

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

**Petition No.51 of 2014  
Date of Order: 26.05.2015**

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

In the matter of: Petition under Section 86 (1) (a) of the Electricity Act, 2003 for determination of tariff in the case of the petitioner which is a small hydro project of 650 KW.

AND

In the matter of: Atlantic Power Private Ltd., House No.528  
behind Tagore Theatre, Sector 18-B,  
Chandigarh through its Managing Director Shri  
Avtar Singh Gill

-----Petitioner

Versus

1. Punjab Energy Development Agency (PEDA) through its Chief Executive Officer, Plot No.1 & 2, Sector 33, Chandigarh.
2. Punjab State Power Corporation Limited, through its Chairman cum Managing Director, The Mall, Patiala.

-----Respondents

**ORDER**

The petitioner is a Private Limited company registered under the Companies Act, 1956 and is an Independent Power Producer (IPP). The petition has been filed under Section 86 (1) (a) of the

Electricity Act, 2003 for determination of tariff for its Mini Hydel Project of 650 KW installed capacity at Terkiana Head Works on Western Bein.

2. The petitioner submitted that the Punjab Energy Development Agency (PEDA) is a nodal agency for promotion and development of non-conventional and renewable sources of energy including development of Small Hydro Projects upto 25 MW capacity. PEDA invited bids in July 2009 for setting up a Mini Hydel Project at Terkiana Head on Holi Bein in District Hoshiarpur. The petitioner submitted the bid no.27117 dated 24.07.2009 on 27.07.2009. The salient features of the Project given in the Bid documents are reproduced hereunder:

“MINI HYDEL PROJECT ON WESTERN BEIN

It is proposed to construct Mini Hydel Project at Terkiana Head Works on the Western Bein (Holy bein) for power generation, to utilize the discharge to be released in Western Bein. The Western Bein which is a natural drain, off takes near village Terkiana and out falls at Harike Patan via Kanjli & Sultanpur Lodhi. The discharge of about 200 cusecs has been released in Western Bein from the Mukerian Hydel Channel-II to revive the religious glory and to derive the social and environmental benefits. The discharge in the Bein will be increased to 350 cusecs by Punjab Irrigation Deptt. / PSEB which will be sufficient to generate 500 kW at Terkian Head Works with  $\pm$  6.5meter available head (FSL of Mukerian Hydel Channel-II – FSL of Holybein). The proposed installed capacity has been calculated on the basis of above data for bid purpose, however the developers are required to have

proper survey of site before submitting their bids. The installed capacity as per the DPR shall finally prevail for implementation of the project. This release of 350 cusec of discharge is as per the concurrence of the PSEB vide memo no.Spl-1 dated 25.5.2009 which states as under:

“During the course of meeting at the residence of Hon’ble Chief Minister, Punjab, on 11.3.2009 on the subject cited above, the PSEB had agreed that 350 cusec of water will be released from Mukerian Hydel Channel Stage-II into the Holy Bein”.

3. The bid document included ‘Project Implementation Schedule’ applicable on allotment of site to the successful bidders. As per Implementation Schedule total time of 665 days has been provided upto the commencement of Commercial Generation. Signing of Memorandum of Understanding (MoU) with PEDDA is 30 days from the date of allotment of site and time for preparation of Detailed Project Report by the developer i.e. successful bidder is 120 days thereafter and time for approval of DPR (by PEDDA) is mentioned as 15 days. The developer was required to sign the Implementation Agreement (IA) with PEDDA, a Tripartite Agreement amongst Punjab Irrigation Department (PID), Government of Punjab / PSEB and PEDDA for use of canal water and Power Purchase Agreement(PPA) with erstwhile Punjab State Electricity Board (PSEB) now succeeded by Punjab State Power Corporation Limited (PSPCL), respondent No.2 herein, since 16.04.2010.

The petitioner was a successful bidder and the project was allotted to the petitioner vide allotment letter dated 20.08.2009 by PEDDA on Build, Operate and Own (BOO) basis. Letter of allotment

specified following terms and conditions of allotment of the Project:-

- “1. The Company shall sign the Memorandum of Understanding (MoU) containing detailed terms and conditions for developing this project with PEDDA, within 30 days from the date of issue of the allotment letter.
2. As mentioned in the bid document Page 13, the priority of the government is to put required discharge in the Holy Bein by providing a regulatory (as part of power house) on the Mukerian Hydrel Channel-II. Therefore you will construct the Part-1 i.e. Link Channel and Regulator as per the layout approved/vetted by PEDDA/PSEB, at Terkiana Headworks firstly within 4 months from the date of allotment. The layout drawing shall be submitted by the company within 15 days from the allotment, for vetting by PEDDA/PSEB. This entire system is to be designed as intake and bye pass channel for the proposed powerhouse. However, the developer is free to design the power house with bye pass or not in such a manner that water in the Holybein through Head Regulator be released first within four months and construction of the power house can be carried on simultaneously.
3. The cost of land at Terkiana head (28K-11M) which has been purchased by PEDDA at the rates fixed by Deputy Commissioner, Hoshiarpur, for the development of this project amounting to ₹ 26.00 Lakh, shall be repaid to PEDDA by you within seven days from the allotment letter. This land will be

transferred to you in due course of time i.e. after completion of the head regulator and link channel / bye pass for release of water into the Holybein or incurring of 30% of the project cost whichever is earlier. The expenses on transfer of land by PEDDA to you on account of stamp duty, registration fee or any other fee payable, shall be to your account.

4. The company shall give percentage energy share of saleable electricity as per your bid submitted to PEDDA (As per Annexure – 1 attached). The monetary equivalent of this percent of electricity sold to PSEB for 30 years from the date of commissioning/commercial generation of the plant shall be paid to PEDDA.
5. The Company shall furnish the Performance Guarantee for this project valid till commissioning of the project (commencement of commercial generation as under :

<b>Capacity</b>	<b>Value of Performance Guarantee</b>
Upto 1 MW	₹5.00 lac

Bank Guarantee shall be furnished in the prescribed format as per bid document on or before signing of the MOU for developing the project.

6. The company shall implement the project within 665 days from the date of allotment of site including time for construction of Head Regulator for release of water in the Holi Bein, as mentioned in the Bid Document.

7. The installed capacity of the project as per DPR shall finally prevail in line with the terms and conditions of the Bid Document.
8. You will enter into a separate Power Purchase Agreement (PPA) with PSEB, within fifteen days (15) from the Effective Date (i.e. signing of Implementation Agreement) for the sale of energy in line with NRSE Policy-2006 / PSERC tariff order dated 13.12.2007 / any other order issued by the PSERC / Govt.
9. The other terms and conditions of allotment shall be as set forth in the bid document”.

4. A Memorandum of Understanding (MoU) dated 27.08.2009 was signed by the petitioner / developer company with PEDDA for implementation of the project of 500 KW capacity. After signing the MoU, the petitioner carried out necessary detailed survey and investigations and prepared Detailed Project Report (DPR) on the basis of the bid specification that full supply discharge of 350 cusecs shall be supplied into Holy bein (Western Bein is called Holy Bein on account of the fact that a Gurdwara in the memory of Shri Guru Nanak Dev ji, 1<sup>st</sup> Sikh Guru is situated on its left bank at Sultanpur Lodhi, District Kapurthala, some 60 km downstream of project site, where bathing in its waters is considered auspicious by the Sikhs and Hindus).

