

BEFORE THE NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
ISLAMABAD

Review Petition No. _____ / 2020

SINDH TRANSMISSION & DISPATCH COMPANY (PRIVATE) LIMITED

APPLICANT / PETITIONER...

REVIEW PETITION AGAINST THE DECISION DATED 22 OCTOBER 2020
WITH REGARDS TO THE INVOICING MECHANISM

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SUBJECT: REVIEW PETITION AGAINST THE DECISION DATED 22
OCTOBER 2020 WITH REGARDS TO THE INVOICING
MECHANISM

Respectfully submitted:

1. That the Sindh Transmission & Dispatch Company (Private) Limited (the Applicant / Petitioner) is registered with Securities & Exchange Commission of Pakistan (SECP) under Companies Ordinance 1984, wholly owned by the Government of Sindh (GoS) and engaged in the business of provision of extra high voltage electric power infrastructure.
2. That the GoS has established the Applicant / Petitioner for evacuation of 100 MW electricity from Sindh Nooriabad Power Company (Pvt.) Limited (SNPCL) and Sindh Nooriabad Power Company Phase-II (Pvt.) Limited (SNPCL-II) (collectively referred to as the 'Sellers') to K-Electric (KE) (Purchaser).

II. TRANSMISSION LICENSE OF THE APPLICANT / PETITIONER

3. That the NEPRA Authority granted generation licences to SNPCL and SNPCL-II (collectively referred to as "Generation Facilities") for the construction, ownership and operation of the Generation Facilities through Determination No. [PAR-147/SNPCL-2015] dated July 15, 2015.
4. That the GoS through the Applicant / Petitioner planned that the electric power generated from the Generation Facilities will be supplied to Purchaser through the Applicant / Petitioner's dedicated transmission lines and for the purpose the Petitioner has designed, engineered, procured and constructed Transmission Facilities and is now operating and maintaining the said Transmission Facilities.

5. That the NEPRA Authority accepted the petition of the Applicant / Petitioner under Section 19 of the NEPRA Act and was pleased to grant a Special Purpose Transmission License No. SPTL/02/2015 dated 17th December 2015 to the Applicant / Petitioner (the "SPTL License") (Annex A / Transmission License).
6. That the SPTL Licence is granted to the Applicant / Petitioner in terms of Section 19 of the NEPRA Act and the applicable documents to construct, own, maintain and operate specified transmission facilities connecting the Generating Facilities to the Transmission Facilities.

III. WHEELING AGREEMENT

7. That a wheeling agreement was negotiated, agreed and initialled between the Applicant / Petitioner, Sellers and the Purchaser on tripartite basis setting out the terms and conditions for the wheeling of electricity from the Sellers to the Purchaser over the Transmission Facilities consistent with the terms of the Transmission License and Tariff Determination (EWA) (Annex B / EWA) and the same was submitted for Authority's approval vide Applicant / Petitioner's letter no. 2018-074 dated July 26, 2018.

IV. SUCCESSFUL OPERATION OF TRANSMISSION FACILITIES

8. That the Applicant / Petitioner with its professional team is efficaciously operating the Transmission Facilities under its SPTL License granted by NEPRA Authority. That the Applicant / Petitioner is evacuating and transmitting electricity from Nooriabad Power Plants which are built, owned and operated on Public Private Partnership (PPP) basis between private party and the GoS.

V. AGREED PAYMENT MECHANISM

9. That the agreed payment mechanism between the Sellers and the Purchaser envisages that the Applicant / Petitioner shall invoice the Sellers for the wheeling charges as per the EWA and Sellers to make payments thereof to the Applicant /

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Petitioner. Furthermore, the Sellers are entitled to invoice such cost of wheeling of electric power services to the Purchaser under the terms and conditions of the Power Purchase Agreement (PPA).

