

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

**Petition No.55 of 2013
Date of Order: 08.01.2014**

In the matter of: Petition under Regulation 9 of the PSERC (Conduct of Business) Regulations, 2005 and applicable provision(s) of the Electricity Act, 2003- Issue pertaining to the wrongful classification of Talwandi Sabo Power Limited (TSPL, which is a generator), as an "Industrial Consumer" and application of peak load exemption charges, power factor surcharge, penalty, service connection charges etc. on a generator availing start up power facility from the distribution licensee.

AND

In the matter of: Talwandi Sabo Power Limited (TSPL), Village Banawala, Mansa, Talwandi Sabo Road, District Mansa, Punjab-151302.

Versus

Punjab State Power Corporation Limited through its Engineer-in-Chief (Thermal Designs), PSPCL, Shed No. T-2, Thermal Design Complex, Patiala-147001

Present: Smt. Romila Dubey, Chairperson
Shri Gurinder Jit Singh, Member

ORDER

Talwandi Sabo Power Ltd. (TSPL) has filed this petition to challenge the imposition of service connection charges, peak load exemption charges, power factor surcharge and penalty as applicable to large supply industrial consumer for the start up power for its 1980 (3x660) MW power plant at Mansa under Regulation-9 of the PSERC (Conduct of Business) Regulations,-2005 and applicable provisions of the Electricity Act, 2003.

- 1) The brief facts of the case are as under:
 - (i) The petitioner company is Special Purpose Vehicle incorporated for setting up a 1980 (3x660) MW power plant at Mansa. The entire power generated by the petitioner company from the aforesaid power plant will be supplied to

State distribution licensee i.e, PSPCL under Power Purchase Agreement dated 1.9.2008.

- (ii) The petitioner applied for release of startup power (4400 kW/4800 kVA CD) to PSPCL on 5.11.2012. This demand was likely to increase to 45-50 MVA nearer to commissioning of the plant.
- (iii) PSPCL by a letter dated 11.1.2013 accorded feasibility clearance for release of load for startup power for the power plant at 400 kV fed from 400 kV substation Bhalwan (Dhuri) under Punjab State Transmission Corporation (PSTCL) as a special case.
- (iv) The necessary Application and Agreement(A&A) form for HT/EHT supply was filled on 24.1.2013.
- (v) The respondent vide letter dated 8.2.2013 demanded ₹ 1,05,60,000/- towards Service Connection Charges for providing start up power which was opposed by the petitioner vide letters dated 22.2.2013 and 11.3.2013 on the grounds that in terms of PPA, petitioner is liable to pay only for the energy consumed for start up power.
- (vi) The petitioner deposited the Service Connection Charges on 11.3.2013 under protest and duress to avoid delay in the commissioning of the power plant.
- (vii) PSPCL by its letter dated 19.3.2013 disputed the reliance placed by the petitioner on the judgment passed by the Hon'ble Tribunal in Appeal No. 166 of 2010 and quoted Clause 4.1.1 (d) of the PPA and justified levy of Service Connection Charges.
- (viii) PSPCL levied various charges such as Power Factor Surcharge, penalty, Peak Load Penalty etc. treating the petitioner as a consumer and also started imposing Peak Load Exemption Charges/ Peak Load Penalty w.e.f. October, 2013 as applicable to Large Supply Industrial Consumer.
- (ix) The petitioner by a letter dated 30.7.2013 drew PSPCL's attention to Hon'ble APTEL order dated 24.5.2011 in Appeal No. 166 of 2010 to contest the treatment of petitioner as consumer and opposed levy of various charges.
- (x) PSPCL in the energy bill for the period 5.7.2013 to 6.8.2013 received on 19.8.2013 by the petitioner imposed Peak Load Exemption Charges and Power Factor Surcharge which was contested by the petitioner vide letter dated 26.8.2013.

- (xi) The petitioner vide letter dated 25.9.2013 made an application to PSPCL for Peak Load Exemption under protest and it was clarified by the petitioner that a generator cannot be classified as a normal industrial consumer for availing startup power. The respondent by a letter dated 7.10.2013 agreed to grant Peak Load Exemption of 4400 kW to the petitioner against payment of Peak Load Exemption Charges.
- (xii) The petitioner applied for enhancement of load to 18800 kW with 20,000 kVA contract demand which was permitted by the respondent vide letter dated 1.10.2013 and demanded Service Connection Charges of ₹ 3,34,40,000/-

2. Aggrieved by the demands of PSPCL for Service Connection Charges, imposition of tariff applicable to Large Supply Industrial Consumers, Peak Load Exemption Charges, Power Factor Surcharge, Penalty etc. the petitioner filed the present petition and submitted as under:-

- i) Respondent is erroneously treating the start up power availed by a generator on the same footing as the supply received by a consumer. Such interpretation is in contravention of the provisions of Electricity Act, 2003 and the judgment passed by the Hon'ble Appellate Tribunal for Electricity.