As mentioned by the petitioner in the petition, the salient details of the DPR (Executive Summary) are as under:-

- Full supply discharge to be supplied to Holy Bein is 350 cusecs (9.91 cumecs)

- Rated head corresponding to the rated discharge of 9.91 cumecs is 7.25 m.
- In order to obtain optimum design head, full supply level (FSL) at EL 246.00 m upstream of the off-take shall be maintained.
- Total installed capacity is 650 kW (1x650 kW) with 10% overload capacity.
- Power shall be generated at 415 V, stepped up to 11 kV and evacuated via 11 kV outdoor switchyard to feed into the existing nearby substation of PSEB.
- PLF for the Project is 95%
- Implementation schedule
  - Pre-construction activities    6 months
  - Construction period                12 months
- Capital cost       ₹635 Lac
- Project cost       ₹699 Lac  
(including IDC and other misc. charges)

PEDA approved DPR and thereafter Implementation Agreement (IA) was executed on 16.10.2009 between the petitioner and PEDA. As per IA, it was to remain in force for 30 years, extendable further on terms and conditions mutually agreed between the parties (clause 4.3 of IA). Further as per clause 4.4 (i) the company (the petitioner) was required to enter into a separate Tripartite Agreement (TPA) with PSEB and PEDA within 15 days from the effective date. The petitioner company was further required to enter into Power Purchase Agreement (PPA) with PSEB also within 15 days from effective date. Effective date has

been defined in the IA and means the date of signing of IA i.e. 16.10.2009. PPA was signed with PSEB on 02.12.2009 to remain in force for 30 years from the commissioning of the project.

5. The project was completed in 10 months and synchronized with the Grid on 31.08.2010. The power was generated by the project for five months but with release of much less discharge of water than agreed discharge of 350 cusecs. After a gap of about 5 months from synchronization of the project the local population/farmers objected on 28.01.2011 to release of water into Holy Bein on the plea that their fields had got waterlogged and on 29.01.2011, the Director / PEDDA directed the petitioner to stop release of water into the Holi Bein and consequently plant was shut down and generation of power stopped. The petitioner has submitted that commencement of commercial operation of the project never took place during this period as there was no regular generation as per terms of Bid Documents, DPR, MoU and IA.

6. A meeting was held on 07.02.2011 under the chairmanship of Principal Secretary to Government of Punjab, Department of Health-cum-Project Coordinator for the Project 'Restoration of Ecology of Holi Bein" to discuss the issues arising out of shut down of the project on 29.01.2011 on account of stoppage of release of water into Holibein on orders of PEDDA. Officers of PEDDA, PSPCL, Department of Irrigation and Managing Director of the petitioner company attended the meeting taken by the Principal Secretary, GoP, Department of Health. The following decisions were taken in the above meeting :-



- “1. Steps would be taken immediately with the support of Department of Irrigation (Drainage) and the District Administration, Hoshiarpur to release 200 cusecs of water into the Holybein immediately thereby enabling M/s Atlantic Power Pvt. Ltd. to resume power generation immediately to the extent possible. However, the participants realize the financial difficulties and losses experienced by M/s Atlantic Power Pvt. Ltd. because of non release of 350 cusecs of water for which a workable solution was discussed.
2. PEDDA in coordination with Punjab State Power Corporation Ltd. (PSPCL) shall formulate a proposal for construction of escape channel to divert the excess volume of water from Holybein into Mukerian Hydrel Channel-II at a suitable point near the tail of the 2 x 9 MW ongoing powerhouse of PSPCL. The financial aspects of this arrangement including financing shall be worked in the light of the offer of M/s Atlantic Power Pvt. Ltd., to arrange initial investment required from its own resources subject to an adjustment of the same from its energy share payable to PEDDA.
3. Department of Irrigation (Drainage) shall prepare within a week's time and then implement a proposal to enable the Holybein to cater for 350 cusecs of water discharge. Meanwhile, the Department of Irrigation shall ensure that 200 cusecs of water are released into the Holybein without any interruption or blockage. This department shall monitor the release of this water.

4. The project coordinator may use his good offices to provide all possible support from the district administration of Hoshiarpur and Kapurthala in order to give effect to the decisions taken during this meeting as also to ensure an uninterrupted flow of water into the Holybein.”

Another meeting was held on 15.02.2011 under the chairmanship of Secretary, Science, Technology, Environment and Non-conventional Energy Sources, Government of Punjab in which management of PSPCL and senior officers of PEDDA, PID and Consultant Hydel participated but no official of the petitioner company was called to attend the same. The following decisions were taken:

- “1. PEDDA will prepare the drawings for the proposed regulator on Holy Bein, associated works, culverts and the escape channel into tail race of MHC-II (18MW) Project and send the same for vetting and approval by PSPCL and Chief Engineer, Drainage, PID. The operation of the proposed regulator in the bein will rest with the Drainage Deptt. so as to maintain the discharge in the bein as per the requirement.
2. PSPCL and Irrigation Drainage Deptt. will vet the drawings within 10 days, so as to execute the proposal expeditiously.
3. The Developer of Mini Hydel Project will utilize 420 cusecs of discharge upto the commissioning of MHC-II 18 MW project, but the discharge shall be limited to 350 cusecs after the commissioning of 18 MW project.

This is subject to final approval of drawings and proposal by PSPCL & PID Deptt.

4. The Developer of MHP Project will construct and incur the entire expenditure required for implementation of this scheme. The expenditure to be incurred by the developer will be compensated from the 20% extra energy available to him upto commissioning of MHP-II 18 MW project, for a period to be calculated by PEDDA which will receive its share of the energy as per the original bid.
5. From the date of commissioning of PSPCL MHC-II (18 MW Project), part of PEDDA's share of energy out of MHP Project at Terkiana (650 KW), will be given to PSPCL, to compensate for the energy loss due to the small rise in tail race water level of MHC-II 18 MW project. The details will be mutually worked out between the PEDDA & PSPCL”.

7. Thereafter, Director PEDDA wrote to Dy.CE/Civil Hydrel Design, PSPCL vide letter No.5681-82 dated 04.03.2011 requesting him to approve / vet the proposal / design and drawings. PEDDA again requested Chief Engineer(Hydrel Projects) vide letter No.467-68 dated 19.04.2011 wherein it was specifically mentioned that the petitioner company will incur entire expenditure for implementation of the scheme (escape channel etc.) and developer (the petitioner company) shall be compensated from the extra energy to be generated.

8. The plant remained closed continuously for 3 months (February, March and April 2011) and thereafter average discharge of 140 cusecs was released into Holi Bein and for the generation of power, which remained at that level till the completion of the escape channel.

9. A Tripartite Agreement was signed by PSPCL, PEDDA and the petitioner on 10.08.2011 to remain in force for 30 years from the commencement of Commercial Operation of the Project. Thereafter PSPCL, PEDDA and PID approved the designs of the Escape Channel after a lapse of 9 months from the shut-down of the project. The petitioner promptly took the construction of Escape Channel in hand and completed the same on 30.04.2012 at the cost of ₹2.10 crore out of which ₹1.50 crore was term loan from the Banks.

10. The petitioner has submitted that due to construction of Escape Channel and closure of the project, the cost of the project has increased from ₹699 Lac to ₹1182 Lac and consequently cost of generation has gone up from ₹2.74 per unit to ₹5.63 per unit.

11. The petitioner has stated that as per bid documents, year of commencement of the project was 2010-11 and therefore rate of electricity was to be considered as per New and Renewable Sources of Energy (NRSE) Policy, 2006 and the Commission's Order dated 13.12.2007. In fact the commencement of the project started on 30.04.2012 when the Escape Channel was completed. Therefore the tariff for the project has to be fixed as per

Order dated 19.07.2012 of the Commission passed in Petition No.35 of 2012.

12. The petitioner has further submitted that the Tripartite Agreement dated 10.08.2011 is one-sided agreement and was got signed from the petitioner under economic duress as the petitioner had invested huge amount in the project and respondents were not releasing promised water for generation at the project and on account of this, the petitioner was suffering huge losses. The one-sided nature of the Tripartite Agreement is evident from the fact that in the Minutes of Meetings held on 07.02.2011 and 15.02.2011 it was clearly mentioned that the cost of Escape Channel would be borne by the petitioner and the petitioner would be compensated for extra cost, but the same finds no mention in the said Tripartite Agreement which was signed six months after these meetings. The cost of Escape Channel was added to the cost of the project entirely due to the fault of the respondents, who had approved the release of 350 cusecs of water into the Holi Bein without ascertaining the fact that it can not take that discharge. Fault lies squarely at the doors of PEDDA, the nodal agency for development of non-conventional and renewable sources of energy projects in the State.

