

**BEFORE**

**THE NATIONAL ELECTRIC POWER REGULATORY AUTHORITY**

**IN THE MATTER OF:**

**CASE No. NEPRA/TRF-490/AWPPL-2019**

**MOTION FOR LEAVE FOR REVIEW UNDER SECTION 7(2)(G) AND SECTION 31 OF THE REGULATION OF GENERATION, TRANSMISSION AND DISTRIBUTION OF ELECTRIC POWER ACT, 1997, READ WITH RULE 16(6) OF THE NEPRA (TARIFF STANDARDS AND PROCEDURE) RULES, 1998 AND REGULATION 3(2) OF THE NEPRA (REVIEW PROCEDURE) REGULATIONS, 2009, EACH AS AMENDED, RESTATED OR MODIFIED FROM TIME TO TIME**

**ON BEHALF OF**

**ARTISTIC WIND POWER (PRIVATE) LIMITED**

**DATED: AUGUST 03, 2020**

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**TABLE OF CONTENTS**

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<b>1. INTRODUCTION .....</b>	<b>1</b>
1.1. BACKGROUND .....	1
1.2. BASIS OF MOTION FOR LEAVE FOR REVIEW .....	3
<b>2. GROUNDS.....</b>	<b>3</b>
2.1. REVIEW MATTERS.....	3
2.2. GROUNDS .....	4
2.3. CONTRAVENTION OF DUE PROCESS.....	4
2.4. PRINCIPLE OF ESTOPPEL & LEGITIMATE EXPECTATION TO RELY ON REFERENCE TARIFF DETERMINATION .....	6
2.5. COMMERCIAL & TECHNICAL REALITIES OF PROJECT FINANCE TRANSACTIONS .....	8
2.6. PRINCIPLES & STANDARDS OF TARIFF DETERMINATION .....	12
<b>3. MISCELLANEOUS .....</b>	<b>13</b>
<b>4. PRAYER / REQUEST.....</b>	<b>14</b>

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## 1. INTRODUCTION

### 1.1. BACKGROUND

1.1.1. Artistic Wind Power (Private) Limited (the “**Company**” or “**Petitioner**”) is a company duly established and existing under the laws of Pakistan with its registered office located at Plot No. 4 & 8 Sector 25, Korangi Industrial Area, Karachi, Pakistan.

1.1.2. The Company was duly incorporated under the laws of Pakistan on October 26, 2015 for the purposes of undertaking the development, implementation, construction and operation of a 50 MW wind power generation facility located at Jhimpir, District Thatha, Sindh (the “**Project**”).

1.1.3. In pursuance of development of the Project, the Petitioner was issued a generation licence on March 28, 2017 by the National Electric Power Regulatory Authority (the “**Authority**” or “**NEPRA**”).

1.1.4. The Project submitted a tariff petition on cost plus basis before the Authority (the “**Tariff Petition**”) which was admitted for further processing. In accordance with due process under the applicable laws, a Notice of Admission/Hearing (the “**Notice of Hearing**”) was published by NEPRA in newspapers, on the Authority’s website and individual notices were issued to the parties, in each case containing salient features of the Tariff Petition, the hearing schedule and the issues framed for the hearing. Through the said notice, NEPRA invited comments and intervention requests from interested parties. In response to the Notice of Hearing numerous stakeholders submitted their comments (including the Central Power Purchasing Agency (Guarantee) Limited), which were evaluated in the course of the proceedings by the Authority. The hearing on the subject matter was held on January 08, 2020 (the “**Reference Tariff Hearing**”) which was attended by a large number of participants and key stakeholders.

*Copy of the Notice of Hearing and Project’s Tariff Petition are attached as **Annexure A** and **Annexure B**, respectively.*

1.1.5. Notably, the issues framed under the Notice of Hearing were exhaustive and allowed an analysis of all components of the proposed tariff, including the subject matter of this Motion for Leave for Review (the “**MFLR**”) i.e. the operations and maintenance (the “**O&M**”) costs. After careful consideration, the Authority issued the ‘*Determination of the National Electric Power Regulatory Authority in the matter of Tariff Petition filed by Artistic Wind Power (Private) Limited for Determination of Reference Generation Tariff in respect of 50 MW Wind Power Project*’ vide an order dated November 19, 2018 (the “**Reference Tariff Determination**”).

