

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

**Review Petition No. 02 of 2019
In Petition No. 14 of 2017
Date of Order: 01.10.2019**

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

Review Petition/Application under Section 94(1) (f) of Electricity Act, 2003 read with Regulation 64 of Punjab State Electricity Regulatory Commission (Conduct of Business) Regulation, 2005, for seeking review of order dated February 11, 2019, rendered by this Ld. Commission in Petition No. 14 of 2017.

AND

In the matter of: Photon Suryodaya Pvt. Limited, 8th Floor, Statesman House, Barakhamba Road, New Delhi-110001 through its Authorized Signatory Mr. Navjeet Singh

.....Petitioner

Versus

1. Punjab State Power Corporation Limited, PSEB head office, The Mall, Patiala, Through its Chairman
2. Punjab Energy Development Agency, Solar Passive Complex, Plot No. 1 & 2, Sector 33-D, Chandigarh 160020 through its CEO.
3. Syndicate Bank Limited, Arunachal Building, 19, Barakhamba Road, New Delhi through its Manager.

.....Respondent

ORDER

Photon Suryodaya Private Limited has filed this Review Petition of order dated 11.02.2019 passed in petition no. 14 of 2017 and I.A. No. 06 of 2018. The petitioner filed petition no. 14 of 2017 under section 86 (1) (f) of the Electricity Act, 2003 for adjudication of the disputes arising

under the Implementation Agreement dated 30.11.2015 executed between the petitioner and Punjab Energy Development Agency (PEDA) read along with the provisions of the Power Purchase Agreement (PPA) dated 13.01.2016, executed between the petitioner and Punjab State Power Corporation Limited (PSPCL). The Petitioner submitted that the delay in achieving the Scheduled Commercial Operation Date of the project occasioned on account of force-majeure events, PEDA's delay in approving/incorporating new sites and on account of PEDA/PSPCL's delay in grant of technical feasibility. The Commission vide order dated 21.06.2017, after considering the averments made by the parties decided to refer the disputes between the parties for arbitration and vide order dated 10.10.2017 appointed Hon'ble Mr. Justice S.S.Saron (Retd.) as Sole Arbitrator to decide upon all the clauses of the prayer in the petition except the tariff, which, if required, shall be determined by the Commission after considering the relief granted by the Arbitrator. The Arbitrator passed the award vide award dated 05.04.2018.

1.2 The petitioner filed IA No. 06 of 2018 in petition no. 14 of 2018 which refers to the award dated 05.04.2018 passed by the arbitrator whereby a prayer was made for disposal of the petition by holding that the tariff i.e. Rs. 5.27 per kWh would remain same till 31.03.2019 especially keeping in view the order dated 10.06.2019 passed by the Commission in petition No. 31 of 2016 and the extension of time was on account of Force Majeure event. While disposing the said application vide order dated 11.02.2019 under review, the Commission held that the tariff of Rs. 3.75 per kWh will be payable by PSPCL for purchase of electricity from the Petitioner's project for the entire term of Power Purchase Agreement (PPA). The petitioner submitted that the Commission vide order dated 17.10.2018 directed PEDA to submit its proposal on tariff for the Petitioner's project along with

methodology for the same. PEDDA submitted the information on 05.12.2018 and PSPCL vide memo no. 5427 dated 15.01.2019, filed its reply/submissions thereto.

1.3 The petitioner submitted that on the perusal of the order it is revealed that the Commission has erred in determination of tariff by disregarding the provisions of CERC RE Regulations, 2017, duly adopted by the Commission vide order dated 09.08.2018, as also by disregarding the project specific determination of tariff and methodology submitted by PEDDA. The Petitioner has been prejudiced in determination of the tariff due to bifurcation of the capital cost into two components, one being the cost already incurred and the other being the cost yet to be incurred and prorating the then awarded tariff and current generic tariff of two states with the bifurcated costs. The petitioner submitted that the project(s) could not be commissioned within the stated timeline, inter alia, owing to existence of Force Majeure events and events of default on part of the respondents including delay in grant of Technical Feasibility Clearance. The said contention has even been judicially determined and upheld by the Arbitrator. The order dated 10.06.2016, passed by the Commission in petition no. 31 of 2016 seems to have escaped the notice of the Commission, whereby it has been clarified that barring Force Majeure/change in law etc., the applicability of the approved tariff beyond 31.03.2017, will not be allowed. Further, the Petitioner submitted that in cases, similar to the present case, where extension of commissioning period due to Force Majeure Conditions had been prayed for, the Commission had granted extensions with the same tariff, as had been provided in the PPA, though the case of the Petitioner has been dealt with differently.

