

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

**Petition No. 79 of 2016
Date of Order:06.03.2018**

In the matter of: Complaint under Section 142 of the Electricity Act, 2003 read with Regulations 60 and 61 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 for the Respondent's willful, deliberate, contumacious, continuous and continuing non-compliance of the Commission's Order dated 15.03.2012 in Petition No.62 of 2011.

AND

In the matter of: M/s A2Z Infra Engineering Limited Formerly known as A 2 Z Maintenance & Engineering Services Limited] 0-116, First Floor, Shopping Mall, Arjun Marg , DLF City, Phase 1, Gurgaon-122002 (Haryana).
...Petition

Versus

Punjab State Power Corporation Limited, The Mall, Patiala

... Respondent

Present:
Ms. Kusumjit Sidhu, Chairperson
Sh. S.S. Sarna, Member
Ms. Anjuli Chandra, Member

ORDER

The Petitioner has filed the present Petition under section 142 of the electricity act, 2003 read with Regulations 60 and 61 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulation, 2005 for willful, deliberate and

contumacious non-compliance of order dated 15.03.2012 by Punjab State Power Corporation Limited (PSPCL). The petition was admitted vide order dated 19.01.2017 directing the respondent to file reply by 21.02.2017. PSPCL filed reply vide memo. no. 5180 dated 02.03.2017.

2. The submissions made by the Petitioner, in brief, are as under:

- I. That the Petitioner has been continuously paid less for the electricity generated and supplied to PSPCL by the Petitioner's Power Plant.
- II. That the petitioner has been reduced to a grave financial position on account of the short payment and continues to suffer despite the fact that the Hon'ble APTEL vide judgment dated 25.11.2014 has affirmed this Commission's order dated 15.03.2012 passed in Petition No.62 of 2011, wherein the Commission has determined project tariff for the purchase of electricity by the respondents from the independent power projects(IPPs) installed by the petitioner at cooperative sugar mills inter alia in Nakodar and Fazilka.
- III. That against the said order the respondents had preferred an appeal before the Hon'ble APTEL being Appeal No.92 of 2012. By its final judgment and order dated 25.11.2014, the Hon'ble APTEL dismissed the said appeal holding that the appeal had no merit and that the "impugned order is correct and based on sound reasoning"
- IV. That the respondent has filed a statutory appeal before the Hon'ble Supreme Court of India bearing no. C.A. No. 2446 of 2015 which was admitted vide order dated 09.09.2016.

The Hon'ble Supreme Court has not stayed the Hon'ble APTEL's Judgment dated 25.11.2014 as well as this Commission's order dated 15.03.2012. On the contrary, the Hon'ble Supreme Court in its order dated 09.09.2016 has specifically clarified that the petitioner may seek the realization of its dues as per the Commission's order dated 15.03.2012 notwithstanding the pendency of the said appeal.

- V. That the order is binding on the Respondent and has been effective on and from 15.03.2012 and has never been stayed or suspended for any reason by any forum.
- VI. That since 05.04.2012, the petitioner has been raising monthly tariff bills on the Respondent based on the project specific tariff determined by this Commission vide order dated 15.03.2012. However, in willful, deliberate, contumacious and continuous and continuing non compliance of this Commission's said order, the Respondent has not paid the petitioner said bills. Instead, the Respondent has paid the petitioner based on the levelised generic tariff determined by this Commission vide order dated 31.1.2011.
- VII. That with respect to the Petitioner's Nakodar IPP, the respondent has paid a sum of Rs.4,54,00,000/- against the sum of Rs.5,25,00,000/- which is due and payable to the petitioner vide the monthly bills raised by the petitioner since 15.03.2012, and the respondent in willful non compliance of the said order has omitted to pay the petitioner a sum of Rs.71,00,000/-.
- VIII. That with respect to the Petitioner's Fazilka IPP, the respondent has paid a sum of Rs.4,43,00,000/- against the

sum of Rs.4,82,00,000/- which is due and payable to the petitioner vide the monthly bills raised by the petitioner since 15.03.2012, and the respondent in willful non compliance of the said order has omitted to pay the petitioner a sum of Rs.39,00,000/-.

- IX. That the petitioner has not paid the sum of Rs.1,10, 00,000/- and for this the petitioner is suffering a grave prejudice on account of short payment by the Respondent. The said short payment by the Respondent is in willful and deliberate non compliance of this Commission order and for which they are liable to be punished under section 142 of the Electricity Act, 2003 by imposing a penalty of Rs1,00,000/- on the respondents and an additional penalty in respect of each of the bills on which the respondents has made a short payment to the petitioner since 15.03.2012.
- X. The petitioner prayed to:
- i) Initiate proceedings against the Respondent for willful, contumacious and continuing, non-compliance and contravention of order dated 15.03.2012 of this Commission in petition no. 62 of 2011 under section 142 of the Electricity Act, 2003 read with Regulation 60 of the PSERC (Conduct of Business) Rules, 2005.
 - ii) Direct the respondent to compensate the Complainant in the sum of Rs.1,10,00,000/- (One crore ten lakh rupees only) along with surcharge for the delayed payment @ 1.25 % per month (fixed by the PPA between the parties), and legal expenses in respect of the instant complaint as per Regulation 61 of PSERC

(Conduct of Business) Rules, 2005.

