

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

Petition No. 62 of 2023
Date of Order: **14.06.2024**

Petition under Section 62 and Section 86 of the Electricity Act, 2003 read with Regulation 39.7 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014 and Regulation 38.7 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Multi Year Tariff) Regulation, 2019 for recovery of under-recovered energy charges from the Respondents due to shortfall in energy generation during the FY 2017-18, FY 2018-19, FY 2020-21, FY 2021-22 and FY 22-2023.

In the matter of: M/s Everest Power Private Limited (EPPL) Plot No. 13, Sy.No.64 Part, Block- D, Third Floor, Hitech City Layout, Madhapur Village, Hyderabad-500081

.....Petitioner

Versus

1. M/s PTC India Limited (PTC) Executive Director, PTC India Limited, 2nd Floor, NBCC, 15, Bhikaji Cama Place, New Delhi, 110066.
2. M/s Punjab State Power Corporation Limited, The Chief Engineer (PP & R), Punjab State Power Corporation Limited, D-3, Shakti Vihar, Patiala-147001.
3. The Chief Engineer (APR&TR), Punjab State Power Corporation Limited, F-3, Shakti Vihar, Patiala-147001.

.....Respondents

Commission: Sh. Viswajeet Khanna, Chairperson

Sh. Paramjeet Singh, Member

EPPL: Sh. Parinay Deep Shah, Advocate (through VC)

PTC: Sh. Shikhar Verma, Advocate (through VC)

PSPCL: Sh. Anand K Ganesan, Advocate (through VC)

ORDER

1. The Petitioner (EPPL) has filed the instant petition for seeking recovery of under-recovered energy charges on account of shortfall in energy generation during the FY 2017-18, FY 2018-19, FY 2020-21, FY 2021-22 and FY 22-2023. It has been submitted that:

1.1 The petitioner is a 'Generating Company' as defined under Section 2(28) of the Electricity Act, 2003, and is operating & maintaining its 100 MW (2x50 MW) Malana II Hydro Electric Project (Project) in the State of Himachal Pradesh (HP). Its entire power (except the free share of HP) since its Commercial Operation Date (COD), which is 12.07.2012, is being supplied to PSPCL through PTC under back-to back long-term PPA dated 25.07.2005 between EPPL & PTC and PSA dated 23.03.2006 between PTC and PSPCL.

1.2 That EPPL, PSPCL and PTC India executed a tripartite agreement on 03.01.2013 in compliance with the Commission's Order dated 06.11.2012 and earlier orders of the Commission. The said tripartite agreement inter-alia provided that this Commission shall determine the tariff in terms of the Regulations of the Commission for the sale and purchase of electricity under the PPA and PSA. Therefore, this Commission, under Section 86(1) of the Electricity Act, 2003 is vested with the jurisdiction to regulate the tariff of the Petitioner. In accordance with the same, the Commission has been determining the tariff/AFC of the Project in terms of the applicable Regulations.

1.3 Regulation 39 (7) (i) of the Tariff Regulation 2014, specify that in case the energy shortfall occurs within ten years from the

date of commercial operation of a generating station, the Energy Charge Rate (ECR) for the year following the year of energy shortfall shall be computed based on the formula specified in the Regulations with the modification that the Design Energy for the year shall be considered as equal to the actual energy generated during the year of the shortfall, till the energy charge shortfall of the previous year has been made up, after which normal ECR shall be applicable. Pertinently, the shortfall energy charges ought to be paid on a rolling basis and no application ought to be filed.

1.4 Regulation 38(8) of PSERC Tariff Regulation 2019, specify that the short fall energy charges in comparison to fifty percent of the AFC for FY 2020-21, FY 2021-22 and FY 2022-23 is provisioned to be recovered in six equal installments after an application is made for the same.

