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**Islamic Republic of Pakistan**

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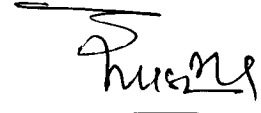
No. NEPRA/TRF-UTB-2013/6348-6350  
April 18, 2018

**Subject: Decision of National Electric Power Regulatory Authority in the matter of Review Motions filed by Central Power Purchasing Agency Guarantee Ltd. against the Award of Upfront Tariff, 2013 to Twelve Bagasse Cogeneration Projects**

Dear Sir,

Please find enclosed herewith the subject Decision of the Authority (15 pages) in the matter of Review Motions filed by Central Power Purchasing Agency Guarantee Ltd. against the Award of Upfront Tariff, 2013 to Twelve Bagasse Cogeneration Projects for information and further necessary action.

Enclosure: As above

  
18 04 18  
( Syed Safer Hussain )

Secretary  
Ministry of Energy  
'A' Block, Pak Secretariat  
Islamabad

CC:

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

**DECISION OF NATIONAL ELECTRIC POWER REGULATORY AUTHORITY IN THE MATTER OF REVIEW MOTIONS FILED BY CENTRAL POWER PURCHASING AGENCY GUARANTEE LIMITED AGAINST THE AWARD OF UPFRONT TARIFF, 2013 TO TWELVE BAGASSE COGENERATION PROJECTS**

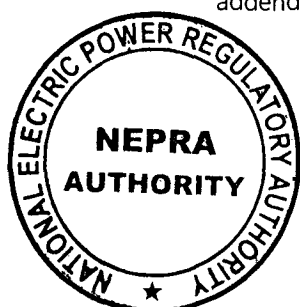
1. This decision shall dispose of the Review Motions filed by the Central Power Purchasing Agency (Guarantee) Limited (hereinafter referred to as "CPPA-G" or the "petitioner") on September 20, 2017 against the decisions of the National Electric Power Regulatory Authority (hereinafter referred to as the "Authority/NEPRA") dated September 11, 2017 in the matter of award of Upfront Tariff For New Bagasse Based Cogeneration Power Projects, 2013 (Upfront Tariff, 2013) to following twelve bagasse cogeneration power projects:

S.#	Project Name	Installed Capacity (MW)
1	Humza Sugar Mills Ltd (HSML)	30
2	Tay Powergen Company (Pvt) Limited	30
3	Faran Power Ltd. (FAPL)	26.5
4	Mehran Energy Limited (MEL)	26.5
5	Mirpurkhas Energy Limited (MKEL)	26
6	HSM Energy Ltd (HSMEL)	26.5
7	Alliance Power (Pvt) Ltd	30
8	Two Star Energy (Pvt) Ltd. (TSEPL)	49.8
9	RYK Energy (Pvt) Ltd (RYKEL)	25
10	Ghotki Power (Private) Limited (GPPL)	45
11	Sadiqabad Power (Private) Limited (SPL)	45
12	Sheikhoo Power (Pvt) Ltd (SPPL)	30
	<b>Total</b>	<b>390.3</b>

2. All the twelve (12) Review Motions have been clubbed together as the submissions of the petitioner are common for all the power projects.

**Brief Background**

3. The Council of Common Interests ("CCI") in Case No. CCI.4/3/2012 dated November 8, 2012 directed Secretary, Ministry of Water & Power ("MoW&P") to pursue NEPRA to finalize determination of upfront tariffs for bagasse, solar and coal power projects. Pursuant to the decision of CCI, the Economic Coordination Committee of the Cabinet ("ECC") on a summary forwarded by MoW&P in its meeting held on March 06, 2013 approved a Framework for Power Cogeneration, 2013 (bagasse/biomass) (hereinafter referred to as "Framework, 2013") as an addendum to the Renewable Energy Policy, 2006.



4. In pursuance of the aforementioned decisions of the CCI and ECC, the Authority initiated suo-moto proceedings under NEPRA Upfront Tariff (Approval & Procedure) Regulations, 2011 ("Regulations, 2011) for determination of upfront tariff for bagasse based cogeneration power projects. The Authority after following due process of law and holding a public hearing issued an upfront tariff determination dated May 29, 2013 whereby Upfront Tariff along with the terms and conditions for power projects based on high pressure boilers (60 bars and above) was approved.
5. The said upfront tariff was reviewed vide Authority's Decision dated 28-08-2013 and some terms and conditions were modified. The upfront tariff was valid for one year from the date of its approval by the Authority. After expiry of the first validity period, the Upfront Tariff was extended for another one year through Authority's decision dated June 19, 2014. Thereafter, the upfront tariff was extended again for another two years vide Authority's decision dated June 17, 2015. All of these decisions were duly notified by the Federal Government in the official gazette. In the last decision dated 17-06-2015, the Authority decided that *"The option for accepting Upfront Tariff by Co-generation projects will be valid up to May 28, 2017"*.
6. It is pertinent to mention here that twenty seven (27) bagasse cogeneration projects having cumulative capacity of approximately 940 MW accepted the upfront tariff, 2013 within its validity period. The consent letters of CPPA-G to purchase power, as required under regulation 4(3)(v) of the upfront tariff regulations, were issued unconditionally in respect of first fifteen (15) projects having collective capacity of around 550 MWs. However, the consent letters issued in respect of latter twelve (12) projects having aggregate capacity of around 390 MW were conditional. CPPA-G included the following conditional clause in the consent letters:

