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EXTRAORDINARY
PUBLISHED BY AUTHORITY

ISLAMABAD, MONDAY, MAY 30, 2022

PART II

Statutory Notifications (S. R. O.)

GOVERNMENT OF PAKISTAN
NATIONAL ELECTRIC POWER REGULATORY AUTHORITY

NOTIFICATION

Islamabad, the 27th May, 2022

S. R. O. 687(I)/2022.—In pursuance of Sub-Section 7 of Section 31 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (XL of 1997), NEPRA hereby notifies the Decision of the National Electric Power Regulatory Authority in the matter of Motion for Leave for Review filed by Artistic Wind Power (Pvt.) Ltd. against decision of the Authority dated July 23, 2020 in Case No. NEPRA/TRF-490/AWPPL-2019.

2. While effecting the Decision, the concerned entities including Central Power Purchasing Agency Guarantee Limited (CPPAGL) shall keep in view and strictly comply with the orders of the courts notwithstanding this Decision.

[No. NEPRA/TRF-489/8187.]

SYED SAFEER HUSSAIN,
Registrar.

1293 (1—7)

Price : Rs. 10.00

[7934 (2022)/Ex. Gaz.]

Decision of the Authority in the matter of Review Motion
filed by Act 2 Wind Power (Private) Limited

**DECISION OF THE NATIONAL ELECTRIC POWER REGULATORY AUTHORITY IN THE MATTER OF MOTION
FOR LEAVE FOR REVIEW FILED BY ACT 2 WIND POWER PRIVATE LIMITED AGAINST DECISION OF THE
AUTHORITY DATED JULY 23, 2020**

Background

1. Act 2 Wind Power (Private) Limited ("AWPPL" or the "Petitioner") is a company formed to develop a 50 MW wind power plant ("Project"). National Electric Power Regulatory Authority ("NEPRA" or the "Authority") issued tariff determination for AWPPL under NEPRA Tariff Standards & Procedure Rules, 1998 ("Tariff Rules") on November 19, 2018 ("Tariff Determination").
2. Tariff Determination was approved on the basis of 100% State Bank of Pakistan's ("SBP") concessionary debt refinancing scheme for renewable energy projects issued on June 02, 2016 ("SBP Scheme 2016"). Later, aforesaid refinancing scheme was revised by SBP on July 26, 2019 ("SBP Scheme 2019"). SBP Scheme 2019 allows renewable energy projects, having capacity of more than 20 MW, to obtain up to 50% of financing (debt).
3. Since the Project being setup by the AWPPL is more than 20 MW capacity, therefore, the Petitioner filed Tariff Modification Petition requesting the Authority to base tariff on a mix of foreign and local financing, on the pretext that not more than 50% financing can be obtained under SBP Scheme 2019. Additionally, the Petitioner requested to adjust its tariff on the prevailing exchange rates, i.e. at PKR 160/USD against PKR 120/USD as given in the Tariff Determination. The Decision of the Authority on the Modification Petition ("Impugned Decision") was issued on July 23, 2020, whereby it was decided that the adjustments, as requested by AWPPL, shall be made in the approved tariff at the time of Commercial Operations Date ("COD") of the Project. Besides, the Authority through Impugned Decision decided to modify the Tariff Determination by including the following additional term ("Impugned Term"):

"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"

Filing of Review Motion

4. The Petitioner filed Motion for Leave for Review ("Review Motion") vide letter dated August 03, 2020, in terms of Section 7(2)(G) and Section 31 of the NEPRA Act, Rule 16(6) of NEPRA Tariff Rules and Regulation

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3(2) of the NEPRA Review Procedure Regulations, 2009 ("Review Regulations"). In the Review Motion, the Petitioner requested to revise the Impugned Decision to the extent of deletion of the Impugned Term, on the basis of the following grounds;