1.5 It is submitted that the Saleable Scheduled Energy in FY 2017-18 was 323.97 MUs, in FY 2018-19 it was 302.40 MUs, in FY 2020-21 it was 322.17 MUs, in FY 2021-22 it was 300.17 MUs and in FY 2022-23 it was 299.69 MUs as against Saleable Design Energy of 350.26 MU. Thus, there is a total shortfall in the generation of 26.65 MUs, 47.86 MUs, 28.09 MUs, 50.09 MUs and 50.37 MUs during FY 2017-18, FY 2018-19, FY 2020-21, FY 2021-22, and FY 2022-23 respectively.

1.6 Accordingly, the present submission is for recovery of under-recovered Energy Charges for FY 2017-18, FY 2018-19, FY 2020-21 FY 2021-22, and FY 2022-23 as detailed below:

| FY | Net Energy Billed (MU) | ECR (Rs/Unit) | AFC (Cr.) | Energy Charges to be recovered (Cr.) | Energy Charges actually recovered (Cr.) | Under recovery of Energy Charge (Cr.) |
|---------|------------------------|---------------|-----------|--------------------------------------|---|---------------------------------------|
| | 1 | 2 | 3 | 4=50%*3 | 5=1*2 | 6=4-5 |
| 2017-18 | 323.97 | 2.302 | 161.42 | 80.70 | 74.58 | 6.13 |
| 2018-19 | 302.40 | 2.374 | 152.13 | 76.07 | 71.79 | 4.28 |
| 2020-21 | 322.17 | 2.104 | 147.41 | 73.71 | 67.78 | 5.92 |
| 2021-22 | 300.17 | 2.046 | 143.32 | 71.66 | 61.42 | 10.24 |
| 2022-23 | 299.69 | 1.899 | 133.05 | 66.53 | 56.72 | 9.80 |

1.7 It is submitted that against the Design Energy of 403.27 MU:

- a) The total generation at the generating end during FY 2017-18 was 368.88 MU resulting in a shortfall of 34.39 MU (403.27 -368.88). The reasons for the same are as under:

| | |
|---|----------|
| A. Shortfall due to reasons beyond the control of the petitioner | |
| Energy shortfall due to less inflow from design inflow | 29.88 MU |
| Total (A) | 29.88 MU |
| B. Shortfall due to any other reason | |
| Due to annual maintenance works | 4.50 |
| Total (B) | 4.50 MU |
| Grand Total (A+B) | 34.38 MU |

- b) The total generation at the generating end during FY 2018-19 was 349.39 MU resulting in a shortfall of 53.88 MU (403.27-349.39). The reasons for the shortfall are as under:

| | |
|---|----------|
| A. Shortfall due to reasons beyond the control of the petitioner | |
| Energy shortfall due to less inflow from design inflow | 48.38 MU |
| Total (A) | 48.38 MU |
| B. Shortfall due to any other reason | |
| Due to annual maintenance works | 5.5 |
| Total (B) | 5.5 |
| Grand Total (A+B) | 53.88 MU |

- c) The total generation at the generating end during FY 2020-21 was 370.45 MU resulting in a shortfall of 32.82 MU (403.27-370.45). The reasons for the shortfall are as under:

| | |
|---|----------|
| A. Shortfall due to reasons beyond the control of the petitioner | |
| Energy shortfall due to less inflow from design inflow | 32.82 MU |
| Total (A) | 32.82 MU |
| B. Shortfall due to any other reason | |
| Nil | 0 |
| Total (B) | 0 |
| Grand Total (A+B) | 32.82 MU |

- d) The total generation at the generating end during FY 2021-22 was 345.65 MU resulting in a shortfall of 57.62 MU (403.27 -345.65). The reasons for the shortfall are as under:

| | |
|---|----------|
| A. Shortfall due to reasons beyond the control of the petitioner | |
| Energy shortfall due to less inflow from design inflow | 57.62 MU |
| Total (A) | 57.62 MU |
| B. Shortfall due to any other reason | |
| Nil | 0 |
| Total (B) | 0 |
| Grand Total (A+B) | 57.62 MU |

