

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

Petition No.02 of 2021
Date of Order:19.07.2021

Petition under Section 86(1)(b) of the Electricity Act, 2003, seeking approval of Amendment No. 3 dated 25.08.2015 to the PPAs dated 01.01.2014 with M/s Bhanuenergy Infrastructure Power Limited and M/s Bhanuenergy Industrial Development Limited.

AND

In the matter of: Punjab State Power Corporation Limited, The Mall,
PSEB Head office Patiala – 147001, Punjab.

...Petitioner

Vs

1. Bhanuenergy Infrastructure Power Limited, 906-907,Indraprasth Corporate, opp. Venus Atlantis, 100 ft. Road, Prahladnagar, Ahmedabad- 380015 Gujarat.
2. Bhanuenergy Industrial Development Limited , 906-907,Indraprasth Corporate, opp. Venus Atlantis, 100 ft. Road, Prahladnagar, Ahmedabad- 380015 Gujarat.
3. Punjab Energy Development Agency, Plot No. 01 & 02, Sector 33D, Chandigarh- 160020.

...Respondents

Present: Mr. Viswajeet Khanna, Chairperson
Ms. Anjuli Chandra, Member
Mr. Paramjeet Singh, Member

ORDER:

1. Punjab State Power Corporation Limited (PSPCL) has filed the present petition seeking approval of Amendment No. 3 dated 25.08.2015 to the PPAs dated 01.01.2014 executed with Bhanuenergy Infrastructure Power Limited (BIPL) and Bhanuenergy Industrial Development Limited (BIDL).

2. The petition was admitted vide Order dated 19.02.2021 and the respondents were directed to file their respective reply by 16.03.2021 and the rejoinder thereto, if any, by the petitioner by 31.03.2021. PEDDA filed its reply vide memo no. 2521 dated 29.04.2021 and PSPCL filed its rejoinder to the same vide memo no. 6190 dated 18.05.2021. The learned counsel for the parties addressed their respective arguments during the hearing held on 19.05.2021 and Respondent No. 1 and 2 (BIPL & BIDL) were directed to file their response, if any within two weeks. BIPL & BIDL filed the common reply dated 16.06.2021 and PSPCL filed its rejoinder to the same vide memo dated 22.06.2021.

3. Submissions of the Petitioner (PSPCL)

Submissions made by the PSPCL in the petition are summarized as under:

- 3.1 PEDDA the nodal agency for the State of Punjab for RE projects invited e-tender for allocation of 300 MW of Solar PV power projects in the year 2013. On the basis of the bids received, PEDDA allocated a total capacity of 250 MW Solar PV power projects to various developers, including the development of 2x15 MW Solar PV Projects to Moser Baer (now BIPL and BIDL) at the discovered tariffs of Rs. 8.63/kWh and Rs.8.52/kWh respectively.
- 3.2 The Commission vide its Orders dated 14.11.2013 & 03.12.2013 in Petition 52 of 2013 filed by PSPCL, approved the procurement of electricity from the said solar projects at the tariffs discovered in the competitive bidding process. The tariffs approved were to be applicable upto 31.03.2015 provided the PPAs were signed on or before 31.03.2014 and the entire capacity covered in each PPA was commissioned on or before 31.03.2015.