10. That the Purchaser submitted the Power Acquisition Request to the NEPRA Authority on July 13, 2015 (PAR) under the Interim Power Procurement Rules 2005 (IPPR 2005) (Annex C / PAR). The PAR specified the payment mechanism as enumerated hereinabove such that the Applicant / Petitioner shall invoice the wheeling charges to the Sellers and the Sellers shall raise invoice in respect of such wheeling charges to the Purchaser. Accordingly, the Sellers shall pay the wheeling charges to the Applicant / Petitioner in the first instance and then the Sellers shall receive such wheeling charges from the Purchaser (the Payment Mechanism).

11. That the NEPRA Authority, on the basis of the PAR, determined (Annex D / PAR-147/SNPCL-2015 dated June 1st, 2016) as follows:

"STDC shall invoice SNPCL for the wheeling charges as per the wheeling agreement and SNPCL shall make the payment thereof. Afterwards, SNPCL shall invoice K-Electric its generation tariff and wheeling tariff it has paid to STDCL. The Authority noted that under the proposed arrangement, K-Electric shall be invoiced by SNPC for the generation tariff and wheeling charges."

12. That the NEPRA Authority made the following determination (Tariff Determination) (Annex E / Case # NEPRA/TRF-346/ST&DCPL-2015 dated February 10, 2017) in respect of the Payment Mechanism:

"As per the referred wheeling agreement, ST&DCPL shall invoice SNPCL for its determined tariff and then SNPCL shall invoice K-Electric both for its generation tariff and transmission tariff of ST&DCPL. It has been noted that the Authority vide its decision dated June 01, 2016 in the matter of aforesaid PAR had allowed the proposed arrangement for the sale and purchase to be taken place at the Authority's determined tariffs and other terms & conditions, both for the generation and transmission companies, as stated in their respective license and tariff decisions."

13. That the same Payment Mechanism has been negotiated and agreed in the Draft Initialled EWA whereby the Applicant / Petitioner invoices the Sellers for the wheeling charges and the Sellers pays the wheeling charges to the Applicant / Petitioner (Annex F / Clauses 5.1, 5.2 and 5.3 of the EWA).
14. That the same Payment Mechanism has been followed in the PPA between the Sellers and the Purchaser whereby the Sellers invoices the Purchaser for the wheeling charges and the Purchaser pays such wheeling charges to the Sellers.

VI. DOUBLE TAXATION SUFFERED BY PETITIONER

(i) Withholding Income Tax

15. That as per the prevailing tax laws regime applicable to the Payment Mechanism, the Applicant / Petitioner's payments received from the Sellers fall within the definition of services and are subject to deduction of withholding income tax at source @8% under section 153(1)(b) of the Income Tax Ordinance 2001 (ITO 2001) which means that Sellers are statutorily obligated to deduct 8% from the wheeling charges and the Petitioner receives 92% of the invoiced payments.
16. That the Sellers in turn would raise an invoice to the Purchaser for the payment of wheeling services provided by Applicant / Petitioner. Purchaser would again deduct 8% withholding income tax from the wheeling invoice sent by Sellers to the Purchaser and release net 92% of the payment to Sellers. Hence, the wheeling charges invoices due to the above arrangements are subject to double taxation on account of deduction of withholding taxes, once at Sellers' end and then at Purchaser end.

(ii) Sindh Sales Tax

17. That pursuant to the Sindh Finance Act 2019 read with the Sindh Sales Tax on Services Act 2011 (SSTA 2019), the "Electric Power Transmission Services" under the tariff heading (9854.0000) have become chargeable to Sindh Sales Tax with effect from July 01, 2019. The Applicant / Petitioner is liable to levy and

collect Sales Tax @ 13% on the Electric Power Transmission Services provided or rendered from and after July 01, 2019. Hence, the Applicant / Petitioner invoiced the Sellers with the addition of applicable Sales Tax @ 13% from and after July 01, 2019.