1.4 Petitioner submitted that the Commission did not appreciate the request to grant extension in the commissioning period and grant the tariff of Rs. 5.27 per unit as per PPA. However, while the Petitioner's request for extension in the date of COD was accepted in view of the Award of the Arbitrator, the petitioner's request for same tariff was not considered and instead, the petitioner was directed to prove its case for Project Specific Determination. The tariff has been determined on the basis, which was unknown to all the stakeholders, including the petitioner before the order under review was received by them. The petitioner did not have any opportunity to make its submissions in that regard. The methodology adopted by the Commission in determining the tariff was neither forming part of the record, nor could it be adopted keeping in view not only the CERC RE Regulations, 2017, duly adopted by the Commission vide order dated 09.08.2018, but also the peculiar facts and circumstances of the present case. The Commission has erred in basing the determination of the tariff in the present case on KERC and MERC orders, which were orders for determination of generic tariff for solar projects for 2018-19 as Rs. 3.05 and Rs. 3.02 per unit, respectively. Certain material aspects/facts seem to have escaped the notice of the Commission, which are as follows:-

- a) The solar irradiation in Punjab is much lower as compared to solar irradiation in Karnataka and Maharashtra. The solar irradiation in the state of Karnataka & Maharashtra is almost 15% higher in comparison with the state of Punjab.
- b) The Govt. of India has imposed a safeguard duty of 25% on import of Solar PV Modules w.e.f 31.07.2018 & same was not considered by KERC & MERC while determining the above Generic tariff of Rs. 3.02 & Rs. 3.05 per kWh respectively. The Ld. MERC has passed

an order on February 18, 2019, wherein it has been observed that such duty amounted to a change of law and that developers should be adequately compensated for it.

- c) The cost of land and/or the lease charges for the land are eight to ten times higher in Punjab than in Karnataka and Maharashtra.
- d) Higher transportation costs involved in transporting the material to remotely situated State of Punjab as compared to well connected states of Karnataka and Maharashtra.
- e) The Ld. KERC and Ld. MERC orders are for the projects commissioned in year 2018-19 whereas the project of the petitioner is to be commissioned in 2019-20 and escalation should have been made for Op & Mtc charges and interest rate. It will be pertinent to mention here that interest rate for 2018-19 taken by CERC were 9.97% and 10.97% for Debt and WC respectively, whereas the corresponding figures for 2019-20 are 10.41% and 11.41%.
- f) The Commission's assumption that tariff determined for 2018-19 will remain applicable for 2019-20 also as per RE Regulations 2012-17 is not applicable here as per the presently applicable RE Tariff Regulations 2017-20.
- g) The Commission ought to have considered that individual costs of various components have already bottomed out and these are going to increase in 2019-20, but no escalation seems to have been considered by the Commission.

1.5 The Commission's assumption to link the incurred costs with earlier tariff and costs yet to be incurred with present day tariff is wrong as the execution of the project cannot be undertaken by delinking the

costs already incurred and to be incurred in the way assumed by the Commission. The Commission has erred in not taking into account that:-

- a) The petitioner had already made 50% advance payments under the head "Inverters and Electricals". Here also, the petitioner has to have identical inverters for the full project and as such negotiations can only be held with the existing supplier on a limited basis.
- b) In fact the unspent amounts for PV panels and inverters cannot be linearly linked with the earlier and current tariff in the way Ld. Commission has assumed for determination of tariff. Apart from this petitioner had also paid a huge amount to other contracts in terms of various contracts entered between the parties.

That the normative Tariff of solar project as per CERC template includes Depreciation, Interest on Loan, Return on Equity, Interest on Working capital and Operation and Maintenance charges.

By prorating the total tariff (comprising of sum of above 5 components) with capital cost, the Commission has reduced all the components of tariff by the ratio. This has reduced the Operation & Maintenance Charges which is not at all linked to Capital cost. Further, this has also reduced the Interest on Working Capital which is partly linked to Capital Cost. The tariff has been stated to be valid till 30.09.2019 whereas the tariff should be for the financial period/year. In the event, there is any delay in commissioning of the project, the agreements inter se the parties are well equipped to cater to such a situation.

2. The petition was taken up on 10.07.2019 for admission wherein the notice was issued to PSPCL and PEDDA, and further directed to file their respective replies on admission of the petition.