13. The petitioner has prayed that tariff for sale of electricity to PSPCL be determined after taking into account all costs incurred by the petitioner for successful completion of the project. Further, in addition to the re-determination of the tariff, the respondents be restrained from recovering any energy share and the same may be waived off for the sake of viability of the project. It has been further

prayed that year of commencement of commercial operation of the unit be fixed as 2012-13 in place of 2010-11 as the commercial production commenced only after 30.04.2012 and during the pendency of the petition, the respondents be restrained from taking any energy share from the petitioner, in the interest of justice.

14. The petition was admitted vide Order dated 28.08.2014. PEDDA and PSPCL were directed to file reply to the petition by 09.09.2014 with copy to the petitioner. PSPCL prayed vide No.5073 dated 15.09.2014 for grant of time of further three weeks to file reply. Similarly PEDDA filed request dated 16.09.2014 for extension of time by three weeks. PEDDA and PSPCL finally filed reply vide their letters dated 14.10.2014 and 27.10.2014 respectively. The reply of PEDDA and PSPCL are briefly discussed in the succeeding paras.

15. PEDDA in its reply has raised preliminary objections that the petition is not maintainable and is bad by jurisdiction. The petitioner has not approached the Commission with clean hands and has concealed the material facts. The conduct of the petitioner qua the project is tainted as the petitioner has not abided by the terms of the contracts / agreements. The petitioner is not depositing the agreed share of revenue generated from the Project to PEDDA. The petitioner is seeking re-determination of tariff on account of the year of commissioning to be considered as 2012-13, whereas the project was synchronized and started generation with effect from 31.08.2010 for which tariff already stands determined and agreed to as per PPA dated 02.12.2009. Further

the petitioner has not disclosed the fact that the petitioner had filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Punjab and Haryana High Court for appointment of Arbitrator which was withdrawn by the petitioner. The petitioner is indulging in unnecessary litigation, one way or the other to escape its own obligations under the agreements.

16. The petitioner has availed admissible subsidy of ₹78 Lacs for this project from Ministry of New and Renewable Energy (MNRE), Govt. of India. The Terms and Conditions of the Bid Documents clearly states that the generation capacity and power generation is indicative for the bid purpose only based on preliminary analysis of head and discharge. The bidders were required to ascertain on their own the capacity discharge that could be used and installed capacity as per DPR was to finally prevail. DPR submitted by the petitioner with installed capacity of 650 KW was approved.

17. PEDDA has submitted that the Micro Hydel Power plant with 650 KW installed capacity was commissioned on 31.08.2010 and synchronized with 66 kV Bhattian Jattan Grid Sub-station of PSPCL on 31.08.2010 at 4.20 P.M. The petitioner was bound to design and execute project as per site conditions after conducting survey, investigation and technical feasibility. The water was made available by PSPCL for commercial operation of the project. On account of excess water being released into Holi Bein there was water logging and seepage in the adjoining areas of Holi Bein damaging the crops of the farmers and the public of the area raised objections. Situation was beyond control of either party, PEDDA and APPL. PEDDA took initiative to work out some sort of

alternative to overcome the problem. It was mutually agreed at Government level to construct an Escape Channel for escaping excess water, which was constructed by the petitioner on its own cost as agreed in the Tripartite Agreement entered into by the parties.

18. PEDDA has disputed the contention of the petitioner that project was not commercially operating since 31.08.2010 after its synchronization on that day. PEDDA submitted that the project has been continuously in operation and earning revenue ever since synchronization of the project on 31.08.2010 with the grid of PSPCL.

19. PEDDA has further submitted that problem of flooding / water logging of the area arose on 28.01.2011 and PEDDA took it up without loss of time for resolution of the same in terms of clause 7.4 of IA (Force Majeure clause). A meeting on 07.02.2011 was held in the office of Principal Secretary, Health, GoP (also Coordinator Holi Bein Project). The decisions taken in the meeting have been reproduced by PEDDA as under:-

- (i) Department of Irrigation will ascertain the existing capacity of Holy Bein, monitor the flow of water into the Bein on regular basis and ensure that it should not overflow under any circumstances.
- (ii) Department of Irrigation will prepare a comprehensive proposal to re-model the Holy Bein for the release of 350 cusecs of water from Mukerian Hydel Channel-II within week's time.



- (iii) Punjab Energy Development Agency to frame a project in close coordination with Chief Engineer (Hydel) PSEB for construction of escape channel proposed to divert the excess volume of water from Holy Bein. It will also study the financial aspects of the proposal, mode of finance viz-a-viz realization of royalty etc.
- (iv) District Administration, Kapurthala, will provide all the administrative support to the line department.

PEDA has denied the existence of MoM dated 7<sup>th</sup> February, 2011 appended by the petitioner with petition.

20. PEDA has admitted the MoM of meeting held on 15.02.2011 as appended by the petitioner with the petition.

21. PEDA has denied any delay on its part in approving the drawings for construction of Escape Channel and associated works. PEDA has submitted that drawings were required to be finalized and submitted by APPL and as soon as these were submitted by the petitioner, the same were approved expeditiously. PEDA has also denied any delay in execution of Tripartite Agreement. PEDA submitted that as soon as proposal was finally submitted by APPL on 27.06.2011 for construction of Escape Channel and associated works, the same was approved on 05.07.2011 for general layout plan for proceeding ahead by the company. TPA was signed on 10.08.2011.

22. PEDA has denied the contention of the petitioner that TPA was got signed under economic duress of the petitioner. The

petitioner has himself agreed to bear the cost of escape channel in unequivocal terms. Agitation of the matter at this stage bears no merit. Clause 15 of TPA, wherein the petitioner has agreed to bear the cost, is otherwise also in consonance with sub-clause (iv) of clause 7.5 of the IA dated 16.10.2009. The terms and conditions of TPA dated 10.08.2011 are binding on all parties including the petitioner.

23. PEDDA agreed that construction of Escape Channel was completed on 30.04.2012 but denied that commercial operation of the project commenced from that date only. PEDDA stated that the project was in commercial operation since 31.08.2010 and earning revenue. Even in the interregnum period while Escape Channel was being planned, designed and constructed, the project was in commercial operation and earning revenue, which can be verified from the record of PSPCL.

24. PEDDA has stated that the petitioner has voluntarily agreed and signed Tripartite Agreement. PEDDA denied that the Tripartite Agreement was got signed from the petitioner under economic distress and the same is one-sided. The petitioner is taking this stand, just to avoid payment of energy share and other liabilities under the Tripartite Agreement. The petitioner is in default in making payment of energy share to PEDDA inspite of the fact that Mini Hydel Project of the petitioner is regularly generating power and the petitioner is earning revenue from the same. The project has generated 118.25 Lac units of energy from date of commissioning i.e. 31.08.2010 upto June, 2014. A sum of ₹100 Lac approximately is pending to be paid to PEDDA on account of energy

share in terms of IA and Tripartite Agreement. Making no payment to PEDDA on account of energy share on the pretext of extra cost of Escape Channel, tantamounts to breach of agreements. In spite of number of requests / reminders to PSPCL to deduct the amount due to energy share of PEDDA from the energy bills of the petitioner, PSPCL has failed to pay the same.

25. PEDDA has prayed to dismiss the petition being not maintainable in law as well as on facts and direct the petitioner to deposit the energy share payable to PEDDA.

26. PSPCL in its reply dated 27.10.2014, submitted that Government of Punjab (GoP) had decided to release 350 cusecs of water into the Holi Bein from Mukerian Hydrel Channel for restoration of ecology of the Holi Bein and harnessing the power potential at that fall. PEDDA being State Nodal Agency for implementation of the New and Renewable Sources of Energy (NRSE) Policy, 2006, of the GoP, was required to invite and evaluate project proposals, grant project approvals and monitor the implementation and operation of the same. PEDDA accordingly initiated necessary competitive bidding process and allotted the hydel power site to the consortium formed by the petitioner with Sea Sky Cargo and Travel (P) Ltd., Delhi, at Tarkiana, Holi Bein / MHC-II, in District Hoshiarpur, Punjab, on 20.08.2009 for development of a Mini Hydrel Project with installed capacity of 650 KW for power generation on BOO basis. Terms of allotment were mentioned in the allotment letter dated 20.08.2009.