Section 2(15) of the Electricity Act, 2003 defines "consumer" as follows:

" (15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be"

Thus the consumer is a person who is supplied with electricity for his own use but the start up power supplied to a generator to start up its generating unit is not for his own use but in a way start up power is supplied for the benefit of the Licensee since the power so generated after synchronization of the generating unit with the grid is supplied back to the Licensee. So generator taking start up power cannot be termed as a consumer.

- ii) Start up power by its very nature is limited in regard to quantum and duration whereas there is no such restriction placed on the consumers seeking supply under Section 43 of the Electricity Act, 2003.
- iii) As per the PPA, the generator is required to pay for the total cost of infrastructure including switching equipment, relays, protective devices etc, for the outgoing circuits upto and including Power Station Switchyard Gantry structure to get connected to three double-circuit 400 kV Transmission lines for power evacuation. The 400 kV transmission conductor connecting from first Tower to power station switchyard gantry structure for outgoing circuit will, however, be in the scope of the procurer. The same HT/EHT connections are used for injecting the generated power into the grid and import of power for start up of the generators. There is no extra expenditure incurred for taking start up power from the distribution licensee. A perusal of the tariff orders of PSTCL for FY 2012-13 and FY 2013-14 indicates that the evacuation system from the Petitioner's plant comprises of 400 kV transmission lines of length approx. 513.6 Km, 4 nos. new 400 kV Sub-Stations at Dhuri, Muktsar, Makhu and Nakodar along with extension of bays at Moga & Amritsar sub-stations of PGCIL. The aforesaid network is already included by PSTCL in its ARR. Therefore, levy of exorbitant service connection charges upon the petitioner, allegedly charged by the respondent depending upon cost incurred by it for laying service line to the consumer, are completely arbitrary and unjust.
- iv) Service Connection Charges as provided in Schedule of General and Service Connection Charges are to be recovered only from the prospective consumers & existing consumers seeking extension in load. As held by Hon'ble APTEL, a generator cannot be termed as a consumer of the Distribution Licensee for availing start up facility so demand of Service Connection Charges to the tune of ₹1,05,60,000/- from the generator is illegal, arbitrary and unreasonable.
- v) Hon'ble Appellate Tribunal of Electricity in case of non conventional energy sources, by an order dated 7.9.2006 in Appeal No. 20 of 2006 observed that *"netting of the monthly export of energy to the grid by the non-conventional energy plants against import of startup power from the grid is a sound proposal for settlement of bills as it reduces the hassles of accounting"*. The

petitioner believes that netting is permitted by the respondent for its own generating stations and the Commission may consider adopting the same approach for the power plant of the petitioner.

- vi) No category of tariff applicable to generating stations availing start-up power has been provided in the state whereas most State Regulatory Commissions provide a different tariff category (temporary supply tariff) for provision of Start-up power to a generator or permit netting off the power supplied by the distribution licensee to a generator for start up against the energy being supplied by the generator to the distribution licensee. A brief overview of the treatment meted out to start up power availed by generators in other states like Maharastra, Madhya Pardesh, Tamil Naidu and Chhatisgarh has been quoted by the petitioner.
- vii) The petitioner has prayed to:
- (a) Declare that the petitioner availing the facility of start-up power is not liable to pay the following charges:-
 - Service Connection Charges.
 - Demand Charges.
 - Peak Load Exemption Charges.
 - Penaltyas applicable to Large Supply Industrial Consumers.
 - (b) Direct PSPCL to permit settling of consumption toward start-up power in energy terms against the power which will be exported to the Grid post synchronization;
 - (c) Direct Punjab State Power Corporation Limited to file appropriate proceedings to enable creation of a separate category for start-up power, keeping in view the established regulatory principles.
 - (d) Approve that the startup power category as a separate category applicable to generating companies which avail start up power and separately determine tariff for the same.
 - (e) During the pendency of the present proceedings, grant interim prayers in terms of prayer (a) hereinabove; and
 - (f) Pass any such other and further order(s) as this Hon'ble Commission may deem fit.

Petition was admitted vide order dated 25.10.2013 and PSPCL was directed to file its reply by 07.11.2013. PSPCL prayed for grant of four weeks time to file the reply. During hearing of petition on 12.11.2013, petitioner made a submission for interim relief with reference to non- payment of Service Connection Charges.

3. Commission vide order dated 12.11.2013 granted time to PSPCL to file reply on the issue of service connection charges and interim relief by 18.11.2013 and ordered as under.

“PSPCL was directed vide Order dated 25.10.2013 to file para wise reply to the petition with advance copy to the petitioner by 07.11.2013. PSPCL has filed a request for adjournment of the petition by four weeks and to grant time of four weeks for submission of reply.

TSPL submitted during hearing that it requires extension of ‘start-up’ load by 30 MVA and prayed that ‘interim relief’ be granted to the extent that ‘Service Connection Charges’ may not be levied for the release of 30 MVA additional load, for the time being, subject to the final Order in this petition. PSPCL argued that it may be allowed time for a week to respond to the prayer of the petitioner for interim relief. PSPCL shall file reply on issue of service connection charges and interim relief by 18.11.2013.