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*Copy of the Reference Tariff Determination is attached as Annexure C.*

- 1.1.6. The Reference Tariff Determination formed the basis of the Project's further development, and placing reliance on the same, the sponsors of the Project, *inter alia*, proceeded to allocate project costs, secure debt financing for the Project and firm up the financial model in consultation with the financiers of the Project.
- 1.1.7. On November 18, 2019 the Project achieved financial close under the Implementation Agreement dated November 12, 2019, executed with the Government of Pakistan.
- 1.1.8. The Petitioner, *vide* submission dated September 28, 2019, filed a Tariff Modification Petition (the "**Modification Petition**") under Section 31 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (the "**NEPRA Act**") and the rules and regulations made thereunder, including Rule 3 of NEPRA Tariff Standards and Procedure Rules, 1998 (the "**Tariff Rules**"). In the Modification Petition, the Petitioner requested the Authority to update the Reference Tariff Determination, in line with the permitted adjustments contained therein, to reflect the prevailing circumstances with respect to: (i) the local and foreign financing mix; (ii) repayment profile of local financing under SBP scheme; and (iii) the reference exchange rate.

*Copy of the Modification Petition is attached as Annexure D.*

- 1.1.9. The Modification Petition was admitted on December 27, 2019 for further processing. Upon admission, the Authority issued a Notice of Admission/Notice of Hearing (the "**Notice of Modification Hearing**") which was published in newspapers, on the Authority's website and individual notices were issued to the parties, in each case containing salient features of the Modification Petition, the hearing schedule and the issues framed for the hearing. Through the said notice, NEPRA invited comments and intervention requests from interested parties. In response to the Notice of Modification Hearing, the Central Power Purchasing Agency (Guarantee) Limited submitted its comments which were evaluated in the course of the proceedings by the Authority. The hearing in the subject matter was held on January 8, 2020 (the "**Modification Petition Hearing**").

*Copy of the Notice of Modification Hearing is attached herewith as Annexure E.*

- 1.1.10. The Authority evaluated the Petitioner's submissions in the Modification Petition and issued its '*Decision of the Authority in the matter of Tariff Modification Petition filed by Artistic Wind Power (Private) Limited for its 50 MW Wind Power Project*' *vide* an order dated July 23, 2020 (the "**Decision**"), served on and received by the Petitioner on July 25, 2020.

*Copy of the Decision is attached as Annexure F.*

- 1.1.11. Under the Decision the Authority was kind to recognize and expressly acknowledge the requests made by the Petitioner in respect of local/foreign debt mix; repayment terms and repayment profile; and exchange rate; and has stated that the documentary evidence required for the adjustments has been fulfilled and that the adjustments are in line with the Reference Tariff

Determination. Therefore, the Petitioner understands that it is merely a procedural formality these adjustments are available to the projects and the same “*shall be made at the time of COD of the Project*” (ref. paragraph 18 (Order) of the Decision).

- 1.1.12. However, to the Petitioner’s utmost surprise, the Authority has included the following new provision in respect of the O&M cost of the Project under paragraph 18 of the Decision:

*“After two years of operations, the Authority may consider making revisions in the O&M cost, while capping the allowed prevailing O&M cost level, anytime during the tariff control period. Those revisions may also entail changing the mix of the approved O&M cost (local and foreign) as well as the indexation mechanism (indices, frequency etc.). For that purpose, the Authority may direct the petitioner to carry out the competitive bidding to select the contractor for the provision of the O&M cost”*

(hereinafter referred to as the “**Impugned Term**”).

1.2. **BASIS OF MOTION FOR LEAVE FOR REVIEW**

- 1.2.1. In view of the foregoing, this MFLR is being filed by the Petitioner to request the Authority to review its decisions under the Decision *vis-à-vis* the introduction of the Impugned Term, in view of the grounds and submissions particularized in Section 2 (*Grounds*).
- 1.2.2. This MFLR is being instituted under Section 7(2)(g) and Section 31 of the NEPRA Act (each as amended *vide* the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2018), read with Rule 16(6) of the Tariff Rules and Regulation 3(2) of the NEPRA (Review Procedures) Regulations, 2009, and all other enabling provisions of the law.

**2. GROUND**

2.1. **REVIEW MATTERS**

- 2.1.1. The Petitioner seeks review of the Authority’s determination under the Decision *vis-à-vis* introduction of the Impugned Term.
- 2.1.2. Without prejudice to the detailed submissions made by the Petitioner in this MFLR, at the outset it is highlighted that a paramount concern of the Petitioner is that the Impugned Term has been introduced into the tariff of the subject Project without following due process and without providing any opportunity to the Petitioner to address the matter. Further, the Impugned Term is without any valid basis given that same overreaches well beyond the Reference Tariff Determination, based on which the Project has achieved financial close, and is in violation of the principles established under the NEPRA Act and rules and regulation framed thereunder.

