

# HAIDERMOTABNR

ADVOCATES AND CORPORATE COUNSEL

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In your reply please  
refer to our ref:

15 March 2017

Via hand delivery

The Registrar  
National Electric Power Regulatory Authority  
NEPRA Tower, Ataturk Avenue  
Sector G-5/1, Islamabad

For information & info A.  
— DRO/DRG-I  
Ctate  
— SAI - I  
— SA(Tech) - Dr(Li)  
— DG(M&E) - LA(NEP)  
-MIF  
16.03.17  
cc: Chairman  
VC/M(T)  
M(Lic)  
M(CA)  
M(M&E)

Re: Review Petition against NEPRA Determination regarding  
Solar PV Power Generation Tariff

Dear Sir:

1. We are counsel for the following companies (collectively, the "Petitioners), all of which are subsidiaries of Zenergy Company Limited:
  - a. Elbel Green Energy Pakistan Limited
  - b. Flare Solar Development Pakistan Limited
  - c. Golden Eye Solar Development Pakistan Limited
  - d. High Flying Solar Development Pakistan Limited
  - e. Indigo Solar Development Pakistan Limited
  - f. King Rider Solar Development Pakistan Limited
2. Each of the Petitioners is the beneficial holder of a valid letter of intent issued by the Punjab Power Development Board with regard to the development of 100 MW solar power projects to be set up at the Quaid- e-Azam Solar Park near Bahawalpur, Punjab. The total project size is 900 MW.
3. Three sister concerns of the Petitioners have already established their 100 MW solar power projects at the Quaid-e-Azam Solar Park and have started commercial operations. They are now adding solar power electricity to the national grid of Pakistan.
4. The Petitioners are currently in dispute with NEPRA regarding the failure of NEPRA to approve the applications for approval of upfront tariff earlier

Registrar  
By No. 2358  
Dated 16-03-17

5. notified by NEPRA. The instant submissions are without prejudice to the submissions of the Petitioners in relation to those pending proceedings.
6. The determination under review is dated 3 March 2017 (the "Impugned Determination"). As per the knowledge and information of the Petitioners, the Impugned Determination has yet to be officially notified by the Ministry of Water and Power. Furthermore, no copy of the Impugned Determination was ever sent by NEPRA to any of the Petitioners, notwithstanding the fact that Zonergy submitted comments before NEPRA regarding the Impugned Determination. Instead, the Petitioners only learnt of the Impugned Determination on 14 March 2017. The instant review petition is therefore being filed within the applicable limitation period. Without prejudice to that submission, it is further respectfully prayed that if it is found that the instant review petition is barred by limitation, that the applicable limitation period may be relaxed in favour of the Petitioners.
7. It is respectfully submitted that the Impugned Determination is contrary to law and is therefore liable to be reviewed on, inter alia, the following grounds:
  - a. The Impugned Determination provides, in essence, that no tariff for any solar power project shall be determined by NEPRA except on the basis of competitive reverse bidding.
  - b. The Impugned Determination notes itself that the issue of vested rights of current holders of letters of intent was raised before NEPRA. The legal aspects of this issue have not been considered to any extent by NEPRA. Instead, the Impugned Determination states simpliciter that NEPRA is "not inclined" to accept this argument.
  - c. It is settled law that executive action cannot operate retrospectively so as to destroy vested rights. The Petitioners and all other companies similarly placed have a vested right to the determination of tariff on the currently existing bases for tariff determination (i.e. cost plus basis). That right cannot be taken away simply through a change of policy by NEPRA.
  - d. Without prejudice to the foregoing, even if it was legally possible for NEPRA to affect vested rights through a tariff determination, the Impugned Determination would nonetheless still be illegal because it is contrary to the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (the "Act") and the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 (the "Rules").

- e. It may generally be noted that NEPRA is charged under Section 7(3) of the Act with the responsibility for determining the tariffs for the supply of electrical energy. Furthermore, Section 31(1) of the Act states that NEPRA shall "determine and prescribe procedures and standards for determination ... of rates." Finally, Section 46(2)(c) specifically provides that NEPRA may make rules "with the approval of the Federal Government, by notification in the official Gazette" for the determination of rates. And indeed, the Rules have been duly notified by the Federal Government.
  - f. The point of the foregoing recitation is that NEPRA is required to determine rates in accordance with the Rules. There is no provision in the Rules which allows NEPRA to say that applicants may not obtain a tariff determination on a cost plus basis but must instead participate in a reverse bidding process. The Impugned Determination is therefore ultra vires of the Rules and the Act and is consequently liable to be reviewed and recalled.
  - g. Without prejudice to the foregoing, it is respectfully submitted that the Impugned Determination is unreasonable and unsustainable. The Impugned Determination itself notes that preparation of a framework for competitive bidding will take the AEDB a period of 10-12 months. Self-evidently, no bidding can take place till such time that a proper framework is developed and till such time that a mechanism for the "disposal" of existing Letters of Intent is worked out. This in turn means that no tariff determination can take place for at least the next 10-12 months. However, NEPRA cannot simply refuse to determine any tariffs in the intervening period. The Petitioners (and other companies similarly placed) have invested millions of dollars on the basis of the policies announced by the Government of Pakistan and in the legitimate expectation that they will be allowed an appropriate tariff by NEPRA. The Impugned Determination, however, abdicates this statutory mandate in consideration for a policy which has yet to be developed and which may never arrive (if history is any guide). It is entirely unreasonable for NEPRA to take such an approach and to tell the Petitioners to wait indefinitely (or even for a further period of 10-12 months). The Impugned Determination is therefore liable to be reviewed and recalled.
8. The Petitioners seek leave to submit other and further grounds at the time of hearing of the instant review petition.

*Haidermota BNR s/o.*