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National Electric Power Regulatory Authority Islamic Republic of Pakistan

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No. NEPRA/R/ADG(Trf)/PAR-146/KE(FPCL)-2015/1990-1992

February 10, 2022

Subject: Decision of the Authority in the matter of Initiation of Suo Moto Proceedings for Inclusion of Mechanism to avoid over payment of Capacity Charges in the matter of FFBL Power Company Ltd. [Case # PAR-146/KE(FPCL)-2015]

Dear Sir,

Please find enclosed herewith the subject decision of the Authority (07 Pages) in the matter of Initiation of Suo Moto Proceedings for Inclusion of Mechanism to avoid over payment of Capacity Charges in respect of FFBL Power Company Ltd. in Case No. NEPRA/PAR-146/KE(FPCL)-2015.

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 within 30 days from the intimation of this Decision. In the event the Federal Government fails to notify the subject tariff Decision or refer the matter to the Authority for reconsideration, within the time period specified in Section 31(7), then the Authority shall notify the same in the official Gazette pursuant to Section 31(7) of NEPRA Act.

3. The Order of Authority's Decision is to be notified in the official Gazette.

Enclosure: As above

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

(Iffikhar Ali Khan)

CC:

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



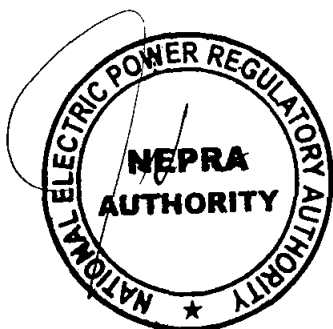
DECISION OF THE AUTHORITY IN THE MATTER OF INITIATION OF SUO MOTO PROCEEDINGS FOR INCLUSION OF MECHANISM TO AVOID OVER PAYMENT OF CAPACITY CHARGES IN THE MATTER OF FFBL POWER COMPANY LIMITED

1. BACKGROUND

- 1.1. FFBL Power Company Limited (FPCL) has been operating a generation facility of 118 MW (Gross) coal fired power plant at Port Qasim, Karachi adjacent to Fauji Fertilizer bin Qasim Limited (FFBL). FPCL is selling 52 MW power (50 Hz system) to KE under take and pay tariff approved on December 29, 2015 subsequently reviewed on January 26, 2017. The remaining power (60Hz system) is being supplied to FFBL. FPCL filed a tariff petition for additional supply of 8MW to KE vide its letter dated May 24, 2019 which was later withdrawn.
- 1.2. While processing the case, it was observed that mechanism does not exist in FPCL's tariff to avoid over payment of capacity charges except for debt servicing. FPCL was allowed take and pay tariff on the basis of assumed plant factor of 85%, however, it was noted that FPCL has been generating electricity in excess of 85% plant factor.

2. INITIATION OF SUO MOTO PROCEEDINGS

- 2.1. The Authority decided to initiate suo moto proceedings to modify the tariff of FFBL Power Company Limited to the extent of inclusion of mechanism to avoid over payment of capacity charges and scheduled a hearing in the matter on June 16, 2021. Following issues were framed for the hearing:
- i. Whether to incorporate a mechanism in the tariff to avoid over payment of capacity charges?
 - ii. Whether to recover any excess capacity payment already received by the company?
 - iii. Any other relevant issue arising during the proceedings.
- 2.2. Hearing in the matter was rescheduled for July 7, 2021 and was further rescheduled for August 10, 2021 on the request of FPCL. Legal Consul of FPCL vide letter dated August 6, 2021 again requested to reschedule the hearing in the first week of September 2021. Accordingly, the hearing was rescheduled for September 7, 2021 with the directions that no further adjournment shall be granted and that in case FPCL failed to participate, the case shall be decided on the basis of available information. Following stakeholders were invited for the hearing:
- i. FFBL Power Company Limited
 - ii. K Electric
 - iii. Whistle Blower



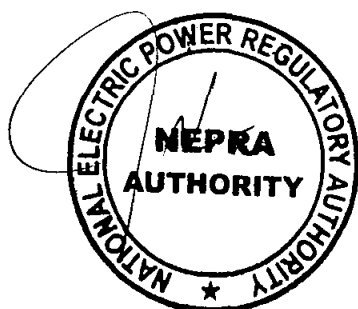
- iv. Ministry of Energy
 - v. Government of Sindh (Energy Department)
- 2.3. The hearing was held as per schedule and was participated by the representatives of the Petitioner and KE.

3. FILING OF SUBMISSIONS

3.1. After the hearing, FPCL and KE were directed vide letter dated September 16, 2021 to file written submissions in the matter.