- iii) Direct the respondent to pay a penalty under section 142 of the Electricity Act, 2003 read with Regulations 60 and 61 of the PSERC (Conduct of Business) Rules, 2005.
3. The submissions of PSPCL, in brief, are as under:
- I. That there has not been any wilful or deliberate non-compliance of this Commission's Order dated 15.03.2012 in Petition No. 62 of 2011. The Respondent is a public entity which has the interest of the consumers as its priority and has no selfish motive or mala fide intention for non-compliance of the Order of this Commission.
 - II. That the order dated 15.03.2012 of the Commission was subject matter of challenge before the Hon'ble Tribunal in Appeal No. 92 of 2012, wherein the Hon'ble Tribunal had issued notice on the appeal and also on the stay application filed with the Appeal No. 92 of 2012. It was in these circumstances that the tariff order dated 15.03.2012 could not be fully satisfied and executed. There was no wilful default on the part of the Respondent and the conduct of the Respondent was bona fide as it sought to prevent the consumers from being burdened in the meanwhile.
 - III. That upon the decision of the Hon'ble Tribunal, the matter is pending before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide order dated 30.03.2015 had issued notice in the appeal and also the application for stay. Thereafter, time was taken by the petitioner herein for filing reply on many occasions.

- IV. That the petitioner had earlier filed a petition being Petition No. 10 of 2015 before this Commission seeking the same relief as at present. The said petition was dismissed by this Commission vide order dated 08.09.2015 on the ground that the matter was pending before the Hon'ble Supreme Court and the result may be awaited. This itself establishes that there is no lack of bona fide on the part of the Respondent. Therefore, it is humbly prayed to consider the pendency of appeal in the Hon'ble Apex Court and not to take any coercive action against the Respondent in the present petition.
- V. That it is a well settled position in law that an appeal is a continuation of the proceedings and during the pendency of the appeal, the order passed is in jeopardy when the appeal is pending. It has been held by the Hon'ble Supreme Court that the decree becomes executable only when the same is disposed of by the court of appeal. In this regard, the Hon'ble Supreme Court has in the case of *Union of India_v. West Coast Paper Mills Ltd.*, (2004) 2 SCC 747 (Page 753) inter-alia, held as under
- i. *"14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a court or tribunal. Once a special leave is granted and the appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of*

fact as well as law. In such an event the correctness of the judgment is in jeopardy.

- ii. *15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the court of appeal."*
- VI. That in the circumstances, it is submitted that pending the decision of the Hon'ble Supreme Court in appeal, particularly when public interest is involved in payment of higher tariff, the higher tariff not to be executed till the disposal of the appeal by the Hon'ble Supreme Court.
- VII. That it was admitted by the petitioner itself in Para 7 and 8 of the Petition, that the Respondent has made payments to the tune of Rs.8,97,00,000/- (Rs. Eight Crore ninety-seven lacs). It is amply clear that a major portion of the payments has already been paid by the Respondent to the Appellant and therefore, it shows that the Respondent has no intention to withhold the payments alleged to be justifiably payable to the Petitioner.
- VIII. That the Respondent is not liable for wilful or deliberate non-compliance of the Order dated 15.03.2012 passed by this Commission. Rather, the Respondent is only awaiting the decision of the Hon'ble Apex Court before paying the difference in tariff solely to safeguard the interest of the consumers at large.
- IX. That the entitlement of the Petitioner for the due payment of Rs.1,10,00,000/- (Rs. One Crore ten lacs) or the surcharge for the delayed payment is not justified in the public interest

- during the pendency of the appeal before the Hon'ble Supreme Court.
- X. That the claim of the Petitioner flows from the order of the Commission, which has merged into the order of the Hon'ble Tribunal and which is pending before the Hon'ble Supreme Court. There is no direction by the Hon'ble Tribunal for payment of any interest. Therefore, the question of seeking compliance of the order passed and seeking interest at this stage does not arise.
- XI. That the question of proceedings under Section 142 of the Electricity Act in such circumstances does not arise, in the absence of any mala fide or contumacious conduct. The Respondent crave leave to refer to the Order dated 07/06/2013 of the Central Commission in Petition No. 241 of 2009 on the nature and scope of penalty proceedings and holding that when the matters were pending before judicial forums, there is no question of lack of bona fide for proceedings under Section 142.
4. The Petitioner submitted rejoinder dated 21.03.2017 to the reply of PSPCL which is summarized as under:
- I. That the reply filed by the respondent does not contain any legal and cogent reason for the non releasing of payment despite the orders having been passed in this regard. There has been willful noncompliance of the order passed by the Commission which was upheld by the appellate authority and despite the said orders having been challenged before the Hon'ble Apex Court, no relief was granted to the respondent, rather, it was observed by the Apex Court that it will be open