4. PSPCL filed its reply to the petition vide letter dated 18.11.2013 received in Commission`s office on 19.11.2013 and submitted as under

(i) Presently petitioner is neither a Generator nor availing start up power owing to the fact that commencement of generation from the project is yet to take place. The petitioner is using commissioning power and as such it cannot be treated as a generator using start-up power. Petitioner can use start-up power after commissioning the plant. Therefore, the petitioner has been treated as a large supply industrial consumer and service connection charges on per kVA basis @ ₹. 2200 per kVA are payable.

- (ii) The clauses 4.1.1 (d) and 11.9 (payment for start-up power) of Power Purchase Agreement signed with the petitioner has been quoted as under:

Clause 4.1.1(d)

- (a) *Procure the requirements of electricity at the Project (including construction, commissioning and start up power) and to meet in a timely manner all formalities for getting such a supply of electricity.*

Clause 11.9 Payment for Start up Power

“The Seller shall be liable to pay, for the power and energy consumed for start-up of the Project and commissioning, to the distribution licensee in whose area the Project is located or such other entity from whom such power/energy is sourced, at the then prevalent rates payable by such Industrial Consumers”.

Since there is no separate clause as per General Conditions of Tariff and Schedule of Tariff to consider generator as a different entity so generator is treated at par with Industrial consumer.

- (iii) Respondent also relied on clause 9 of the PSERC Electricity (Supply Code and Related Matters Regulations)-2007 to support his contention for recovery of Service Connection Charges from the petitioner which is reproduced below:

9. Power to Recover Expenditure:

9.1.1 For New Connections:

- (a) *Domestic, Non-Residential, Industrial and Bulk Supply Categories*
- b) *Where load/demand required exceeds 500 KW/500 kVA, the applicant will be required to pay per kW/kVA charges as approved by the Commission or the actual expenditure for release of connection, whichever is higher.*
- c) *The applicant seeking supply at voltage of 33000 volts and above will be liable to pay the expenditure incurred for providing the service line and proportionate cost of back-up/common line (33000 volts or above) up to the feeding substation including bay, if any.*
- (iv) As per provision 11.9 of PPA, the power/energy is to be sourced at the then prevalent rates payable by such industrial consumers and when petitioner is industrial consumer for the applicability of tariff charges

then he cannot be exempted from payment of relevant charges for the release of connection.

- (v) There is no separate Availability Clause as per General Conditions of Tariff and Schedule of Tariff, to provide for start up power for the project and its commissioning. As per existing instructions, 4.4 MW/4.8 MVA power connection needs to be released at 33/66 kV voltage level by erecting 33/66 kV line/related power system at the cost of petitioner , but as per the demand of petitioner, the connection was released at 400 kV considering it as a Special Case.
- (vi) “Essential Services” and “Essential Industries” are specifically mentioned by PSPCL from time to time via its Commercial Instructions/Power regulations and in no case, the nature of services as of Petitioner’s has been covered in Essential Industries (PR No. 05/2010) and furthermore the consumers covered under Essential Services have to observe Peak load Restrictions and if they want to avail power during peak load hours, then such consumers have to pay PLEC charges as per the prevalent rate.
- (vii) So far as the application of judgment of the Hon’ble APTEL in Appeal no. 166/2010 is concerned, respondent stated that the matter had already been discussed in the Feasibility Clearance Committee meeting held on 5.3.2013 wherein it was clearly decided that such decision could not be relied upon in this case as the petitioner was governed by PPA. Hence demand of Service Connection charges raised upon the petitioner is fully justified and is in line with the Regulation 9.1.1 of Supply Code Regulations-2007 for new connection.
- (viii) Reliance placed on the specific tariff orders of the Regulatory Commissions of other states is misplaced and no such comparison can be made. The terms and conditions applicable in each state are different and different terms and conditions applied in other states, is not a ground for review of the tariff order of the Hon’ble commission. No exemption can be sought for in individual cases, wherein the applicable tariff and terms and conditions have been specified in a generic manner. The petitioner company is required to pay all the applicable charges for seeking supply of electricity from the respondent.

5. The Commission after going through the submissions made by the petitioner and the respondent, issued interim order dated 20.11.2013 as under:

“PSPCL filed reply to the petition vide No.6953 dated 18.11.2013 with copy to the petitioner. . The petitioner sought time to file rejoinder to the reply by 20.11.2013. The petitioner shall supply a copy of the rejoinder directly to PSPCL. PSPCL submitted that it intends to file detailed reply after receipt of a copy of the rejoinder to be filed by the petitioner. PSPCL shall file the same by 26.11.2013 with advance copy to the petitioner.