It is a well settled law that *in exercise of discretion person endowed with such discretion must act reasonably and not in an arbitrary or whimsical manner and must give reasons for his decisions.*

2.1.3. Failure to provide such reasoning is not only unjust to the Petitioner but is also in violation of established statutory and legal principles for quasi-judicial and governmental bodies.

2.1.4. Reliance is placed on Section 7(6) of the NEPRA Act which states that, “in performing its functions under this Act, the Authority shall protect the interests of consumers and companies providing electric power services in accordance with the principles of transparency and impartiality.” Emphasis Added. The Authority is requested to treat the Petitioner in a non-discriminatory manner and in line with the legal principles applicable to a public functionary to carry out functions in fairness, good faith and non-prejudicial manner.

2.1.5. The detailed grounds for the Petitioner’s current MFLR are provided herein below.

## 2.2. GROUND

2.2.1. Through this MFLR, the Petitioner requests that the aforementioned Decision be reviewed, *inter alia*, on the following grounds:

## 2.3. CONTRAVENTION OF DUE PROCESS

2.3.1. The Decision of the Authority, to the extent of the Impugned Term, is not in compliance with the duty imposed on public authorities to follow the course of due process of law, which includes the requirement to ‘*not condemn a party-unheard*’, especially when in an adjudicating position.

2.3.2. To elaborate, as prescribed under the Tariff Rules, the Authority is required to allow a petitioner to present arguments and evidence in support of its pleadings as well as any additional issues that are framed by the Authority during the course of such proceedings. In particular, the Authority’s attention is drawn to the following provision of the Tariff Rules:

“9. *Hearings by the Authority.* — (1) *At the time of admission of petition, the Authority shall also determine whether a hearing is required to arrive at a just and informed decision. For the purposes of making such an order, the Authority may (i) administer discoveries and interrogatories to any person; (ii) make information directions; or (iii) require the appearance of any person.*

(2) *In case the Authority orders a hearing, the Authority shall fix the date of hearing for the parties to present written or oral arguments on the basis of the pleadings. The Authority may also frame the issues over which the parties may be allowed to address arguments and present evidence before the Authority, and the Authority may decide as to which issues may be allowed to be addressed during the course of the hearing. In framing the issues, the Authority may exclude one or more issues or matters raised or stated in the pleadings, and may also include additional issues or matters not raised in the pleadings.*

Emphasis Added

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- 2.3.3. Based on a plain reading of the above, it is imperative to note that the objective of holding hearings in relation to a petition is to achieve a just and informed decision. As a general rule and matter of procedure, parties are entitled to provide written or oral arguments to the Authority in relation to pleadings. In the case of additional issues being framed, the Authority is required to give due consideration to allow concerned parties to have an opportunity to address the additional issues that are framed by the Authority through presentation of arguments and/or evidence in order to reach a decision that is impartial, fair and just. Such process is critical to ensure due consideration of all plausible perspectives (including perspectives of the concerned and/or affected parties, such as the Petitioner) are taken into account.
- 2.3.4. Contrary to the above, in the present case, the Impugned Term was neither framed as an initial issue in the Notice of Modification Hearing nor as an additional issue by the Authority at any stage of the proceedings. It was only upon receipt of the Decision that the Impugned Term came to the knowledge of the Petitioner. Clearly, the Petitioner was not awarded a single opportunity to submit its case (including any comments, arguments and evidence in support of its case) to the Authority in respect of the Impugned Term. Therefore, the Decision, in the context of the Impugned Term, was given by the Authority on an arbitrary basis and without adequately substantiating the basis or rationale for such decision in proper detail. Those reasons which have been provided by the Authority under the Decision are critically analysed under paragraph 2.5 of this MFLR and are found to be out of sync with the ground realities of the subject Project and are therefore incognizable.
- 2.3.5. Even otherwise, the Authority would appreciate the right to due process is enshrined under the Constitution the Islamic Republic of Pakistan, 1973 (the "**Constitution**"). Particularly, as per Article 10-A of the Constitution the Authority may note that for the determination of civil rights and obligations, a person is entitled to a fair trial and due process.
- 2.3.6. Similarly, in keeping with the principle of natural justice, the common law maxim of *audi alteram partem* (i.e. 'listen to each side of the story') which has been repeatedly applied and upheld by the superior courts of Pakistan requires that a party must be heard before a decision in relation to its rights and obligations is imposed by an authority having jurisdiction over the matter in question. This principle has been upheld by a plethora of case law in Pakistan such as in *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2011 (SC) 671, where the Hon'ble Supreme Court reiterated that "it is a **cardinal principle** of natural justice **of universal application** that no one should be condemned unheard. Not only this Court, but the courts in other countries having a regular system of administration of justice would, in almost every case, where there was likelihood of any adverse decision/action against anyone, follow the above principle and provide the person concerned an opportunity of being heard." Emphasis Added
- 2.3.7. Moreover, the superior courts have stated that the said principle has a '*presumption of existence*' in every statute, and is deemed to be written in every statute, even if there is no express provision to this effect. Nonetheless, in relation to the Impugned Term, the constitutional as well as common law rights of the Petitioners were not adhered to.
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2.3.8. In relation to the proceedings before the Authority, it is noteworthy that due process would require the Authority to, at a minimum, provide an opportunity to the Petitioner for a hearing in relation to the Impugned Term including the opportunity to present arguments and evidence in support of its submissions. However, none of these opportunities were afforded to the Petitioner and the Impugned Term was simply notified to the Project through the Decision. Therefore, regardless of the merits of the Impugned Term (which have not been adequately considered to date in the proceedings, as that would require participation of the Petitioner), the Decision regarding the Impugned Term was taken by adopting a procedure that was inequitable i.e. it lacked any of the essential ingredients of due process; and that alone is sufficient as ground for the Authority to review the Decision.