27. PSPCL further submitted that this Commission had undertaken the process of tariff determination under NRSE Policy, 2006 and passed Tariff Order dated 13.12.2007 wherein tariff rate for purchase of power by PSPCL from Mini / Micro Hydel Projects would be ₹3.59/unit with base year 2007-08 with annual escalation thereon, applicable for a period of 5 years upto 2011-12 after which the last escalated tariff was to continue. In furtherance of the above allotment, the petitioner and PEDDA signed MoU on 27.08.2009. MoU was to remain in force for 6 months unless extended by mutual consent of the parties. The MoU envisaged two agreements by the petitioner: a PPA for sale of energy to PSPCL at the rate determined by the Commission and a Tripartite Agreement with PEDDA and PSPCL with respect to utilization of Mukerian Hydel Channel-II (MHC-II) water. PEDDA and the petitioner entered into an Implementation Agreement (IA) on 16.10.2009. IA also envisaged execution of PPA and TPA as described above, from which it was clear that TPA and PPA were to cover canal and power house aspects respectively and to be a part of IA. All issues relating to regulation of water discharge were to be covered under Tripartite Agreement and all matters relating to purchase of power generated from the project were to be as per terms of PPA incorporating Tariff Order dated 13.12.2007 passed by the Commission.

28. PPA was signed on 02.12.2009, wherein the petitioner unequivocally agreed to supply entire power generated from the project at agreed tariff of ₹3.81/unit (for the year 2009-10) with 3% annual escalation upto FY 2011-12 after which the last escalated tariff was to remain applicable for the entire duration of PPA. Thus

the petitioner can not seek the re-opening of the PPA as has been sought in the petition.

29. The petitioner undertook, under Article 10.1.0 of PPA that it would commission the generation facility and synchronize the same with the grid of PSPCL as per IA / schedule intimated by PSPCL. Synchronization is defined to mean the date on which the project was to be synchronized for the first time with grid as per IA/schedule intimated by PSPCL. The commencement of commercial operation is defined to mean the date on which the project is capable of delivering active and reactive power on regular basis after successfully completing the commissioning tests as per prudent utility practice. The petitioner had further agreed as per Article 5.11 of PPA that it would pay percentage energy share as per applicable tariff from the electricity sold to PSPCL.

30. PSPCL submitted that the Project was commissioned on 31.08.2010 and commercial operations commenced from the same day. The petitioner became entitled to receive payment for energy sold to PSPCL at rates agreed under PPA and became liable to make payment to PEDDA for percentage energy share as undertaken under the PPA.

31. PSPCL has reiterated the facts and sequence of events regarding shutdown of the project leading to the construction of Escape Channel and terms and conditions of approval letter dated 01.06.2011, which are not disputed by any party. In response to PSPCL approval letter dated 01.06.2011, the terms and conditions

of approval letter No.2410 dated 20.06.2011 of PEDDA are as under:-

“This has reference to your memo no.1326-28 dated 1.6.2011 in response to our letter no. 651 dated 28.04.2011 regarding construction of escape channel at MHP Terkiana. Punjab Energy Development Agency (PEDDA) agrees to the vetting of subject proposal by PSPCL with various provisions as mentioned in the letter dated 01.06.2011. The energy share payable to PEDDA from this project by M/s Atlantic Power Pvt. Ltd. (APPL) will be paid to PSPCL from the date of commissioning of PSPCL 18 MW Project”.

32. The petitioner decided to construct escape channel and associated works as per approved plan by PSPCL and accordingly entered into a Tripartite Agreement dated 10.08.2011, recording the terms relating to issues concerning discharge regulation, release of agreed discharge into Holi Bein from MHC-II, maintenance of canal, safety of canal wherever required and approval of drawings etc. The Tripartite Agreement was to be an integral part of the IA/PPA.

33. PSPCL contended that the terms of the Tripartite Agreement as regards the payment of percentage energy share and the cost of construction of escape channel to be borne by the petitioner, were as per the agreement reached between the parties in that behalf in accordance with the fundamental understanding incorporated in the MoU and IA at the time of undertaking the project and there was no economic duress or unequal bargaining

power involved in the same as alleged by the petitioner or at all. The petitioner having entered into binding contractual obligations is liable to fulfil its obligations under the IA, PPA and the Tripartite Agreement read and construed together as a whole and could not be permitted to wriggle out of its obligations thereunder by wrongly seeking to re-open and unsettle the settled state of affairs by which it was completely bound. And in these facts and circumstances of the case, there is no merit in the petition and the same is liable to be dismissed.

34. PSPCL has prayed as under:-

- (a) to dismiss the petition.
- (b) pass such further and other order(s) as the Commission may deem fit in the facts and circumstances of the present case.

35. The petitioner filed rejoinders to the replies of PSPCL and PEDDA on 11.11.2014. After considering the replies of PSPCL and PEDDA and the rejoinders of the petitioners and hearing the parties on 09.12.2014, the Commission vide Order dated 10.12.2014 directed PEDDA and PSPCL to file reply to the respective rejoinders. PEDDA filed reply to the rejoinder of the petitioner vide No.15462-64 dated 07.01.2015. PSPCL filed reply vide No.5049 dated 19.01.2015. The further contention raised by the petitioner in its rejoinders and reply of the respondents needs discussion before considering the issues involved one by one and the same are discussed in the succeeding paras.

36. The petitioner in rejoinder to the reply of PSPCL reiterated that DPR was prepared on the basis of promised water discharge of 350 cusecs which could not be ensured by PEDDA. The discharge of 350 cusecs could be ensured only after construction of Escape Channel by the petitioner on 30.04.2012 and plant was commissioned on that date, so the petitioner is entitled to re-determination of tariff taking 30.04.2012 as commissioning date and also on the basis of increase in the cost of the project. The Commission has jurisdiction under Section 86 (1) (a) read with Section 86 (1) (e) of the Electricity Act, 2003.

37. The plant of the petitioner received subsidy as per MNRE, Gol, scheme and DPR of the project was based upon this scheme. The plant received subsidy in two instalments on 24.09.2010 and then on 24.09.2012 after successful commissioning of the project on generating 80% of rated capacity for 90 consecutive days and 100% capacity for 72 hours. Performance testing certificate was issued by PSPCL on 01.09.2012.

38. As regards the reliance of PEDDA on Force Majeure clause, the petitioner submitted that clause 7.5 (v) of the IA provides that in case of Force Majeure the cost incurred for remedy of Force Majeure event has to be added to the cost of the Project for all purposes, which means for the purpose of tariff re-determination also. The petitioner has submitted that PEDDA initially promised 500 cusecs release of water to one Poly Plex Corporation Limited which was allotted this project. Then on realization that Holi Bein could not take 500 cusecs of discharge, it was reduced to 350 cusecs. The first allottee of the project backed out on this account.



The project was then allotted to the petitioner on the basis of 350 cusecs, but the assessment of PEDDA that 350 cusecs water can be released into the Holy Bein was again proved wrong, resulting in shutdown of the project and necessitating construction of Escape Channel. PEDDA has defaulted in discharge of its duties. PSPCL has also failed to appreciate that PEDDA and PSPCL could not ensure release of 350 cusecs of water as promised, without construction of Escape Channel.

39. The petitioner has further submitted that clause 15 of TPA is wrongly interpreted by the respondents. It is nowhere mentioned in clause 15 that after spending the cost of Escape Channel, the same would not be recovered from the respondents or tariff would not be got revised. Further the petitioner was forced by the circumstances to sign TPA as the petitioner was continuously suffering O & M charges without earning any revenue or earning revenue for much less power by running the plant at reduced discharge. Economic duress of the petitioner is evident when this situation prevailed for 7 months before the TPA was signed.

