



Registrar

National Electric Power Regulatory Authority

Islamic Republic of Pakistan

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No. NEPRA/PAR-69/14329-14331
November 12, 2014

Subject: Decision of the Authority in the matter of Motion for Leave for Review filed by Roomi Fabrics Limited in the matter of Approval of Power Acquisition Request dated 27.01.2014 in Case # PAR-69

Dear Sir,

In continuation of this office letter No. NEPRA/PAR-69/942-944 dated 27.01.2014 whereby Approval of the Authority in the matter of Power Acquisition Request filed by Multan Electric Power Company Ltd. (MEPCO) for purchase of 10.5 MW from Roomi Fabrics Limited was sent to the Federal Government for notification in the official Gazette.

2. Please find enclosed herewith the decision of the Authority (07 pages) in the matter of Motion for Leave for Review filed by Roomi Fabrics Ltd. against NEPRA's Approval dated 27.01.2014 in Case No. NEPRA/PAR-69.

3. The Decision is being intimated to the Federal Government for the purpose of notification in the official gazette in accordance with the provisions of Section 31(4) of the Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997).

4. Please note that Order of the Authority at para 10.1 of the Decision needs to be notified in the official gazette.

Enclosure: As above

Secretary
Ministry of Water & Power
'A' Block, Pak Secretariat
Islamabad

(Syed Safeer Hussain)

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CC:

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



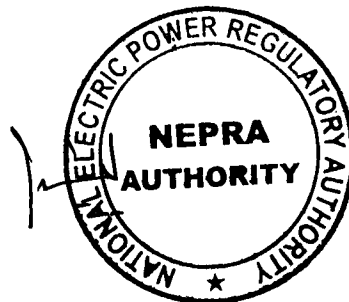
Decision of the Authority in the matter of Motion for Leave for Review Filed by Roomi Fabrics Limited in the matter of Approval of Power Acquisition Request dated 27-1-2014 in Case No. NEPRA/PAR-69

1. Background

1.1 Brief facts of the case are summarized as under:-

- Roomi Fabrics Limited (RFL) is a Captive Power Plant having generation license No. SGC/38/2008 dated 29th August, 2008 for a generation facility of 4.17 MW at 13-KM Khanewal-Multan Road, Multan, Punjab.
- RFL and Multan Electric Power Company Limited (hereinafter "MEPCO") entered into a Power Purchase Agreement for purchase of 5 MW gas based power as CPP dated 6th February 2009 on take and pay basis.
- RFL filed Licensees Proposed Modification (LPM) on February 1, 2010 under the NEPRA Application & Modification Procedure Regulation, 1999 (hereinafter "the Regulations") to enhance the installed capacity from 4.17 MW to 15.87 MW (addition of 11.70 MW).
- RFL in the submitted "Text & Reason in Support of Modification" statement informed that it has decided to expand its business by setting up new weaving units.
- RFL further stated that with the addition of new weaving units the in-house requirement of electricity will increase from 3 MW to 10 MW and in order to cater for the additional power requirements, it has been decided to install additional gas engines.
- Regarding the "Impact on Tariff", RFL informed that it had signed Power Purchase Agreement with MEPCO on February 6, 2009 (5 MW PPA as CPP) and the installation of additional gas engines would not have any effect on the agreed tariff with MEPCO.
- RFL vide letter dated 9th February 2010 submitted that they are negotiating with MEPCO for sale of power under policy framework for new-captive power plants (NCPPI).
- The Authority approved the LPM on 19th May 2010 and allowed RFL to sell surplus power available with RFL to the tune of 5 MW to MEPCO on mutually agreed terms and conditions.

- 2.** Multan Electric Power Company Limited (hereinafter "MEPCO") filed Power Acquisition Request (PAR) dated 21st November 2011 in respect of purchase of 10.5 MW gas based power from Roomi Fabrics Limited (RFL) under NEPRA Interim Power Procurement Regulations, 2005 which was approved vide a decision dated 27th January 2014. Being aggrieved from said decision, RFL filed a motion for leave for review dated 6th June, 2014 through its representative, Aqlaal Advocates. RFL also requested for condonation of delay in filing the review within the prescribed 10 days time. RFL also informed about the conditional withdrawal of its Civil Miscellaneous Application No. 1286 of 2014 in Writ Petition No. 693 of 2013 in the Multan Bench of the Lahore High Court wherein the impugned decision was challenged by RFL.