*"... CPPA-G will procure power, on behalf of relevant DISCOs from the project companies on*

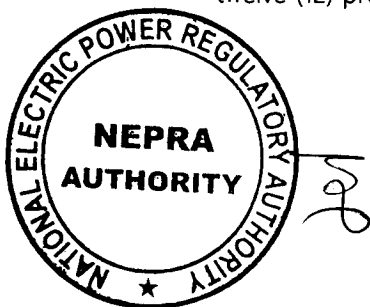
*a) Priority dispatch basis during the crushing season;*

*b) Take and Pay basis during non-crushing season*

*(Note: Crushing season will be notified by the relevant authorities)*

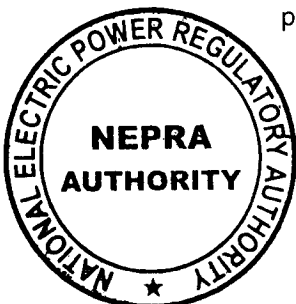
*Based on the above, necessary changes will be made in the EPA."*

7. The Authority considered the conditions introduced by CPPA-G in its consent letters for the twelve (12) projects; however, the Authority decided to award the upfront tariff, 2013 to these



power projects in the standard form as was done in the case of earlier fifteen (15) bagasse cogeneration power projects. Being aggrieved from the decisions of the Authority, the CPPA-G filed the instant Review Motions. The gist of the submissions of CPPA-G in the Review Motions is as under:

- i. As per Section 7(6) of the NEPRA Act, the Authority has to protect the interest of consumers and companies providing electric power services;
- ii. As per Rule 18(2) of the NEPRA Tariff Rules, a tariff determined by the Authority shall not become effective until such time it is published in the official gazette;
- iii. Regulation 4(3) of Upfront Tariff Regulations, 2011 provides for provision of consent of power purchaser. CPPA-G submitted that once the applicants accepted the contents of consent letters, now the applicants cannot resile therefrom and NEPRA should take into account the conditions imposed by CPPA;
- iv. Prior to the expiry of the period for Upfront Tariff, 2013, the Authority had already undertaken and initiated the exercise of afresh determination of the Upfront Tariff, 2017 which is lower than Upfront Tariff, 2013. Thus, during the pendency of such process, the decisions whereby additional benefit has been granted to these twelve projects, notwithstanding the aspects/conditions specified by CPPA-G duly noted by the dissenting member, at the cost of consumer are liable to be reviewed and set-aside.
- v. By the time decision for these twelve power projects were issued by NEPRA, Upfront Tariff, 2013 stood expired.
- vi. The executive authorities are bound to enter into contracts for supplies at the least expense to the public exchequer and the best economical mode of meeting the public needs of power. In view of the aforementioned, the current portfolio of CPPA-G commitments under the prevailing Power Policy Generation, 2015 involves must dispatch of (i) RLNG Power Plants; (ii) Imported Coal Power Plants; and (iii) Local Mine Mouth Coal Power Plants to cover fixed energy components. Hence, purchase on priority from bagasse cogeneration power projects as per Framework, 2013 shall lead to displacement of cheap and efficient conventional source of generation leading to impact on basket prices. In view thereof, the decision to issue conditional consent letter to these twelve power projects was taken in the meeting of National Economic Council ("NEC") held on May 20, 2017.
- vii. The conditionality mentioned in consent letters dated May 25, 2017 enshrined the principles in earlier decision of the Authority and in this regard reliance is placed on: (i)



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letter dated 07-10-2016 of the Authority; (ii) Decision dated 06-10-2011 of the Authority Upfront Tariff Determination of Wind; (iii) Decision of the Authority in the matter of motion of review of Fatima Energy Limited. The decisions of the Authority fail to take account of the mentioned principles and clearly are not within the legal and regulatory framework therefore, the decisions of these twelve power projects should be set aside.

viii. No opportunity of hearing was allowed to CPPA-G while taking the decisions and the applicants were granted relief over and above what was sought by them.