The case was argued by the counsels of the parties on the issue of ‘interim relief’. The petitioner submitted that it requires extension of ‘start up’ load before 25.11.2013 for commissioning of unit of the plant scheduled for 25.11.2013 and prayed that the same be released without levy of ‘Service Connection Charges’ subject to the final decision of the petition. The petitioner also submitted that it had already deposited ‘Service Connection Charges’ as per demand of PSPCL for 30 MVA load, which was released by PSPCL earlier. The petitioner submitted that it was not insisting on the refund of the same in the ‘interim relief’. PSPCL on the other hand argued that ‘Service Connection Charges’ had been demanded as per provisions of Supply Code Regulations and Power Purchase Agreement. There was no merit in the petition and therefore, no ‘interim relief’ be granted to the petitioner.

The Commission has considered the submissions of both sides made in the petition by TSPL and reply to the petition filed by PSPCL. The Commission has also considered the arguments of the counsels on ‘interim relief’. The Commission has observed that the petition can be decided only after considering the submissions to be made by the petitioner in the rejoinder and the detailed reply of the PSPCL to be submitted by PSPCL on 26.11.2013. The Commission observes that under these circumstances, ‘balance of convenience’ lies in favour of the petitioner for granting ‘interim relief’ The Commission, therefore , directs PSPCL to immediately release extension in load without demanding deposit of ‘Service Connection Charges’ subject to the final decision of this petition, after observing all other formalities as per rules and regulations”.

6. The petitioner filed rejoinder to the reply of PSPCL limited to the issue of interim relief on 21.11.2013 wherein it is reiterated that as per the terms of the PPA, it is the obligation of PSPCL to develop necessary infrastructure including transmission lines for evacuation of power. The startup power for petitioner is provided through the same transmission line and no separate infrastructure has been created by the Respondent/PSPCL. Thus there is no basis for levy of service connection charges. The judgment dated 24.05.2011 passed by Hon'ble Appellate Tribunal for electricity in Appeal No. 166 of 2010 was again quoted.

The plea of the respondent that the petitioner is using commissioning power and start-up power can only be drawn subsequent to commissioning of the plant was contested by the petitioner and judgment of Hon'ble Appellate Tribunal for electricity in Appeal No. 176 of 2010 was quoted wherein it has been held that start up power can be used for initial commissioning of the generator and its auxiliaries. It was also submitted that the judgments have been rendered in a generic sense and are relevant to the present case.

7. In response to the rejoinder of the petitioner, respondent filed its reply on 2.12.2013. The argument that petitioner is presently drawing the commissioning power for commissioning activities and not the start up power so petitioner cannot be treated as a generator at this stage and other averments as mentioned in para 4 above were reiterated. The relevant articles of PPA and Supply Code were again reproduced. It was submitted that as per clause 49 of Conditions of Supply, penalties for violation of Peak Load Hours restriction are levied and as such PLEC are correct. It was also submitted that as there is no separate clause as per General Conditions of Tariff and Schedule of Tariff to consider generator as a different identity so Generator is treated at par with Industrial Consumer.

The respondent quoted clause 15.9 (i) of Electricity Supply Instructions Manual (ESIM) dealing with elements of service line wherein it has been provided that the EHT/HT service line will comprise the length of the line, EHT/HT switch gear including isolator/GO switch both at the sending and receiving end and thus expenditure has been incurred by the respondent to develop these facilities at sending end and accordingly Service Connection Charges are levied.

The comparison by the petition company with other states is misplaced. The petitioner company is required to pay all the applicable charges for seeking supply of electricity from the respondent. Any other interpretation would amount to the

petitioner company being given a benefit at the cost of other consumers in the state of Punjab, which would be impermissible and arbitrary.

8. The petitioner again filed rejoinder to the reply of PSPCL dated 2.12.2013 on 3.12.2013. It was again stressed that in view of the judgment of APTEL in Appeal No. 166 of 2010 and 176 of 2010, a generator requiring start up power from the grid cannot be treated as a consumer and start up power can be used for initial commissioning of the generator auxiliaries.

The reference made by the respondent to certain clauses of PPA and Supply Code are erroneous misinterpretation in the light of Hon'ble APTEL judgments wherein it has been specifically held that a generator requiring start up power cannot be treated as a consumer and the said principle cannot be taken away even by a Regulation. Any Regulation or Agreement including the present PPA cannot take away the rights conferred under Electricity Act, 2003. Thus treating petitioner as a consumer is entirely misplaced as any contractual stipulation or Regulations cannot override the absolute principle laid by Hon'ble Appellate Tribunal for Electricity as it is a settled law and holds ultimate sanctity.

The petitioner also refuted the averment made by the Respondent w.r.t construction of 33/66 kV line and it was stated that no such line has been constructed so there is no question of paying any charges qua the said line. The petitioner also contested the averment of the respondent with regard to duty of the petitioner to erect special line for startup power as per clause 4.1.1 (d) of the PPA and submitted that said clause does not at all talk about any such obligation.

It was stated that petitioner made payments of the charges to wipe out any possible hurdles during the commissioning of the power plant and these payments were made under protest so as to save its right for challenging the levy of the same at an appropriate forum.

