

振发巴基斯坦新能源有限公司

Zhenfa Pakistan New Energy Company (Private) Limited

100MW/NEPRA/Tariff/Review

March 13, 2017

To,
THE REGISTRAR
NEPRA
Government of Pakistan
Islamabad

Dear Sir,

We, Zhenfa Pakistan New Energy Company (Private) Limited, hereby submit our Motion for Leave for Review against the Decision of Authority in the Matter of Solar PV Power Generation Tariff bearing reference No. NEPRA/SPVPGT-2017/2915-2917 dated 03 March 2017.

We understand that in terms of section 16 (6) of the NEPRA (Tariff Standards and Procedure) Rules, 1998, a Motion for Leave for Review is required to be filed within 10 days of service of the determination, which in the present case is to expire on Monday 13 March 2017. In view of the weekend falling immediately before the submission deadline, it is requested that the delay of 1 day may kindly be condoned if the Motion for Leave for Review is not received by the Authority by Monday 13 March 2017.

Please acknowledge the same.

Best Regards,

Col R Muhammad Ahmad Jawad
Project Manager

For M. Anchan
- DRO/D Reg-I M. A.
Sub:
- SAT-I
- SAT (Tech)
- Dir (Tr.): Yusaf B.
- LA (KIP) - M/F
cc: Chairman
Vc (M(T))
M(LC)
M(CA)
M(M&E)
14.03.17

Registrar

By No. 2244
Dated 16.03.17

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Details of The petitioner

NAME AND ADDRESS

Zhenfa Pakistan New Energy Company (Private) Limited

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AUTHORIZED REPRESENTATIVE OF ZHENFA PAKISTAN NEW ENERGY COMPANY (PRIVATE) LIMITEDNAME: **Col R Muhammad Ahmad Jawad**

DESIGNATION: Project Manager

Grounds for Motion for Leave for Review

- 2.1 Zhenfa Pakistan New Energy Company (Private) Limited (the “**Company**”), a private limited company incorporated under the laws of Pakistan, is establishing a Solar Power Plant at Rakh, Choubara, District Layyah, Punjab with a capacity of 100 MW (the “**Project**”).
- 2.2 The National Electric Power Regulatory Authority (“**NEPRA**”), in exercise of its powers under Rule 3 of the NEPRA (Tariff Standards and Procedure) Rules, 1998 (“**Tariff Standards and Procedure Rules**”) initiated suo moto proceedings in order to, *inter alia*, decide whether to continue the upfront tariff regime or to shift towards competitive bidding mode. NEPRA issued its ‘Decision in the Matter of Solar PV Power Generation Tariff’ bearing reference No. NEPRA/ SPVPGT-2017/2915-2917 dated 03 March 2017 (the “**Impugned Order**”).

(The Impugned Order is placed herewith as Annexure A).

- 2.3 Pursuant to Rule 16(6) of the Tariff Standards and Procedure Rules, read with the provisions of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (XL of 1997) (“**NEPRA Act**”) and the Rules and Regulations made thereunder and for the grounds given below, the

Company is filing this Motion for Leave for Review ("**Motion for Leave for Review**"), before NERPA, to object to the Impugned Order. We ask for NEPRA's reconsideration in respect of the same on account of the reasons discussed below.

- 2.4 It is also necessary to respectfully direct NEPRA's attention to Regulation 3(2) of the National Electric Power Regulatory Authority (Review Procedure) Regulations, 2009 ("**Review Procedure Regulations**"). The said Regulations state that, 'any party aggrieved from any order of NEPRA and who from the discovery of new and important matter of evidence or on account of some mistake or error apparent on the face of record or from any other sufficient reasons, may file a motion seeking review of such order'. It is arguable that Regulation 3(2) of the Review Procedure Regulations is open to challenge as it restricts the operation of the operative provision, namely, Rule 16(6) of the Tariff Standards and Procedure Rules, by limiting the grounds for review. The Company reserves its right to make this challenge and neither the fact of the instant Motion for Leave for Review, nor any other act / omission of the Company is intended (or may be construed) as a waiver of any of its rights in this regard. Nonetheless, and without conceding the foregoing, we respectfully submit that even on its own terms, the second and third grounds for review in Regulation 3(2) (i.e. a 'mistake or error apparent on the face of record' and 'any other sufficient reasons') are both wide enough to provide the basis for this Motion for Leave for Review.
- 2.5 Each of the grounds for the Motion for Leave for Review have been elaborated upon in the Sections below, and consist of the following heads:
- (a) Estoppel, Legitimate Expectation, and Vested Right;
 - (b) Non-Speaking & Arbitrary Nature of Impugned Order;
 - (c) Bidding Process;
 - (d) Discriminatory Effect of Impugned Order; and
 - (e) Undermining Confidence in Investment in RE Sector of Pakistan.
- 2.6 We request that the Company be allowed, during the proceedings, to take additional grounds, submit additional evidence and make further submissions in relation to this Motion for Leave for Review.
- 2.7 Further, we would be pleased to provide any further information, clarification or explanation that may be required by NEPRA during the evaluation process.