3. PEDA filed its short reply vide letter dated 05.08.2019 and submitted that after passing of the award by the Sole Arbitrator, the petitioner filed an application i.e. IA No. 06 of 2018 in Petition No. 14 of 2017 titled as Photon Suryodaya Pvt. Limited Versus Punjab State Power Corporation Ltd. & Others, seeking tariff @ Rs. 5.27/kWh for the sale of power to PSPCL generated from the project in question. During the pendency of the said application the Commission directed PEDA to submit a proposal on tariff. Accordingly, PEDA vide letter dated 05.12.2018, submitted its proposal on tariff before the Commission.

3.1 PEDA submitted that the Commission did not rely upon the same and vide order dated 11.02.2019 allowed the average tariff of Rs. 3.035 per kWh for the remaining 67.71% expenditure, based upon the weighted average tariff for the petitioner's solar PV power project works out to Rs. 3.75 ($5.27 \times 0.3229 + 3.035 \times 0.6771$) per kWh. After passing of the award dated 05.04.2018 by the Sole Arbitrator, the Competent Authority of PEDA, vide its decision dated 01.05.2018 extended the date of the commissioning of the project by a period of 7 months from the date of signing of PPA, ultimately got signed by the petitioner with PSPCL on 28.02.2019. Thus, the project in question has to be commissioned by 30.09.2019.

3.2 The Competent Authority of PEDA vide its order dated 01.05.2018 had categorically held that no further extension will be given to the petitioner in case of delay beyond 7 months from the date of signing of PPA and in case of delay on account of non-commissioning of the projects as per the amended time schedule, PEDA shall encash the PBG's of the company without any demur. Accordingly, with the consent of the parties an amendment in the I.A. was carried out on 22.05.2018.

3.3 Although no further extension can be granted to the petitioner for setting up of the project in question as per the amended IA signed between PEDDA and the petitioner, however, still the petitioner has inter-alia sought the further extension in the date of commissioning while filing the instant application before the Commission. PEDDA submitted that in case petitioner fails to complete the project in question by the extended date i.e. 30.09.2019, PEDDA well within its right has a right to get encashed the PBG's submitted by the party. As per the latest report submitted by the District Manager (Bathinda) vide email dated 15.07.2019 of Village-Myser Khana and Swaitch & Sandhoa it has transpired that no work is being done thereafter 23.08.2018. Security guards of these plants told that status of the work is as per joint committee visited on dated 23.08.2018 and the petitioner is not carrying on work for commissioning of the project in question.

4. PSPCL filed its reply vide Memo No. 5499 dated 06.08.2019 and submitted that after the determination of tariff by the Commission on 11.02.2019, PPA was signed between petitioner and PSPCL on 28.02.2019 whereby an extension period of 7 months was provided to the petitioner for completing the project by 30.09.2019 as per the arbitrator's award. PSPCL submitted that the only intent of the petitioner behind the instant review petition is to again delay the commissioning of the project as the petitioner ought not to have signed the PPA, also the petitioner had failed to make any progress on the ground.

4.1 That so far as the question of the methodology adopted by the Commission is concerned, it is submitted that the same is in accordance with the CERC Regulations, of which capital cost is the primary factor, which has been given due weightage by the Commission while determining the tariff vide order dated 11.02.2019. It is thus evident that

no ground is made out for review of order dated 11.02.2019, which is legal and valid having been passed after considering each and every contention of the petitioner. PSPCL further submitted that the petitioner cannot dictate the methodology to the Commission which would serve its purpose as the Commission has to go by the CERC Regulation and determination of a project specific tariff on case to case basis, of which the Commission has complete powers to employ the most suitable approach. As per para 17 of the order dated 11.02.2019, the Commission has relied upon the audited account statements for the year 2016-17 and 2017-18 and has taken the estimated value of the capital cost to be Rs. 280 crore. Therefore, the assertions of the petitioner are absolutely false and frivolous calling for no interference by the Commission.

4.2 While on the one hand the petitioner pleads for a project specific determination and on the other hand, it has objections also if the Commission makes a project specific determination of its own keeping in view the CERC guidelines and peculiar facts and circumstances of the case. The methodology to be adopted has to be compliant with CERC Regulation and a case to case approach has to be taken for determination of project specific tariff, which could only be on the basis of the peculiar facts and circumstances of the case.

4.3 The petitioner has mentioned that the rates of debt and WC has increased in year 2019-20 as compared to 2018-19, however the petitioner has not mentioned the per watt rates of solar panels have been reduced despite the increase in debt and WC rates the overall cost per MW of a solar plant is decreasing as already submitted to the Commission in reply filed by the PEDDA in petition no. 14 of 2017. The petitioner has also requested that the tariff should remain valid till 31.03.2020 instead of 30.09.2019. It is apparent by this, that the

petitioner is already assuming that there would be delay in commissioning the project. It is pertinent to mention that ample amount of time is already given to the petitioner for setting up and commissioning the plant as amendment no 02 in PPA which was signed on 28.02.2019, however, there is no progress at all on the ground and now the petitioner is looking for ways to justify its inaction by blaming the same on the determined tariff by the Commission.