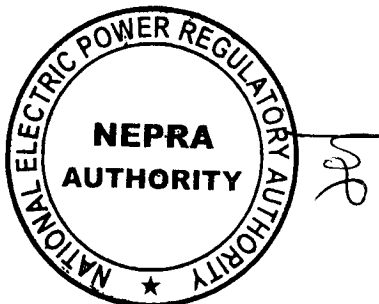
8. The Review Motions were admitted by the Authority on October 10, 2017 and the Authority decided to grant an opportunity of hearing to CPPA-G. The hearing was scheduled for November 23, 2017 and notices thereof were sent to the relevant stakeholders on November 10, 2017. However, the Counsel of CPPA-G vide letter dated November 20, 2017 and the Counsel of Ghotki Power (Private) Limited and Sadiqabad Power (Private) Limited vide letter dated November 21, 2017 requested for adjournment of the said hearing. The Authority acceded to the aforementioned requests and the hearing was adjourned. Later, the hearing was scheduled for December 07, 2017 and notices thereof were sent to the relevant stakeholders on November 24, 2017. However, few stakeholders again requested the Authority to adjourn the hearing to another date. The Authority acceded to the request of the stakeholders and hearing was adjourned again. Finally, the hearing was scheduled for January 04, 2018 and notices thereof were sent to the relevant stakeholders on December 27, 2017. The hearing was held as per schedule and the petitioner CPPA-G and the representatives of the project companies as well as the stakeholders participated in the hearing.

9. The brief of the submissions of the parties during the hearing is as under:

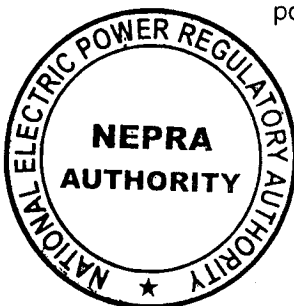
CPPA-G:

Consent within the Legal, Policy and Regulatory Framework

i. CPPA-G while referring to one of the paragraphs of the summary forwarded by MoW&P to the ECC for development of Framework, 2013 submitted that the said summary envisaged a period from November to April for the operations of the bagasse cogeneration power plants. Further, CPPA-G also referred to the following provision of Framework, 2013:



- Upfront tariff for bagasse / biomass based cogeneration projects to be determined by NEPRA.
  - Tariff shall be on a per unit basis for energy delivered to the grid.
  - It shall be mandatory for the Power Purchaser to evacuate all the energy offered to it by the Power Producer, failing which such plants shall be deemed to have dispatched and sold the energy to the Power Purchaser....
- ii. CPPA-G submitted that based on the Framework, 2013, NEPRA initiated suo moto proceedings for the Upfront Tariff, 2013. For that purpose, the Authority proposed Annual Plant Capacity Factor ("APCF") of 50%. However, based on the submissions of participating parties, NEPRA decided to keep it at the level of 45%. The Authority, inter alia, on the basis of APCF of 45% determined per unit tariff for delivery of electricity to the power purchaser. In the Upfront Tariff, 2013, the Authority left it to the discretion of the prospective projects to decide about the size of the plants as per the magnitude of the investment and availability of bagasse. Further, the Authority included a term in the determination that *"all energy offered for sale by the co-generation projects shall be taken by the power purchaser on priority"*.
- iii. The petitioner further submitted that units of electricity only to the extent of 45% have been attributed priority to ensure mandatory purchase by the power purchaser in the Framework, 2013 and Authority's Upfront Tariff, 2013. The payments beyond that level shall translate into windfall profits for the project developers. This act shall be in contravention of the NEPRA Act which, inter alia, provides that while determining tariffs the Authority has to protect the interest of the consumers. Quantifying the impact, CPPA-G submitted that around three billion rupees has been paid for energy beyond 45% to four operational power projects in just three years of their operations. Moreover, CPPA-G submitted that the Authority has prescribed a sharing mechanism for the energy beyond the set benchmark of energy in the upfront tariffs of other technologies and absence thereof in Upfront Tariff, 2013 means that payments are limited to the APCF of 45%. Further, CPPA-G also submitted that the Authority in Upfront Tariff, 2017 has also limit the mandatory purchase to the extent of set plant factor which also endorses its aforesaid position for Upfront Tariff, 2013.
- iv. The petitioner further submitted that the conditional consent given by it to these twelve power producers is in consonance with the Framework, 2013 and Upfront Tariff, 2013.



Whereas, the unconditional consent given to earlier bagasse cogeneration projects were not correct. CPPA-G submitted that it shall revise all the EPAs it has signed with earlier cogeneration projects as they are inconsistent with the Framework, 2013 and the Authority's Upfront Tariff, 2013. Also, the additional payments that have been made to those projects shall also be set off.