- e) The total generation at the generating end during FY 2022-23 was 343.56 MU resulting in a shortfall of 59.71 MU (403.27-343.56). The reasons for shortfall are as under:

| | |
|---|----------|
| A. Shortfall due to reasons beyond the control of the petitioner | |
| Energy shortfall due to less inflow from design inflow | 59.71 MU |
| Total (A) | 59.71 MU |
| B. Shortfall due to any other reason | |
| Nil | 0 MU |
| Total (B) | 0 |

| | |
|------------------|-------|
| Grand Total(A+B) | 59.71 |
|------------------|-------|

- 1.8 That on account of energy shortfall from the COD, it was evident that the Design Energy so determined was not being achieved by the Project. Hence, the Petitioner was constrained to approach Water and Power Consultancy Services (India) Limited (WAPCOS) for a review of the earlier water availability studies carried out by the Project as additional discharges/inflow data from 2005-06 onwards had become available. Subsequently, during the course of proceedings in Petition No. 43 of 2021, upon permission from this Commission, the Petitioner approached the Central Water Commission (CWC) and Central Electricity Authority (CEA) for fresh determination of Design Energy. Upon submission of fresh revision of the Design Energy proposal based on updated hydrology data of water availability series of the Hydro Project for the period 2001-02 to 2019-20, the Design Energy was revised. The Design Energy determined by CEA and also accepted by the Commission is 326.57 MU. Thus, it is to the knowledge of the Respondents and of the Commission that the submissions made by the Petitioner are bonafide.
- 1.9 The current filing is submitted while reserving all rights, and does not waive any submissions previously made regarding shortfall charges for the financial years 2012 to 2016. This petition also does not compromise any positions taken in DFR 589 of 2023, filed before the Honorable Appellate Tribunal for Electricity.
- 1.10 PRAYER: It is, therefore, prayed that the PSERC may:

- a) Allow recovery of energy charges amounting to INR 6.13 Cr. in FY 2023-24 against the shortfall in the saleable generation of 26.65 MU in FY 2017-18 as per Regulations 39.1(i) of PSERC (Terms and Conditions of Multi-Year Tariff) Regulation, 2014.
- b) Allow recovery of energy charges amounting to INR 4.28 Cr. in FY 2023-24 against the shortfall in the saleable generation of 47.86 MU in FY 2018-19 as per Regulation 39.7(i) of PSERC (Terms and Condition of Multi-Year Tariff) Regulation, 2014.
- c) Allow recovery of energy charges amounting to INR 5.92 Cr. in FY 2023-24 against the shortfall in the saleable generation of 28.09 MU in FY 2020-21 as per Regulation 38(8) of PSERC (Terms and Condition of Multi-Year Tariff) Regulation, 2019.
- d) Allow recovery of energy charges amounting to INR 10.24 Cr. in FY 2023-24 against the shortfall in the saleable generation of 50.10 MU in FY 2021-22 as per Regulation 38(8) of PSERC (Terms and Condition of Multi-Year Tariff) Regulation, 2019.
- e) Allow recovery of energy charges amounting to INR 9.80 Cr. in FY 2023-24 against the shortfall in the saleable generation of 51.57 MU in FY 2022-23 as per Regulation 38(8) of PSERC (Terms and Condition of Multi-Year Tariff) Regulation, 2019.
- f) Allow issuance of supplementary bills after the approval of revised estimates for FY 2022-23 in Petition No 75 of 2022, pending before this Commission.
- g) It is also prayed that this Commission may allow recovery of the Shortfall amount along with simple interest at the rate equal to the bank rate (i.e., SBI plus 350 basis point) as of 1st April of the respective years of the tariff period in six equal monthly installments.
- h) Direct Respondents to pay the regular monthly energy invoices till the finalization of the matter by this Commission.

i) Pass such other and further order(s) as are deemed fit and proper in the facts and circumstances of the case.”