Estoppel, Legitimate Expectation, and Vested Right

- 3.1 It is important to point out that a letter of interest was issued by the Punjab Power Development Board (“PPDB”) to the sponsors of the Company in respect of the Project on 19 March 2015 (the “LOI”) and the Company furnished a bank guarantee in favor of PPDB for an amount of USD 100,000/- for the purposes of the LOI. The Project squarely fits into the category of “unsolicited proposals” under the Policy for Development of Renewable Energy for Power Generation: Employing Small Hydro, Wind, and Solar Technologies, 2006 (the “RE Policy”) and is therefore, subject to the process for unsolicited proposals provided in clause 8.7.1 of the RE Policy.

(The LOI is placed herewith as Annexure B)

- 3.2 Since the issuance of the LOI, the Project has achieved significant milestones and is therefore, at a very advanced stage. The Feasibility Study has been completed and was duly approved by the Panel of Experts within the stipulated time. Land measuring 650 acres in Mouza Rakh Choubara Teshil Choubara District Layyah (the “Site”) has been allocated by the Collector, Government of Punjab to the Company for the Project vide allocation letter bearing reference No. 09-13/DRA dated 31 December 2015 (the “Allocation Letter”). The requisite approval from the EPA has also been obtained vide letter bearing reference No. DD (EIA)/EPA/F-831(IEE)/0101/2015/13 dated 08 January 2016 (the “EPA Approval”). The generation license application of the Company has also been admitted by NEPRA. The Project is also under consideration to be included in the China-Pakistan Economic Corridor. At various points, it has been acknowledged by the PPDB that the Company has met all its timelines and requirements.

(The Minutes of Meeting of the Panel of Experts approving the Feasibility Study, The Site Allocation Letter, The EPA Approval, NEPRA’s letter admitting the application for General License, and the presentation given for the purpose of inclusion of the Project in CPEC are attached herewith as Annexures C, D, E, F, and G)

- 3.3 In achieving the aforementioned milestones, the Project has incurred significant costs in the amount of approximately PKR 156,000,000 (USD 1,500,000/-) till date. The Company has been incurring these costs while relying upon the representations made by the State of Pakistan in the RE Policy and therefore in the legitimate expectation that its Project would be processed in line with the mechanism provided for unsolicited proposals in the RE Policy which would include being able to avail negotiated tariff or upfront tariff in terms of clause 8.7.1.5 and Annexure A of the RE Policy. Paragraph A.7 of Annexure A of the RE Policy clearly provides that the option of negotiated tariff or upfront tariff is available for projects being established on the basis of unsolicited proposals (which the Project of the Company is) whereas tariff through competitive bidding is only applicable to projects being established on the basis of solicited proposals which the Project is not.