**2.4. PRINCIPLE OF ESTOPPEL & LEGITIMATE EXPECTATION TO RELY ON REFERENCE TARIFF DETERMINATION**

2.4.1. The Decision, to the extent of the Impugned Term, is also in contravention to the doctrine of legitimate expectation. To elaborate, legitimate expectation entails that by virtue of any act (which may include a representation, promise or past consistent practice) a public authority creates a legitimate expectation for another person to be treated in a certain manner. In the context of the present case, the Authority, by virtue of the Reference Tariff Determination clearly created a legitimate expectation for the Petitioner. It is an established practice that once a determination is issued by the Authority the same is referred to as the 'reference determination' and is the basis upon which the Project achieves financial close. Thereafter, the only changes and 'cost openers' under a reference tariff are the various one-time adjustments, indexations, and periodic adjustments stated in the reference tariff itself. Accordingly, the Reference Tariff Determination (including the O&M cost) formed the basis of the overall development of the Project, and by placing reliance on the same, the sponsors of the Project proceeded to allocate project costs and in pursuance of securing debt financing for the Project firmed up the financial model in consultation with the financiers of the Project.

2.4.2. It is pertinent to note that the Reference Tariff Determination (including the O&M cost) (as stated above) was determined following an exhaustive process, as prescribed under the NEPRA laws, including by holding the Reference Tariff Hearing, inviting comments from stakeholders and the public, framing issues and conducting a detailed analysis prior to concluding the Reference Tariff Determination. Accordingly, re-opening of aspects of the Reference Tariff Determination, which aspects did not even form part of the Modification Petition Hearing, is an arbitrary act of the Authority, which outrightly contravenes the legitimate expectation created for the Petitioner through the Reference Tariff Determination and the reliance that the Petitioner placed on the same in the process of development of the Project. Evidently the Impugned Term, if implemented, will be unfairly and unjustly detrimental to the Petitioner, thereby making the Impugned Term and the manner in which the Authority has deliberated and imposed the Impugned Term on the Petitioner, highly inequitable.



2.4.3. Ample jurisprudence has been developed by Pakistani courts over the years to support applicability of the doctrines of legitimate expectation and promissory estoppel, specifically in cases involving public authorities. Some of these cases are summarized below.

2.4.4. In the case of *Messrs M.Y. Electronics Industries (Pvt.) Ltd. through Manager and others v. Government of Pakistan through Secretary Finance, Islamabad and others*, 1998 PTD 2728, the Hon'ble Supreme Court of Pakistan held that the doctrine of promissory estoppel is founded on equity and it arises when a person acting on the representation by the Government or a person competent to represent on behalf of the Government, changes his position to his detriment, takes a decisive step, enters into a binding contract or incurs a liability. In such case, the government or a person competent to represent on behalf of the government will not be allowed to withdraw from its promise or representation.

2.4.5. Similarly, in the case titled *Dr. Shamsher Ali Khan and 27 other petitioners v. Government of Khyber Pakhtunkhwa through Secretary Finance and 2 others*, 2019 MLD 87<sup>1</sup> the court observed that "the doctrine of promissory estoppel and legitimate expectation are equitable doctrine evolved by the Judges while adjudicating upon the complaint lodged by the aggrieved party against an unfair and arbitrary action of the government..." Emphasis Added

2.4.6. It is also useful to seek some guidance from precedence set by foreign courts as these reflect the universal principles enshrined in natural law and common law, and as foreign judgments hold persuasive guideline for Pakistani courts. Foreign jurisprudence on the matter is similar to the manner in which the Pakistani courts have interpreted and applied the doctrines of legitimate expectation and promissory estoppel, which is summarized below.