2. PSPCL's Objections to the Petition's Maintainability:

On 12.04.2024, PSPCL filed preliminary objections in its reply to the Petition. PSPCL also challenged and called into question the maintainability of the Petition. It sought leave to file a detailed reply later if required. The issues raised by PSPCL are summarized as under:

2.1 Claims being Barred by Limitation:

a) It is submitted that the claims pertaining to three years prior to the filing of a suit are barred by the law of limitation and as such are not maintainable. That in terms of the Limitation Act, 1963, there is a bar for seeking a legal recourse in a court of law for recovery of such amounts. Therefore, it is clear that no claims are maintainable except for a period of three (3) years before the date of filing of a Petition. Since the present petition has been filed on 10.11.2023, the claims as sought for in the present petition prior to 10.11.2020 are clearly barred by limitation.

b) Also, the Petitioner came to file Petition No. 43 of 2021 seeking adjudication of dispute with PSPCL relating to the recovery of shortfall charges from FY 2012-13 to FY 2018-19. It is relevant to note that even in the present Petition, the Petitioner has sought for recovery of shortfall charges for FY 2017-18 and FY 2018-19 which is overlapping from the claims made by the Petitioner in Petition No. 43 of 2021. In absence of any liberty or

express waiver of limitation by the Commission therein, it is not understood as to how the claims for FY 2017-18 and FY 2018-19 are even maintainable which are clearly barred by the law of limitation.

2.2 Proviso in Regulations for Revision of the Design Energy:

Further, the Project was commissioned on 12.07.2012. The Petitioner's stand is that there has been lower discharge since the commissioning of the Project and therefore it approached the CEA in 2021 for the revision of its Design Energy. However, in terms of the CERC Tariff Regulations, 2014, the Petitioner was required to approach CEA with relevant hydrology data for revision of Design Energy immediately after FY 2015-16 (commissioning of the project being in 2012). Since, the Petitioner did not approach the CEA at the relevant time, it cannot be granted with the benefit of shortfall charges on account of losses due to its own failures since the shortfall in energy generation would not have arisen had the Petitioner approached the CEA at the appropriate time after FY 2015-16.

2.3 Reasons for Shortfall in Energy Generation

a) Regulation 39 of the PSERC Tariff Regulations, 2014 and Regulation 38 of the PSERC MYT Regulations, 2019 specifically states that the shortfall charges can be sought for in case of shortfall in generation only for reasons beyond the control of the generating station. The applicable regulations only take into account reasons which are beyond the control of the generator. The qualifying criteria thus being that the shortfall must have occurred for reasons beyond the control of the generator. Mere shortfall in

generation of energy does not inherently entitle the generator to the shortfall charges.

b) Therefore, when the regulations provide for the shortfall charges to be paid where the shortfall is for reasons beyond the control of the generator, the onus is on the generator to establish that the reasons are beyond its control. However, the Petitioner has not substantiated its claim with relevant data. The vague reasons given by the Petitioner for shortfall in generation appear to be two-fold:

- (i) Shortfall due to less inflow from design inflow; and
- (ii) Shortfall due to annual maintenance works

c) It is submitted that there cannot be a case where the Petitioner makes claims towards energy shortfall on account of reasons which were within its control. From the reasons as mentioned by the Petitioner towards energy shortfall for the period, it appears that the plant had undergone planned outages on account of annual maintenance. This was within the control of the Petitioner as such any burden on account of the same cannot be passed onto the consumers. Further, the claims of the Petitioner is silent on the aspect whether the plant was under any sort of forced outage apart from annual maintenance. The information ought to be provided after certification from Northern Region Load Dispatch Centre (NRLDC) which is the nodal agency and approves the maintenance as well as establishing record for the forced outages of the plant.