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- 3.4 It is also worth pointing out that even in terms of the Punjab Power Generation Policy 2006 (revised 2009) (the **"Punjab Power Policy"**) issued by the Government of Punjab a clear distinction has been made between solicited and unsolicited projects. In paragraphs 23 and 30 of the Punjab Power Policy it is clear that competitive bidding is only restricted to solicited projects, which the current project is not.
- 3.5 It is respectfully submitted therefore that the Impugned Order is in clear violation of the RE Policy as well as the Punjab Power Policy and is liable to be reviewed in light of this fact alone.
- 3.6 Moreover, given the express representations of the State of Pakistan through the RE Policy and the Punjab Power Policy (upon which the Company has relied to its detriment), as well as its actions over the last several years through notifications of upfront tariffs, its issuance of an LOI to the Company to undertake work, the allocation of land to the Company, and grant of EPA approval all combine to create a situation where vested rights have accrued to the Company entitling the Company to complete the Project on the basis of the existing regulatory regime / policy and NEPRA cannot interfere or revoke those vested rights by way of the Impugned Order. Multiple agencies of the Government / State including NEPRA, the Alternative Energy Development Board (**"AEDB"**) and the Ministry of Water and Power, Government of Pakistan (**"MOWP"**) have conducted themselves in a manner so as to create a legitimate expectation that a certain course i.e. the mechanism for processing unsolicited proposals under the RE Policy will be followed and it would be grossly unjust if NEPRA, AEDB and/or MOWP were permitted to suddenly follow a different course (i.e. tariff through competitive bidding) to the detriment of the Company who entertained the aforementioned expectation and acted on it by incurring substantial costs and achieving the milestones discussed above. Furthermore, nowhere in the RE Policy is there an indication that once the process for unsolicited proposals has commenced (and is well underway, with the LOI having been issued), the relevant authorities can adopt the process for solicited proposals and make the same applicable on developers (such as the Company) who have been legitimately developing their Project on the basis of the process set out for unsolicited proposals.
- 3.7 If the process for solicited proposals/tariff through competitive bidding is imposed on the Company at this stage, it would be unfair and to the detriment of the Company who entertained the reasonable expectation that the process for unsolicited proposals would be applicable to its Project. Additionally, having already incurred significant costs in the amount of approximately USD 1,500,000/- till date for the development of the Project, entering into competitive bidding at this stage would result in the entire amount becoming an unexpected and devastating sunk cost. Therefore, under the doctrine of promissory estoppel NEPRA, AEDB and MOWP would be estopped from imposing the competitive bidding regime on the Company and overriding the vested rights accrued to the Company on the basis of the RE Policy, LOI, Site Allocation, and EPA Approval.
- 3.8 Furthermore, the relevant authorities would also not be able to rely on the doctrine of locus poenitentiae given the LOI and the RE Policy have taken legal effect, and in pursuance thereof certain rights (i.e. for the Project to be processed in line with the mechanism provided for

unsolicited proposals in the RE Policy which would include being able to avail negotiated tariff or upfront tariff in terms of the RE Policy) have been created in favour of the Company and the effective provisions of the RE Policy cannot be withdrawn or rescinded by way of the Impugned Order to the detriment of the Company's accrued rights.

Non-Speaking & Arbitrary Nature of Impugned Order

- 4.1 At paragraph 9 of the Impugned Order, NEPRA provides that "*Subsequently, AEDB vide its letter dated December 16, 2016, inter alia, submitted that it has initiated the process of developing competitive bidding framework with the support of technical expertise available through donor agencies for which it would take 10-12 months. AEDB further submitted that the mechanism for disposal of remaining LOIs for wind and solar power projects would also be developed in the course of development of aforesaid framework*" (emphasis is ours).
- 4.2 NEPRA reiterates its position at paragraph 12 of the Impugned Order where NEPRA states that "*In Authority's opinion, the issuance of LOIs should not be considered an impediment for the shift towards competition for which AEDB has also submitted that the mechanism for disposal of LOIs would be developed in the course of development of auction framework.*"
- 4.3 The above-referred paragraphs clearly admit that at present there is no mechanism in existence for competitive bidding in relation to projects that already have an LOI issued and are at various different stages of development. The Company's Project in particular is at an extremely advanced stage of development as explained above. NEPRA has also been clearly told by the AEDB that the development process could take up to 10 months. This effectively means that through the Impugned Order the Company's Project has essentially been held in abeyance as it will have no way of obtaining any tariff. There is no guarantee that at the end of the 10-month period an effective, fair and approved mechanism will be developed in any event. This amounts, therefore, to an indefinite suspension of the Company's Project putting at risk the Company's entire investment.
- 4.4 This also highlights another aspect of the Impugned Order i.e. the completely arbitrary and non-speaking nature of the order. It is clear that many of the interveners and commentators in the hearing (including the Company) had opposed the NEPRA's decision and submitted that such a decision would unfairly impact the existing LOI holders and those projects (such as the Company's) that are at an advanced stage. The Authority, in simply one line, states that in its opinion this would not be the case. The Authority has provided no reasons for its "opinion" or engaged with the arguments presented.
- 4.5 It is also clear from the above referred paragraphs of the Impugned Order that NEPRA, along with the relevant authorities, has not, prior to issuance of the Impugned Order, given much