- i. Contravention of Due Process
 - ii. Principle of Estoppel & Legitimate Expectation to rely on Reference Tariff Determination
 - iii. Principles & Standards of Tariff Determination
 - iv. Commercial & Technical Realities of Project Finance Transactions
 - a) Project Finance & Operational Risk Management
 - b) Long Term Structure & O&M Pricing
 - c) Competitiveness and Viability of Long Term O&M Operator
5. The Authority considered the Review Motion and decided to admit the same for further processing. Upon admission, the Authority decided to provide an opportunity of hearing to the Petitioner. The hearing in the matter was scheduled on September 29, 2020 through ZOOM. Notices of hearing were sent to the Petitioner, Central Power Purchasing Agency Guarantee Limited ("CPPAGL"), National Transmission and Despatch Company Limited ("NTDCL") and others on September 10, 2020. The hearing was held as per the schedule which was attended by the representatives of the Petitioner.
6. A brief summary of legal and commercial grounds, as presented by the Petitioner in the Review Motion and during the hearing, is provided hereunder:
- The Petitioner submitted that the Authority, under Tariff Rules, was required to give due consideration to allow concerned parties to have an opportunity to address the additional issues through presentation of arguments and/or evidence in order to reach an impartial, just and fair decision. However, in the instant case, the Impugned Term was neither framed as an Initial issue nor as an additional issue at any stage of proceedings. The Petitioner submitted that the provision of right to due process is also provided in the Constitution of Pakistan as well as the principles of natural justice also require that a party must be heard before a decision is made in relation to its rights and obligations. According to the Petitioner, neither constitutional nor common law rights of the Petitioner were adhered to in the instant case while introducing the Impugned Term.
 - The Petitioner submitted it relied upon Tariff Determination and entered into financing agreements and achieved Financial Close. Now the re-opening of the Tariff Determination, i.e. the introduction of Impugned Term in the instant case, which was not even part of the proceedings of Impugned Decision,



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is in contravention to the doctrines of vested rights, legitimate expectation and promissory estoppel. To support its stance, the Petitioner provided examples of a number of court cases to support their claim for the applicability of the aforesaid doctrines in the instant case.

- The Petitioner submitted that the Impugned Term is in contradiction of NEPRA's legal framework as the same is against the interest of the company and violate the principle of providing efficient, certain and comprehensible tariff structure. Further, the Petitioner submitted that Tariff Rules provide for recovery of all prudently incurred costs and it is stated in the Tariff Determination that the approved O&M cost is prudent, therefore, that should not be changed.
- The Petitioner submitted that the Project is structured on a project finance model wherein all the factors affecting the stability and predictability of its revenue stream must be evaluated to assess their impacts on the level and volatility of cash flows - both in terms of availability for debt service and ensuring the expected returns for the sponsors. According to the Petitioner, a key component of the technical and financial viability of the Project is the assessment of its operational risks for which the Project needs to have a sound O&M plan. In this respect, the Petitioner explained the benefits of having Long Term O&M ("LT O&M") arrangement in terms of allocating the risks, defining of performance parameters and ensuring secure supply chain for parts/services required during the course of the life of the facility. AWPPL also talked about the eligibility of the parties to whom LT O&M is outsourced and the time when they enter LT O&M. The Petitioner also informed about the importance of role of Original Equipment Manufacturer ("OEM") for the selection of LT O&M and/or having OEM as the main operator of the facility. AWPPL also highlighted that for the Pakistani wind sector, the financiers/sponsors require a certainty with respect to the LT O&M arrangement at the outset and also mentioned that earlier the Authority also removed the condition of carrying out competitive bidding for O&M contractor on the pretext of requirement of lenders.
- Then, AWPPL highlighted the advantages, both for the company and O&M Operator, of having LT O&M in terms of price, optimization of resources, ensuring availability of the expertise and skills etc. The Petitioner indicated that the O&M services providers have to take into consideration mobilization and de-mobilization costs which may be escalated if the term of the services become uncertain. According to the Petitioner, the requirement of competitive bidding tends to dislodge the long-term competitive pricing structure, and while including therein the termination amount, the price will burst out of the ceiling set by NEPRA in the Tariff Determination.
- The Petitioner also submitted that it 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. AWPPL indicated that the Authority's



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concerns regarding carrying out competitive bidding have already been 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. Finally, the Petitioner has submitted that the O&M costs include both operator's costs and Petitioner's own operating costs and that the recovery of both is a challenge given the O&M costs allowed in the Tariff Determination.

7. Given the above, the Petitioner prayed that the Authority may revise its decision to the extent of deleting the Impugned Term.

