The bidder offering the lowest tariff shall

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA
AUTHORITY

be considered successful, though subject to subsequent KEL's assessment and approval of the Authority. If declared/approved as successful, this tariff number shall remain applicable throughout the control period, subject to indexation at COD and then quarterly during project operations, in accordance with the given indexation mechanism. The actual debt servicing period, financing mix, or any other factor, shall not change the structure of the tariff.

38. Another related issue is that the Authority in the Impugned Decision did not take into account the cost of land in the benchmark tariff. This was due to the fact that KEL did not provide the documents related to the allocation and valuation of land at that time. KEL in the Review Motion submitted that Balochistan Energy Company Limited ("BECL") has given some valuation with regards to the lease amount of land to be paid upfront, however, the matter is still subject to the decision of the Government of Baluchistan ("GoB"). The Authority considers it important to highlight that the issue of the cost of land was initially framed when KEL submitted the RFP for competitive bidding with a benchmark tariff. However, with the shift to an open bidding process, it would be more appropriate for the bidders to account for this cost, either upfront or periodic payments, in their bids, based on the final agreement reached with the GoB.

Technical Evaluation Criteria

39. The Authority in the Impugned Decision decided to include the mechanism for the evaluation of EPC and O&M contractors in the technical evaluation criteria. Additionally, KEL was instructed to ensure that the equipment to be installed fulfill the technical standards as stipulated in the Grid Code 2023. It was also directed to introduce the provisions in the RFP to evaluate the sponsors for their plan on the local economic development in the country.

40. KEL submitted that the technical evaluation should be based on the assessment of equipment to be installed by the bidder, and not on the contractors for EPC and O&M works. The Petitioner stated that it may not be feasible to require the bidders to finalize the EPC contractor at the bidding stage, as it could lead to inflated bidding prices. This is because the potential contractor will include all risks and costs in its quoted price, considering the fact that it will be providing the bid for the longer-term financial close. Later, in the event if the EPC contractor of the bidder fails to honor its quoted price, KEL will be forced to re-evaluate the replacement provided by the successful bidder to ensure that it meets the criteria set forth in the RFP. KEL also pointed out that this requirement will discourage the bidders from executing the project in self-EPC and self-O&M modes, which could lead to a considerable decrease in cost that could be beneficial for the consumers. KEL informed that the requirement of compatibility of equipment with the Grid Code, as directed by the Authority, has been included in the knock-off criteria in the RFP. Regarding the criteria of contribution towards local economic development, KEL sought guidance from the Authority about what factors to assess under this head.

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA AUTHORITY

13/19

Observations/Findings and Decision of the Authority

41. The Authority deliberated on the submissions of KEL and noted that EPC and O&M contractors' charge considerable margins for their services. The criteria for assessment of EPC contractors shall remove the possibility of developing a project on self-EPC or self-O&M mode. This could in turn increase the overall cost and corresponding tariff of the projects, due to above said margins. Further, it is noted that no such criterion was included in the RFP approved for the 600 MWp solar PV project. Therefore, the Authority considered that the arguments provided by KEL provide sufficient reason to review the Impugned Decision, and decided to remove the requirement for evaluating contractors from the technical criteria. Regarding clarification sought by KEL, the Authority considers that actions such as sourcing material locally to support the local industry, and initiatives of Corporate Social Responsibility ("CSR") may be included for evaluation under contribution towards the local economy and community services in the area.

Pre-qualification of the prospective bidders

42. The Authority noted that KEL has already carried out the prequalification process, and has shortlisted a number of qualified bidders on that criteria. However, KEL has now requested open competitive bidding, which is a new auction design. This new design may attract more prospective bidders to participate as compared to the reverse competitive auction design earlier approved. Additionally, it is noted that under Regulation 9 of the NCBTR, notice of inviting bids has to be published, whether or not the pre-qualification has already been carried out. Keeping in view Regulation 9 of the NCBTR and KEL's request for open competitive bidding, the Petitioner is directed to publish the notice of inviting bids for these projects for the information of the public at large. KEL is further directed to apply/include the pre-qualification criteria for new prospective bidders as part of its technical evaluation process. However, the previously prequalified bidders may not be required to undergo the prequalification process again.