- d) At this juncture, it is submitted that PSPCL is in a double jeopardy situation where on one hand PSPCL has not been supplied with the tied-up power and would have had to procure costlier alternate power while on the other hand, PSPCL is now being asked to make good the generator for the shortfall in energy generation. It is for this reason, that the legislative intent was to limit adjudication on the claims which are beyond the control of the generator.
- e) Thus, any claim towards shortfall on account of annual maintenance works and forced outages, if any, are not maintainable and ought to be rejected outrightly. Further, this position has been consistently upheld by the Central Commission. The Petitioner craves leave to refer to the said decisions at the time of hearing.
- f) That other reason espoused by the Petitioner is that the substantial claims of shortfall was on account of less inflow from the design inflow. The Petitioner's case is that there has been lower discharge since the commissioning of the Project and therefore for the revision of the Design Energy of the project the Petitioner approached the CEA in 2021. It is reiterated that the Petitioner was required to approach the CEA for revision of its Design Energy immediately after FY 2015-16, which it evidently failed to do so. The Petitioner cannot be granted with the benefit of shortfall charges on account of losses due to its own failures since the shortfall in energy generation would not have arisen had the Petitioner approached the CEA at the appropriate time (after FY 2015-16).

2.4 That the petitioner has claimed interest on the shortfall charges, which is wrong and denied. It cannot be that the Petitioner sleeps over its rights over the years, fails to file requisite applications before the Commission, and even fails to approach the CEA for getting its Design Energy re-rated and despite all of these lacunas, now seeks for interest on the shortfall charges. Further, it is added that claim of shortfall charges is not like determination of tariff. It is an application where petitioner is required to establish the facts that the shortfall is due to reasons beyond control of generator like a force majeure claim. Such force majeure claims are considered without interest. As such any claim of the Petitioner towards interest is misconceived and ought to be rejected.

2.5 Further, the Petition has been silent on the issue of whether the Petitioner has earned any revenue under the Deviation Settlement Mechanism (DSM)/Unscheduled Interchange (UI). The Central Commission in various orders has held that revenue earned through DSM ought to be adjusted towards the total claim towards shortfall in energy charges. In view thereof, the Commission may direct the Petitioner to provide the details of the revenue, if any, earned through DSM.

2.6 The respondent craves leave to submit a detailed reply to petition if required at a later stage.

3. Rejoinder by the Petitioner

On 17.05.2024, the Petitioner filed its rejoinder to PSPCL's reply reiterating its earlier submissions and further adding that:

3.1 It is denied that the Petitioner had made claims for FY 2017-18 and FY 2018-19 in the Petition No. 43 of 2021 before the Commission. In the said Petition, the Appellant has sought refund of the amounts wrongfully deducted by PSPCL for FY 2012-13 to FY 2016-17. The Petitioner, vide the present Petition, has for the first time prayed before this Commission for the recovery of the shortfall energy for the FY 2017-18 and FY 2018-19. Therefore, the Respondent's contention that there exists an overlap vis-à-vis the claims are misplaced. The said claims made by the Petitioner cannot be regarded as time barred since; it is the first time that these under-recovered energy charges are being claimed by the Petitioner.

Further, in *State of Kerala & Ors. vs V.R. Kalliyankutty & Anr.*; (1999) 3 SCC 657, the Hon'ble Supreme Court held as under:

"16. ... An Act must expressly provide for such enlargement of claims which are legally recoverable, before it can be interpreted as extending to the recovery of those amounts which have ceased to be legally recoverable on the date when recovery proceeding are undertaken. Under the Kerala Revenue Recovery act such a process of recovery would start with a written requisition issued in the prescribed form by the creditor to the Collector of the district as prescribed under Section 69(2) of the said Act. Therefore, all claims which are legally recoverable and are not time-barred on that date can be recovered under the Kerala Revenue Recovery Act.

17.....Looking to the scheme of recovery and refund under Sections 70 and 71, "amounts due" under Section 21 are those amounts which the creditor could have recovered had he filed a suit."