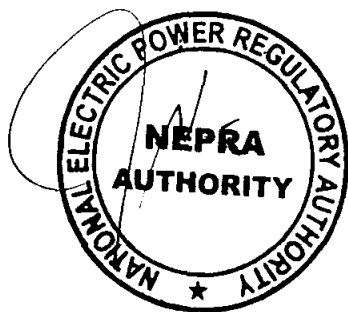
3.2. FPCL vide letter dated September 22, 2021 submitted following in the matter:

- i. The tariff of FPCL is duly approved by the NEPRA Authority and the Power Purchase Agreement (PPA) containing the tariff and payment terms including the capacity charges has been further approved by the NEPRA Authority.
- ii. That there is a prescribed mechanism in the PAC/PPA which caters for the avoidance of capacity charges (excluding debt servicing) and the excess plant operations, if any, is merely due to creating cushion against shortfall in recovery of capacity charges below mentioned risks as is explained in the proceedings para;
- iii. Tariff is based on "Take and Pay" mechanism which is subject to FPCL falling within K-Electric (KE) merit order, hence the risk of non-dispatch is borne by FPCL unlike grid connected IPPs, due to higher international coal prices FPCL rank in merit order has substantially been dropped from average rank between 5-10 during year 2019-20 to 15-20 in year 2021. Furthermore, FPCL Merit Order Position may further drop due to:
 - Commission of upcoming 900 MW RNLG based power plant with KE network and
 - International FOB Coal Prices remained above 100 USD/MT. Therefore, FPCL is carrying a continuous threat against loss of capacity due to vulnerability in merit order during the term of KE-PPA.
- iv. Plant Efficiency is fixed for life of the project at 29.24% with no adjustments.
- v. All the project risks are borne by the sponsors i.e. technical, financial and legal risks as there are no security package agreements and guarantees of the federal government.
- vi. In contrast to the take or pay arrangement in the standard power purchase agreements, whereby the IPP is allowed to undertake 30 additional days (other than scheduled outage period and forced outage or partial forced outage period) to conduct the major overhaul of the complex during which capacity payments are payable by the power purchaser. FPCL project is not allowed any of such additional period for undertaking



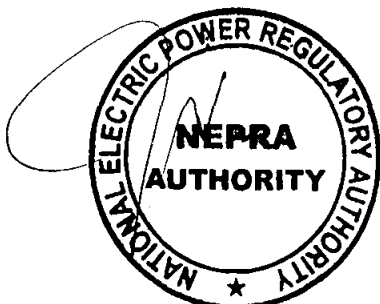
of major overhaul which is mandatory as per the technical requirements of the Project in accordance with the OEM recommendations.

- vii. Therefore, in order to protect the Company against potential loss of capacity payments during such period of major overhaul, the concept of 'Targeted Availability' of the Complex is agreed under the PPA which means that the required availability of the Complex is benchmarked at minimum of eighty five percent (85%) per year but for the purposes of determining excess or shortfall from the Targeted Availability, period of ten (10) Agreement Years is prescribed for evaluation.
- viii. Hence, the determination of Targeted Availability (excess/shortfall from 85%) shall be made in 11th Year from Commercial Operations Date of the Complex. This mechanism allows the Company to save in case of efficient operations, its scheduled outage period upto 1,440 hour (60 days) during each Targeted Availability Period. These saved hours shall be used for the carrying of major overhaul and payment of capacity charges during such period. Such hours are prone to lapse after every target availability period, if not utilized by the Company.
- ix. Furthermore, NEPRA's letter No. SBD/AR/NEPRA-0143/2704 dated 27th April 2017 for approval of PPA of FFBL Power Company Limited and K-Electric Limited under Para (g) states that "Annual Availability of plant should be maintained at 85%". Major overhaul should be accommodated in such a manner that availability over the life does not drop below 85%.
- x. That the applicable tariff is on take and pay basis and capacity charges are payable when (a) coal power plant is dispatched in accordance with the merit order and; (b) no power is procured from FPCL, if it does not fall in the merit order even though the plant is available for dispatch. Hence, the risk of non-dispatch of power plant due to higher tariff or reduction in K-Electric power demand is borne by FPCL. The capacity charges (if any) in respect of more than benchmark units provide escrow against non-payment of such charges during the periods of non-dispatch ability of the power plant as well as during the periods of major overhaul;
- xi. Due to the KE network limitations, the power supplies to its consumers may disrupt for which KE demanded seven (7) days [168 hours] period in each Agreement year to cover its technical limitations under the PPA. During such hours/days in a year, if technical fault arises in KE network, the capacity payment to FPCL shall not be made by KE even FPCL plant is available and falls under KE merit order list. Since the occurrence of such technical faults is not certain therefore FPCL plant should be made available more than required annual availability in a year to cover the risk of shortfall in annual recovery of capacity charge.
- xii. That the NEPRA Authority has provided for a total levelized tariff of Rs. 10.6896 /kWh during first ten (10) years and tariff for Rs. 6.9774 / kWh during remaining twenty (20) years based on annual generation of 387.19 GWh. Hence, to determine excess capacity charges for the three initial Agreement Years is incorrect as in some years, upto the first ten (10) years, the generation may not be upto the benchmark