18. That as per the existing designed legal arrangement agreed between the parties and sanctioned by the NEPRA Authority, the Applicant / Petitioner the Sellers whereas the Sellers invoices the Purchase for the payment of wheeling charges. The Applicant / Petitioner is being prejudiced through this arrangement as follows:

- (i) Sellers are obligated to deduct 1/5th of the sales tax on wheeling services as per withholding rules on the applicable rate of 13%; and
- (ii) Purchaser cannot claim input adjustment in respect of the deducted sales tax as the Sellers are not the transmission services providers and therefore will deduct 100% of applicable 13% Sindh Sales on Wheeling Services as per withholding rules from the invoice of the seller;

19. That due to the aforesaid withholding taxes in respect of income tax and sales tax, cash flows of the Applicant / Petitioner are being seriously delayed and affected.

20. That the additional unjustified impact of double taxation, as above, on the payments of the Applicant / Petitioner in respect of transmission services approximately results in 21% i.e. (extra 8% Income Tax Withholding and extra 13% Sindh Sales Tax Withholding) which is material and adverse and is affecting performance of the Petitioner.

21. That the issue of double taxation was brought to the cognizance of NEPRA technical team during the meeting of the stakeholders on October 04, 2019 at NEPRA Head Office Islamabad.

VII. PROVISIONAL ARRANGEMENTS

22. That the Applicant / Petitioner and the Sellers have obtained six (6) monthly withholding income tax exemptions from income tax authorities since commercial operations date up-to December 31, 2019 as an interim measure.

VIII. IMPUNGED DECISION

23. That the Applicant / Petitioner filed a tariff modification petition under Section 31 of the NEPRA Act, 1997 read with NEPRA Tariff (Standards and Procedure) Rules, 1998 (Tariff Rules). The NEPRA Authority first issued notices to the relevant stakeholders then conducted hearing in the matter on 14 July 2020, which was attended by the representatives of the Applicant / Petitioner, Sellers and the Purchaser through their interventions and intervention requests.

24. That it was contended by the Applicant / Petitioner that in view of the issues related to double taxation, a new payment invoicing mechanism needs to substitute the existing Payment Mechanism as notified by the NEPRA Authority vide the Tariff Determination. More specifically, the following revision was sought: -

"STDC shall invoice K-Electric for the wheeling charges as per the wheeling agreement and K-Electric shall make the payment thereof."

25. That the NEPRA Authority vide its decision dated 22 October 2020 (**Impugned Decision**) dismissed the tariff modification petition in light of the following reasons stated in Paras 6.3. and 6.4 of the Impugned Decision (reproduced hereunder): -

"6.3 The authority approved the proposed invoicing mechanism by SNPC-I&II, STDC and K-Electric. Now STDC intends for modification of the invoicing mechanism however SNPC and K-Electric have not recommended the proposal of the STDC. In order to provide an opportunity for substantiating its claim, the Authority directed the SNPC, STDC and K-Electric to submit the agreed mechanism of invoicing in next two weeks. However, no response in the matter

was submitted. NEPRA issued letter to STDC on September 9, 2020 to submit the mutually agreed invoicing mechanism. In response STDC vide letter dated September 11, 2020 submitted that in the event parties reach an amicable solution we will inform NEPRA.

6.4 The Authority considers that justifying its claim thorough provision of documentary evidence is responsibility of the petitioner. In the instant case revision / modification in the invoicing mechanism has been requested by the petitioner, for which mutual agreed mechanism has been submitted along with the modification petition. However, no agreed mechanism has been submitted despite authority's directions during the hearing dated July 14, 2020 and letter dated September 09, 2020. In view thereof the authority has decided to dismiss the modification petition".

26. That the NEPRA Authority, through the Impugned decision, dismissed modification petition of the Applicant / Petitioner as in the NEPRA Authority's view, the Applicant / Petitioner did not submit a mutually agreed payment mechanism. (Annex G / Letter dated September 9th, 2020)

IX. PROPOSED REVISION OF THE IMPUGNED DECISION AND TARIFF DETERMINATION

27. That during the course of modification of tariff proceedings that translated into the Impugned Decision, the Applicant / Petitioner, Seller and Purchaser were conducting negotiations to resolve the issue of invoices. At the time of issuance of the Impugned Decision, the parties were in the midst of the negotiations and had not reached a settlement. However, the NEPRA Authority as evident from the Impugned Decision did not allow more or additional time for finalization of the negotiations for resolving the double taxation issue.
28. That in pursuance of the aforesaid negotiations, the Applicant / Petitioner, the Seller and the Purchaser collectively have negotiated a Memorandum of Agreement (MOA) with the intent to settle the issue of invoicing. All the parties are agreed in principle that the prevailing invoicing mechanism as provided in