Acceptance of Consent by Power Producers

- v. CPPA-G reiterated that in terms of regulation 4 (3) of the upfront tariff regulations, the consent of power purchaser is a condition precedent for filing an application for acceptance of upfront tariff by a power producer. It submitted that the earlier applications filed by these twelve power projects were duly returned by the Authority on account of not being supported with the consent of CPPA-G for power procurements. CPPA-G submitted that the issuance of conditional consent to these twelve power projects was resolved on 24-05-2017, in pursuance of the meeting of NEC held on 20-05-2017. Keeping in view the cut-off date, these twelve projects after having accepted the terms and conditions of the consent of CPPA-G, resubmitted the applications along with the consent. In view thereof, CPPA-G submitted that once these projects have accepted the consent and thereby attaining the benefit of the cut-off date and seeking additional financial benefit as compared to Upfront Tariff, 2017, these twelve projects could not have resiled therefrom. Moreover, CPPA-G submitted that it is established law that when a deed confers on a person certain benefits and burdens with certain obligations, that person has the right to elect whether he would take benefit under the deed or not. If he does elect to take benefit under the deed, he must also bear the burdens created thereby.

Financial Implications

- vi. CPPA-G submitted that on account of expiry of the period for Upfront Tariff, 2013, the Authority had already initiated the exercise of determination of Upfront Tariff, 2017. During the hearing, CPPA-G submitted that upon initiation of proceedings of fresh tariff determination, the period of earlier tariff should have ceased. Moreover, CPPA-G submitted that since the decision of the matter is pending and action requested by the power producers has not attained finality, the further windfall benefits may not be allowed to be passed on and should be catered for while granting Upfront Tariff, 2017 to these

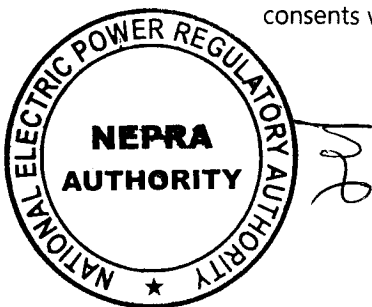


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twelve projects in the instant Review Motions. CPPA-G also submitted that six more projects with whom EPAs have not been signed may also be awarded Upfront Tariff, 2017. Citing the impact, CPPA-G submitted that this act shall save billions of rupees (Rs. 190 billion approx.) over the approved life of these eighteen (18) power projects.

Submissions of the Representative of Project Developers during hearing and in writing

- i. It was submitted that Framework, 2013, inter alia, provides that it shall be mandatory for the power purchaser to purchase all the energy offered to it by the power producer. The aforesaid provision has been translated by NEPRA in Upfront Tariff, 2013 while stating that all the energy offered for sale by cogeneration power projects shall be taken by the power purchaser on priority. Based thereon, it was submitted that these companies have legally enforceable vested rights and legitimate expectations to have all of the electrical energy offered for sale to be taken up by CPPA-G on priority irrespective of whether the energy is offered during the crushing season or non-crushing season. This is how both the Authority and CPPA-G have interpreted and applied the conditions of Framework, 2013 and Upfront Tariff, 2013 in respect of no less than fifteen (15) earlier bagasse based co-generation power projects. Since the incentives offered by the Framework, 2013 and terms of Upfront Tariff, 2013 to bagasse based co-generation power plants have not been amended or withdrawn; therefore, the conditions mentioned in the consent letter of CPPA-G are in direct conflict and violation of the provisions of the Framework to which CPPA-G is bound to follow. Further, CPPA-G is discriminating by inserting the conditionality clause in the consent letters for the 12 power projects as it has given consent letters to earlier fifteen (15) bagasse power projects without any conditionality.
- ii. It was further submitted that CPPA-G in its Review Motion had initially taken a stance that CPPA-G's must dispatch commitments and upcoming demand supply situation position was considered by a special committee headed by Managing Director, NTDCL. The committee found that in the event of further procurement under the 2006 Policy as modified in 2013, with the condition of 'purchase on priority' shall lead to displacement of cheap and efficient conventional source of generation leading to impact on basket prices. These aspects lead to resolution reflected in the consent letter dated 25-05-2017 of CPPA-G in furtherance of meeting of NEC. The counsels of power producers submitted that during the hearing CPPA-G had changed its stance by stating that the conditional consents were issued by it on proper interpretation of Framework, 2013 and Upfront Tariff,