- 3.3 The Implementation Agreements (IAs) were signed by PEDA on 30.11.2013 and PPAs were executed between the parties on 01.01.2014 with SCOD as 31.01.2015. Subsequently, there were two amendments in the PPAs; 1st amendment pertaining to a change of name of the company and 2nd amendment pertaining to an incorporation of the location of the project site.
- 3.4 As per Clause 10.1.0 of the PPAs, BIPL and BIDL were required to Commission the solar power plants within 13 months from the effective date i.e. date of signing of the PPA. In terms of the above, SCOD in both cases was 31.01.2015. Further, any delay in commissioning beyond 31.01.2015 and till 31.03.2015 could be permitted subject to forfeiture of bank guarantee by PEDA. Any delay beyond 31.03.2015 and upto 30.06.2015 could be permitted subject to the payment of liquidated damages by the generators to PSPCL. PEDA exercised its powers vested under clause 10.5(ix) of the Implementation Agreement and extended the date of commissioning for certain solar developers including BIPL and BIDL from 31.01.2015 to 15.03.2015.
- 3.5 BIPL & BIDL approached the Commission vide Petitions 15 & 16 of 2015 respectively, seeking project specific extension for 6 months (from 31.03.2015 to 30.09.2015) in the period of commissioning, at the already approved tariff of Rs. 8.63/kWh and Rs. 8.52/kWh, citing reasons beyond their control causing a delay in commissioning of their power plants.
- 3.6 The Commission vide its Orders dated 12.06.2015 decided to allow extension in applicability of the already approved tariff for the petitioners' projects till 30.04.2015 in place of 31.03.2015. For a delay beyond 30.04.2015 the tariff was fixed as Rs.6.88 per kWh provided the projects are commissioned by 31.03.2016, without in

any way impinging upon the other contractual terms and conditions between the parties.

3.7 PEDA amended the IAs with BIPL and BIDL on 28.07.2015 incorporating the Commission's Order dated 12.06.2015 and PSPCL entered into a 3rd Amendment in the PPA dated 25.08.2015 with BIPL & BIDL incorporating the revised tariff of Rs. 6.88/kWh and revised the SCOD to 31.03.2016. The Solar Projects of BIPL & BIDL were thereafter finally commissioned on 29.03.2016.

3.8 Due to extension of SCOD vide aforementioned IAs/PPAs, the due dates of forfeiture of Bank Guarantee and Liquidated Damages also got extended. However, such extension of the SCOD is subject to the approval of the Commission.

3.9 In the facts and circumstances mentioned above, it is prayed that the Commission may be pleased to:

- a) Approve the 3rd Amendment dated 25.08.2015 entered into between PSPCL and BIPL & BIDL respectively;
- b) Pass such other further order(s) as the Commission may deem just keeping in view the facts of the present case.

4. Submissions by PEDA

PEDA, the State Nodal agency for development of RE projects in Punjab, in its reply to the petition vide memo No.2521 dated 29.04.2021, has raised the following issues:

4.1 That no cause of action has arisen to file the instant petition as this Commission vide its Orders dated 12.06.2015 in Petitions 15 &16 of 2015 has already rendered its decision inter-alia with regard to the admissible tariff and the commissioning date determined to be 31.03.2016. The orders passed by the Commission may be read in

toto and may not be read in isolation as is being attempted by the petitioner.

- 4.2 Since the IA happens to be the main contractual document under which the project has been conceived, therefore, the clauses with regard to the commissioning of the project mentioned in the IA shall prevail over all the subsequent contractual documents such as the PPA.
- 4.3 That the 3rd Amendment to the PPA carried out by PSPCL with the developers was inter-se between these parties, to which PEDDA was not a party. Since the amendment to the agreement is undisputed between these parties, therefore, it has complete legal sanctity in the eyes of law.
- 4.4 The petitioner has approached this Commission only with regard to seeking approval of the third amendment in the PPA, without there being any whisper about the approval of the original PPA as also the subsequent first and second amendments carried out by the petitioner therein. Apparently, the petitioner by way of the present petition has approached this Commission with some motive under the garb of seeking approval to the third amendment. The petition is hugely delayed since the 3rd amendment was carried out in the year 2015. Hence the petitioner is approaching the Commission after a lapse of almost 6 years.
- 4.5 It is denied that the SCOD mentioned by the petitioner in the amended PPA was subject to the approval of the Commission, as no such stipulation can be found in the third amendment to the PPA under reference. The petition filed by the petitioner is a misuse of the process of law and contains misleading and misconceived facts/submissions. Thus, the captioned petition may be dismissed with exemplary costs.