3. Relief Sought

RFL sought the following relief:

- a. Remove the retrospective application of the revised tariff;
- b. Remove the application of CPP tariff on the first 5 MW of generation; and
- c. Restore the tariff mutually agreed by the RFL and MEPCO under the PPA.

4. Admission of the Motion for Leave for Review

The review motion was admitted on 3rd July 2014 after condoning the delay as requested by the RFL since the RFL had withdrawn its application to implead NEPRA as party in the Multan Bench of the Lahore High Court and approached NEPRA for remedy through this motion. While admitting the subject motion, it was also decided to give an opportunity of hearing to the parties after framing the issues.

5. Issues for the Hearing

Following issues were considered in the hearing:

- i. Maintainability of the review Motion
- ii. Removal of the retrospective application of the revised tariff;
- iii. Removal of the application of CPP tariff on the first 5 MW of generation;
- iv. Restoration of the tariff mutually agreed by the RFL and MEPCO under the PPA.

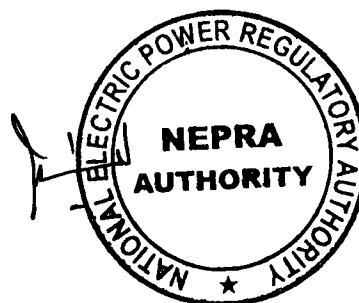
6. Hearing

6.1 The hearing into the matter was conducted on 8th August 2014 in Conference Hall NEPRA Tower which was participated by the parties, i.e., RFL and MEPCO.

7. Having gone through the record and hearing both the parties, the findings of the Authority on respective issues is given as in the succeeding paragraphs.

8.1 Maintainability of the review Motion

8.1.1 According to the RFL, the proceedings leading to the Determination were sui-generis (a Latin phrase meaning "of its own kind"), a concoction of IPPR and NEPRA (Tariff Standards and Procedures) Rules, 1998 (Tariff Rules), in that the tariff was determined without a tariff petition and without proper arraying of the parties. The representative of RFL stated that the public hearing was held without circulation of any "petition" and "evidence in support", as required under the Tariff Rules, and it was therefore not possible for any one, including the RFL, to second-guess or crystal-gaze the tariff parameters, financial values and the like that NEPRA would and ultimately did take into account in disturbing the tariff mutually agreed between the RFL and MEPCO.

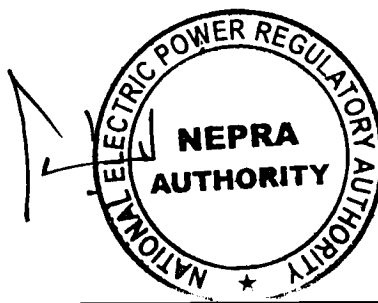




- 8.1.2 The RFL also stated that the procedural framework of the Tariff Rules was not followed, and merely the enabling high-level statutory power of tariff determination was invoked, it was also not possible, nor is even now, for the RFL to meticulously follow the procedural framework to file a review (the RFL not being a "party" to the original proceedings being just one of the limitations) and, consequently, the RFL was constrained to invoke the Constitutional jurisdiction of the Lahore High Court being the only remedy available under the circumstance.
- 8.1.3 The representative of RFL also stated that that the RFL has withdrawn conditionally its Civil Miscellaneous Application No. 1286 of 2014 in Writ Petition No. 693 of 2013 in the Multan Bench of the Lahore High Court challenging the Determination and impleading NEPRA. The RFL has also provided a copy of the order of withdrawal.
- 8.1.4 It was also stated on behalf of The RFL that due to reasons aforesaid, the 10 day time limit prescribed under the Tariff Rules for filing of review is not applicable to the RFL. It was further contented that assuming, without conceding, that the limitation is applicable, the RFL seeks condo nation for the reasons set forth in this petition and submits that it is a fit and proper case for condo nation.
- 8.2 While admitting the petition, the Authority has already condoned the delay in filing the review petition. The Authority was also cognizant of the fact that the NEPRA Review Procedure Regulations, 2009 are being modified to accommodate filing of review motion by a person who is a party to Power Purchase Agreement (PPA) which was approved by NEPRA. It is a matter of record that through the impugned decision, the Power Purchase Agreement executed between M/s RFL and MEPCO was approved by NEPRA with certain modifications and thus RFL being a party to the PPA is competent to seek review of the decision of NEPRA. The challenge to the maintainability could be raised by MEPCO but during the course of proceedings, the issue of maintainability of the petition was never raised by MEPCO. Even otherwise, there are suo moto powers of review available for NEPRA through which NEPRA is competent to review any decision, determination or order given by it, therefore, the question of maintainability becomes redundant.