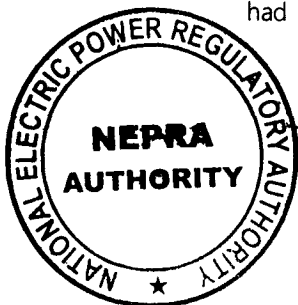


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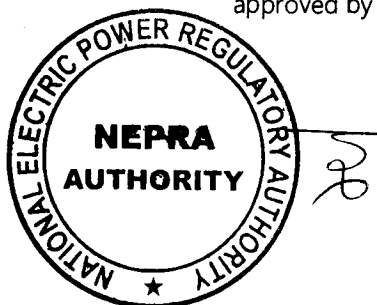
2013. CPPA-G submitted that now it has been unearthed to it that Upfront Tariff, 2013 provided 45% plant factor as the maximum limit for the payment of tariff and receiving generation from bagasse cogeneration power plants. Making payments to these projects beyond APCF of 45% would result in windfall profits, which is against Upfront Tariff, 2013. For the approval of consent letter given in the NEC meeting, CPPA-G during the hearing itself submitted that the submission in this regard may be discarded. The power producers submitted that changing its position by CPPA-G in the hearing from what has been submitted in Review Motion is inconsistent and is in defiance of the settled principle of law and the principles as laid down by the Supreme Court of Pakistan that a party cannot go beyond its original pleadings. Further, it was submitted that CPPA's position during hearing on plant factor is not a ground which falls within the permissible scope of Rule 16 of the Tariff Rules, 1998. Further, this submission of CPPA-G is without merit or substance, having previously been considered and decided otherwise by the Authority as part of the process of issuance of the Upfront Tariff, 2013. Regarding the point of plant factor of 45%, they submitted that under Upfront Tariff, 2013, the high and low side of plant factor was left with the power generators and they were allowed to achieve higher plant factor while keeping in view the submissions of sugar industry that to achieve this plant factor required significant investments. Referring the excerpts of Upfront Tariff, 2013, they submitted that the tariff was designed to promote new efficient plants with latest technology to ensure optimal utilization of bagasse for a longer period of year. In view thereof, the Authority did not limit the maximum and minimum capacity for the purpose of Upfront Tariff, 2013. Further, they submitted that CPPA-G's view during the hearing that term delivery used in upfront tariff, 2013 implies to "take and pay" basis is incorrect as the same term has been used in Power Purchase Agreements (PPA) on "take or pay" basis of the IPPs under 1994 and 2002 power policies. Citing the technical reasons, they submitted that unlike coal or LNG, bagasse cannot be indefinitely stored in the off- season due to its high moisture content and then deteriorates and loses calorific value due to microbial activities over time. Therefore, imposition of a take and pay modality in the non-crushing season instead of the deemed dispatch and must run arrangement would make the projects for these companies economically uncertain, unviable and un-bankable.

- iii. It was submitted that CPPA-G in its Review Motion submitted that the consent of power purchaser is mandatory for the purpose of application of Upfront Tariff, 2013. In this regard, it was submitted that the Authority in its modification decision dated June 19, 2013 had itself removed this requirement. Nevertheless, it was submitted that the power



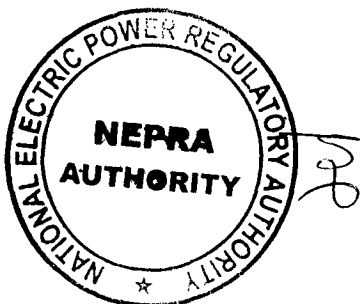
producers duly applied to the CPPA-G for issuance of the consent letters after complying with all the necessary legal, regulatory and procedural requirements including those set-out in CPPA-G's own "Guidelines / SOPs for Power Procurement by CPPA-G under NEPRA Renewable Energy Guidelines, 2015" dated 31-5-2016; which do not contain or envisage or empower CPPA-G to impose the conditions. However, CPPA-G inordinately delayed issuance of such consents without any plausible reason. Subsequently, it issued twelve (12) consent Letters on 25-5-2017 with the conditions imposed in them for the first time, without any notice or any reasons or rationale. They submitted that CPPA-G has no right to include any conditions in the consent letter which are inconsistent with the Framework, 2013, the RE policy 2006 and/or Upfront tariff, 2013. With only one (1) working day left before expiry of the deadline of 26-5-2017, the companies submitted that they were left with no option and had to submit the consent letters in the same form as received. However, they submitted that they never accepted the condition mentioned in the consent letter of CPPA-G and a number of companies expressed their reserved rights in respect of the condition in its application filed with the Authority. Therefore, they said that aforesaid conditionality is non-binding and void ab initio and therefore have no adverse impact on the entitlement of the companies to the same upfront tariff which has been granted to earlier 15 projects.

- iv. Responding to the submission of CPPA-G for limited operations of bagasse cogeneration power plants, they submitted that continuous production by indigenous renewable biomass fuel even in the winter season, when Pakistan's power generation capacity is at the lowest due to shortage of water and gas, was just an added benefit. The policies and various NEPRA tariff determinations have also emphasized that power generation through local renewable biomass/bagasse fuel will result in savings of foreign exchange that would otherwise be spent on imported fuel to generate electricity through furnace oil.
- v. It was also argued that CPPA-G during the hearing has acknowledged that they have deviated from scheme approved earlier for fifteen bagasse cogeneration projects while stating that the arrangement proposed for latter twelve (12) projects is actually in consonance with the true spirit of Framework, 2013 and Upfront Tariff, 2013. In light thereof, CPPA-G submitted that it will amend the EPAs it has already signed with the projects in operation. Doing so, they submitted that CPPA-G will not only override the functions of the Authority but will also challenge the documents which have been approved by ECC and that shall lead to another set of arbitration.