5. Submissions of BIPL & BIDL

BIPL and BIDL filed a common reply dated 16.06.2021. The submissions made therein are summarized as under:

- 5.1 The petitioner has filed the instant petition after a lapse/delay of more than 5 years without giving any cause for delay, seeking approval of the amended PPAs dated 27.08.2015 under Section 86(1)(b) of the Act. The respondents object to the maintainability of the present petition filed by the petitioner. The filing of the petition appears to be an afterthought, having been done with some motive and in the garb of seeking this Commission's approval.
- 5.2 Further, there is no condition in the PPAs dated 01.01.2014 or in the amended PPAs dated 27.08.2015 to seek any statutory post-facto approval of the Commission under Section 86(1) (b) of the Act. The present matter has been filed by the Petitioner on a completely incorrect understanding of the provisions of the Act and the Orders of the Commission and has been undertaken in order to harass and presumably cause prejudice to the Respondents.
- 5.3 Accordingly, it is prayed before the Commission to adjudicate upon the maintainability of the present Petition before adverting to the merits. In this regard, it is submitted that the Hon'ble Supreme Court, in a catena of judgments, has held that the question of maintainability has to be decided at the preliminary stage of hearing. Once the maintainability of the matter is established then only the merits can be adjudicated upon.
- 5.4 The Commission vide its Order dated 12.06.2015, in the aforesaid Petitions, allowed the commissioning of the projects to take place by 31.03.2016. Subsequently, IAs and PPAs were amended on 28.07.2015 and 27.08.2015 respectively. It is significant to highlight

that in the IAs and the PPAs the SCOD was amended and reflected as 31.03.2016 and the respondents commissioned their project on 29.03.2016.

- 5.5 The Commission, vide Orders issued in Petition No. 15 and 16 of 2015, has already rendered the decision *inter-alia* with regard to tariff admissible for the projects to be commissioned by 31.03.2016. Therefore, it is amply evident that the requirement of prior approval as mandated under Section 86(1)(b) of the Act has already been met vide the Commission's orders dated 14.11.2013 and 12.06.2015.
- 5.6 It is submitted that based on the amended IAs and amended PPAs, it is undisputed that there existed a common understanding between the parties that SCOD stood extended to 31.03.2016. Further, it has continued to work on the agreements with the aforesaid understanding for a period of more than 5 years. Accordingly, at this belated stage there is no occasion for the Petitioner to change the said understanding/stance to contend that SCOD as agreed by way of amended PPAs dated 27.08.2015 is subject to any further affirmation or approval by the Commission.
- 5.7 It is relevant to highlight the decision rendered by the Hon'ble Tribunal in the case of Punjab State Power Corporation Limited v. Everest Power Private Limited (Appeal No. 194 of 2016) dated 11.10.2018 wherein, the Hon'ble Tribunal has clearly held that the issue of approval under Section 86(1)(b) of the Act for purchase and procurement of power by PSPCL had reached finality by way of a series of orders and accordingly, there was no need to get approval of PSA under Section 86(1)(b) of the Act.
- 5.8 In the instant case also, the price and procurement process of the power being supplied by the Respondents has attained finality and

already stands approved under Section 86(1)(b) of the Act in terms of the previous Orders of the Commission. Accordingly, the instant Petition filed to seek statutory approval of the amended PPAs dated 27.08.2015 is without any merit or substance.

5.9 It is submitted that interpretation being attempted by the Petitioner to the expression "*without in any way impinging the other contractual terms and conditions between parties*" appears to be incorrect. Based on a bare perusal of the Order of the Commission, it is evident that the Commission in order to be "*just and fair to all*" provided that the Projects be commissioned by 31.03.2016 and the tariff for the Projects was also revised and fixed at Rs. 6.88 per unit. Any other interpretation that is being attempted by the Petitioner to the aforesaid expression is without any basis and is completely contrary to the conditions and understanding of the parties as recorded in the amended PPAs dated 27.08.2015.

5.10 The Petitioner continued to work on these agreements for 5 years in line with the amended PPAs wherein, it specifically agreed to the SCOD being modified as 31.03.2016 in place of 15.03.2015. It is further submitted that the Petitioner has filed the instant petition on the basis of a certain opinion received from its lawyers wherein, it was pointed out that despite the amended PPAs, the Petitioner is entitled to impose liquidated damages upon the Respondents. It appears that in order to save its claim for liquidated damages being barred by limitation, the Petitioner has approached the Commission by invoking its regulatory power in the garb of getting the amended PPAs approved under Section 86(1)(b) of the Act. It is a settled position of law that what cannot be done directly cannot be permitted to be done indirectly and accordingly, the Commission

should take strict note of Petitioner's conduct and the vexatious litigation filed by it.