thought to the treatment of existing letter of interest holders and the impact of the Impugned Order on such existing letter of interest holders who have incurred substantial costs for the development of their respective projects prior to the issuance of the Impugned Order. When it has been clearly admitted that no alternate effective competitive bidding regime has been developed, and that it will take at least ten months to develop one, how can the Authority force all such Projects into a regime that has not yet been developed? How can the Authority have decided upon the propriety and adequacy of this regime? This establishes the arbitrary nature of the Impugned Order and the fact that it has been passed in haste without the required degree of consideration being given to the surrounding circumstances (such as the expectations of and detrimental effect to existing advanced projects such as the Company's) given the stakes involved nor has any clarity or specifics been provided in respect of the bidding process to be adopted. The Impugned Order has replaced an existing regime, with a hypothetical future regime, of the propriety and adequacy of which, there is no guarantee whatsoever.

- 4.6 Moreover, no concrete reasoning has been provided by NEPRA as to how the Impugned Order will not impact letter of interest holders such as the Company or put them in a detrimental position whereas during the course of the hearing held by NEPRA in respect of this matter on 21 July 2016 numerous submissions were made by various stakeholders that introducing a competitive bidding regime at this stage would be unconscionable and unfair to letter of interest holders but NEPRA has simply disagreed with those submissions in its Impugned Order without providing any justification for the same. This exemplifies the arbitrary and non-speaking nature of the Impugned Order.

Bidding Process

- 5.1 Bidding procedures are adopted for specific projects with different parties involved where all conditions like solar irradiance, soil status, ground, transportation, grid, weather etc. are similar. For example, competitive bidding procedure could have been adopted for the projects to be established in the Quaid-e-Azam Solar Park where these conditions would be the same for all. The above-mentioned conditions are different for different projects which are not in the Quaid-e-Azam Solar Park and are to be located at different locations due to which each project requires specific project designing with different configurations. The land status for each project is also different, some projects have acquired private land whereas others have leased public land from the relevant governments and as a corollary due to these different variables the project cost will also differ for different projects. Therefore, the competitive bidding procedure being applicable to all projects intended to be established is clearly not practical.
- 5.2 Moreover, there is no guidance in respect of the bidding process and it's working. NEPRA has simply directed the relevant agencies to prepare the competitive bidding framework and request

for proposal. It is unclear whether the bidding will be in relation to specific land or would be generally based on technology type and project cost. If the latter, then for the reasons discussed in the above paragraph the bidding process would be impractical due to the different variables for each project. If the bidding process is to be based on specific land identified by the relevant agencies, then this would be extremely detrimental for the Company (and other developers in the same position) who has already acquired land and incurred significant costs in respect of the same as well as conducted an extensive feasibility study and grid study specific to the Site – leading to the Company's vested rights (as discussed above) being infringed.

- 5.3 Additionally, project developers who have already incurred project development costs (which may be sunk costs due to the competitive bidding regime being imposed on them) will not be able to give as low a bid as perhaps projects which are not that advanced (and have not incurred substantial development costs) can and in such a situation the Company (along with similar project developers) will not be able to bid competitively, effectively putting them in a weaker position, which would render the bidding process unfair thus being a violation of the basic principle bidding is founded on i.e. transparency and fairness. Furthermore, competitive bidding tariff will not ensure that the development costs already incurred will be compensated.