8.3 Removal of the retrospective application of the revised tariff

- 8.3.1 According to the RFL there is no provision in the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 enabling tariff decisions to be given with retrospective effect. According to the RFL, the Determination is patently inconsistent with the Act and the law; to the extent it directs MEPCO to recover the difference between the mutually agreed rates and the Reduced Tariff with retrospective effect. According to the RFL it is established law that an adverse decision or order of a public body can never be retrospective against the subjects and only the Parliament is empowered to do so through enabling enactments.
- 8.3.2 It was contended on behalf of RFL that its License was modified by the Authority on 19-5-2010 to enable it inter alia to supply additional electricity to MEPCO and accordingly a PPA was signed between the RFL and MEPCO. According to the RFL NEPRA had or ought to be deemed in law to have full knowledge of such supply and its inclusion in the national power pool (including as mentioned in its Annual Reports). PAR for additional 10.5 MW power purchase as well as the PPA was filed with the Authority by MEPCO on 21-11-2011.



- 8.3.3 According to the RFL as per Regulations 4 and 5 of the IPPR, the Authority was required to issue its approval for PAR within 30 days of filing of the PAR and approval of the PPA within 60 days of its submission. According to the RFL the Authority issued the Determination after a lapse of about 2 years and then ordered retrospective application of the Reduced Tariff. According to the RFL, it is not clear as to why the RFL, who was not required to seek tariff approval in light of the public notices of NEPRA and some policy of PEPCO, is left to bear the burden of retrospective adjustment of so-called over-payments for a period of 2 years, without any default on its part.
- 8.3.4 The RFL in support of its arguments submitted a decision of the Supreme Court of Pakistan in the matter of Anoud Power Generation Limited and others versus Federation of Pakistan and others. The court held as "that the notification withdrawing exemptions from payment of customs duty and sales tax would not operate retrospectively and all exemptions would be available indiscriminately to the petitioner. The referred case was regarding retrospective application of a notification withdrawing exemptions from payment of customs duty and sales tax on power generation equipment and is distinguishable from the facts of the instant case.
- 8.3.5 The parties in the instant case were required to seek approval of NEPRA before entering into the power purchase agreement which was not sought. The submission of the RFL that the Authority while modifying its generation licence on 19-5-2010 enabled the RFL inter alia to supply additional electricity to MEPCO and accordingly a PPA was signed between the RFL and MEPCO is incorrect. The fact of the case is that the Authority while modifying the generation licence allowed the RFL to sell surplus power of only 5MW to MEPCO for which the PPA already existed dated 6-2-2009. The enhanced capacity was for self consumption instead of selling to MEPCO. The PPA dated 16-11-2010 for 10.5 MW between MEPCO and RFL was required to be approved from NEPRA after observing the procedure provided in IPPR, 2005 which was not done by MEPCO and a subsequent request dated 21.11.2011 was filed which was processed and decided by NEPRA in the form of impugned decision.
- 8.3.6 The Authority having gone through the arguments and referred case law considers that the instant case is entirely different. The power sector is governed by the NEPRA Act and Rules made thereunder. The Authority has the exclusive powers to determine the tariff, rates, charges and other terms and conditions for supply of electricity generation, transmission and distribution companies and recommend to the Federal Government for notification in terms of Section 7(3)(a) and 31(4) of the NEPRA Act. Under section 12 of the NEPRA Act, these powers cannot be delegated. The argument that in the light of public notice and some policy of PEPCO, approval from NEPRA was not required is misconstrued as the Act and Rules do not allow much waiver under the Interim Power Procurement (Procedures and Standards) Regulation, 2005. As per said Regulations, the transmission or distribution company, as the case may be is required to file Power acquisition request in respect of the offer for sale of power to be in accordance with its obligation to procure electric power at the best effective price obtainable or a transmission company's least cost expansion plan. As per the applicable law, the tariff becomes applicable only when it is notified in the official gazette, which means that even if power producer and power purchaser agree to a rate even then it requires approval of NEPRA for notification in the official gazette. Regulation 5(1) of IPPR requires that "before