Tariff Determination, the PPA and EWA is prejudicial to their interests and is imposing unnecessary financial burden related to double taxation. (Annex - H)

29. That Clauses 1.1, 1.2, 1.3, and 1.4 of MOA provide the invoicing mechanism between the Applicant / Petitioner, the Seller and the Purchaser and for ease of reference, the afore-referred clauses are reproduced herein below:

"1.1 That the SNPCs, from and with effect from the date hereof, hereby perpetually, irrevocably, and unconditionally assigns, transfers, and conveys to the STDC, all of the rights, titles, interests, pertaining to the billing, invoicing, receipt and collection of transmission services charges or wheeling charges to and from the KE under the Power Purchase Agreements.

1.2 That the STDC, from and with effect from the date hereof, hereby perpetually, irrevocably, and unconditionally undertakes, accepts and assumes all of all of the rights, titles, interests, pertaining to the billing, invoicing, receipt and collection of transmission services charges or wheeling charges to and from the KE under the Power Purchase Agreements.

1.3 That the KE consents to the aforesaid assignment, transfer, conveyance, acceptance and assumption by the SNPCs and STDC.

1.4 That STDC accordingly will not generate any invoice in favour of SNPC for its Wheeling Charges and STDC will generate the invoices for its Wheeling Charges in favour of KE and send it directly to KE and further that the KE shall make payments directly to the STDC against the invoices for the Wheeling Charges after deduction of the applicable income tax and sales tax."

30. That review of the Clauses 1.1, 1.2, 1.3, 1.4 of MOA suggests that Seller has transferred its rights with regards to collection of transmission services charges and wheeling charges under the EWA and PPA to the Applicant / Petitioner and accordingly the Applicant / Petitioner have accepted the said arrangement. The Purchaser has also sanctioned the afore-mentioned transfer of right to invoice. As per the new invoicing arrangement, the Applicant / Petitioner shall invoice the Purchaser directly which shall make

payments against the invoices submitted after deduction of the income and sales tax as per law.

31. That Clauses 2.2 and 2.4 of the MOA deals with the already issued invoices pertaining to sales tax by the Applicant / Petitioner in favour of the Seller for the period commencing at since July 2019. It has been agreed that the Applicant / Petitioner will withdraw those invoices and reissue the same in favour of the Purchaser. The Applicant / Petitioner will revise its Sindh sales tax returns and the Purchaser will release/reimburse payments directly to the Applicant / Petitioner.
32. That as per Clause 4.1 of the MOA, the MOA shall be presented before the NEPRA Authority. It is pertinent to note that the Applicant / Petitioner, Seller and Purchaser have reached an understanding and all the issues related to invoicing, double taxation and the already issued invoices by Applicant / Petitioner have been settled through MOA.
33. That the Applicant / Petitioner has filed the instant review under the Section 7 of the NEPRA Act, 1997, read with Tariff Rules and the NEPRA (Review Procedure) Regulations, 2009 (Review Regulations). Regulation 3(2) of the Review Regulations provide, *"Any party aggrieved from any order of the Authority 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"*.

Accordingly, the MOA is an important matter of evidence that is being brought on record entitling the Applicant / Petitioner to file the instant review for revision of the invoicing mechanism contained in the Tariff Determination.

34. That the subject of invoicing is a tripartite issue between Applicant / Petitioner, Seller and Purchaser which have been recognized by the NEPRA Authority through Para No. 6.3 of the Impugned Decision wherein the NEPRA Authority had previously allowed the Applicant / Petitioner, Seller and Purchaser to submit the mutually agreed terms pertaining to the subject of invoicing. NEPRA Authority's recognition of the right Applicant / Petitioner, Seller and Purchaser to