2.4.7. In the case titled *M/s. Motilal Padampat Sugar Mills Co Ltd. V. State of Uttar Pradesh & Others*, (1979) 2 SCC 409, the Supreme Court of India, while granting legitimate expectations, ruled that "the government is neither exempted from liability to carry out a representation made nor can it claim to be the judge of its own obligation to the citizen on an ex parte appraisalment of the circumstances in which the obligation has arisen."

2.4.8. Similarly, in the case titled *Chanchal Goyal (Dr) v. State of Rajasthan*, (2003) 3 SCC 485, the Supreme Court of India observed that "it may be said that the doctrine has its roots in rule of law, natural justice, and estoppel, simultaneously. The doctrine is much focused on the principle of legal certainty rather than on principle of legality. It is used against statutory bodies and government authorities on whose representations or promises, parties or citizens act and some detrimental consequences are taken because of refusal of authorities to fulfil their promises or honor their commitments. The principle at the root of the doctrine is Rule of Law, which requires

<sup>1</sup> Similar principles have also been found in: *Federation of Pakistan and others v. Ch. Muhammad Aslam and others*, 1986 SCMR 916 (SC); *Messrs M.Y. Electronics Industries (Pvt.) Limited through Manager and others v. Government of Pakistan through Secretary Finance, Islamabad and others*, 1998 PTD 2728 (SC); and *Fetco Belarus Tractors Limited v. Pakistan through Ministry of Finance Economic Affairs and another*, 2001 PTD 1829 (SC).

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*regularity, predictability, and certainly the government's dealing with the public."* Emphasis Added

- 2.4.9. Based on the above noted jurisprudence, it is clear that the doctrines of legitimate expectation and promissory estoppel are often applied by courts in instances where, after making a representation or promise, a public authority arbitrarily decides to not honor it. In such cases, courts allow application of legitimate expectations and/or promissory estoppel simply because it would be inequitable and unconscionable not to do so. Therefore, the introduction of the Impugned Term is a derogation of the Petitioner's right to have legitimate expectation and reliance on the Reference Tariff Determination, and as such is sufficient ground for the Authority to review the Decision in the terms prayed.

**2.5. COMMERCIAL & TECHNICAL REALITIES OF PROJECT FINANCE TRANSACTIONS**

- 2.5.1. It is respectfully submitted that the introduction of the Impugned Term is contradictory to numerous principles under the NEPRA laws (discussed in detail under paragraph 2.6 hereof) including the requirement under the applicable NEPRA laws for the determined tariff to provide for prudent costs incurred by a generation company. Moreover, the Impugned Term is out of sync with the fundamental nature of project finance as implemented in Pakistan and world-over, and thus the market realities applicable to the Project, as further elaborated here below.

**Project Finance & Operational Risk Management**

- 2.5.2. As the learned Authority is well aware, the subject Project is structured on a project finance model whereby all factors affecting the stability and predictability of a project's revenue stream must be evaluated to assess their impact on the level and volatility of cash flow – both in terms of availability for debt service and ensuring the expected sponsor returns. The technical feasibility and soundness of the projects' technology, along with certainty of costs and revenues are fundamental parameters for this risk evaluation.
- 2.5.3. Accordingly, a key component of the technical and financial viability of the project is assessing the operational risks of the project. This includes evaluating the O&M structure of the project such that the Project has a sound O&M plan which ensures the generation facility's availability and optimal maintenance, the ability to handle unplanned maintenance and manage downtime, and the management of O&M costs in line with the financial model of the project. Therefore, the O&M structure and the long term operations and maintenance ("LT O&M") arrangement for a project is critical and impacts the viability and bankability of a project. The LT O&M arrangement serves to, *inter alia*, allocate operating risk *inter se* the operator(s) and the project company, with the objective of placing risk on the party best placed to bear it; ensures that there are clear performance parameters for the project, in order to ensure that such targets are met and adequate revenues for the project are generated; and to ensure transparent and efficient management of the O&M costs.