units of 387.19 GWh and hence the variation is permissible so long it does not breach (a) the prescribed levelized tariff over a period often (10) years; and (b) the cumulative benchmark of 3871.9 GWh. Therefore, the NEPRA Authority is hereby requested to remove the restriction for repayment of debt up to ten years and allow the company to recover debt against dispatch up to 3,871.9 GWh only.

- xiii. That the FPCL has achieved the financial closing based on the terms and conditions of tariff approved by the NEPRA Authority on the basis of PAR which have been incorporated in the PAC / PPA as instructed by the NEPRA Authority for the tariff period which means the period for which the tariff have been determined by the NEPRA Authority on the basis of reference parameters which in the instant case is thirty (30) years and such period commences from the date of commercial operations. Any variation / adjustment at this stage shall trigger default of the FPCL under the financing documents which may jeopardize the operations of the power plant.
- xiv. That FPCL acknowledges that the NEPRA Authority does have powers and functions as listed in Section 7 of the NEPRA Act, 1997 (as amended from time to time) (NEPRA Act). Similarly, the Rule 3(1) of the NEPRA Tariff (Standards & Procedure) Rules, 1998 (Tariff Rules 1998) does provide for initiation of proceedings *suo motu* by the NEPRA Authority, however these powers are subject to certain restrictions and exercise within given I prescribed parameters. However the Tariff Rules 1998 are not applicable to power acquisitions made (as in the instant matter) under the NEPRA Interim Power Procurement (Procedure & Standards) Regulations, 2005 (IPPR 2005).
- xv. That the 'proceedings' as defined in the Tariff Rules 1998 means where the NEPRA Authority initiates the process of determination of tariff and culminates when the NEPRA Authority makes a final determination. It is clarified that the NEPRA Authority in the instant matter is not in the process of determination of tariff which has already been determined through the decision of the NEPRA Authority in the matter of granting Permission to K-Electric for Negotiation of Power Acquisition Contract (PAC) with FPCL for purchase of 52 MW of Power [Case # PAR -146/KE (FPCL)-2015] dated 29th December, 2015 (the Decision). The Decision is closed and past transaction;
- xvi. That the terms and conditions of power purchase in the instant case are governed through PAC under the IPPR 2005 which does not refer to Tariff Rules 1998 for determination of terms and conditions of power purchase and is an independent regulatory framework for determining terms and conditions of the power purchase through the route of Power Acquisition Request (PAR) and PAC which does not provide for unilateral or *suo motu* modification of such terms and conditions by the NEPRA Authority unless there is a request for modification of power acquisition;
- xvii. That the meaning of the 'proceedings' in the IPPR 2005 is fundamentally distinct to the meaning ascribed to the 'proceedings' in the Tariff Rules 1998. The proceedings as defined in the IPPR 2005 means the entire process commencing from the date of filing of a power acquisition contract with the NEPRA Authority and ending on the



date the NEPRA Authority makes its final determination on such power acquisition contract and shall include any stage during the proceedings. There is no alluding to the process where the NEPRA Authority itself initiates the process of determination of tariff in respect of the power acquisition contract and hence suo motu powers are not available to the NEPRA Authority under the IPPR 2005.

- xviii. That the Decision at Para 37.1 states that the NEPRA Authority has decided to approve the PAR and grant permission to K-Electric for negotiating the PAC for purchase of 52 MW of power from the FPCL along with the tariff which shall be incorporated in the draft PAC;
- xix. That unless the PAR is modified, upon the petition filed by the FPCL, and following thereto the PAC is amended, the NEPRA Authority cannot unilaterally modify or revise the terms and conditions of the tariff as the terms and conditions of the tariff arise out of and are in relation to the PAR and PAC which form the substructure/foundation upon which the tariff is built upon;
- xx. That the tariff petition filed by FPCL for tariff determination of additional supply of 08 MW to K-Electric Limited out of which the subject matter proceedings in exercise of the suo motu power by the NEPRA Authority are purportedly initiated has been withdrawn with the approval of the Authority and hence any derivative proceedings arising out of or in relation to the said tariff petition cannot be proceeded with;

3.3. Karachi Electric vide its letter date September 27, 2021 submitted following submissions in the matter:

- i. We would like to humbly submit that the tariff determined by the Authority vide its decision having Ref. No. NEPRA/PAR-146/KE(FPCL)-2015/1503-04 dated 26th January 2017 and the Energy Purchase Agreement approved by the Authority vide its decision having Ref. No. NEPRA/C(HYDRO)/PAR-146/KE(FPCL)-2015/20416 dated 19th December 2017 does not restrict any Capacity Payments other than the Debt Servicing Component in case of supply above given threshold. Accordingly, KE being a regulated entity, is required to follow the Authority's determinations for all tariff payments and all payments to FPCL have been made accordingly, as per the Authority's determinations.
- ii. In addition to the above, KE would continue to follow the Authority's instruction in this regard and will ensure compliance with the Authority's subsequent determinations in this regard, if any.