40. The petitioner has denied any non-disclosure of material facts regarding filing of petition in the Hon'ble High Court as alleged by PEDDA on the ground that the petition filed by the petitioner in Hon'ble High Court was for appointment of Arbitrators under Section 11 of the Arbitration and Conciliation Act, 1996 whereas this petition before the Commission has been filed for re-determination of tariff for the project under relevant provisions of the Electricity Act, 2003.

41. The petitioner further submitted in its rejoinder that PEDDA could get its energy share only in case respondents have supplied full water as promised or the respondents have to give charges for deemed generation for the period from the date of synchronization to the completion of Escape Channel i.e. from 31.08.2010 to 30.04.2012 plus the cost of construction of Escape Channel, as full generation was achieved as per installed capacity only after that date.

42. The petitioner in its rejoinder has reiterated that cost of Escape Channel, assuming it to be a remedy of Force-Majeure is required to be dealt under clause 7.5(v) of IA and not under clause 15 of TPA, which are contrary to each other. The provision of TPA being a supplementary agreement can not over-ride the provisions in the IA.

43. The arguments on behalf of the petitioners were heard at length on 20.01.2015. After considering the record on file and hearing the arguments of the parties, the Commission made following observations:-

“1. With regard to PEDDA’s submissions dated 07.01.2015 in response to the petitioner’s rejoinder dated 11.11.2014, PEDDA to comment/clarify as follows:

- i) As per the PPA, the date of synchronization and commencement of commercial operation are two different events whereas PEDDA’s stand in its reply dated 07.01.2015 is not in line with the same.

- ii) (a) PEDDA's reply is silent to petitioner's submission with regard to the performance test required to be performed for successful commissioning of the project/declaration of COD.
  - (b) Also, it may be intimated whether performance test was witnessed by PEDDA's officials.
  - iii) PEDDA to submit copy of MNRE guidelines for release of subsidy in instalments to the small hydro projects. The petitioner has submitted that the second/final instalment of subsidy was to be released after successful commissioning of the project/ performance testing and accordingly, in its case also, the same was released by MNRE vide letter dated 25.09.2012. PEDDA had recommended to MNRE for the release of subsidy to the petitioner in June, 2010 and first instalment was released on 24.09.2010.
2. The submissions of PEDDA dated 07.01.2015 are not in line with the oral submissions made by PEDDA during various hearings that the petitioner has factually spent extra amount of ₹2.10 crore (approx.) for construction of Escape Channel after synchronization with Grid and in all fairness compensation is warranted. PEDDA to clarify.

3. It needs to be brought out by the parties, when the Commercial operation Date (CoD) of the project was declared with documentary proof.
4. PEDDA's bid documents envisaged setting up of 500 KW small hydro project with commitment to make available 350 cusecs discharge of water to be released in the Western Bein (Holybein). Parties to submit the daily discharge data since the date of synchronization of the project."

The parties were directed vide Order dated 21.01.2015 to file reply to the above observations of the Commission by 18.02.2015 with copy to each other. The petitioner was further directed to file reply to the sur-rejoinder dated 19.01.2015 of PSPCL.

44. In reply to the observations of the Commission vide Order dated 21.01.2015, PSPCL filed second sur-rejoinder dated 23.02.2015. PSPCL refuted the contention of the petitioner that plant never operated at 100% capacity for 72 hours to fulfill the requirement of performance test envisaged for commencement of commercial operation. PSPCL contended that the plant had already run at 100% capacity for more than 72 hours and at 80% capacity for 90 consecutive days during the months of September-December, 2010. PSPCL had already submitted Annexure 'R-2/4' and 'R-2/5' with the sur-rejoinder in support of this fact. Even as per Tripartite Agreement, date of commercial operation has been recorded as 31.08.2010, the day on which the plant was synchronized with grid and started commercially operating. PSPCL submitted discharge data for following periods:-

- i) 15.10.2010 to 17.02.2011 ]
- ii) 20.05.2011 to 18.08.2011 ]
- iii) 21.06.2013 to 29.08.2013 ] Annexure 'R-2/2'
- iv) 30.06.2014 to 04.12.2014 ]
  
- v) 26.08.2011 to 05.03.2012 ]
- vi) 12.12.2012 to 09.06.2013 ] Annexure 'R-2/7'
- vii) 28.11.2013 to 14.05.2014 ]

PSPCL submitted that the data shows that water released by PSPCL is more than the requirement of the petitioner and proves that data submitted by the petitioner for monthwise production at rated capacity and water drawl from Mukerian Hydrel Channel-II (MHC-II) is not correct.

45. On the other hand, the petitioner vide its rejoinder to the reply (sur-rejoinder) dated 19.01.2015 of PSPCL, has disputed the veracity of the data submitted by PSPCL and annexed monthly discharge data vide Annexure P-27 and daily discharge data vide Annexure P-28 to contend that plant could not run on 100% capacity for 72 hours and at 80% capacity for three months prior to 30.04.2012, the date of completion of escape channel.

46. PEDDA in its reply dated 20.02.2015 to the observations of the Commission reiterated that the petitioner synchronized its plant on 30.08.2010 and ever after, is earning revenue at the applicable tariff as per PPA, which makes it evident that the project was in commercial operation from that date. With regard to witnessing the performance test by PEDDA, PEDDA submitted that there is no such provision in IA for the same nor the petitioner has submitted any document confirming that tests were ever done and what was the

outcome. As regards the observation that PEDDA had agreed to cost of Escape Channel as ₹2.10 crore and that the petitioner needs to be compensated on account of that, PEDDA replied that no oral submission regarding cost of Escape Channel was made. Escape Channel was constructed by the petitioner on its own and cost incurred is best known to the petitioner only. PEDDA was requested to issue 'Letter of Comfort' to enable the petitioner to raise loan to construct Escape Channel. The petitioner had conveyed the requirement of term Loan of ₹1.30 crore vide letter No.APPL/03/18 dated 18.03.2011. PEDDA further submitted that Mukerian Hydel Channel-II is under the control of PSPCL. As per the Tripartite Agreement, the developer/petitioner was required to hand over the regulation gates to PSPCL to regulate the water flowing into Mini Hydel Project. Till date regulation gates are under the control of the petitioner. No flow meters have been installed by the developer to record water discharge passing through the Mini Hydel Project. From the generation data for the months of September 2010 to January 2011, it is evident that sufficient water was available to the petitioner for power generation. After 30.04.2012, data shows that more than required water was passing through the Mini Hydel Project of the petitioner.

47. The Commission heard the parties on 24.02.2015 and observed that there are differences between the petitioner and PSPCL with regard to data / details of discharge / generation submitted by the petitioner and PSPCL and accordingly the parties were directed to reconcile the differences and file correct data jointly. The petitioner filed reconciled data vide submissions dated 23.03.2015. The further arguments of the parties were heard on

31.03.2015 and the parties were directed to file Written Submissions by 15.04.2015 and next date of hearing was to be conveyed to the parties subsequently, if required. In compliance of the directions of the Commission, PEDDA submitted vide No.122-24 dated 10.04.2015 that its replies dated 14.10.2014, 07.01.2015 and 20.02.2015 may be considered final Submissions of PEDDA. The petitioner filed Written Submissions dated 20.04.2015. PSPCL filed its Written Submissions vide No.5579 dated 27.04.2015. The Commission after considering the Written Submissions of the parties decided to close further hearing of the case vide Order dated 30.04.2015. Order was reserved.