- 2.5.4. Given the high level of expertise required to manage the operational risks of a generation facility the project company will undoubtedly outsource the LT O&M to entities with substantial experience in providing such services. Therefore, the lenders and sponsors will place significant reliance on the strength of the counterparty/counterparties to the agreement(s) under which the LT O&M arrangement is outsourced, including their experience and track record, technical capabilities, and financial capacity *vis-à-vis* cash flows and ability to absorb liability.
- 2.5.5. In the context of wind power projects, wind turbine generators (the “WTGs”) form a substantial part of the technology required for the generation of electricity and represent approximately seventy percent (70%) of the capital cost of the project. The technology of the WTGs is proprietary in nature therefore the services, required to maintain the same at an optimal level, are highly specialized. Likewise, visibility on the types and nature of services (including specialized repair & maintenance capabilities) and spare parts that may be required during the course of the life of the facility, and ensuring a secure supply chain for such parts are paramount considerations in the LT O&M structure. Therefore, the selection of the O&M service provider(s) at an early stage, prior to the construction stage, decreases the risks of gaps in the operational scope of work and mispricing of services and overruns in the allocated operational budget. Certain services and availability of parts (including availability of parts at competitive prices) can often only be secured from the original equipment manufacturer (“OEM”), and for this reason the OEM is required to perform a critical role in LT O&M arrangement and/or is the main operator of the facility. Hence, the finalization of the LT O&M structure and selection of the O&M operator(s) takes place alongside the selection of the EPC contractors/suppliers and the selection of WTG OEM.
- 2.5.6. In particular, for the Pakistani wind sector, given its nature, financiers require a certainty with respect to the LT O&M arrangement at the outset, for the entire debt servicing period (i.e. a minimum of eleven (11) years after the initial two (2) year warranty period). Accordingly, the Petitioner shall have entered into firm arrangements for the LT O&M well in advance of completing the construction.
- 2.5.7. We note that paragraph 16 of the Decision discusses that the requirement to undertake competitive bidding for O&M costs was initially introduced in the August 2018 tariff of Master Green Energy Limited. However, based on comments from stakeholders, this condition was not included in the tariff determinations for twelve wind power projects, including the Petitioner, in November 2018 and the condition was also removed from the Master Green Energy Limited tariff in February 2019. In the Decision the Authority states that the condition was taken out “*while considering that the O&M cost approved is quite competitive and comparable as well as in view of the existing relatively less mature stage of wind industry in Pakistan*”.<sup>2</sup> Given that in its own decision for the Reference Tariff Determination the Authority addressed the competitiveness and appropriateness of the determined O&M costs (in view of stage of the wind industry’s maturity) in extensive detail, and that the subject analysis by the Authority still holds ground, given that the

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<sup>2</sup> Please refer to Paragraph 16 of the Decision.

state of the wind industry has not materially changed, the reintroduction of the concept of competitive bidding for O&M costs (particularly for a project that has achieved financial close) is unfounded.

- 2.5.8. Moreover, the Authority has mentioned that the requirement for competitive bidding for the O&M was originally removed under the Reference Tariff due to *"the requirement of lenders of getting O&M done through OEM during the debt servicing period was also given due consideration for the removal of this condition."*<sup>3</sup> This extract indicates an assumption by the Authority that it is only the lenders of the Project which require the security and stability of a LT O&M arrangement, and not the sponsors. At this juncture it is pertinent to clarify that the project finance nature of the transaction takes into consideration the demands of not only the debt financiers of the Project, but also those of the equity investors. Just as the project financiers require mitigation of operational risks, the sponsors also seek to ensure their projects are entrenched in long-term contracts in order to best allocate the operational risk and therefore engage the certainty of cash flows. In a scenario where the indexations and adjustments applicable to the post debt repayment period are uncertain, the choice to repair and/or replace equipment when required (i.e. further capitalization), may be delayed – this in turn may impact the optimal performance of the facility, which is not in the interest of any energy market stakeholder, including consumers.

#### **Long Term Structure & O&M Pricing.**

- 2.5.9. LT O&M agreements, in their fundamental structures, are pre-determined fixed price, long term contracts over the entire service period, with clearly defined indexation parameters. Pricing thresholds are controlled through the economies of services duration. The benefit of such structure is that it provides the owner with a predictable O&M cost profile over the life of the facility, and ensures synergy with the financial model - on which sponsors and financiers have structured their investment. The Petitioner has formulated the financial model in reliance on the Reference Tariff Determination, as explained in paragraph 2.4 hereof, and did not envision any new tariff openers or uncertainty in revenue.
- 2.5.10. This long term pricing structure is also preferred by the service providers as it allows them to optimize their resources through long term planning, ensure availability of the expertise and skill required to provide technical support including major repairing works requiring specialized skills and to guarantee the availability of parts which are proprietary of the OEMs. It is pertinent to keep in view the fact that in a relatively small market, such as Pakistan, resources are mobilized for specific projects. Accordingly, the service provider also needs to take into account the cost of mobilization and demobilisation of various resources and where the term of services is not certain, such overhead prices are amplified for the Operator.

<sup>3</sup> Please refer to Paragraph 16 of the Decision.