9. PSPCL submitted reply to the rejoinder of the petitioner on 23.12.2013 and all arguments as mentioned in paras 4 & 7 above have been reiterated. It was submitted that the judgment of Hon'ble APTEL was discussed in the FCC meeting held on 5.3.2013 and it was held that the judgment was concerning construction of 132 kV line for evacuation of power at their own cost whereas in the present case, the petitioner is governed by Power Purchase Agreement dated 1.9.2008 read with Electricity Supply Code, 2007. Thus levy of Service Connection Charges, Peak Load

Exemption Charges, Power Factor Surcharge and penalty applicable to Large Supply Industrial Consumers for startup power is justified.

The respondent submitted that reliance on the judgment of Hon'ble APTEL in Appeal No. 176 of 2010 is wholly mistaken and erroneous as it is clearly stated in the judgment that there existed a separate tariff category for startup power where as there is no separate availability clause to provide start up power in the State of Punjab. The release of connection to the petitioner on 400 kV was a special case but the 33/66 kV line/related power system was still to be constructed for the same. The respondent submitted that as per article 4.2 of PPA and clause 15.9 of ESIM, the respondent has performed its duty and undertaken expenditure of developing the 33/66 kV service line to the petitioner and the charges are to be recovered from the petitioner.

The Article 4.1.1 (d) of PPA lays down an obligation of the petitioner to procure requirement of electricity at the project, which include construction, commissioning and start up power. Thus erecting special line for startup power is a requirement which securely falls in the contents of the Article.

10. The petitioner submitted its written submission on 23.12.2013 and summed up the arguments as under:

- (i) The various charges levied by the respondent for the start up power availed by the petitioner for its 1980 (3x660) MW power plant at Mansa are illegal and unjust as a generator availing intermittent start up power facility cannot be treated on the same footing as a Large Supply Industrial Consumer running a general industry.
- (ii) The Commission has the jurisdiction to adjudicate a dispute between a generator and a Licensee under the Act since the present dispute has arisen on account of wrongful treatment/classification of the petitioner in the capacity of a generator not as a consumer *simpliciter* as alleged by the respondent. The judgment dated 15.3.2011 passed in Appeal No. 176 of 2010 by Hon'ble Appellate Tribunal for Electricity has been quoted by the petitioner.
- (iii) As per Section 2 (15) of the Electricity Act 2003, a consumer is a person who is supplied with electricity for his own use and whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee. The startup power is supplied to a generator to start up its

generating unit and as the respondent is the owner of the full capacity, so start up is required for the use of respondent and not of the petitioner. The 400 kV transmission lines built for evacuation of power from the power plant are being used for startup power to the generator and no separate infrastructure have been laid down by the petitioner for providing start up power. Since in the present case, the generating unit is only connected with the works of the petitioner for the purpose of exporting power and the supply of start up power is only incidental to the commissioning of the power plant so the petitioner cannot be termed as consumer.

- (iv) The start up power by its very nature is limited in regard to quantum and duration whereas for a person getting supply under Section 43 of the Act no such restriction is placed for consumption or duration of the drawl. Hon'ble APTEL in its judgment in Appeal No. 166 of 2010 has clearly held that a generator requiring start up power from the grid cannot be termed as a consumer. It is submitted by the petitioner that the aforesaid judgment is wholly applicable to the fact of the present case as Hon'ble APTEL discussion and deliberation are not limited to the regulatory framework of Chhattisgarh, but the Tribunal has placed reliance on the provision of Electricity Act, 2003.

Although there is no separate category for startup power in the Tariff Orders issued by the Commission or General conditions of Tariff and Schedule of Tariff but the jurisdiction of the Commission is not curtailed in any manner to create such a classification in appropriate regulatory proceedings.

- (v) Guided by the principles enshrined in Section 61 of the Electricity Act, 2003, the Hon'ble Commission is required to determine a cost-reflective tariff. In the present case the tariff being charged by the Respondent is certainly not cost-reflective for the following reasons:

- a. Supply of start-up power is limited both in quantum and duration unlike a large supply industrial consumer running a general industry.

The quantum and duration of supply to a generator availing start up power is limited. This fact is even recognised by the Hon'ble Commission in its Punjab State Electricity Regulatory Commission (Harnessing of Captive Power Generation) Regulations, 2009, applicable only to captive power plants in the State of Punjab.

b. As the quantum of demand for start-up power is very small and of short duration and occurs less frequently, it is not reasonable for the Respondent licensee to claim demand charges as also PLEC, power factor surcharge and impose the tariff applicable to a large supply industrial consumer upon the Petitioner generator.

(vi) The Respondent's allegation in its sur-joiner that no service connection charges have been paid by the Petitioner and that the Petitioner has failed to produce any proof or evidence of such payment being made to the Respondent, is wholly incorrect and a material misrepresentation of facts. The Respondent has already illegally and arbitrarily recovered ₹1,05,60,000/- towards service connection charges from the Petitioner. The Petitioner has also paid ₹3,34,40,000/- on 1.10.2013 and ₹2,20,00,000/- on 30.10.2013 towards service connection charges for increasing the contract demand.