executing a power acquisition contract a transmission company or a distribution company shall file its proposed power acquisition contract with the registrar for its approval by the Authority". Moreover according to Regulation 5(3) of IPPR "all proposed power acquisition contracts shall accompany a statement providing justification of the rates, terms and condition proposed to be agreed with the sponsor under the proposed power acquisition contract."

- 8.3.7 From the discussion above it is clear that the mutually agreed rates become effective after the approval of power acquisition contract by the authority that means that before execution of the contract, the Authority's prior approval was required.
- 8.3.8 In the hearing, the Authority observed that RFL is at liberty to seek approval of its generation tariff under NEPRA Tariff Rules, 1998 on cost plus basis. In the eventuality of filing of any such petition, the tariff will be re-determined and will be made applicable w.e.f. commercial operations date.

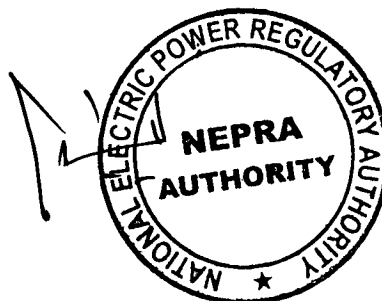
8.4 Removal of the application of CPP tariff on the first 5 MW of generation

- 8.4.1 It was contended on behalf of RFL that the Authority has ordered a duality of power tariffs in the determination, such that for any delivery of electricity by RFL to MEPCO, first 5 MW should be purchased as per the rates determined for RFL as CPP (CPP Rates) and for remaining delivery, the rates specified for the plant installed through new machinery (10.5 MW) shall be applicable. According to the RFL, this is inconsistent with the Authority's own acts and representations as when the Generation Licence issued to the RFL was modified by the Authority vide its determination dated 19-5-2010, no distinction between a CPP licence of old plant or the enhanced capacity upon new machinery was made by the Authority. As per the petitioner, there are no provisions requiring or allowing different tariff calculation treatments for different units of power generated or delivered under a single generation licence.
- 8.4.2 According to the RFL, two separate power purchase agreements under two separate regimes were made with MEPCO and the two agreements have no similarity as regard to contractual obligations of the parties, investments, rates, capacity, performance criteria, etc. therefore, supply from 10.5 MW newly installed plant under heavy investments has no relation with supply made under the 5 MW CPP power purchase agreement. The power purchase agreement for supply of 5 MW electricity is completely causal on take and pay basis. Hence the decision of Authority in this matter is not logical and not justified. 8.3.3 It has further been stated by RFL that the operation of 5MW plant under the first power purchase agreement dated 6-2-2009 signed between MEPCO and the RFL as CPP had been closed and there had been no activity for the last five months.
- 8.4.3 The Authority has considered the request of RFL for removal of the application of CPP tariff on the first 5 MW of generation. Keeping in view the separate interconnections and separate billing arrangements of both generating facilities, Para 23 of the decision of the Authority merits reconsideration. Although there is a difference of rate of tariff for the two generating facilities, there is minimum of chances that energy generated by cheaper 5 MW unit can be claimed/billed under higher rates for 10.5MW generation facility due to separate interconnection and billing arrangement. Accordingly, the Authority has decided to withdraw Para 23 of the Decision of the Authority dated 27-01-2014.