5.11 Therefore, it is humbly submitted that the present Petition, being frivolous, is an abuse of the process of the court and being bereft of any cause of action, needs to be rejected at the outset as being non-maintainable.

6. Rejoinders by PSPCL

PSPCL in its rejoinder dated 18.05.2021 and 22.06.2021 to the replies filed by PEDA, BIPL & BIDL, while reiterating its submissions made in the Petition, submitted as under:

- 6.1 It is not denied that the Commission has passed its dictum with respect to the tariff as applicable to the projects of the respondent Generators. However, the said order categorically held that all other term and conditions of the contract between the parties shall remain the same.
- 6.2 Due to the extension of the SCOD by way of amendments to the IAs and PPAs, the due dates of forfeiture of bank guarantee/liquidated damages also got extended accordingly. However, such specification of the SCOD is subject to the approval of the Commission.
- 6.3 The amendment in a power purchase agreement being entered into by the parties is a separate cause of action distinct from the price and quantity approval. While the parties have entered into the 3rd Amendment Agreement, the same has not been filed before the Commission for specific approval. The petitioner has approached the Commission for approval of the said amendments under section 86(1)(b) of Electricity Act, 2003, as it was not earlier placed before the Commission. The delay is

inadvertent and the same may be condoned. The approval is a statutory requirement under section 86(1)(b) of Electricity Act 2003.

- 6.4 PSPCL has further submitted that the case laws relied upon by BIPL & BIDL have no bearing on the instant petition and has denied that the decision of Hon'ble APTEL in Appeal No. 194 of 2016 is applicable to the instant petition. PSPCL is seeking regulatory approval of the amendment to the PPA.

7. Observations and Decision of the Commission

The Commission has carefully gone through the petition, reply of PEDDA, reply of BPL & BIDL, rejoinders by the petitioner and other submissions made by the parties. The observations and decision of the Commission is as under:

- 7.1 The Commission, in Petition 52 of 2013 has approved the procurement of power from the said generators at the tariff discovered in the competitive bidding process conducted by PEDDA provided the entire capacity covered in each PPA is commissioned on or before 31.03.2015. The IAs and PPAs were executed between the parties with SCOD as 31.01.2015. Subsequently, the PEDDA extended the date of commissioning for certain solar developers including BIPL and BIDL from 31.01.2015 to 15.03.2015. Thereafter, the Commission vide Orders dated 12.06.2015 in Petitions 15 & 16 of 2015:

- a) Allowed the applicability of the already approved tariffs for the petitioners' projects till 30.04.2015 in place of 31.03.2015, and
- b) Fixed the tariff of the petitioners' project beyond 30.04.2015 as Rs. 6.88 per kWh provided the project(s) is commissioned by

31.03.2016, without in any way impinging upon the other contractual terms and conditions between the parties.

PSPCL and BIPL & BIDL signed the amended PPAs dated 25.08.2015 incorporating the applicability of the revised tariff fixed by the Commission in its Orders dated 12.06.2015. Also, in the amended PPAs, the parties also agreed upon the revised SCOD as 31.03.2016. PSPCL is seeking approval of the Commission for the same.

7.2 The Commission notes that it has already approved the quantum and the applicable tariff for procurement of power from the said projects, in Petition 52 of 2013 and in Petitions 15 & 16 of 2015, as mandated under the PSERC Regulations read with the Section 86(1)(b) of the Electricity Act, 2003.

Accordingly, the Commission is of the view that the instant Petition filed by PSPCL is devoid of any reasonable cause of action and is not maintainable under Section 86(1)(b) of the Electricity Act, 2003.

The petition is disposed of accordingly.

Sd/-	Sd/-	Sd/-
(Paramjeet Singh)	(Anjuli Chandra)	(Viswajeet Khanna)
Member	Member	Chairperson

Chandigarh

Dated: **19.07.2021**