Since the distribution licensee is a revenue neutral entity, there is no ability on its part to levy service connection charges when there is no such additional/actual charge incurred for providing service/connection. Even Clause 9.1.1 of the Supply Code requires payment of Service Connection Charges only if there is any actual expenditure incurred. This is also consistent with the provisions of section 45 and 46 of Electricity Act, 2003. Therefore the Respondent is guilty of non-compliance with the Supply Code and provisions of the Electricity Act, 2003.

(vii) Petitioner denied that the Respondent has constructed any 33/66 kV line for supply of start-up power to the generator and also contested the reliance of the respondent upon Articles 4.1.1. (d), 4.2 and 11.9 of the power purchase agreement executed between the parties on 01.09.2008 for treating the generator availing start-up power as a large supply industrial consumer running a general industry.

The petitioner submitted that Article 4.1.1 (d) and 4.2 (b) relate to obligations of the Seller and the procurer at the development stages of the project. The said articles do not in any manner support the case of the respondent licensee that they are entitled to charge the petitioner service connection charges and industrial tariff applicable to Industrial consumers, for providing start up power. As regards Article 11.9 of PPA, it is submitted that the said

Article state that the distribution licensee is entitled to charge the Petitioner/Seller of Electricity “prevalent rates payable by such industrial consumers”. The petitioner raised a question whether there is at all a prevalent rate for such industrial consumers, which effectively means the Seller category. The petitioner’s case is that the Seller is not a consumer simpliciter. The Seller is a generator.

- (ix) The Petitioner believes that netting off is being permitted by the Respondent for its own generation stations. This fact has been mentioned by the Petitioner in the petition as well as the rejoinder. However, the respondent neither in its reply nor in its sur-joinder has denied this fact. It is only just and equitable that such facility be extended to private generators as well. Neither the tariff principles enshrined in the State Commission’s tariff regulations nor the Electricity Act, 2003 permit any differentiation between private developers and State generating stations. Thus, the Petitioner may be treated on the same footing as State generating stations.

The case was closed on 23.12.2013 after hearing the arguments of both sides. PSPCL was directed to file written submissions by 26.12.2013 and the order was reserved.

11. The Respondent filed written submissions dated 25.12.2013 which was received in the Commission on 26.12.2013. The brief of the submissions are as under:

- i) The petitioner apart from challenging the imposition of various charges prays for creation of separate category for startup power applicable to generating companies and separately determining tariff for the same. However, nowhere has the petitioner challenged the provision of PPA or conditions set out therein. Thus the various provisions concerning Seller’s obligation to build, own and operate the Project (Article 4.1), Procurer’s obligation (Article 4.2) and Payment for start-up power (Article 11.9) are binding on the petitioner. The aforementioned provisions are reproduced as under :

“4.1 The Seller’s Obligation to build, own and operate the Project :

4.1.1 Subject to the terms and conditions of this Agreement the Seller undertakes to be responsible at Seller’s own cost and risk for :

(a) to (c) XX XX XX XX

(d) procure the requirements of electricity at the Project (including construction, commission and start-up power) and to meet in a timely manner all formalities for getting such a supply of electricity.

4.2 Procurer's Obligation

Subject to the terms and conditions of this Agreement, the Procurer :

(a)

(b) Shall ensure that the seller is provided an electrical connection for reasonable construction, commissioning and start-up power at the project as reasonably requisitioned by the seller by written intimation to the procurer, on the then prevalent terms and conditions as applicable to such consumer.

11.9 Payment for Start-up Power :

"The Seller shall be liable to pay, for the power & energy consumed for start-up of the project and commissioning, to the distribution licensee in whose area the project is located or such other entity from whom such power/energy is sourced, at the then prevalent rates payable by such industrial consumers."

Since the petitioner has voluntarily accepted the terms of the PPA and not challenged the same, the petitioner in the light of the aforementioned provisions of the PPA is an Industrial Consumer for payment of relevant charges for release of connection.

- ii) The reliance of the petitioner on the judgments of Appellate Tribunal of Electricity in Appeal No. 176 of 2010 and Appeal No. 166 of 2010 is wholly misconceived and erroneous and cannot be relied upon to decide the present matter as the aforementioned judgments are factually different from the present matter at hand. Since the present matter is governed by the contents of PPA read with Supply Code, the respondent has rightly considered the petitioner as industrial consumer to demand various charges for start up power.
- iii) The petitioner has been drawing commissioning power for commissioning activities as mentioned in article 6 of the PPA read with schedule 5 of the agreement. The requirement of start up power was to arise only after

commissioning of the units so the judgment of Hon'ble APTEL in Appeal No. 166 of 2010 is not applicable to the present case.

