



Registrar

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/R/ADG(Tariff)/TRF-362/K-Electric-2016/7573-75
December 30, 2020

Subject: Decision of the Authority in the matter of Review Motion filed by Anoud Power Generation Ltd. (APGL) regarding Monthly Fuel Charges and Quarterly Adjustments of K-Electric Limited for the period from July 2016 to June 2019 [Case No. TRF-362/K-Electric-2016]

Please find enclosed herewith subject Decision of the Authority (8 Pages) in Case No. NEPRA/ TRF-362/K-Electric-2016.

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.

Enclosure: As above

(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 OF THE AUTHORITY IN THE MATTER OF REVIEW MOTION FILED BY ANOUD
POWER GENERATION LIMITED (APGL) REGARDING MONTHLY FUEL CHARGES AND
QUARTERLY ADJUSTMENTS OF K-ELECTRIC LIMITED FOR THE PERIOD FROM JULY 2016 TO
JUNE 2019**

1. Pursuant to the provisions of Section 31(7) of the Regulation of Generation, Transmission and Distribution of Electric Power Act 1997, and as per the mechanism for monthly, quarterly and annual adjustments provided in the Multi Year Tariff (MYT) determination of K-Electric Limited (herein referred to as "K-Electric or KE") dated July 05, 2018, duly notified in the official Gazette vide SRO No. 576(I)/2019 dated May 22, 2019, the Authority has to review and revise the approved tariff on monthly, quarterly and annual adjustments.

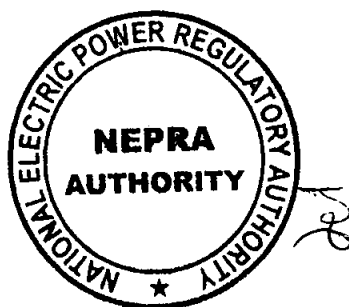
2. Pursuant to notification of the determined MYT, K-Electric filed its adjustment requests on account of monthly fuel price from July 2016 to June 2019 and Quarterly adjustment requests on account of Power Purchase Price (PPP), indexation of O&M costs, adjustment of T&D losses etc. from July 2016 to March 2019. In addition, K-Electric also requested gross Write-offs for the FY 2017 and FY 2018.

3. The Authority issued its decisions in the matter of K-Electric's FCA for the period July 2016 to June 2019 vide decision dated December 27, 2019 and in the matter of Quarterly adjustments for the period from quarter ending Sep. 2016 to quarter ending Mar. 2019 vide decision dated December 31, 2019.

4. The Authority, in its decision dated December 31, 2019 in the matter K-Electric's quarterly adjustments for the period from July 2016 to March 2019, keeping in view the 1st Addendum between K-Electric and AGPL decided that;

"The Authority has also observed that as per clause 1.5 of the 1st addendum dated April 27, 2010, signed between K-Electric and Anoud Power Generation Limited (APGL), K-Electric is liable to impose penalty on APGL, in case APGL supplies less than the minimum monthly guaranteed units of 5,040,000 kWh. As per the details provided by K-Electric regarding energy delivered by APGL, and the invoices raised by APGL, the Authority noted that APGL during the period from July 2016 to June 2019, only provided the required energy in three (03) months, whereas, for the remaining period, AGPL did not meet the minimum guaranteed energy of 5,040,000 kWh. K-Electric, therefore, in line with clause 1.5 of the 1st addendum to the PPA, was required to impose a penalty of around Rs.65.034 million on AGPL for the undelivered energy. However, as per the information provided by K-Electric, it imposed a penalty of only Rs.18.99 million on APGL; the workings of which are not supported by the relevant clauses of PPA. In view thereof, the Authority has adjusted an amount of Rs.65.034 million as penalty from the cost of AGPL claimed by K-Electric owing to non-supply of energy as per the minimum threshold provided in the 1st addendum to the PPA."

5. The relevant provisions of the 1st addendum to the PPA between K-Electric and AGP are reproduced hereunder;



Handwritten mark: "Handwritten mark" and "3"

1.4 GUARANTEED UNITS (the following amendment is made to Appendix B of the Contract)

It is hereby agreed between the Parties that APGL shall sell and KESC shall purchase, the minimum guaranteed Electrical Energy of 5,040,000 kWh (the "Guaranteed Units") each month for the Term of the Contract.