48. The following Issues emerge from the petition, replies of the respondents, rejoinders and sur-rejoinders, Written Submissions and other material that has come on the record of the file, for consideration and decision of the Commission:-

- (i) Whether the petition is maintainable or not under the relevant provisions of the Electricity Act, 2003 and applicable regulations of the Commission ?**
- (ii) What is the date of commencement of commercial operation of the plant of the petitioner ?**
- (iii) Whether construction of Escape Channel is a Force Majeure event and whether the cost of construction of the Escape Channel is required to be added to the Capital Cost of the Project for re-determination of tariff for the Project ?**
- (iv) Whether the petitioner is required to be compensated for the cost incurred by it towards construction of the Escape Channel?**

- (v) Whether the PPA can be re-opened for re-determination of tariff for the project of the petitioner in the facts and circumstances of the case ?**
- (vi) In case the petitioner is to be compensated then how and in what manner the petitioner is to be compensated and who is liable to compensate the petitioner ?**

### **FINDINGS OF THE COMMISSION**

**49. Issue (i) - Whether the petition is maintainable or not under the relevant provisions of the Electricity Act, 2003 and applicable regulations of the Commission ?**

The petitioner has filed this petition under Section 86 (1) (a) of the Electricity Act, 2003 for re-determination of tariff for its Mini Hydel Project (650 KW) at Tarkiana, District Hoshiarpur on MHC-II. PEDDA has averred that the petition is not maintainable both de jure and de-facto. PEDDA is nodal agency of the State of Punjab responsible for development of power projects under NRSE Policy of the State and is also respondent No.1 in the petition. PEDDA invited bids in July, 2009 on energy sharing basis for setting up Mini Hydel Project at Terkiana, where proposal was to release 350 cusecs of water from Mukerian Hydel Channel-II into Holi Bein under the 'Project for Restoration of Ecology of Holi Bein' and to harness the head available for generation of power. The petitioner was successful bidder. MoU dated 27.08.2009 and IA dated 16.10.2009 were signed between the petitioner and PEDDA, which envisaged that a PPA shall be signed with PSPCL to supply power from the project at tariff rate fixed by the Commission vide its Order dated 13.12.2007 in accordance with NRSE Policy, 2006.



PPA dated 02.12.2009 was accordingly signed by the petitioner with PSPCL for supply of entire power generated at the project.

The Commission notes that power is being procured by PSPCL, a deemed Distribution Licensee within territory of the State (under the regulatory jurisdiction of this Commission) from a RE project situated in the State. The power is being procured as per terms of PPA dated 02.12.2009 at the tariff determined by the Commission vide Order dated 13.12.2007 under NRSE Policy 2006 notified by Government of Punjab. Section 86 (1) (a) and 86 (1) (e) are relevant in the case and are reproduced hereunder:-

“86. Functions of State Commission – (1) The State Commission shall discharge the following functions, namely:-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State.

Provided that where open access has been permitted to a category of consumers under Section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) -----

(c) -----

(d) -----

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for

connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee”.

The mere perusal of the above provisions of law and facts mentioned hereinabove leaves nothing in doubt that this Commission has jurisdiction to consider and decide the petition on merit.

50. Issue No. (ii) - **What is the date of commencement of commercial operation of the plant of the petitioner ?**

There is no dispute between the petitioner and respondents about the date and time of synchronization of the plant with the grid of PSPCL which is admittedly 31.08.2010 at 4.20 P.M. The petitioner, however, contends that date of synchronization should not be taken as date of commissioning of the plant on the ground that

- (a) ‘Commissioning’ of plant has not been defined in IA dated 16.10.2009 and PPA dated 02.12.2009 but ‘commencement of commercial operation’ has been defined in clause 1.2 of IA and clause 1.0.0 of PPA as under:-

‘Commencement of commercial operation’ means the date on which the project is capable of delivering Active and Reactive on regular basis

after successfully completing the commissioning tests as a per prudent utility practice'

- (b) that due to failure on the part of the respondents to release promised 350 cusecs of water for the plant for which it was bidded and its installed generation capacity of 650 KW was based, it could not generate power on regular basis.
- (c) As per Govt. of India, Ministry of New and Renewable Energy (MNRE), second instalment of subsidy is released after the project is commissioned. As per scheme of subsidy of Govt. of India, MNRE, the commissioning of project would be deemed only after performance testing during which 80% of rated capacity be demonstrated for 90 consecutive days and 100% capacity for at least 72 hours. This could not be done without ensuring release of 350 cusecs of water discharge for this period. This could be done only after 30.04.2012 on completion of Escape Channel, as release even upto 200 cusecs of water into Holi Bein flooded the area in upper reach of the Holi Bein rivulet and project was got to be shutdown completely for three months. The discharge data shows release of much less discharge during the entire period of operation from 31.08.2010 to 30.04.2012. The actual date of release of second instalment of subsidy is 24.09.2012 after PSPCL gave certificate dated 01.09.2012 showing operation capacity of plant for May, 2012 to July, 2012.

- (d) In order dated 19.07.2012 passed by the Commission in Petition No.35 of 2012, generic tariff for plants was determined by the Commission for the NRSE Projects 'commissioned' during the year 2012-13 and not 'synchronized' during 2012-13. As such, the petitioner is entitled to tariff for the projects commissioned in year 2012-13.
- (e) Only the generation output is the criteria which determine the 'commissioning' of the project. It has to be at 100% rated capacity for at least 72 hours and at 80% capacity for 90 consecutive days. The petitioner has disputed the data submitted by PSPCL for month of October, November and December to show that these conditions were fulfilled. The petitioner has shown that the generation output should be 15600 units per day for 100% rated capacity. There are no spell of 72 hours period for which this can be shown. Sr. XEN appointed by PSPCL as per the directions of the Commission for reconciliation of data jointly with the petitioner, has agreed that there was huge variation in import readings recorded at the Grid.

On the basis of above submissions, the petitioner pleads that date of commissioning be deemed 30.04.2012 and year of commissioning as 2012-13 and on this basis the project of the petitioner be allowed tariff as determined by the Commission in its Order dated 19.07.2012 in Petition No.35 of 2012.

On the contrary PEDA and PSPCL contend that the plant of the petitioner was synchronized on 31.08.2010 with the grid of

PSPCL and has been generating power and earning revenue for a period of 20 months before 30.04.2012 and as such has been in commercial operation during all this period. The petitioner had bid and had agreed to tariff under NRSE Policy, 2006 as fixed by the Commission in its Order dated 13.12.2007. This has been agreed to by the petitioner as per IA and PPA signed by it which are binding on the parties for 30 years. The petitioner is not entitled to any other tariff. PSPCL further submitted that the construction of Escape Channel was necessitated on account of the fact that Holy Bein could not take 350 cusecs of discharge of water and area around it got flooded and waterlogged. It was not original part of the plan of the project or DPR. The responsibility of carrying water through Holi Bein was that of the developer or that of PEDDA and in no way of PSPCL, which was only responsible to regulate release of 350 cusecs of water from MHC-II for which there has never been any default on the part of PSPCL. On release of 200 cusecs of water, it was found that X-Section of Holi Bein was inadequate to carry this discharge.

PSPCL has further reiterated in its submissions that reliance of the petitioner on the decision of the Commission in Petition No.72 of 2012 for re-opening the PPA is misplaced. That Order was passed by the Commission on the basis of Judgment of Hon'ble Tribunal rendered in case of Rithwik Energy System Ltd. Vs Transmission Corporation of Andhra Pradesh and Ors. PSPCL has submitted that APTEL has distinguished that Judgment in its judgment dated 09.04.2014 in Appeal No.19 of 2013 in the matter of M/s Puri Oil Ltd. Vs Haryana Power Purchase Centre and Others and submitted that Rithwick case is not applicable for re-opening of PPAs in cases such as that of petitioner.

PEDA has also submitted that the petitioner had never mentioned about performance tests to be carried out for declaring the commissioning date of the project. It has in fact never intimated either to PSPCL or PEDA that its project be deemed to have been commissioned after 30.04.2012 only.

The Commission after considering the data submitted during the proceedings and the submissions of the parties observes that the petitioner has been operating its plant on commercial basis and earning revenue from 31.08.2010 on the commercially agreed tariff as per the bid documents, IA and PPA. That PSPCL had always more than required discharge available through MHP-II to release for Mini Hydel Project of the petitioner and would have no hesitation to release the same but for the extraneous reasons like inadequate capacity of Holi Bein to carry full discharge of 350 cusecs. PSPCL was also able to show that during months of September 2010 to December 2010, sufficient discharge has been released to fulfill performance test conditions although the same has been disputed by the petitioner by finding fault with the recordings of import of power during these months. This fact, only, is not sufficient to accept that the 'commissioning' of the plant happened only after construction of Escape Channel when regular release of 350 cusecs was ensured. The petitioner can not be allowed to have it both-ways i.e. to earn revenue from the project by operating it commercially from 31.08.2010 onwards and to allow re-determination of tariff, considering deemed date of commissioning as 30.04.2012, at par with the tariff determined in Petition No.35 of 2012 for the projects commissioned in year 2012-13.