Order of the Authority

43. In view of the foregoing, the Authority has decided to review the Impugned Decision to the following:

    a. KEL is allowed to hold a non-controlling equity shares in the SPV. However, the successful bidder will decide if they want KEL to be part of the equity shareholding in the SPVs. For clarity, KEL shall declare at the forefront its desired equity shares percentage, capped up to 25%. Furthermore, KEL shall specify the terms and conditions in the SPA, the same shall be made part of RFP documents when floated to the potential bidders.

    b. KEL is allowed to conduct open competitive bidding, without benchmark tariff, for the subject projects. Further, KEL is directed to include the criteria for rejection of the bids,

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA
AUTHORITY

in case the lowest bid is considered imprudent on the basis of the criteria detailed in this decision.

c. KEL will evaluate the prudency of the successful bid based on prevailing equipment cost, market conditions, and funding costs, as well as for the confirmation of displacement analysis as per IGCEP and PAP. KEL shall be having powers for the rejection of the bid in case it is found imprudent. If the bid is found to be prudent, these assessments will be included in the Bid Evaluation Report submitted for approval to the Authority.

d. Following mechanism shall be applied for the quarterly adjustment of tariff:

(i) Indexation mechanism in case 150 MWp shall be developed as three projects of 50 MWp each with SBP financing:

Revised AT	=	$AT*Sx\%\left[\frac{Rev\ SOFR}{Ref\ SOFR} - 1\right] + AT*75\% * \left[\frac{ER\ Rev}{ER\ Ref} - 1\right] + AT*25\%* \left[\frac{ER\ Rev\ (one\ time)}{ER\ Ref} - 1\right] + AT$
AT	=	Awarded Tariff
Sx%	=	Percentage of AT to be indexed with SOFR variation, which in the instant case is 5%
Rev SOFR	=	quarterly revised Term or Daily SOFR, as the case may be based on GoP policy decision on the transition from LIBOR to SOFR, as on the last day of the preceding quarter
Ref SOFR	=	5.3671%
ER Ref	=	288.65 Rs. /USD
ER Rev	=	The revised exchange rate as of the last day of the preceding quarter
ER Rev (one time)	=	The revised exchange rate is the average of the exchange rates of each day during the maximum construction period of 10 months, starting from the date of Financial Close.

Note: 1st adjustment shall be made for the quarter in which the COD occurs. This adjustment will be applicable from the COD until the end of that quarter. The subsequent adjustments will be applicable for the entire quarters.

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA AUTHORITY

15/19

(ii) <u>Indexation mechanism in case 150 MW shall be developed as two projects, i.e. one project of 100 MWp and the other one of 50 MWp with commercial financing:</u>

Revised AT	=	$AT*Kx\%\left[\frac{Rev\ kibor}{Ref\ Kibor}-1\right]+AT*Sx\%\left[\frac{Rev\ sofr}{Ref\ sofr}-1\right]+AT*80\%*\left[\frac{ER\ Rev}{ER\ Ref}-1\right]+AT*20\%*\left[\frac{ER\ Rev\ (one\ time)}{ER\ Ref}-1\right]+AT$
AT	=	Awarded Tariff
Kx%	=	Percentage of AT to be indexed with KIBOR variation which in the instant case is 8%
Sx%	=	Percentage of AT to be indexed with SOFR variation, which in the instant case is 5%
Rev KIBOR	=	Quarterly revised 3-month KIBOR, as on the last day of the preceding quarter
Rev SOFR	=	quarterly revised Term or Daily SOFR, as the case may be based on GoP policy decision on the transition from LIBOR to SOFR, as on the last day of the preceding quarter
Ref KIBOR	=	21.28%
Ref SOFR	=	5.3671%
ER Ref	=	288.65 Rs. /USD
ER Rev	=	The revised exchange rate as of the last day of the preceding quarter
ER Rev (one time)	=	The revised exchange rate is average of the exchange rates of each day during the maximum construction period of 10 months, starting from the date of Financial Close.