Analysis and Decision of the Authority

8. The Authority noted that the Impugned Term was introduced due to rapid decline in the O&M costs of wind power plants occurred across the world and in Pakistan. In the Impugned Decision, it was stated that back in 2013, the O&M costs of USD 45,000/MW/Year was approved which was reduced to USD 23,000/MW/Year in 2018, i.e. around 50% decline in 5 years. Therefore, with the intention to discover the true O&M prices and to ensure the O&M cost is not left unchecked (source of savings beyond the approved return) during the entire tariff control period, the Authority included the Impugned Term.
9. Regarding the contention of the Petitioner with respect to due process, the Authority noted that it provided an opportunity to AWPPL by admitting the subject Review Motion and by conducting the hearing thereon dated September 29, 2020. The arguments and contentions were heard at length by the Authority in the hearing, thus, the said contention of the Petitioner has now effectively been addressed. The Authority also noted that Tariff Determination is still in field and inclusion of the Impugned Term cannot be construed to mean the violation of doctrines of legitimate expectation and promissory estoppel, especially due to the fact that the said Term was introduced for public interest. With respect to violation of NEPRA framework, the Authority noted that under the said framework, it has been conferred with the powers to modify the approved tariffs. The Authority also considered the submission of the Petitioner of allowing it prudent cost and is of the view that the objective of introducing the competitive bidding term is to arrive at the prudent O&M cost and to allow the same to the Petitioner.
10. With respect to the Petitioner's arguments of executing the LT O&M and benefits/reasons of signing that agreement with the OEM, the Authority noted that the Impugned Term does not restrict AWPPL to sign the agreement for long term and that too with the OEM. The term was introduced to reflect the most competitive prices for the O&M services in the tariff. This was also stated by the Authority during the hearing that there is no bar of having OEM as O&M contractor in case it can match with the competitive O&M prices. Therefore, the Authority found these arguments, as such, not relevant in the instant case.



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11. The Petitioner had submitted that it has finalized the O&M terms, therefore, during the proceedings, AWPPL was asked to submit the copy of the finalized agreement(s). Accordingly, AWPPL submitted the copy of 2 years Warranty Period ("WP") O&M contract signed with HydroChina International Engineering Co. Ltd Pakistan at USD 869,004 per year. Additionally, the Petitioner submitted the copy of LT O&M, applicable for 11 years post WP O&M, finalized with HydroChina International Engineering Co. Ltd, having Goldwind Pakistan Private Limited as sub-contractor, at average foreign cost of USD 769,091 per year and local cost of Rs. 32.40 million per year. While submitting the aforementioned documents, the representative of AWPPL submitted that the contract price does not include costs relating to scope of work which is under owner's domain of responsibility, i.e. cost of site security, extra work, VSAT costs, administrative cost (utilities, rent, vehicles, land lease, etc), HR costs, forecasting consultant (required under EPA), Lenders Annual Fees (Agency Fee, Security Trustee Fee etc.), Lenders Monitoring Fee (Technical and Environmental), Regulatory Fee (Audit, GL fee, EPA fee and other Government Agencies Fee), etc. The Petitioner submitted that these costs of the company range between USD 8,000 to 10,000/MW/Year.
12. The Authority noted that since the Petitioner has already finalized its WP and LT O&M contracts and cancelling the same may result in additional costs to the company, thus, the Authority has decided that the amount of O&M cost, its mix, and the corresponding mechanism thereof as approved in the Tariff Determination shall be applicable for the period during which the Petitioner has already finalized the WP and LT O&M Agreements, i.e. 2 years + 11 years. During this time, however, the Petitioner shall be required to submit, on an annual basis, the documentary evidence/report pertaining to actual expenditures on account of O&M. The savings, if any, in the actual O&M cost compared to the approved O&M cost shall completely be passed on to the consumers.
13. Subsequent to the lapse of the LT O&M Contract, in order to claim O&M costs, the Petitioner shall be required to carry out competitive bidding for the selection of the O&M contractor in accordance with NEPRA's applicable law. Based on this competitive bidding process, the Authority may consider making revisions in the O&M cost, while capping prevailing level of the approved O&M cost. 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.).

Order

14. In the light of above the Authority has decided to review the Impugned Term as follows:

"The O&M cost, its mix, and the corresponding mechanism thereof as approved in the Tariff Determination of Act 2 Wind Power (Private) Limited shall be applicable for the period during which



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the Petitioner has already finalized the WP and LT O&M Agreements, i.e. 13 years. During this time, however, the Petitioner shall be required to submit, on an annual basis, the documentary evidence/report pertaining to actual expenditures on account of O&M. The savings, if any, in the actual O&M cost compared to the approved O&M cost shall completely be passed on to the consumers.

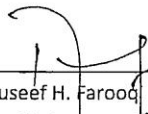
Subsequent to the lapse of the LT O&M Contract, in order to claim O&M costs, the Petitioner shall be required to carry out competitive bidding for the selection of the O&M contractor in accordance with NEPRA's applicable law. Based on this competitive bidding process, the Authority shall make revisions in the O&M cost, while capping the prevailing level of the approved O&M cost. 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.)."

15. The Order part is recommended for notification by the Federal Government in the official gazette in accordance with Section 31 (7) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997.

AUTHORITY


28/4/21
Rehmatullah Baloch
Member


28/4/21
Engr. Rafique Ahmed Shaikh
Member


Tauseef H. Farooq
Chairman




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