Discriminatory Effect of Impugned Order

- 6.1 The Impugned Order puts the developers who are at advanced stages and have incurred substantial development costs (such as the Company) and new projects in the same position, thereby classifying them as being equal whereas they are in fact unequal. Treating unequals as equals in this manner is a clear violation of Article 25 of the Constitution, which guarantees equal protection of the law and equal treatment under it.
- 6.2 Furthermore, grouping all such projects together into one category, regardless of whether an LOI has been issued, or whether the projects are at various different stages of completion, is a clearly unreasonable and arbitrary classification. The Impugned Order by creating such a classification is clearly contrary to Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973, which affords citizens equal protection of the law. The Company's Project, which is at an advanced stage of development, cannot be considered the same as a raw undeveloped project or even the same as another project with LOI that is at an early stage of development. Creating a classification that ignores the intelligible differentia between such parties is clearly in violation of the Constitution and the Impugned Order clearly suffers from this constitutional defect.
- 6.3 Apart from the terms of the Impugned Order itself, the effect of the Impugned Order is also discriminatory as it violates the vested rights of the Company (discussed above), which would not be the case for a new project. The Impugned Order does not have the same impact on the

entire class (both existing advanced projects and new projects being considered the same) being created by the Impugned Order given developers such as the Company will suffer detriment in the form of loss of opportunity and significant costs by operation of the Impugned Order whereas a new project which has not incurred any development costs will not suffer such detriment and will in fact benefit from the Impugned Order by being catapulted into the same league as advanced projects such as the Project of the Company.

Undermining Confidence in Investment in RE Sector of Pakistan

- 7.1 In the present matter, the lack of consistency from the relevant authorities regarding the process for unsolicited proposals for the setting up of a renewable energy project, has not only come at an incredible cost but has also undermined the Company's (as well as other investors) confidence as an interested investor. The idea of competitive bidding being applicable to projects based on unsolicited proposals (such as the Project) is surprising and inconsistent with the representations made in the RE Policy approved by the Federal Government of Pakistan and the Punjab Power Policy approved by the Government of Punjab. Such inconsistency will and is already having a negative impact on investors especially international investors which would have the effect of investment significantly reducing in the renewable energy sector of Pakistan.
- 7.2 It is also worth noting that many international investors (including the Company) that had commenced its Project and investment on the basis of a particular expectation and regulatory regime would rightly perceive this as a retroactive change by the Authority. Any changes brought about through the Impugned Order should only operate prospectively after due consultation and examination of all options. The government's / NEPRA's failure to maintain a stable regulatory environment will dramatically impact the risk perception of foreign investors such as the Company at a time when foreign investment is key to development of energy infrastructure and the success of CPEC. It is also worth noting that the Company has already gone through multiple changes of heart by relevant regulators. Since the Company has received its LOI the upfront tariff has been revised downwards at least twice. Now, the regime is sought to be changed entirely. In such a situation, it would be impossible for foreign investors to plan any investment in Pakistan. The Company's Project, which has made substantial investments on the basis of a particular regulatory regime may not now be suddenly thrust into an as yet undeveloped and uncertain new regulatory regime and equity, fairness and the law all require that the Company's Project be allowed to opt for an upfront tariff.

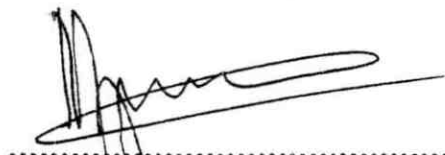
Prayer

In view of the above, it is hereby most respectfully requested that NEPRA may kindly be pleased to:

- (i) Review the Impugned Order dated 03 March 2017 and reverse its decision that all new projects (including those with LOIs) would be awarded tariff through competitive bidding process, which is yet to be developed, and issue an upfront tariff for solar power projects that have been issued letters of interest by the respective authorities, or at the very least for projects such as the Company's that apart from having a letter of interest also have a valid EPA Approval, Site Allocation, and approved Feasibility Study;
- (ii) In the alternative, clarify that the Impugned Order applies only to 'new projects' as stated in paragraph 14 of the Impugned Order, and that such 'new projects' do not include the Project of the Company that has been issued an LOI, EPA Approval, Land Allocation, and Feasibility Study Approval; and consequently allow the Project of the Company to apply for an upfront tariff notified by NEPRA

FOR AND ON BEHALF OF

ZHENFA PAKISTAN NEW ENERGY COMPANY (PRIVATE) LIMITED



.....
Col R Muhammad Ahmad Jawad

Project Manager