Note: 1st adjustment shall made will be for the quarter in which the COD occurs. This adjustment will be applicable from the COD until the end of that quarter. The subsequent adjustments will be applicable for the entire quarters.

e. The bidders will account for the cost of land in their bid tariffs, based on the final agreement reached with the GoB.

f. The Authority has decided to approve the technical evaluation criteria, as proposed by KEL. For the evaluation of local economy contribution, the sourcing of materials combined with local community level CSR initiatives/services plan may be included in RFP document.

g. KEL is directed to make the RFP documents publicly available for the other interested parties and prospective bidders at large. The pre-qualification criteria for new prospective

NEPRA AUTHORITY NATIONAL ELECTRIC POWER REGULATORY AUTHORITY bidders shall be made part of technical evaluation process. However, the previously prequalified bidders shall not be required to undergo the prequalification process again, their earlier qualification is deemed valid.

44. Accordingly, the earlier decision of the Authority in the matter, dated October 14, 2022, stands modified/revised to the extent of the above.

AUTHORITY

Rafique Ahmed Shaikh
Member

Engr. Maqsood Anwar Khan
Member

Mathar Niaz Rana (nsc)
Member

Amina Ahmed
Member

Waseem Mukhtar
Chairman

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA AUTHORITY

29/02/24

Additional note by Authority is enclosed.

* My additional note is attached

17/19

ADDITIONAL NOTE

The pre-qualification process for the project was done earlier prior to allowing open competitive bidding process so is not relevant now as the earlier model of procurement has changed. Now placing the pre-qualification criteria in the technical evaluation part may provide an edge to the already pre-qualified bidders in terms of negotiating with the potential lenders and suppliers before bids submission as compared to those bidders who will undertake the prequalification through technical bid after submission of the same along with financial bid in the bidding process. Therefore, in my opinion fresh prequalification under the guidelines given in the section 15 of Public Procurement Rules 2004 may be done. So all prequalified firms may submit technical and financial bids on equal footing.

Mathar Niaz Rana (nsc)
Member (Tariff)

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA
AUTHORITY

Additional Note by Majority Members of Authortity

The Authority has been established under the NEPRA Act and for its smooth functioning the Authority further specifies the relevant regulations and applicable documents. Accordingly, the project is being processed under NEPRA Competitive Bidding Tariff Regulations, 2017 (the "NCBTR 2017"), the Public Procurement Rules, 2004 may not be relevant in the matter, considering K-Electric being licenced and regulated under NEPRA Act and its status as a private utility company. This means that the specific provisions as specified within the NCBTR 2017 will govern the auction and procurement process for this project.

2. As per Regulation 5 of the NCBTR 2017, the relevant/procuring agency holds the discretion to determine whether to do the pre-qualification or not. In the present case, K-Electric has previously conducted a pre-qualification process based on a reverse competitive auction with benchmark tariff. However, with K-Electric's request to allow transition to an open competitive bidding process, the majority members of the Authority decided to mandate K-Electric to conduct the pre-qualification process again for the additional prospective bidders. This requirement for pre-qualification process for new prospective bidders underscores the Authority's commitment to upholding fairness and transparency in the open competitive bidding process. To streamline the auction process timelines, it was decided that pre-qualification will be integrated and made part of the technical evaluation process.

3. The project lenders make a commitment to lend to a project, only after the tariff has been awarded to the successful bidder/project sponsor. Prior to award of the tariff, any prospective or qualified bidder has an equal opportunity to negotiate loan term sheet with its lenders. The pre- qualification process evaluates the capabilities of prospective bidders, such as their financial position, past performance and experience. However, it is not necessarily true that getting pre-qualified early in a bidding process gives any qualified bidders an advantage in negotiating with lenders or suppliers compared to their competitors/prospective bidders. Instead, ultimately the competitiveness of the bid and the bidder's financial position and capability to execute the project will have a greater impact on their ability to negotiate favorable loan terms.

4. In view of the above, accordingly majority members of the Authority decided as mention in the Para 2 with regards to the "pre-qualification" in the subject matter.

Waseem Mukhtar
Chairman

Rafique Ahmed Shaikh
Member

Maqsood Anwar Khan
Member

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
NEPRA AUTHORITY

19/19