- iv) The petitioner is neither a generator nor availing any start-up power presently owing to the fact that commencement of generation from the project is yet to take place. The petitioner is presently drawing commissioning power for its commissioning activities and the start-up power so utilized can be drawn only after commissioning of plant, as such treating petitioner as a generator does not arise at this stage. As per Article 11.9 of the PPA, the power/energy was to be sourced at the then prevalent rates payable by such industrial consumers. Since the petitioner is an industrial consumer for applicability of tariff charges for release of connection, then it cannot be exempted from payment of relevant charges for release of connection. As per existing instructions 4.4 MW/ 4.8 MVA power connection needs to be released at 33/66 kV voltage level, but release of connection of 400 kV was considered as a Special Case. Otherwise, 33/66 kV line/related power system was to be constructed at the cost of petitioner. Further Regulation 9.1.1(i)(c) of the Supply code provides for levy of Service Connection Charges on kW/kVA basis or actual expenditure for release of connection whichever is higher. Thus, the petitioner who is acquiring 400 kV connection through 33/66 kV line/related power system constructed for the same, squarely falls in the aforementioned criteria for the provision of power and levy of charges per kW/kVA is valid.
- v) According to the commercial instructions/power regulations of the respondent, the nature of services as of petitioner's company has not been covered in essential industries and further more even the consumers covered under essential services have to observe Peak Load Hours Restrictions and such consumers have to pay PLEC as per prevalent rates for the running of load during Peak Load Hours. Further as per Clause 49.5 of Conditions of Supply, Penalty for violation of Peak Load Hour Restriction is levied. Similarly power factor surcharge in case power factor falls below 0.9 is chargeable from the petitioner.
- vi) The petitioner is an industrial consumer as per article 11.9 of the PPA and also the petitioner falls in the category of consumer as it is being supplied with electricity for its own use i.e the commissioning activities.

- vii) No Service Connection Charges have been paid by the petitioner and no evidence to show that such payment have been made to the respondent has been produced by the petitioner.
- viii) Since the Regulations formulated by each State are basically to further the provisions of Electricity Act 2003 so the same can confer or take away rights as conferred under the Act.
- ix) The present dispute is between the petitioner who is a consumer and Distribution Licensee and this dispute has to be agitated before appropriate consumer Dispute Redressal Forum having jurisdiction over the matter.
- x) The petitioner has agreed in the PPA to be treated at par with industrial consumer and agreed that the charges as are applicable to the industrial consumer shall be borne by the petitioner so the claim that the petitioner be charged only as in case of State run power plants are made to pay is unsustainable. The contract being a valid and binding contract and the fact that petitioner has not disputed any of the terms of the contract establishes that the contract is legal and binding. The charges are as per Supply Code, ESIM and Conditions of Supply and can be recovered by the petitioner having been provided in the PPA.
- xi) The interpretation of "such" to means any other generator is not permissible as the word "such" is followed by "Industrial Consumer".
- xii) By submitting the A&A form on 24.1.2013, the petitioner has agreed to the payment of charges.
- xiii) The petitioner should have approached for appointment of an arbitrator as per the alternative Dispute Settlement Mechanism prescribed in the PPA.
- xiv) Till such time the Commission decided to treat the generator as a distinct or separate class the petitioner have to be placed within the class of consumers so prescribed by this Commission.
- xv) The proviso to regulation 9.1.1(i)(c) of the Supply Code prescribes minimum amount to be charged towards Service Connection Charges irrespective of the actual expenses incurred by the petitioner. The very fact that the petitioner has been supplied with power is sufficient to levy the said charges.
- xvi) PSPCL is entitled to levy charges as the petitioner made all the investment to pre-pone the laying down of the system for evacuation of the power which

involves capital expenditure. The minimum charges have to be paid even if the Licensee has made no expenditure.

Issues

After examining all the documents filed by the parties and submissions made by the learned counsel for the parties, the following issues for consideration have emerged:-

- 1) Has the Commission the jurisdiction to adjudicate in the matter?
- 2) Whether the Service Connection Charges imposed by the Licensee on the petitioner for availing start-up power is in accordance with the provisions of the Electricity Act, 2003 and PSERC(Electricity Supply Code and Related Matters) Regulations, 2007?
- 3) Can the start-up power supply be utilized for initial commissioning of the generator and its auxiliaries?'
- 4) Whether the petitioner is liable to pay various charges such as tariff, peak load exemption charges, power factor surcharge/incentive and other penalties as applicable to Large Supply Industrial Consumers for the start-up power?