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- vi. It was contended that CPPA-G has filed Review Motions against the decision of the acceptance of the upfront tariff by these projects rather than the upfront tariff determination. On this point, it was submitted that upfront tariff is a take it or leave it package. During the proceedings thereof, relevant stakeholders can advance their submissions. However, once determined after the participation of all the stakeholders, none of the party has any flexibility to open it or change it. The Authority issued upfront tariff in May, 2013, then modified it in August, 2013, then extended it for one year in June, 2014 and then again extended it for two years in 2015. None of the aforementioned decisions were challenged or filed review against by CPPA-G. Now when the companies have been awarded that tariff, CPPA-G has filed Review Motions thereon.
- vii. It was also argued that CPPA-G itself is a regulated entity and does not have the jurisdiction to impose such conditions as by doing so it has usurped policy making powers of Federal Government and overridden the regulatory powers and functions of the Authority under the NEPRA Act. The act of balancing the interest of consumers and investors is undertaken by the Authority under section 7(6) of the NEPRA Act which was done while determining upfront tariff and now CPPA-G cannot request to amend the terms in the name of the consumers. While referring one of the decisions of the Honorable Islamabad High Court it was reiterated that act of balancing the interest of consumers is the function of the Authority under NEPRA Act. CPPA-G cannot, based on certain calculations, asserts that something which has been approved by NEPRA is not prudent and against the interest of the consumers. Further, CPPA-G is an agent and procures power on behalf of the Ex-WAPDA Distribution Companies from power generation companies. These 12 bagasse based power projects are located within the service territory of different XWDISCOs; however, CPPA-G has filed review motions without any authorization therefrom.
- viii. Regarding the point of CPPA-G that the decisions were issued by NEPRA after expiry of the Upfront Tariff, 2013, it was contended that the applications for acceptance were filed by each of them within the time prescribed Upfront Tariff, 2013. Therefore, it is a misconceived assertion by CPPA-G that the order also needs to be issued by the Authority by such deadline.

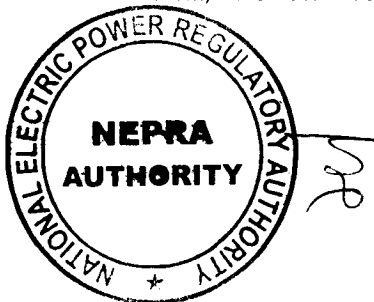


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- ix. The project developers requested in their submissions to reckon the date of achieving Commercial Operations Date from the date of issuance of the Review Motion decision as the delay has been caused which was not in their control.

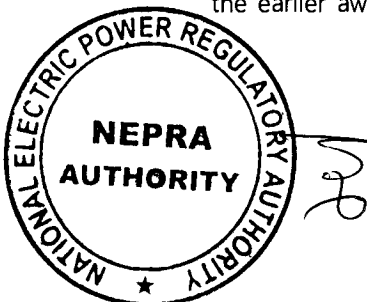
**Discussion, Analysis and Decision of the Authority**

10. The Authority has considered submissions and arguments of all the parties. At the outset, it is observed that as per regulation 3(2) of the NEPRA (Review Procedure) Regulations, 2009 a Review Motion may be filed against a decision of the Authority upon discovery of new or important matter of evidence or on account of some mistake or error apparent on the face of the record or from any other sufficient reasons. Thus the scope of the review proceedings is limited and the whole case cannot be opened without fulfilling the prerequisites as mentioned in the Review Procedure Regulations. Further, these Review Motions have been filed against the decisions of award of upfront tariff to twelve bagasse based power projects and not against the original upfront tariff determination. Therefore, only matters which are related to the award of upfront tariff may be agitated by the petitioner and not the matters which are related to the original upfront tariff determination.
11. The petitioner contended in its written submissions as well as during the hearing that the National Economic Council held some discussion regarding the purchasing of power on priority basis from renewable energy power projects and the decision of CPPA was pursuant to the said meeting of NEC. During the hearing, the Authority inquired from the petitioner about the sanctity of a decision of NEC and whether that decision would be equivalent to the Policy of the Federal Government or Upfront Tariff of the Authority? The petitioner responded that a decision of NEC cannot be considered Policy or Regulatory Framework. Further, CPPA-G requested that the submissions with respect to the NEC meeting may be discarded by the Authority. As CPPA-G itself has asked not to consider the meeting of NEC and no further submissions with respect to must dispatch commitments and demand-supply position were presented or substantiated through documents by CPPA-G, therefore, these submissions have not been considered while deciding the instant Review Motions.
12. It was contended by the petitioner that Upfront Tariff, 2013 had expired by the time the Authority issued the decisions of the twelve projects. The project developers in this regard submitted that acceptance was filed by each of them within the time prescribed in the Upfront Tariff, 2013. It has been observed by the Authority that the decision of the Authority dated June