8.5 Restoration of the Agreed Tariff

- 8.5.1 It has been contended inter-alia on behalf of RFL that the PPA was signed by the RFL and MEPCO on the basis of the general permission granted by the Authority to captive power producers to sell power at "*mutually agreed rates*" through the public notice dated 15.6.2007, NEPRA letter NEPRA/R/LAG-60/7320 dated 24-8-2008 as well as the incentives offered to captive power producers under a policy of PEPCO and at no point in time did the Authority challenge the PEPCO Policy either by a public advertisement or through private communications to its licensees that the policy statement of the PEPCO permitting "*mutually agreed rates*" was not acceptable to NEPRA or was subject to revision under IPPR or otherwise by NEPRA. As per RFL, the decision of NEPRA in revising the mutually agreed rates downward is against the law and facts of the case. Learned Counsel for RFL reiterated his stance that if it was supposed to determine the tariff, then the due procedure provided in NEPRA Tariff Rules, 1998 should have been followed entitling RFL to submit its point of view.
- 8.5.2 Learned Counsel for RFL submitted that as per Para 9 of the Determination, the Authority relied presumably on section 7(3)(a) of the NEPRA Act to initiate suo moto proceedings for tariff determination as well as Regulations 4 and 5 of the IPPR which entitle it to approve power acquisition requests and power purchase agreements between distribution and generation companies; however, it is quite clear from a reading of Rules 3 through 9 of the Tariff Rules that, even in case of suo moto proceedings, the process set out in the Tariff Rules has to be followed which entails inter alia a tariff petition (even if scarce in detail but containing a substance of the target tariff), admission of petition, arraying parties, notice and publication, hearing based on the petition and the replies/rejoinders thereto duly supported with evidence. In the instant case, however, no tariff petition of any kind was ever before the Authority; rather what was before the Authority was a power acquisition request.
- 8.5.3 According to the RFL, for the reasons stated above, it is unclear as to how and why the RFL could reasonably be expected to properly present its case in the proceedings where no tariff petition or indicative tariff was before it to being with, nor was there any sound basis to conclude that a substantive tariff Determination will follow.
- 8.5.4 Having gone through the contentions raised on behalf of RFL, the Authority is of the view that RFL is a generation licensee of NEPRA and being licensee is fully aware as to relevant laws of NEPRA regarding approval of tariff etc. It was very much in the knowledge of RFL that being licensee it could charge only such tariff which is either approved or determined by the Authority. The advertisement referred for "selling electricity at mutually agreed rates" could not be interpreted in a manner that no one will even follow the rules and regulations on the subject. No exemptions whatsoever were granted to any person from the applicable Rules and Regulations of NEPRA. It was MEPCO which filed a Power Acquisition Request before NEPRA for purchase of Power from RFL and any PPA so entered into could be applicable and binding only when it is approved by NEPRA.
- 8.5.5 Notwithstanding the above stated legal and factual position on the subject, rule 3 of NEPRA Tariff Rules, 1998 allows any interested person to file a tariff petition before NEPRA and in case, the petitioner considers itself aggrieved from the rates approved by NEPRA through the





impugned decision, it is always at liberty to approach NEPRA seeking determination of tariff on cost plus basis. In the opinion of the Authority; the amicable solution for the RFL is to file a tariff petition under NEPRA Tariff (Standards & Procedures) Rules 1998 on cost-plus basis giving full disclosure of the each item of the cost substantiated by documentary evidence regarding technical and financial aspects of the project. On the basis of the proceedings of the case, submissions made by the RFL, comments/intervention by the stakeholders and evidence on record, the tariff will be re-determined. The re-determined tariff, either upward or downward, will be made applicable w.e.f. commercial operations date achieved by RFL.

9. DECISION

- 9.1 The upshot of the above discussion is that the review petition filed by RFL is partly accepted to the extent that Para 23 of the impugned decision dated 27.1.2014 regarding application of CPP tariff on the first 5 MW of generation is hereby ordered to be omitted. Regarding other reliefs pertaining to the revision of rates and its retrospective application, the petitioner RFL would be at liberty to file a separate tariff petition under NEPRA Tariff (Standard & Procedure) Rules, 1998 and in the event of filing of such petition, the same shall be decided on its merits.

10. ORDER

- 10.1 The Authority decides to withdraw Para 23 of the decision of the Authority dated 27-01-2014.
- 10.2 The above order of the Authority shall be notified in the official Gazette in terms of Section 31(4) of the NEPRA Act 1997.

Authority

(Khawaja Muhammad Naeem)

Member

(Maj (R) Haroon Rashid)

Member

(Himayat Ullah Khan)

Member

(Habibullah Khilji)

Vice Chairman