4. **CONSIDERATION OF THE VIEWS OF THE STAKEHOLDERS, ANALYSIS AND DECISION**

4.1. The submissions of FPCL and KE were examined. In pursuance of section 7(2) (g), section 31(4) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 read with Regulation 3 (1) of the NEPRA (Review Procedure) Regulations, 2009, and rule 3(1) of NEPRA Tariff (Standards & Procedure) Rules, 1998, the Authority



has the exclusive powers to initiate *Suo Moto* proceedings. The power to determine, modify and revise the tariffs have been conferred by NEPRA Act and NEPRA Tariff Rules and this power cannot be restricted on any manner. In performing these powers and functions, the Authority has to protect the interest of consumers and companies providing electric power services, therefore, the question of applicability is not relevant

- 4.2. Since the Power Acquisition Contract (PAC) of FPCL & K-Electric was also approved by NEPRA Authority vide decision dated December 19, 2017. However, the Authority has the power to initiate the proceedings, take cognizance and to incorporate or remove any discrepancies. No exemptions whatsoever were granted to any person from the applicable Rules and Regulations of NEPRA.
- 4.3. FPCL highlighted the targeted availability period of 10 agreement years as per PPA (Clause 5.16(b)) and that there is no compensation to FPCL for its schedule outage period of 1440 hours (60 days) for major overhaul during each targeted availability period. FPCL further highlighted that Tariff is on "Take and Pay" basis which is subject to FPCL falling within K-Electric (KE) merit order, hence the risk of non-dispatch is borne by FPCL unlike grid connected IPPs and that due to higher international coal prices, FPCL rank in merit order has substantially been dropped from average rank between 5-10 during year 2019-20 to 15-20 in year 2021.
- 4.4. Keeping in view the submissions of FPCL, the Authority has decided to incorporate following mechanism in the approved tariff to avoid overpayment of capacity charges components other than debt servicing:
 - i) Revenue earned on account of Capacity charges other than debt servicing against the bench mark energy shall be reconciled after every major overhaul or the targeted availability period whichever is earlier. KE shall adjust any over-payment of capacity charges beyond benchmark energy for the respective period against the outstanding amount and the same shall be passed on to the consumers.
 - ii) The first such reconciliation shall be made immediately after completion of the first major overhaul or the 1st targeted availability period whichever is earlier.
 - iii) The second reconciliation shall be made immediately after completion of the second major overhaul or 2nd targeted availability period whichever is earlier for the period falling between the completion of the first major overhaul or the 1st targeted availability period as the case may be to the completion of the second major overhaul or 2nd targeted availability period and so on for the succeeding periods

5. ORDER

- 5.1. The Authority has decided to include the following mechanism in the approved tariff of FFBL Power Company Limited for delivery of electricity to K-Electric:
 - i) Revenue earned on account of Capacity charges other than debt servicing against the bench mark energy shall be reconciled after every major overhaul or the targeted availability period whichever is earlier. KE shall adjust any over-payment





of capacity charges beyond the benchmark energy for the respective period against the outstanding amount and the same shall be passed on to the consumers.

- ii) The first such reconciliation shall be made immediately after completion of the first major overhaul or the 1st targeted availability period whichever is earlier.
- iii) The second reconciliation shall be made immediately after completion of the second major overhaul or 2nd targeted availability period whichever is earlier for the period falling between the completion of the first major overhaul or the 1st targeted availability period as the case may be to the completion of the second major overhaul or 2nd targeted availability period and so on for the succeeding periods

5.2. The above mechanism shall be incorporated in the Power Acquisition Contract.

6. NOTIFICATION

6.1. The above Order of the Authority is to be notified in the official gazette pursuant to Sector 31(7) of the Regulation of Generation, Transmission and Distribution of Electric Power Act. 1997.

AUTHORITY

(Rehmatullah Baloch)
Member

(Engr. Maqsood Anwar Khan)
Member

(Engr. Rafique Ahmed Shaikh)
Member

(Tauseef H. Farooq)
Chairman



10/2/22