Discussions, findings & decisions

- 1) Whereas the issue relating to jurisdiction is concerned, the present dispute relates to classification of the petitioner and applicability of the tariff and is not merely a billing dispute. The Commission has the jurisdiction under Section 86 (1) (a) and (f) to adjudicate dispute between a distribution licensee and a generating company on the issue of applicability of tariff and classification of consumer. This position has also been held by Hon'ble Appellate Tribunal of Electricity in its judgment dated 15.3.2011 in Appeal No. 176 of 2010. Accordingly, the Commission has the jurisdiction to adjudicate the present dispute between the distribution licensee and the generating company.
- 2) The second issue is regarding levy of Service Connection Charges by the respondent on the petitioner for availing start-up power on the basis of Power Purchase Agreement (PPA) signed on 1.9.2008 and provisions of Supply Code.
Section 46 of the Act provides for recovery of any expenses reasonably incurred by the distribution Licensee in providing any electric line or electric

plant used for the purpose of giving that supply as per the Regulations framed by the State Commission. Accordingly, Regulation 9 of PSERC (Supply Code & Related Matters) Regulations, 2007 provide for recovery of expenditure by the licensee from an applicant requiring supply of electricity or additional load/demand.

As per sub Regulation 9.1.1 (c) of the Supply Code, *“the applicant seeking supply for new connection at voltage of 33000 volts and above, will be liable to pay the expenditure incurred for providing the service line and proportionate cost of back-up/common line (33000 volts or above) up to the feeding substation including bay, if any.*

Provided that charges payable will not be less than those computed on per kW/kVA basis”.

The various provisions of the Act and Supply Code has to be read in tandem to settle this issue. The Act clearly provides that Distribution Licensee can recover only those expenses which have been reasonably incurred in providing electric line or plant for release of such connection. The Distribution Licensee must demonstrate that some expenditure has been incurred which will qualify for recovery as per the Regulations framed by the Commission. Secondly the sub-regulations 9.1.1(c) of the Supply Code permit recovery of expenditure incurred for providing the service line and proportionate cost of back up/common line up to the feeding sub station including bay if any. In this case, no service line has been provided by the respondent and also there is no backup/common line for which proportionate cost is to be recovered. The proviso to sub-regulation 9.1.1(c) shall come in to force only in case some expenditure has been incurred by the licensee which will then be subject to minimum of charges calculated on kW/kVA basis. The 400 kV line used for catering start up power is a transmission line of transmission licensee(PSTCL) to be used for evacuation of power from the generating plant and cannot termed as a service line of the Distribution Licensee. The Distribution Licensee has not given any proof of incurring any expenditure for giving start up power as per PPA. The cost of 400 kV system laid by PSTCL for evacuation/dispersal of power from TSPL has been claimed by PSTCL in the ARRs. Thus no service connection charges are recoverable by the respondent from the petitioner. The Commission directs

PSPCL to refund the Service Connection Charges already deposited by the petitioner for obtaining start up power.

- 3) Regarding use of start up power for testing of generator and its auxiliaries, the matter has already been settled by Hon'ble Appellate Tribunal of Electricity in its Judgment dated 15.03.2011 in Appeal No. 176 of 2010. Hon'ble APTEL has held that start-up power can be utilized for initial commissioning of a generator and its auxiliaries. So there is no distinction between commissioning and start-up power. Start up power can be used for initial testing and commissioning of generator and its auxiliaries as well as during forced/planned shutdown.
- 4) The issue regarding payment of various charges for use of start-up power by the petitioner is to be examined in the light of the Judgment of Hon'ble APTEL in Appeal No. 166 of 2010 and various provisions of Power Purchase Agreement signed between the parties.

Firstly, a consumer has been defined in the Act as a person who is supplied with electricity for his 'own use'. The start up power is only to start up the generating unit. Once a generating unit is synchronized with the grid the requirement of startup power ends and power generated is supplied back to the respondent. As per Hon'ble APTEL Judgment dated 24.5.2011 in Appeal No. 166 of 2010, a generating plant taking start up power from Distribution Licensee and supplying power to the same Licensee cannot be termed as a consumer. Thus it is a settled position that petitioner generating company cannot be termed as a consumer for availing start up power from the distribution licensee.

As per article 11.9 of the Power Purchase Agreement signed between the parties, the seller (petitioner) shall be liable to pay for the power and energy consumed for start up of the project and commissioning to the Distribution Licensee at the then prevalent rates payable by such Industrial consumers. The interpretation of the counsel for the petitioner that 'such' means such 'generating company' is not sustainable since 'such' is followed by words 'industrial consumers'. Thus, in view of the agreement between the parties, settling of the consumption towards start up power in energy terms against the power which will be exported to the grid post synchronization, cannot be

permitted and the petitioner is liable to pay various charges such as energy charges, demand charges, power factor surcharge/incentive, voltage surcharge/rebate etc. as provided in Schedule of Tariff for Large Industrial Power Supply (General) (SI of Schedules of Tariff) till a separate schedule for Start up power is approved by the Commission. However, Peak Load Hours Restrictions, Peak Load Hours Exemption Charges or penalty for violation of Peak Load Hours restrictions are not to be made applicable to the petitioner company since start up power is essentially required by every generating station and it should be treated at par with essential services as far as applicability of peak load hour restrictions or PLEC are concerned.

The petition is disposed of accordingly.

Sd/-
(Gurinder Jit Singh)
Member

Sd/-
(Romila Dubey)
Chairperson

Chandigarh
Dated: 08.01.2014