It is also pertinent to mention the Regulation 39.7 of the Tariff Regulations 2014 about the Recovery of Shortfall Energy Charges. The relevant part of the Regulation is extracted hereinafter:

“39.7 In case actual total energy generated by a hydro generating station during a year is less than the design energy for reasons beyond the control of the generating company, the following treatment shall be applied on a rolling basis:

- i. In case the energy shortfall occurs within ten years from the date of commercial operation of a generating station, the ECR for the year following the year of energy shortfall shall be computed based on the formula specified above with the modification that the DE for the year shall be considered as equal to the actual energy generated during the year of the shortfall, till the energy charge shortfall of the previous year has been made up, after which normal ECR shall be applicable;”*

3.2 It is submitted that the Petitioner has claimed the shortfall energy charges under the provisions of the prescribed State Commission's Regulations, where under Regulation 38(8) of the Tariff Regulations 2019 provides for the recovery of the shortfall and the same has been sought by the Petitioner to claim the under-recovered energy charges. The short fall energy charges in comparison to fifty percent of the AFC for FY 2020-21, FY 2021-22 and FY 2022-23 is provisioned to be recovered in six equal installments after an application is made for the same. Further, it is pertinent to mention that there was no shortfall of the energy for the FY 2019-20. It is to be noted that the

provision for approaching CEA has been introduced for the first time vide the Tariff Regulations 2019 and as such there existed no obligation to approach CEA until the said Tariff Regulations came in force i.e. upto 31.03.2020. The relevant portion of the Regulations 2019, is extracted, hereunder:

"38.7. In case the saleable scheduled energy (ex-bus) of a hydro generating station during a year is less than the saleable design energy (ex-bus) for reasons beyond the control of the generating station, the treatment shall be as per Regulation 38.8, on an application filed by the generating company.

38.8. Shortfall in energy charges in comparison to fifty percent of the annual fixed cost shall be allowed to be recovered in six equal monthly installments:

Provided that in case actual generation from a hydro generating station is less than the design energy for a continuous period of four years on account of hydrology factor, the generating station shall approach the Central Electricity Authority with relevant hydrology data for revision of design energy of the station.

3.3 It is denied that the Petitioner is making claims towards energy shortfall on account of reasons which were within its control. It is submitted that:

- a) The low water discharge witnessed by the Project after its commissioning and resulting in energy shortfall could not be said to be within the reasonable control of the Petitioner despite the exercise of due diligence. It is submitted that the years for which the Petitioner is seeking shortfall energy charges in the present petition has had very low water discharge and therefore it could not generate power

corresponding to the stated design energy. It is further submitted that this Commission has already revised the design energy in its Final Order in Petition 43 of 2021.

b) It is also denied that the claims for the shortfall energy claims cannot be made on account of outages due to annual maintenance works. It is submitted that the Petitioner has been communicated timely to PSPCL about the maintenance works being conducted. However, it is pertinent to note that maintenance works do not imply a halt on the generation activities and therefore is included in 'other reasons'. Therefore, the Respondent's reasoning that the shortfall cannot be considered based on the maintenance work is flawed. Moreover, as per the details provided, the maintenance works had taken place only during the FY 2017-18 and FY 2018-19 and therefore, cannot be termed as annually planned maintenance work.

c) It is submitted that the pre-dominant cause of generation shortfall from 2012 to 2017 was low water discharge which was undisputedly beyond the Petitioner's control. This was verified and affirmed by both the CEA and WAPCOS reports. The shortfall in design energy of the Project is for the reasons that are in the nature of Force Majeure events, as would be evident from the documents submitted by the Petitioner along with the Petition No. 43 of 2021, including the Report submitted by WAPCOS.

4. On 22.05.2024, the Petition was taken up for hearing on admission. The Ld. Counsel for the parties argued the matter on the

maintainability of the petition. After hearing the parties, the Order on maintainability of the petition was reserved.

5. Analysis and Decision of the Commission:

The Commission has examined the submissions and arguments thereon made by the parties. The Petitioner is seeking the payment of shortfall in energy charges on account of saleable scheduled/billed energy being less than the saleable design energy for FY 2017-18, FY 2018-19, FY 2020-21, FY 2021-22 and FY 22-2023. Challenging the Petitioner's claims, PSPCL has filed preliminary objections to the very maintainability of the Petition. In view of the pertinent issues of Limitation and the provision of the applicable Regulations raised by PSPCL on the maintainability of the Petition, the Commission deems it fit to first examine the same, as under:

5.1 Issue of Limitation:

PSPCL's contention is that in terms of the Limitation Act, 1963, there is a bar for seeking a legal recourse in a court of law for recovery of claims beyond three years prior to the filing of a suit.