1.5 PENALTY AMOUNTS

1.5.1 It is hereby agreed between the Parties that in the event APGL supplies less than the minimum monthly Guaranteed Units to KESC, KESC shall be entitled to the following deduction, at the end of the month, in the Billing amount based on the differential between the Guaranteed Units and the Energy Delivered at the Energy Delivery Point (the "APGL Penalty Amount"):

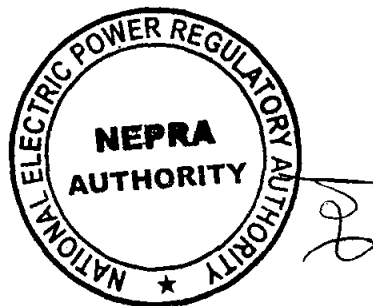
- a. One and a half (1.5) times the rate applicable for Operational & Management Cost; plus
- b. One and a half (1.5) times the rate applicable for Financing Component & Return on Investment cost.

The above charges shall be shown as a separate line item in the monthly Billing invoice and as a deduction in the monthly Billing amount payable to APGL by KESC for each such month that APGL supplies less than the Guaranteed Units to KESC.

1.5.2 It is hereby agreed between the Parties that in the event the total Electrical Energy notified and received by KESC during a month is calculated to be less than the monthly Guaranteed Units, APGL shall be entitled to charge the additional following rates, at the end of the month, over and above the Billing amount based on the differential between the Guaranteed Units and the Energy Delivered at the Energy Delivery Point (the "KESC Penalty Amount"):

- a. One and a half (1.5) times the rate applicable for Operational & Management Cost; plus
- b. One and a half (1.5) times the rate applicable for Financing Component & Return on Investment cost.

The above charges shall be shown as a separate line item in the monthly Billing invoice and as an addition in the monthly Billing amount receivable by APGL from KESC for each such month that KESC consumes less than the Guaranteed Units.



1.5.3 It is hereby agreed between the Parties that the penalty amounts set within Clause 1.5.1 and 1.5.2 above shall not be applicable on either Party during the Outage Period(s) and/or in the event of a gas supply shutdown that lasts for not more than two (2) months in a Year, if such gas shutdown is not attributed to any act(s) and/or omission(s) of APGL.

1.5.4 In the event that such gas supply shutdown as set in Clause 1.5.3 above, not attributed to any act(s) and/or omission(s) of APGL, exceeds the period of two (2) months in a Year, KESC shall have the option to issue a despatch notification to APGL, at KESC's sole discretion, for the purposes of issuing instructions to decrease or cease the Electrical Energy delivered to KESC by the Facility. With respect to any under-consumption of the Guaranteed Units that may result, KESC shall be fully exempted from the KESC Penalty Amount set within Clause 1.5.2 above.

"Outage Period" means a period(s) accumulating up to a maximum of thirty (30) days times 24 hours in a Year, during which there will be an interruption or shutdown of the Facility's generating capacity either due to Forced Outage(s) or Scheduled Outage(s).

1.7 NOTIFICATION OF DESPATCH (the following addition is made to Article 3 of the Contract)

1.7.1 KESC shall issue despatch notification to APGL from the Load Dispatch Centre ("LDC"), from time to time, in order to schedule and control the generation of the Facility and to increase, decrease or cease the Electrical Energy delivered to KESC under the terms and conditions of the Contract;

1.7.2 Each despatch notification shall be issued to APGL by KESC forty eight (48) hours prior to its required implementation by APGL;

1.7.3 APGL hereby undertakes to deliver Electrical Energy in conformance, as far as reasonably possible, with the despatch notification of KESC at all times during the Term of Contract.

6. APGL, against the aforementioned decisions of the Authority, filed Motion for Leave for Review (MLR) vide letters dated January 23, 2020; the same was admitted by the Authority on February 18, 2020.

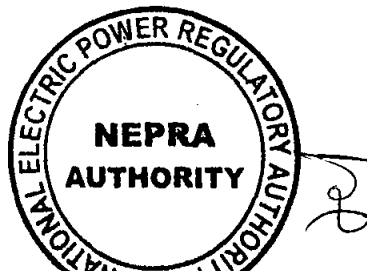
7. A summary of the submissions made by AGPL in its MLR is as under;

i. The impugned decisions are based on incorrect information and mere conjectures;

The Authority adjusted and disallowed an amount of Rs.65.034 million from the amount payable to the AGPL "as penalty, owing to non-supply of energy as per the minimum threshold provided in the 1st addendum to the PPA". Prima facie, the relevant part of the impugned decision has been made erroneously on the basis of incomplete information and mistaken interpretation.

ii. Incomplete Information

The impugned decision is based on incomplete information and mistaken interpretation.