- 2.5.11. The introduction of the Impugned Term dislodges the long term pricing structure and incorrectly assumes that the LT O&M agreement executed by the Project can include a 'termination for convenience' option at no risk or consequence to the Company. Moreover, such a 'termination for convenience' enhances the risk profile of the contract for the Operator and displaces the Operator's assumptions for providing a competitive long term price and maintaining optimal resources, as explained in paragraph 2.5.10 hereof. This notion is far removed from the commercial realities of the world-wide wind industry market whereby a 'termination for convenience' clause carries severe financial consequence for the Company. In the off chance that a lower termination amount is negotiated with the operator(s) this will no doubt raise the risk profile of the LT O&M agreement for the operator and attract a higher contract price, which price will burst out of the ceiling set by NEPRA in the Reference Tariff Determination. Nevertheless, the Project has finalized the LT O&M terms hence, it is not possible to re-open negotiations at this stage to introduce the possibility of termination of the contract on the basis of a competitive bidding scenario as per the Impugned Term.
- 2.5.12. Connected with this, we note that both the Reference Tariff Determination and the Decision contain a commentary which reflects the view that the cost of O&M has decreased world-wide. Whilst this may be true for certain jurisdictions, such commentary does not highlight that other regions have more mature energy markets, in terms of expertise and skill, and where the scope of the operator is narrower, thus allowing for lower prices. Nonetheless, under paragraph 35 of the Reference Tariff Determination the Authority does acknowledge that *"the costs of India and China cannot be replicated in Pakistan due to advanced development stage of wind industry in those countries and consequent available expertise in terms of manpower and required equipment as well as due to difference in tariff regimes."*
- 2.5.13. Surprisingly, the Authority has backtracked on its reasoned and lucid reasoning, reflected in the Reference Tariff Determination, and under the Decision has again commented that *"decrease in O&M price may continue in the future as well, therefore, it may not be considered appropriate and justified to let the approved O&M cost remain fixed for the whole tariff term. Besides, the Authority also understands that approved O&M cost, linked with prescribed indexation, may result in excessive savings, on top of the approved return, and therefore cannot be left unchecked for the whole control period of 25 years."* Such justification ignores the Authority's own conclusions under the Reference Tariff Determination which clearly recognized that the Pakistan market is not on par with other jurisdictions and therefore a downward trend in pricing does not apply as it does in mature markets. Moreover, such conclusion further ignores that the sponsors placed reliance on the financial model in undertaking their investment into the Project, as further discussed in paragraph 2.4 above. With regards to the Authority's anticipation of a 'downward' trend in LT O&M costs in the future, we note that currently costs are at 'floor' prices for the breadth of the services and obligations that are required to be discharged by operators in order to keep the Project operational and perform optimally. The Project has struggled in securing an 'all inclusive' package from operators considering the cost of manpower to be deployed on site, the cost of parts, the cost of regular maintenance, the cost of specialized services etc. There is also the likelihood that an open-ended LT O&M cost (i.e. on account of price uncertainty) can result in an 'upward' cost trend in future years and avoiding this is a major purpose of locking in the LT

O&M arrangement upfront. This risk of an 'upward' market trends in costs is actually a risk that the Project substantially offloads onto the operator when contracting the LT O&M arrangement.

- 2.5.14. Furthermore, we would like to draw the Authority's attention to the fact the O&M tariff revenue is to cover the O&M operators' cost as well as the Petitioner's own operating costs. The Petitioner's own costs include cost of works at site which are not part of the scope of work of the O&M operator(s) (for instance site security etc.), office administrative costs, regulatory fees, audit fees, lenders fee, legal fees, salaries of Petitioner's employees etc. In view of the current market rates, we submit that recovery of both the O&M operator's cost and Petitioner's operating costs from the approved O&M tariff component is a challenge.

#### **Competitiveness and Viability of Long Term O&M Operator**

- 2.5.15. The Authority's concern regarding carrying out competitive bidding is substantially addressed as the sponsors and financiers carried out a detailed due diligence whilst selecting the LT O&M operator, keeping in view and balancing both least cost *and* optimal technical options. As discussed in paragraph 2.5.5 above, the LT O&M arrangement must be finalized in tandem with the OEM and EPC. Therefore, the selection of the O&M operator takes place at the same time as the WTG selection and finalization of EPC contract and all due diligence, including technical and costs, are performed at that stage. In other words, the bidding process for the EPC also takes care of selection of the LT O&M operator. Accordingly, at this time, the Project has already secured the LT O&M arrangement.