In response, the Petitioner, while admitting that vide the present Petition it has prayed before the Commission for recovery of the shortfall energy charges for the FY 2017-18 and FY 2018-19 for the first time, has placed reliance on the Hon'ble Supreme Court *Judgment in case of the State of Kerala & Ors. vs V.R. Kalliyankutty & Anr.; (1999) 3 SCC 657*, citing the relevant part of the Order which is as under:

“16. ... An Act must expressly provide for such enlargement of claims which are legally recoverable, before it can be interpreted as extending to the recovery of those amounts which have ceased to be legally recoverable on the date when recovery proceeding are undertaken. Under the Kerala Revenue Recovery act such a process of recovery would start with a written requisition issued in the prescribed form by the creditor to the Collector of the district as prescribed under Section 69(2) of the said Act. Therefore, all claims which are legally recoverable and are not time-barred on that date can be recovered under the Kerala Revenue Recovery Act.”

Commission’s Analysis:

The Commission peruses the provisions of the PSERC MYT Regulations 2014, applicable to the Petitioner’s project for FY 2017-18 to FY 2019-20, as cited by the Petitioner, which read as under:

“39.7 In case actual total energy generated by a hydro generating station during a year is less than the design energy for reasons beyond the control of the generating company, the following treatment shall be applied on a rolling basis:

- i. In case the energy shortfall occurs within ten years from the date of commercial operation of a generating station, the ECR for the year following the year of energy shortfall shall be computed based on the formula specified above with the modification that the DE for the year shall be considered as equal to the actual energy generated during the year of the shortfall, till the energy charge shortfall of the previous year has been made up, after which normal ECR shall be applicable;”*

As is evident, the shortfall, if any for reasons beyond the control of the generating company, is required to be claimed in the year following the year of energy shortfall. As such, the shortfall, if any, in FY 2017-18 and FY 2018-19, was required to be claimed in the FY 2018-19 and FY 2019-20 respectively. However, as per the Petitioner's own admission, it is the first time that the recovery of the shortfalls for the FY 2017-18 and FY 2018-19 are being claimed vide the present petition.

The Commission notes that the Limitation Act provides that any suit relating to contracts must be made within the period of three (3) years. The case judgment cited above by the Petitioner also does not supports its case, as it only states that, 'all claims which are legally recoverable and are not time-barred on that date can be recovered'. The judgment is also based on specific provisions in the relevant Kerala Act in a different context. Further, the Commission refers to the Hon'ble Supreme Court judgment in the matter of Andhra Pradesh Power Coordination Committee & Ors. Vs Lanco Kondapalli Power Ltd. & Ors.; (2016) 3 SCC 468, cited earlier in Petition 43 of 2021, which is absolutely pertinent to the present issue, wherein it has been held as under:

"30.....In the absence of any provision in the Electricity act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation."

In view of above, the Commission is of the view that the Petitioner's claims for the shortfall energy charges for FY 2017-18 and FY 2018-19 raised in the present petition are barred by the Limitation Act and are hence not maintainable.

5.2 Proviso in the Regulations for Revision of Design Energy:

PSPCL's contention in its challenge to the maintainability of the Petition is that, since the Petitioner's claim is that there has been lower discharge since the commissioning of the Project i.e. 12.07.2012, it ought to have approached the CEA with relevant hydrology data for the revision of its Design Energy immediately after FY 2015-16 in terms of the applicable CERC Tariff Regulations, 2014. Therefore, the Petitioner cannot now seek to claim payment of any shortfall charges on rolling basis.