date
2

The parties to the PPA Addendum have, through their conduct, implemented the minimum generation requirements of the aforementioned Clause 1.5 on an annual basis, so that the annual cyclical generation excesses and shortfalls are evened out over each year. As the Authority may appreciate, implementing the minimum generation requirement on a monthly basis will only lead to an unfair and unrealistic state of affairs, where the Petitioner is penalized for seasonal shortfalls in generation that are not attributable to it. Further, the "Outage Periods" (definition reproduced below) allowed to the Petitioner are annual in nature and it is not possible to implement them on a monthly basis.

iii. Mistaken interpretation:

The Impugned Decision has clearly been made on the basis of a mistaken interpretation that ignores Clause 1.5.3. Clause 1.5.3 identifies the situations in which the Petitioner is excused from the penalty provisions of Clause 1.5, including "Outage Periods" and gas supply shutdowns. In determining the amount of Rs.65.034 million, the Impugned decision has clearly failed to account for the various Outage Periods and gas supply shutdowns that excused the Petitioner from the penalty provisions of Clause 1.5.

iv. K-Electric's role in controlling generation output has been ignored:

The Impugned decision has clearly been made without consideration of K-Electric's role in ensuring that the minimum generation requirements of Clause 1.5 are met by the Petitioner. As per clause 1.7 of the PPA Addendum, K-Electric is exclusively responsible for despatching the Petitioner's generation output and for any "increase, decrease or cease" thereof. In light of the above, it is clear that the entire control of the Petitioner's generation is with K-Electric and it is K-Electric, and not the Authority that is best positioned to determine whether, the Petitioner was able to meet its generation obligations. Further, the Petitioner's performance or shortfall can only be ascertained in light of K-Electric's dispatch instructions and to what extent they were honored - which has been conveniently ignored to the Petitioner's detriment.

v. Overstepping the bounds of the Authority's Regulatory mandate

The Impugned decision has overstepped the bounds of the Authority's regulatory mandate to force K-Electric to impose penalties that can only be imposed by K-Electric through the exercise of its contractual rights under the PPA Addendum. Although the Authority may ensure that there is no double recovery by K-Electric on account of penalties recovered from generation companies, requiring K-Electric to impose a penalty, when no such penalty has been imposed or invoiced by K-Electric as per K-Electric's contracts exceeds the Authority's mandate and runs contrary to practical sense.

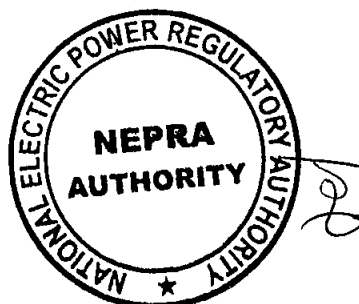
vi. The Petitioner has been condemned unheard and without merits

It is submitted that the virtual imposition of a penalty on the Petitioner through the Impugned Decision without affording the Petitioner an opportunity to make its case, is a violation of *inter alia* the Petitioner's legitimate expectations and the principles of *res inter alios judicatae nullum aliis praejudicium faciunt* (a decision relating to the matters of others shall not prejudice a person who was not a party to it) and *audi alteram partem* (no one shall be condemned unheard).



Mak
2

- vii. **The impugned decision is patently illegal and *ultra vires* NEPRA laws, inter alia, because**
- it seeks to assail the contractual provisions of PPA between the Petitioner and K-Electric;
 - it seeks to rewrite the commercial terms of PPA to the detriment of Petitioner and conveniently mutes the provisions of the PPA, under which K-Electric's claim and recovery is rendered illegal and unlawful;
 - it takes a biased and prejudicial view - without even giving the Petitioner an opportunity of hearing;
 - it relies on matters which are palpably extraneous in nature and not a part of record of the file or are relevant to the proceedings;
 - it is against the principles of legitimate expectation, unjust enrichment, promissory estoppel and due process. The Petitioner's minimum expectation is that NEPRA would treat the Petitioner in a fair and transparent manner in accordance with the due process;
 - it fails to recognize that Electric cannot raise any claim, recovery or set-off under the PPA without first raising an invoice;
 - it seeks to disregard the provisions of PPA under which the claim renders illegal and unlawful;
 - it fails to appreciate the fact that the PPA is on "take and pay" arrangement and not on take or pay basis;
 - it fails to recognize the significance of the relevant PPA provision, which imposes a requirement upon K-Electric to issue dispatch instructions in order to establish any default;
 - It fails to recognize that under the limitation Act 1905 a contractual claim cannot be lodged for amounts which are more than three (3) years old;
 - it fails to take into consideration how the parties have handled such matters in the past several years and attempts to prescribe a mechanism which is in complete departure to past practices find understanding of the parties and is patently illegal;
 - it seeks to reopen past and close transactions;
 - it denies the Petitioner the ability to dispute the claim and invoke dispute resolution mechanism of the PPA;
 - it fails to recognize the fact that K-Electric has no right to set-off the amount under the PPA;
 - violates the sanctity of contractual relationship and contractual autonomy;
 - amounts to micro-management of affairs with "prejudicial mindset";
 - it has rendered NEPRA incompetent to adjudicate the PPA disputes, since it has unfairly disclosed its mind, without having heard the Petitioner;
 - it violates the fundamental rights of the Petitioner; (xix) it is against NEPRA's own laws; and