17, 2015 whereby the validity period of the upfront tariff was extended specifies that *"The option for accepting Upfront Tariff by Co-generation projects will be valid up to May 28, 2017"*. The applicability period given in the Decision of NEPRA provides the time period for submitting the applications to NEPRA along with all the requisite documents meaning thereby that the projects which have submitted applications for opting the Upfront tariff, 2013 along with requisite documents before May 28, 2017 have accepted that tariff and are qualified for it. It is not required in the upfront tariff regulations and the Upfront Tariff determination that the decision of the Authority has to be issued within that time period. The decision of the Authority may be issued after expiry of the applicability period of the upfront tariff. The Authority also observed that it has awarded tariffs to a number of power projects in other technologies post expiry of upfront tariff on the basis that those projects had filed the complete application within the validity period of the respective tariffs. In the instant cases also, the applications were filed by these twelve projects latest by May 26, 2017, i.e. before the expiry of the upfront tariff on May 28, 2017; therefore, there was no bar on the Authority to issue their decisions post expiry of Upfront Tariff, 2013.

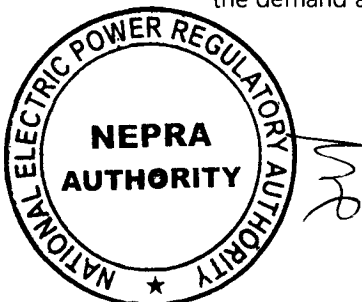
13. The petitioner submitted that prior to the expiry of the period for Upfront Tariff, 2013, the Authority had already undertaken and initiated the exercise of fresh determination of the Upfront Tariff, 2017 which is lower than the Upfront Tariff, 2013. Thus, during the pendency of such process, the impugned decisions are liable to be reviewed and set-aside as the same are granting additional benefits to the project developers. The petitioner also requested the Authority to approve Upfront Tariff, 2017 for not only these twelve projects but also for other six projects with which EPAs have not been signed as the same shall lead to considerable savings over the life of these projects. It has been observed by the Authority that the proceedings of issuing Upfront Tariff, 2017 were initiated to avoid the lag between the two upfront tariffs. Further, CPPA-G in its Review Motions itself has referred to Rule 18(2) of the Tariff Rules which provides that a tariff determined by the Authority shall not become effective until such time it is published in the official gazette. It is abundantly clear from this rule that the initiation of the proceedings for new Upfront Tariff, 2017 cannot mean that the Upfront Tariff, 2013 has ceased to be applicable. It is pertinent to mention here that the upfront tariff, 2013 was valid till 28-05-2017, therefore, the Authority is bound to entertain any application filed within the applicability period. Moreover, it was noted that the tariff schemes providing certain incentives are approved for a definite period of time. Upon expiry thereof, new schemes are introduced with incentives relatively lower than allowed in the earlier decisions. Setting aside the earlier awarded tariffs due to reduction in incentives through subsequent tariff schemes



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would not be appropriate. Hence, the Authority considered that setting aside decisions of eighteen projects merely on the basis of differential impact between two tariffs is not worth considering. Such action shall not be correct and lawful as well as the same will be in contravention of basic regulatory principles of certainty and predictability.

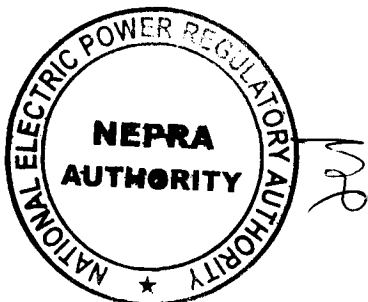
14. The petitioner put much thrust on the argument that as these projects had accepted the conditional consent of CPPA-G, and attained the benefit of the cut-off date, hence, they could not resile therefrom and they have to abide by the conditions mentioned in the consent letters. It was noted by the Authority that the conditional consent letters were considered by the Authority at the time of issuance of the impugned decisions; however, it was decided to issue the decisions in the standard form. Further, it was also observed that attaching conditions with the power purchaser's consent was not in consonance with the Upfront Tariff, 2013 as well as the upfront tariff regulations, 2013. The Authority observed that under the NEPRA Act and rules and regulations framed thereunder, it is prerogative of the Authority to determine the tariff and its terms and conditions. The power purchaser does not have the authority to amend the tariff and its terms and conditions. Further, the Framework 2013 as well as the Renewable Energy Policy, 2006 also does not empower the power purchaser to impose such conditions in the consent letter. The Authority noted that if a condition is related to the commercial terms which are part of the EPAs and are not covered in the tariff determination then such matter is between the parties and does not have any bearing on the decision of NEPRA. However, if the condition is such which is related to the tariff determination and restricts the benefits granted by the tariff determination, then such condition shall be void as CPPA does not have the power to modify the tariff determination issued by NEPRA and notified by the Federal Government. It was also noted by the Authority that the award of upfront tariff to a power projects has to be on the same terms and conditions which are mentioned in the original tariff determination. At the time of awarding of the upfront tariff, new terms and conditions cannot be imposed and introduced in the decision of award of upfront tariff. Therefore, the contentions of the petitioner that the conditions introduced by it in the letter of consent should have been part of the decisions of NEPRA are devoid of merit and unfounded.
15. The petitioner also referred to the letter of NEPRA dated October 07, 2016 sent to Ministry of Water and Power requesting certain changes to be made in the Cogeneration Policy, 2008 and Framework, 2013. It is noted that Upfront Tariff, 2013 provides for priority dispatch of energy from bagasse cogeneration power projects, i.e. to run these plants on priority while balancing the demand and supply position. It does not provide the payment arrangement, i.e. whether to