Whereas, the Petitioner's plea is that the provision for approaching CEA was introduced for the first time vide the Tariff Regulations 2019. It has also been mentioned that there was no shortfall of the energy generation from the project in the FY 2019-20. The Petitioner is seeking claim of the shortfall of energy charges for FY 2020-21, FY 2021-22 and FY 2022-23 under the provisions of Regulation 38 of the Tariff Regulations 2019, which provides for the recovery of the shortfall energy charges in comparison to fifty per cent of the AFC in six equal instalments after an application is made for the same.

Commission's Analysis:

The Commission refers to the relevant extract of the PSERC MYT Tariff Regulations 2019, applicable for the Control Period of FY 2020-21 to FY 2022-23, which reads as under:

"38.7. In case the saleable scheduled energy (ex-bus) of a hydro generating station during a year is less than the saleable design energy (ex-bus) for reasons beyond the control of the generating station, the treatment shall be as per Regulation 38.8, on an application filed by the generating company.

38.8. Shortfall in energy charges in comparison to fifty percent of the annual fixed cost shall be allowed to be recovered in six equal monthly installments:

Provided that in case actual generation from a hydro generating station is less than the design energy for a continuous period of four years on account of hydrology factor, the generating station shall approach the Central Electricity Authority with relevant hydrology data for revision of design energy of the station."

As is evident, the above Regulations allow recovery of the Shortfall in energy charges subject to the proviso contained therein that, 'in case actual generation from a hydro generating station is less than design energy for a continuous period of four years on account of hydrology factor, the generating station shall approach the CEA with relevant hydrology data for revision of design energy of the station.

The Commission observes that the Petitioner is maintaining the position that it is continuously facing the energy shortfall, since the COD of the project (i.e FY 2012-13), due to lower water discharge. Contrarily, the Petitioner has made a submission herein that there was no shortfall in energy for the FY 2019-20 which seems to be factually contradictory. A fact check of the record reveals that the scheduled/ billed energy of the Petitioner's project as per the True-up of FY 2019-20 submitted

by PSPCL in Petition No. 45 of 2020 is shown as 332.40 MU (i.e. less than its stated saleable design energy of 350.26 MU at that time).

Further, the Petitioner's submission that the provision for approaching CEA was introduced for the first time vide the Tariff Regulations 2019, is also misconceived. The Commission, while referring to the CERC Tariff Regulations 2014, applicable to the Petitioner's project for the period of FY 2014 to FY 2016-17, has already observed in Petition No. 43 of 2021 that:

"9.2....The Commission observes that the CERC Tariff Regulations, 2014 specify that in case the actual generation is less than the design energy for a continuous period of four (4) years on account of hydrology, the generating station shall approach the CEA with relevant data for revision of design energy of the station. As the Petitioner is claiming shortfall in generation since the commissioning of the project i.e. 12.07.2012, it was required to approach the CEA with the relevant hydrology data for revision of design energy of its station immediately after FY 2015-16."

As already observed by the Commission in the above referred Order, the Petitioner failed to approach CEA in time for a reassessment of its Design Energy. In fact, it did so only after the issue came up for discussion before the Commission in Petition No. 43 of 2021. The delay in following the Regulations and getting the appropriate reappraisal done is a lapse entirely attributable to the Petitioner and thus it cannot now be allowed to seek a remedy and benefit from it as an afterthought.

In view of above, the Commission is of the view that the Petitioner's claim for the shortfall energy charges for FY 2020-21, FY 2021-22 and FY 2022-23 is also not maintainable.

5.3 Also, PSPCL has rightly contended that the Petitioner is required to establish that the shortfall in energy generation was for reasons beyond its control, which it has not done based on substantial data beyond quoting shortfall in flow of water. The other reason quoted of undergoing maintenance is, in fact, entirely within the control of the Petitioner. PSPCL also correctly argued that while it faced a shortage of committed energy from this project which it had to make up from other more expensive sources, it faces a double jeopardy now in this claim from the Petitioner who aims to profit from its own lapses in not approaching the CEA in time for a re-assessment of its Design Energy. The issue of shortfall and the claim would not have arisen if the Design Energy had been got recalibrated in time as per the Regulations.

The Petition is therefore dismissed in limine.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh

Dated: 14.06.2024