5. After receiving the replies from PSPCL and PEDDA on admission of the petition, the petition was taken up for hearing on admission on 28.08.2019 and after hearing the parties, Order is reserved.

6. Observations, Findings and Decision

The Commission has gone through the review petition, replies submitted by PSPCL, PEDDA and other submissions/ documents and observes that the petitioner has contended that a few material aspects/facts seem to have escaped the Commission's notice, as brought from (a) to (g) in para 1.4 hereinbefore.

The Commission feels that the points at sub para 1.4 (a), (c), (d), (e) & (f) are related to Cost plus approach, which is not applicable in the instant case as petitioner was allotted the project in the competitive bidding undertaken by PEDDA on the basis of discount offered on the generic tariff for FY 2015-16 and the Commission allowed the same on the basis of rates finalized in the competitive bidding process though the expenditure already incurred was allowed as it is to the benefit of the petitioner and to minimize the burden. The CERC has inter alia specified the parameters including Capacity Utilization Factor (CUF) of 19% for determination of generic tariff for Solar PV Power Projects considering the solar irradiation on PAN India basis. However,

where required, CERC has specified different CUF for different states in other renewable energy technologies viz. wind energy projects etc. Similarly, regarding alleged higher land lease cost in Punjab and higher transportation charges for transporting the material to Punjab as compared to other states, CERC in its Regulations for the control period FY 2012-13 to FY 2016-17, has specified the capital cost for Solar PV Power Projects on PAN India basis. These parameters have also been adopted by PSERC and other SERCs while determining the generic tariff on which bidding is carried out. Further, as regards sub para 1.4 (f) & (g), it is opined that application of FY 2018-19 rates upto 30.09.2019 in case of petitioner project is to the benefit of the petitioner as the rates discovered in competitive bidding have been consistently falling every quarter during the past few years. The contention of the petitioner that individual costs of various components have already bottomed out is not substantiated with facts/data.

As regards the imposition of safeguard duty of 25% on import of Solar PV Modules w.e.f 30.07.2018 by the Govt. of India [sub para 1.4(b)], the same was imposed on the imports from China and Malaysia only. The petitioner is at liberty to source the solar PV modules from other countries or from within the country. In fact, the petitioner had paid Rs.14 crore for procurement of domestic modules to EPC contractor i.e. Sarkun Solar Private Limited as per the certificate issued by the Chartered Accountants. Considering the above, the Commission observes that no new fact has emerged in the submissions in the review petition.

The Commission notes that a review as per Regulation 64 of the Punjab State Electricity Regulatory Commission (Conduct of

Business) Regulations, 2005, can be allowed on the following grounds:

- (i) discovery of new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order was made,**
- or**
- (ii) some mistake or error apparent on the face of the record,**
- or**
- (iii) for any other sufficient reason**

The grounds of review are the discovery of new matters or evidence which, after the exercise of due diligence, was not within knowledge or could not be produced by the petitioner at the time when the decree was passed or Order made. The review may also be asked for on account of some mistake or error apparent on the face of the record. Power of review is not to be confused with appellate power which may enable an Appellate Court to correct all kinds of errors committed by the subordinate court. Whereas, the power of review may be exercised on the discovery of new and important matter or evidence which the person seeking review could not know and which could not be produced before the Order was made, it cannot be exercised on the ground that the decision was erroneous on merits. That would be the prerogative of the Court of Appeal. There is a distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. The Commission had passed a detailed and reasoned Order after considering the entire submissions, data, record and arguments etc. of the parties and discussing the same. The Order needs no reconsideration in this review, as facts and evidence remains the same and no error is apparent on the face of

record and there is no other sufficient reason for reviewing the Order dated 11.02.2019.

The Counsel for the petitioner during the hearing of the review petition on 28.08.2019 acquiesced that in case the Commission decides to keep the tariff of the project same as decided by the Commission in its Order dated 11.02.2019, at least the petitioner may be allowed extension in the date of commissioning upto 31.03.2020. This submission also cannot be the subject for review considering the discussion above.

The review petition is disposed of in terms of the above.

Sd/-

(Anjuli Chandra)
Member

Sd/-

(S.S. Sarna)
Member

Sd/-

(Kusumjit Sidhu)
Chairperson

Chandigarh
Dated: **01.10.2019**