*[Handwritten signatures]*

pay without the dispatch of energy or otherwise. In the referred letter, the point which was highlighted primarily was related to the payment arrangement decided in the approved Energy Purchase Agreements ("EPAs"). It is hereby explained that the Authority in the Advisory communicated that arrangement of payments decided in the EPA was made in light of deemed dispatch provisions given in the Framework, 2013 and therefore proposed changes in that Policy document. No mention was made in the Advisory that these plants be given dispatch only to certain limit of Apcf. Nevertheless, in response to that Advisory, MoW&P vide its letter, *inter alia*, submitted that recommendations of NEPRA are being deliberated at the Federal Government level, however, till such time a policy amendment is made, NEPRA is bound to work within the given Framework. Here, it can be construed from the response of MoW&P that it agreed that aforesaid payment mechanism has been decided in light of Framework, 2013 and stated that recommendations of NEPRA shall be considered. Moreover, the MoW&P asked NEPRA to continue implementing the Framework, 2013 till changes are made therein. As no amendments have been made in the Framework, 2013; therefore, referring Advisory sent by NEPRA for the sake of these proceedings does not add any substance in this case and is irrelevant.

16. During the hearing, the petitioner submitted that units of electricity only to the extent of 45% annual plant factor have been attributed priority to ensure mandatory purchase by the power purchaser in the Framework, 2013 and the Authority's Upfront Tariff, 2013. In this respect it has been noted by the Authority that the Framework, 2013 does not specify any number for annual plant factor. Further, the upfront tariff determination has specified a minimum annual plant factor of 45% after considering all the relevant factors. The said plant factor is a minimum bench mark and the dispatch of energy on priority basis has not been linked anywhere in the Framework, 2013 and the upfront tariff determination with the minimum or maximum annual plant factor. Even the matter of linkage of 45% annual plant factor with the priority dispatch was not a condition of the letter of consent issued by CPPA-G. It is important to note here that these Review Motions are against the issuance of decisions of award of upfront tariff to twelve bagasse based cogeneration power projects wherein the main grievance of CPPA-G is that the conditions of the consent letter were not made part of the decisions of NEPRA. These proceedings are not meant for review of the original upfront tariff determination and its terms and conditions. Therefore, raising of issues which are related to the terms and conditions of the original tariff determination is not permissible under these proceedings. Further, the matter of maximum annual plant factor and its linkage with the priority dispatch seems to be an



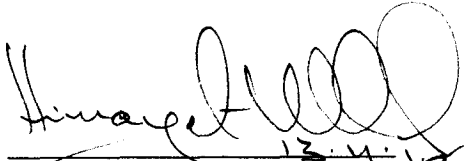
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afterthought of the petitioner, which is not supported from the contents of the Framework, 2013 and the Upfront tariff, 2013.

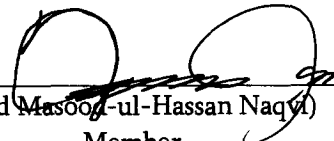
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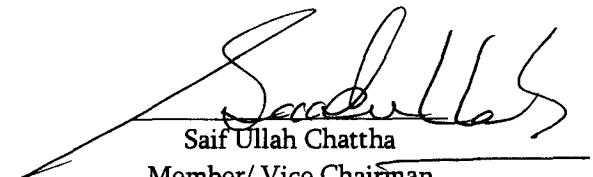
17. In light of the above discussion, the Authority is of the considered view that these Review Motions are devoid of merit and therefore, all the Review Motions are hereby dismissed. It is pertinent to mention here that the Authority also considered the request made by the project developers that the date of COD should be reckoned from the date of decisions of instant Review Motions. It has been observed that there has been no delay due to any act of the Authority. Therefore, the Authority has decided not to make any change with respect to the date of COD.

**AUTHORITY**

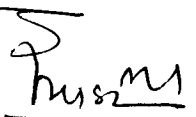
  
13.4.18  
(Himayat Ullah Khan)  
Member

  
13/4/18  
(Rehmatullah)  
Member

  
(Syed Masood-ul-Hassan Naqvi)  
Member

  
13.4.2018  
Saif Ullah Chattha  
Member/ Vice Chairman



  
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