- for the respondents to take steps in accordance with law for realization of amounts, if due, notwithstanding the pendency of the said appeal.
- II. That in the whole reply, no reason has been assigned for not complying with the order of the Commission dated 15.3.2012 as upheld by the Hon'ble APTEL. The only ground that has been assigned is that the respondent is a public entity and has no mala fide intention, which hardly is a ground for non-compliance of the orders and in view of the same, the respondent is liable to be punished as per Section 142 of the Electricity Act and Under Regulation 60 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005.
- III. That the payment of part of the amount does not absolve the liability of respondent to comply with the orders passed by this Commission and the non-payment of amount due to PSPCL makes them liable to be proceeded against under section 142 of the Electricity act 2003.
5. On 02.05.2017 the matter was taken for hearing wherein PSPCL made the statement that principal amount has already been paid to the petitioner. During the hearing the petitioner submitted the details of the outstanding amount and requested that the same is required to be reconciled by the parties. The request was acceded to by the Commission. In compliance thereof, PSPCL vide CE/ARR &TR Memo no. 5942/TR-5/829 dated 15.5.2017 has submitted minutes of meeting held on 04.05.2017 for reconciliation of arrears pending between the parties, wherein PSPCL has stated that it has paid arrears as per 5% per annum escalation whereas

the petitioner has claimed the payment at price indexation formula. As per order dated 15.3.2012 the petitioner has to opt either for 5% escalation factor or Fuel Price Indexation. The petitioner has raised all the invoices based on Fuel Price Indexation, whereas PSPCL has released payments based on 5% escalation per annum. The Representative of the petitioner has opted Price Indexation formula in 05/2012 but the letter was not available with the representative of the petitioner. It has been agreed that when so ever the petitioner will produce the copy of option exercised bearing the date from which option is effective; the PSPCL will pay all the differences of arrears to the satisfaction of both the parties. Regarding the issue of delayed payment interest, PSPCL assured that the matter has been referred to the concerned authorities, the decision of which may take some time.

6. On 06.07.2017 matter was taken up for hearing and PSPCL was directed to pay the outstanding payment to the petitioner. In compliance thereof, vide Memo no. 5161 dated 27.09.2017 PSPCL has submitted the details of the payment made to the petitioner and enclosed the copy of cheque of Rs. 26,10,048/- received by the petitioner. Vide order dated 06.07.2017, PSPCL was directed to pay the outstanding payments to the petitioner.

7. Commission's Observations, Findings and Decision

The Commission has carefully gone through the petition, reply filed by PSPCL, rejoinder to the reply by the petitioner and other submissions made by the parties. The petitioner has prayed to:

- a) Initiate proceedings against PSPCL for non-compliance of Order dated 15.03.2012 in petition no. 62 of 2011 u/s 142 of the Act read with Regulation 60 of the PSERC (Conduct of Business) Regulations, 2005.

- b) Direct PSPCL to compensate the sum of Rs. 1.1 crore alongwith surcharge @ 1.25% per month and legal expenses as per Regulation 61 of the PSERC (Conduct of Business) Regulations, 2005.
- c) Direct PSPCL to pay penalty u/s 142 of the Act r/w Regulations 60 & 61 of the PSERC (Conduct of Business) Regulations, 2005.

Considering the submissions of the parties as brought out in the foregoing paras, the findings and decision of the Commission on the issues raised in the petition are as follows:

The petitioner submitted that the Commission Vide Order dated 15.03.2012 in petition no. 62 of 2011 determined project specific tariff Rs. 5.20 per kWh for its IPPs of 15 MW against the tariff of Rs.4.79 per kWh applicable to co-generation projects determined by the Commission in its generic tariff order dated 31.10.2011 in petition no. 59 of 2011 (Suo-Motu). PSPCL filed Appeal No. 92 of 2012 against the said Order dated 15.03.2012 and Hon'ble APTEL dismissed the said Appeal vide judgment dated 25.11.2014. The petitioner submitted that PSPCL filed Civil Appeal No. 2446 of 2015 before Hon'ble Supreme Court against APTEL's judgment dated 25.11.2014 which was admitted and Hon'ble Supreme Court in its order dated 09.09.2016 clarified that the complainant may seek the realization of its dues under Order dated 15.03.2012. The petitioner further submitted that it was raising monthly tariff bills since 05.04.2012 on PSPCL, based on project specific tariff but PSPCL paid the bills based on levellized generic tariff determined by the Commission vide Order dated 31.10.2011. The petitioner submitted that it ought to be awarded compensation for the short payment of Rs.