Arshad
3

- the impugned decision will not be effective unless it is notified in the official gazette and any recovery by K-Electric, if made prior to notification in the official gazette, is illegal and liable to be forthwith reversed/reimbursed to the Petitioner.

8. The Authority in order to proceed further, decided to conduct a hearing in the matter, which was held on June 16, 2020 through ZOOM; Notices thereof, were sent to the Petitioner, K-Electric and parties to the proceedings. Hearing was attended by Mr. Waheed Soomro, CFO AGPL along-with legal council RIAA Barker Gillette; Mr. Adnan Rizvi, Head of Business Development & Mr. Faizan Pasha, General Manager, represented K-Electric.

9. AGPL, during the hearing, reiterated its earlier submissions by stating that NEPRA has not accounted for the outage periods as allowed in the PPA in terms of gas supply shutdowns, K-Electric's role in despatch instructions, and routine maintenance, which excuses AGPL from the penalty provisions of clause 1.5. AGPL also requested the Authority that till decision on MLR, K-Electric may be directed not to deduct the penalty amount from AGPL as decision of the Authority only becomes binding once it is notified by the Federal Government in the official gazette.

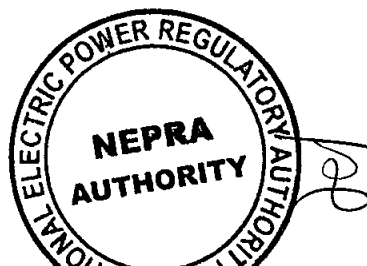
10. K-Electric submitted during the hearing that while calculating the penalty amount, they have taken into account the outages provision allowed to AGPL as per clause 1.5.3 of the PPA applicable on yearly basis and accordingly worked out the penalty amount as Rs.18.99 million.

11. The Authority during the hearing directed both APGL and K-Electric to provide all the relevant documentary evidences substantiating the claimed outages along-with calculations of the penalty amount.

12. Subsequently, AGPL through its legal council M/s RIAA Barker Gillette vide letter dated June 29, 2020 submitted its written response, wherein, the Petitioner, *inter alia*, while reiterating its earlier submissions submitted that;

- Through Article 3 of the PPA and Clause A-3 of the Appendix, K-Electric agreed to buy and APGL agreed to sell Electrical Energy on 'as and when delivered' basis (i.e. 'Take and Pay basis). Through, the PPA addendum, APGL was required to pay penalty damages for shortfall in generation, while K-Electric was required to pay penalty amounts for shortfall in despatch.
- Such provisions appear inherently in conflict with the Take and Pay concept envisaged in the PPA. If there is any contradiction in the provisions, in such case the interpretation of the PPA should be done in a manner that is not detrimental to Petitioner exclusively and the letter and spirit of the PPA should be identified, which was strictly agreed as Take and Pay. Therefore, there is no binding obligation on the Petitioner to pay penalties or damages for non-provision of power without despatch instructions being issued. This is also unprecedented and a complete departure from NEPRA's regulatory jurisprudence for similarly placed projects.

13. K-Electric vide letter dated June 24, 2020 submitted that;



Attu
3

- While calculating the penalty amount of Rs.18.99 million in terms of section 1.5.3 of the 1st addendum, it exhausted the outages period before any penalty under section 1.5.1 could be imposed. However, the Authority while working out the penalty amount of Rs.65.034 million did not allow any outages period.
- Regarding adjustment of penalty amount before notification of the Authority's determination, K-Electric submitted that the Authority has not determined any tariff for APGL rather it has interpreted the relevant penalty clauses of PPA between AGPL and K-Electric. The implications of this interpretation are immediate and not dependent on notification, therefore K-Electric proceeded for recovery of remaining penalty amount immediately.

14. Subsequently AGPL was again directed vide letter dated August 27, 2020, to provide complete information in respect of outages claimed along-with supporting documents and detail of events for lesser despatch instructions given by K-Electric, if any, for the period under review, without further delay.