Further, the petitioner has accepted the fact that its project was commissioned on 31.08.2010 and commenced its commercial operation. This fact is recorded in the recital of the Tripartite Agreement (TPA) dated 10.08.2011 executed by the petitioner with PEDDA and PSPCL.

The Commission, therefore, decides that project was commissioned on 31.08.2010 and decide this issue against the petitioner and in favour of respondents and holds that the project of the petitioner is entitled only to tariff as determined by the Commission in its Order dated 13.12.2007 and as per terms of IA dated 16.10.2009 and PPA dated 02.12.2009 signed by the petitioner with PEDDA and PSPCL respectively. The Commission also observes that the effect of higher tariff is ultimately borne by the consumers of the State and PPAs should be re-opened in only exceptional cases in the interest of viability of the projects even in the case of RE Projects, although the Commission has the mandate of law to promote the same. In the instant case, though the petitioner has suffered revenue loss in peculiar conditions but there are sufficient other provisions in the PPA to settle such situations / eventualities.

**51. Issue No. (iii) - Whether construction of Escape Channel is a Force – Majeure event and whether the cost of construction of the Escape Channel is required to be added to the Capital Cost of the Project for re-determination of tariff for the Project ?**

**Issue No. (iv) - Whether the petitioner is required to be compensated for the cost incurred by it towards construction of the Escape Channel?**

Before taking up these issues, it is necessary to re-capture briefly the sequence of events leading to the construction of Escape Channel for the project, post commissioning which are as under:- .

The bids for the project were invited in July, 2009. Bid was submitted by the petitioner on 27.07.2009. Memorandum of Understanding (MoU) was signed by the petitioner and PEDDA on 27.08.2009.

Detailed Project Report (DPR) was prepared on the basis of full supply discharge of 350 cusecs to be supplied to Holi Bein and rated Head corresponding to rated discharge of 350 cusecs (9.91 cumecs) to be  $\pm 7.25$  m and installed generation capacity of 650 KW (1x650 KW) with 10% over load capacity, PLF of the project 95%, implementation schedule: Pre-construction activities: 6 months, construction period: 12 months, capital cost ₹635 Lac, Project cost ₹699 Lac.

Implementation Agreement was signed by the petitioner and PEDDA on 16.10.2009. PPA was signed by the petitioner and PSPCL on 02.12.2009. The project was synchronized with the grid of PSPCL, the procurer, on 31.08.2010. Plant was shut down on 29.01.2011 on the orders of PEDDA.

Meetings were held at Government level for resolution of the problem of flooding of area around Holi Bein and to run the project at its installed capacity, on 07.02.2011 and 15.02.2011 and it was decided to construct Escape Channel to escape excess discharge of water into bye-pass channel of the under construction 18 MW MHP-II Project of PSPCL.



The petitioner has submitted that the construction of Escape Channel was necessitated on account of the fact that during operation of the plant, it was found that Holi Bein, into which as per earlier decisions mentioned in the Bid Documents, the full design discharge of 350 cusecs was to be released, was found to be inadequate to carry the same and farm area around it got waterlogged on increasing the release of water towards full discharge. As such, the project ran at lower capacity and generated much less saleable power as was envisaged during months of September to December, 2010 and January, 2011. The problem aggravated on 28.01.2011 when farmers whose fields in the area got waterlogged, resorted to agitation. The plant was completely shut down on 29.01.2011 on the directions of PEDDA. It was decided in meetings held on 07.02.2011 and 15.02.2011 that in the interest of the project already completed for discharge of 350 cusecs, an Escape Channel be constructed to drain excess water over the requirement / capacity of Holi Bein, so that the project is able to operate at its full capacity without flooding of fields of the farmers. It was further decided that the petitioner shall bear the cost for construction of the Escape Channel, to be compensated suitably by releasing excess discharge over a period or by adjustment against the percentage energy share agreed in the IA/PPA.

The petitioner submitted that design of Escape Channel was approved by PSPCL for discharge of 350 cusecs and no scope was kept for compensating the petitioner through release of 20% higher discharge for generating excess energy and earning higher revenue over a period.

PEDA / PSPCL have taken a stand that as per clause 15 of Tripartite Agreement, the petitioner had unequivocally agreed to construct Escape Channel for the Project at its own cost. PEDA / PSPCL had cooperated and helped the petitioner in every way, so that this project start earning full revenue as stipulated in the Bid Documents / MoU / IA / PPA & TPA and the petitioner may not be allowed to wriggle out of it by re-determining the tariff for the project due to higher cost of the project on account of extra cost of Escape Channel after the completion of the project. PEDA contended that construction of Escape Channel is Force Majeure event and should be treated under clause 7 (iv) of the IA read with clause 15 of TPA.

In reply to above contentions of the PEDA / PSPCL, the petitioner relied on clause 7.5 (v) of the IA which provides that after completion of the project, additional cost required for remedial and alternate measures to remove / remedy the Force Majeure shall be added to the project completion cost for all purposes of the Agreement. All purposes includes re-determination of tariff for the project for which the petitioner has prayed in this petition.

The Commission has gone through the rival contentions of the parties. The Commission notes that in the MoM dated 07.02.2011 & MoM dated 15.02.2011 and more particularly in the later MoM, it was indicated / agreed that the petitioner needs to be compensated for the extra cost towards construction of Escape Channel by releasing 20% extra discharge for generating more power and for earning more revenue. But the same was not

approved in the final design / drawing for whatever reason by PSPCL. The Commission is not inclined to go into the same. Suffice it to say that 20% extra discharge was not allowed by PSPCL.

Regarding the adding of the cost of Escape Channel to the total Project cost under clause 7.5 (v) of the IA, the Commission notes that this being a bid project, the tariff was bid by the petitioner at the rate applicable to the RE Projects under NRSE Policy-2006 and agreed to give percentage energy share @ 20% for 10 years and @ 30% for remaining 20 years (IAs, PPA being operative for 30 years period), which in fact means that the petitioner had bid to develop the project at the 80% tariff applicable for NRSE Projects commissioned during FY 2007-08 to FY 2011-12 for 10 years and at 70% of that tariff for next 20 years. Balance revenue was to be given to PEDDA / PSPCL on percentage energy share as agreed to. Cost of the project was not a factor in determination of tariff. So additional cost is immaterial so far as tariff for the project is concerned. PEDDA / PSPCL has rightly contended in this respect.

The other contention of the petitioner that TPA was got signed from the petitioner under economic duress, though vehemently denied by the respondents, needs examination in the facts and circumstances of the case. The Commission can not miss to note the facts that :

- (a) The discharge of 350 cusecs was promised to the petitioner.

- (b) Installed capacity of the project was based on promised discharge.
- (c) It was the understanding of PEDDA and others even at Govt. level that Holi Bein requires and would carry this discharge without flooding / water logging of the area.
- (d) The IA and PPA were signed taking above facts into account.
- (e) The cost of project was incurred by the petitioner in the belief that it would run with full discharge.
- (f) The petitioner completed in project much within the scheduled completion time.
- (g) Only after releasing discharge of water into the Holi Bein, it was realized that Holi Bein has not adequate Section to carry that discharge.
- (h) The project was operated on less than design discharge for about five months when it had to be shut down under a situation already noted above.
- (i) The matter was promptly resolved at Government level by deciding to construct the Escape Channel for which experts of PID, PEDDA and PSPCL were in agreement and helpful.
- (j) But the project remained shut down for three months before again operating at a lower discharge that Holi Bein was capable of carrying.
- (k) A Tripartite Agreement was signed on 10.08.2011, though it was stipulated in the IA that the same would be signed within 15 days of effective date which was date of signing of IA on 16.10.2009.