- 2.5.16. In conclusion, the introduction and implementation of the Impugned Term would make the Project non-viable as it disregards in the fundamental requirements of a project finance transaction for financiers and sponsors alike, as outlined above. The determination of a tariff in line with market realities is a cornerstone of the NEPRA laws, as further elaborated in paragraph 2.6 below, and as such, the Impugned Term being out of sync with the market realities is sufficient grounds for the Authority to review the Decision in terms of the 'prayer' hereunder.

#### **2.6. PRINCIPLES & STANDARDS OF TARIFF DETERMINATION**

- 2.6.1. Under the NEPRA Act, the Authority is required to, *inter alia*, "ensure efficient tariff structures for sufficient liquidity in the power market".<sup>4</sup> It is respectfully submitted that efficient tariff structures are intrinsically linked to allow full recovery of costs. Therefore, if the costs for O&M provided for in the Reference Tariff Determination are not maintained, the same would be a violation of the provisions of the NEPRA Act.
- 2.6.2. In line with the aforementioned overarching principle stated in the NEPRA Act, the applicable Tariff Rules specify the standards that form the basis of determination, modification and revision of tariffs by the Authority, under Rule 17 of the Tariff Rules.

<sup>4</sup> Please refer to Section 7(2)(ac) of the NEPRA Act.

- 2.6.3. The Petitioner submits that under the law, it is entitled to recovery of all costs prudently incurred. This is also reflected in Rule 17(3) of the Tariff Rules which provides that: *"tariffs should allow licensees the recovery of any and all costs prudently incurred ..."* Emphasis Added. It is evident from the foregoing submissions that the execution of an LT O&M is a necessity for the Project, and that the Petitioner is entering into such arrangement after substantial due diligence and evaluation of costs and technical parameters, as elaborated in paragraph 2.5 above. Therefore, the current O&M costs, as detailed in the Reference Tariff Determination, are prudent costs and therefore, should be allowed.
- 2.6.4. Under Rule 17(3)(xiii) of the Tariff Rules, the applicable law states the principles that the *"tariffs should be comprehensible, free of misinterpretation and shall state explicitly each component thereof."* The Impugned Term specifically states that *"the Authority may consider making revisions in the O&M cost... anytime during the tariff control period..."* Emphasis Added. The result of such a condition is that the Petitioner is faced with lack of clarity on whether or not the Authority shall revisit the O&M costs, and that too at any time in the twenty-five (25) year tariff control period. Moreover, the Decision states that 'opener' of O&M costs can extend to the *"O&M cost (local and foreign) as well as the indexation mechanism (indices, frequency etc.)"* which results in an additional element of uncertainty. The cumulative impact of the ambiguity and uncertainty introduced by the Impugned Term, is not only that it is inherently at odds with the required standard of being 'comprehensible' and ensuring clarity of 'each component' of a tariff, but that it also has a paralyzing effect on the Petitioner's and financiers' ability to have certainty on recovery of costs and viability of operations over the tariff control period.
- 2.6.5. The foregoing submissions of the Petitioner should, therefore, be evaluated and decided based on the relevant principles and guidelines set out in the NEPRA Act (i.e., Section 31 of the NEPRA Act and Rule 17 of the Tariff Rules) which apply to the Authority in the determination, modification or revision of rates, charges and terms and conditions for provision of electric power services.
- 2.6.6. Moreover, the concerns outlined in paragraph 2.1 above are reiterated: the Authority's obligation to act with transparency, impartiality, and reasonableness are again highlighted and that the Petitioner be treated in accordance with the due process under law. The Petitioner feels that these principles and guidelines have been disregarded by the Authority by introducing the new Impugned Term into the Reference Tariff Determination, as elaborated in Section 2.1 (Review Matters) and Section 2.2 (Grounds) above.

### **3. MISCELLANEOUS**

- 3.1.1. The Company, in the interest of a judicious and efficacious judgment, requests the Authority to kindly allow: (a) any other submissions not contained herein to be raised for the Authority's kind consideration during the hearing of this MFLR; and (b) the submission of additional and further evidence.
- 3.1.2. The Company would be pleased to provide any further information, clarification or explanation that may be required by the Authority during its evaluation process.

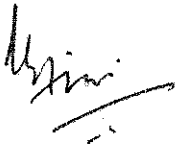
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**4. PRAYER / REQUEST**

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In light of the above, it is requested that the Decision may kindly be revised to the extent of deletion of the Impugned Term from the Decision.

It is further requested that a hearing be provided for the purposes of detailed submissions made under the subject MFLR.



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**RAFIQUE KHANANI**

CFO/COMPANY SECRETARY

FOR &amp; ON BEHALF OF ARTISTIC WIND POWER (PRIVATE) LIMITED