15. AGPL in response, vide letter dated 01.09.2020, in addition to its earlier submissions, provided the details to the extent of planned maintenance schedule of the plant. AGPL also submitted that;

- AGPL also submitted that PPA between AGPL and K-Electric is on take and pay basis, inter alia, implying that both the parties are not under any obligation to sell and off take power and should not be subjected to any penal consequences therefrom.
- Concept of take and pay cannot be deemed redundant for the reason that there is a clause 1.5 of the PPA suggesting penalties for non-provision of certain guaranteed units for a particular month.
- K-Electric deliberately and thereafter NEPRA erroneously has calculated certain penalties for the shortfall in the provision of electricity during certain periods.
- Clause 1.7 of the PPA mandates the power purchaser (K-Electric) to raise despatch instructions for the seller (AGPL), however, no despatch instructions were ever issued by K-Electric.
- Calculation of penalty amount cannot be imposed on account of, inter alia, shortfall in supply of gas, outages (including maintenance outages) and force majeure.

16. The Authority observed that despite clear directions of the Authority during the hearing, AGPL did not provide any supporting evidences/ details in terms of gas supply shutdowns, K-Electric's role in despatch instructions, and routine maintenance carried out for the plant during the period, which excuses AGPL from the penalty provisions of clause 1.5.

17. The Authority also noted that pursuant to clause 1.5 of PPA, both parties i.e. AGPL and K-Electric are exempted from penalties, in case minimum guaranteed energy is not transacted due to outages (up to 30 days in a year) and gas supply shut down (for not more than 2 months in a year). Though, an outage of period of 30 days has been allowed to AGPL but the quantum of energy has not been specified. K-Electric while making calculations of penalty AMOUNT assumed full capacity i.e. 11.92 MW for the entire period of 30 days i.e. 8.239 GWh as outage allowance. However, from the



matu
3


generation data of APGL as supplied by K-Electric it is evident that 8.239 GWh were never generated in any month during the disputed period, therefore, the energy of 8.239 GWh as outage allowance is not justified.

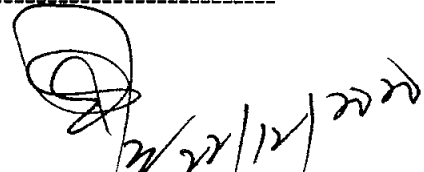
18. In view of the above discussion, non-submission of required documentary evidence/ details by AGPL, relevant clauses of PPA and the fact that quantum of outages in terms of energy i.e. kWh has not been specified in the PPA, the Authority has decided to restrict the outages allowed to AGPL during the year for future to the extent of minimum guaranteed electrical energy of 5,040,000 kWh. Thus, K-Electric in order to work out the monthly penalties in case of shortfall in energy from the minimum guaranteed level of energy, would consider 5,040,000 kWh as maximum annual outages allowance and in future K-Electric is directed to follow the same calculation methodology.

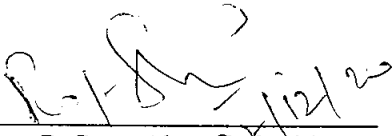
19. Both K-Electric and AGPL are also directed to abide by the clauses of PPA and take timely action for imposition of penalties if and when become due. It is further directed to maintain the relevant data of generation, scheduled outages/ forced outages, gas supply shut downs, despatch instructions etc. as per the provisions of PPA and penalty imposed by any party against the other shall be substantiated by relevant documents/ record.


20. In view of the above, the Authority has reworked the penalty amount as Rs.35.108 million, based on actual available data, instead of Rs.65.034 million already adjusted from the quarterly adjustment of K-Electric. The differential amount of Rs.29.926 million shall be included in the subsequent quarterly tariff adjustments of K-Electric.

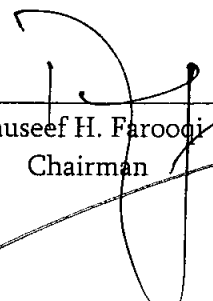
AUTHORITY

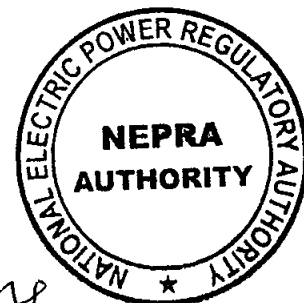

Engr. Bahadur Shah
Member

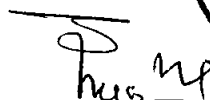

Rehmatullah Baloch
Member


Rafique Ahmed Shaikh
Member


Saif Ullah Chattha
Vice Chairman 21.12.2020


Tauseef H. Farooqi
Chairman




30 12 20