- (1) That drawings for Escape Channel were approved by PSPCL / PEDDA / PID on 05.10.2011 after lapse of about 7 months from the decision to construct the same.

During all this period from completion of the Project and synchronization of the same with grid on 31.08.2010 upto signing of TPA on 10.08.2011, the project certainly came under economic/ financial stress as enough revenue could not be earned by it for debt servicing and for meeting the O&M charges. The Commission can not fail to appreciate that no party other than the petitioner, who had invested in the project by raising term loans would have come under economic stress during this period. As time lapsed the respondents continued to gain dominance in the matter. The situation is revealed by Written Submissions dated 27.04.2015 of PSPCL wherein in para 9, PSPCL has submitted, inter-alia, as under:

**“.....Accordingly, vide letter dated 01.06.2011, the petitioner was allowed to carry out the work of construction of Escape Channel from its power house subject to signing the Tripartite Agreement with respondent No.2 and PEDDA and agreeing to give entire share of free power that it had already promised to PEDDA as also 50% free units out of the excess units produced beyond 5 million units per annum. This construction of Escape Channel had been allowed only as a goodwill gesture to facilitate the petitioner to**

**ensure full generation from its plant on the request of PEDA.....”**

It is more than obvious from the perusal of above submissions of PSPCL that PEDA / PSPCL were in position to dictate terms to the petitioner who was facing situation of becoming his project a NPA at the instance of the lenders. Under these conditions of economic duress brought upon the petitioner for which the petitioner was not at all responsible and nobody has blamed it for the same, the petitioner had to agree to the terms of TPA including clause 15 of the same, on the basis of which PEDA/PSPCL submitted that expenditure incurred was agreed to be borne by the petitioner voluntarily and it is of no concern of PEDA / PSPCL.

The Commission, in the light of above discussion, is of the view that additional cost incurred by the petitioner on construction of Escape Channel can not entitle the petitioner for re-fixing the tariff by including it in the project cost as the tariff of project is bidded tariff but the petitioner is entitled to be compensated for the cost incurred by it on construction of Escape Channel, notwithstanding the clause 15 of the Tripartite Agreement.

**52. Issue No. (v) - Whether the PPA can be re-opened for re-determination of tariff for the project of the petitioner in the facts and circumstances of the case ?**

Issue has been extensively discussed in foregoing paras 50 and 51. The finding of the Commission on this issue is in the

negative as no justification exist to re-open the PPA for re-determination of tariff for the project. The prayer of the petitioner in this regard is not acceded to, as the re-determination tariff on the plea that project was factually 'commissioned' after completion of Escape Channel on 30.04.2012 has already been answered in the negative by the Commission. The Commission is in agreement with PEDDA / PSPCL that project was under commercial operation from 31.08.2010, the date it was synchronized with the grid of PSPCL and was supplying power to PSPCL at tariff under PPA which was a commercial transaction. As regards the plea of the petitioner that it was entitled to re-fixing of higher tariff on account of increase in project cost by more than ₹2 crore and further due to IDC, non-repayment of loans etc. is concerned, the Commission has already discussed the issue in the preceding para and have given the findings that the petitioner is entitled to be compensated for the cost incurred by the petitioner on Escape Channel, which was post completion of the project but is not entitled to any tariff revision on this account. The issue is decided against the petitioner.

**53. Issue (vi) - In case the petitioner is to be compensated then how and in what manner the petitioner is to be compensated and who is liable to compensate the petitioner ?**

PEDDA had invited the bids on the basis of 350 cusecs discharge to be let into Holi Bein. The project was completed on this basis. But it came out that Holi Bein was inadequate to carry this discharge and so Escape Channel was required to be constructed after completion of the project for full generation by

the project. The observations of Comptroller and Auditor General of India in para 2.2.9 of Report on Public Sector Undertakings (Social, General and Economic Sectors) for the year ending 31st March, 2014, is relevant here and is reproduced hereunder:-

**“2.2.9 Less receipt of energy share**

Punjab Drainage Department was entrusted with the work of desilting/remodeling of Holy Bein rivulet for enabling it to have a capacity of 500 cusecs discharge so that a MHP could be installed on it to harness power potential. PSPCL having agreed (March 2009) to release 350 cusecs of water from Mukerian Hydrel Channel-II, PEDDA allotted (August 2009) site at Terkiana (Hoshiarpur) Headworks to M/s Atlantic Power Private Limited (Developer) for setting up a MHP of 500 KW capacity (revised to 650 KW) on BOO basis. The Project was commissioned in August 2010 and 200 to 250 cusecs of water was discharged in the Holy Bein from MHC-II. The project was shut down (January 2011) on account of breaches in the banks of Holy Bein which resulted in water logging and damaging of the crop in the area. The developer constructed an escape channel at his own cost and refused (July 2013) to release the energy share to PEDDA. This resulted in less receipt of energy share to PEDDA amounting to ₹1.05 crore including interest upto March, 2014.

GoP accepted (October 2014) the fact and stated that efforts were being made by PEDDA to realize due energy share through PSPCL. The reply from PID was awaited. The



developer has sought arbitration proceedings to settle the dispute”.

The construction of Escape Channel was neither envisaged in the Bid Documents, nor in MoU or IA or PPA. Had it been envisaged, in the bid documents by PEDDA after exercising due diligence in investigations / surveys, the bidders would have factored the cost of the same before submitting the bids. The bids were invited on percentage energy share basis by PEDDA. Higher estimated cost of the project would have resulted in corresponding lowering of percentage energy share of PEDDA in the bids, to recover the higher initial cost of the project. Considering conversely, PEDDA has gained in its percentage share by wrongly promising that discharge of 350 cusecs would pass through the Holi Bein safely. So under the circumstances it is PEDDA, who should bear the cost of Escape Channel. The Commission has noted that PEDDA has not received any percentage energy share since the synchronization / commissioning of the project, nor it has pressed for the same and already more than ₹1 crore is due to be paid to PEDDA. Although, it has submitted in its replies that the petitioner has filed this petition not with clean hands on account of failure to pay the percentage energy share from the energy generated by the plant and be made to do so, the Commission is of the view that PEDDA could have got the same recovered easily through PSPCL who clears the monthly bills of the petitioner for energy sold to PSPCL. The energy share committed to PEDDA shall pass on to PSPCL on commissioning of 18 MW MHP-II Project, which was scheduled to be commissioned long ago. PEDDA has also gained from the delayed completion / commissioning of the

Project, as PEDDA is entitled to the percentage energy share in the meanwhile for a prolonged period.

#### **54. Decision of the Commission**

In view of the above findings, the decision of the Commission is as under:-

- (i) The prayer of the petitioner for determination of tariff is not allowed. The tariff for the project shall remain as per PPA i.e. as determined by the Commission in its Order dated 13.12.2007 under NRSE Policy-2006 of the Government of Punjab and agreed to in IA dated 16.10.2009, PPA dated 02.12.2009 and TPA dated 10.08.2011 by the parties.
- (ii) The petitioner is entitled to recover cost of Escape Channel (without interest) from the percentage energy share of PEDDA. The petitioner shall satisfy PEDDA about the actual cost incurred by the petitioner on the construction of Escape Channel and associated works. PEDDA shall also not charge interest on the amount in arrears on account of its percentage energy share since the synchronization of the project. After recovery of cost of the Escape Channel and associated works, the petitioner shall be liable to deduction of percentage energy share from the energy bills of the petitioner and PEDDA / PSPCL, as the case may be, shall be entitled to percentage energy share as agreed to in the IA, PPA and TPA. It is made clear that PSPCL is not liable to compensate the petitioner from its energy share after it

becomes entitled to the same on the commissioning of its  
18 MW MHP-II Project.

The petition is disposed of, in terms of above decisions and  
directions.

**Sd/-**  
**(Gurinder Jit Singh)**  
**Member**

**Sd/-**  
**(Romila Dubey)**  
**Chairperson**

**Chandigarh**  
**Dated: 26.05.2015**