1.1 crore with surcharge for the delayed payment at the rate of 1.25% per month.

PSPCL submitted that it is awaiting the decision of Hon'ble Supreme Court of India before paying the difference in tariff solely to safe guard the interest of the consumers at large. PSPCL further submitted that the Hon'ble Supreme Court of India in the case of Union of India Vs. West Coast Paper Mills Limited held that the decree becomes executable only when the same is disposed of by the Court. The petitioner contended that the para as referred by PSPCL in the judgment of Hon'ble Supreme Court of India in the case of Union of India Vs. West Coast Paper Mills Ltd. is not applicable. PSPCL submitted that the major portion of the payment has been paid as PSPCL made payment of Rs. 8.97 crore. PSPCL contended that the payment of Rs. 1.1 crore is not justified in the public interest during the pendency of Civil Appeal in the Hon'ble Supreme Court of India. PSPCL further contended that there is no direction by Hon'ble APTEL for payment of any interest. PSPCL submitted that CERC in its Order dated 07.06.2013 in petition no. 241 of 2009 on the nature and scope of penalty proceedings held that when the matters were pending before Judicial Forum, there is no question of lack of bonafide for proceedings u/s 142 of the Electricity Act, 2003.

The Commission notes that during hearing on 02.05.2017, PSPCL submitted that it has already paid the principal amount whereas the petitioner submitted details of the outstanding amount. The parties were directed to reconcile the same by 12.05.2017. PSPCL vide letter dated 15.05.2017 submitted the minutes of meeting of the reconciliation signed by the Consultant of the petitioner and PSPCL. The perusal of the minutes of the meeting reveals that PSPCL has paid arrears as per 5% per annum

escalation in fuel price whereas the petitioner has claimed payments at price indexation formula. As per the Commission's order dated 15.03.2012 in petition no. 62 of 2011 whereby project specific tariff of the petitioner's project was determined, the petitioner had to opt either for 5% escalation factor or Fuel Price Indexation. The petitioner has raised all the invoices based on Fuel Price Indexation whereas PSPCL has released payments based on 5% escalation per annum. It has also been mentioned in the aforesaid minutes of the meeting that the petitioner claimed that it opted for the Fuel Price Indexation formula in May, 2012 but the letter was not available in PSPCL's record nor it was available with the petitioner. It has been agreed by the parties that when so ever the petitioner will produce the copy of option exercised bearing the date from which option is effective, PSPCL will pay all the difference of arrears. It has been further mentioned in the minutes of meeting that as regards the issue of delayed payment interest, the matter has been referred to the concerned authority and the decision on the same may take some time. The Commission during hearing on 06.07.2017 directed PSPCL to pay the outstanding payments to the petitioner by 14.07.2017. PSPCL vide letter dated 27.09.2017 submitted the undertaking dated 20.07.2017 given by the petitioner wherein the petitioner has acknowledged and confirmed that as per direction of the Commission dated 06.07.2017, it has received Rs. 26,10,048/- vide cheque No. 761307 dated 19.07.2017 as difference of cost between invoices raised by A2Z Infra Engineering Ltd. and payment released by PSPCL. The interest part / amount also payable by PSPCL is not included in the said amount.

Keeping the above in view, the Commission finds that all the issues raised in the petition already stand settled between the parties as per interim directions of the Commission except the payment of interest by PSPCL. The Commission notes that the petitioner has prayed for surcharge for the delayed payment at the rate of 1.25% per month. The Commission further notes that it has been recorded in the minutes of the meeting dated 11.05.2017 that regarding the issue of delayed payment interest, PSPCL has assured that the matter has been referred to the concerned authorities, the decision of which may take some time. Further, PSPCL has filed Civil Appeal No. 2446 of 2015 before Hon'ble Supreme Court of India against APTEL's Judgment dated 25.11.2014, which stands admitted. The Commission holds that the surcharge for delayed payment would only be substantiated upon the decision of Hon'ble Supreme Court of India in the aforesaid Civil Appeal. Therefore, the issue of surcharge for the delayed payment shall be settled consequent upon the decision of Hon'ble Supreme Court of India.

The petition is disposed of in terms of above.

-Sd/-

(Anjuli Chandra)
Member

-Sd/-

(S.S. Sarna)
Member

-Sd/-

(Kusumjit Sidhu)
Chairperson

Chandigarh
Dated: 06.03.2018