

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

**Petition No.51 of 2015
Date of Order: 22.01.2016**

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

In the matter of: Petition under sections 62 and 86 (1)(e) of The Electricity Act, 2003 seeking revision of the tariff of the Madhopur Beas Link-III (MBL-III) small hydel project of the petitioner herein located at Madhopur Beas Link in terms of the Tariff Orders passed by this Commission applicable to mini hydel projects in the State of Punjab (Capacity of Plant 3.8 MW).

And

In the matter of: Gill Acqua Hydro Power Generation Company Pvt. Ltd. through its Director, 1688, Sector 33-D, Chandigarh.
Amended Address: Gill Acqua Hydro Power Generation Company Pvt. Ltd., through its Director, II Floor, B-6/10, Safdarjung Enclave, New Delhi-110029.

.....Petitioner

Versus

1. Punjab State Power Corporation Limited through its Chairman-cum-Managing Director, PSEB Head Office, The Mall, Patiala-147001.
2. Punjab Energy Development Agency through its Director, Solar Passive Complex, Plot No.1 & 2, Sector 33-D, Chandigarh.

.....Respondents

ORDER

Gill Acqua Hydro Power Generation Company Pvt. Ltd. (Gill Acqua; petitioner) filed this petition under sections 62 and 86(1)(e)

of The Electricity Act, 2003 (Act) before the Punjab State Electricity Regulatory Commission (Commission) seeking revision of the tariff for its Madhopur Beas Link-III (MBL-III) small hydel project (project) with capacity 3.8 MW.

2. The petition was admitted by the Commission on 08.09.2015 and the respondents Punjab State Power Corporation Limited (PSPCL; respondent-1) and Punjab Energy Development Agency (PEDA; respondent-2) were directed to file reply to the petition by 29.09.2015 vide Commission's Order dated 08.09.2015. The next date of hearing was fixed as 06.10.2015. PSPCL vide letter dated 29.09.2015 requested for grant of extension in time by four weeks to file reply and postponement of the date of hearing. During hearing on 06.10.2015, both PSPCL and PEDA requested for extension in time to file reply. The Commission vide Order dated 07.10.2015 granted time to respondents to file reply by 28.10.2015 with a copy to the petitioner. The petitioner was directed to file rejoinder, if any, to the replies by 30.10.2015 with copy to the respondents. The next date of hearing was fixed as 03.11.2015 later revised to 05.11.2015.

3. PEDA filed reply vide letter dated 09.10.2015 and PSPCL vide letter dated 12.10.2015 received on 14.10.2015. The petitioner filed rejoinders dated 02.11.2015 to the replies of PSPCL and PEDA. In the hearing on 05.11.2015, the petitioner requested for alternate date for hearing of the petition due to unavailability of its advocate. Accordingly, the next date of hearing was fixed as 17.11.2015. During hearing on 17.11.2015, arguments of the petitioner and PSPCL were heard at length. PSPCL sought time to file reply to the rejoinder dated 02.11.2015 filed by the petitioner.

The Commission in its Order dated 18.11.2015 directed PSPCL to file the sur-rejoinder by 01.12.2015 with copy to the petitioner and PEDDA. The next date to hear further arguments of the parties was fixed as 08.12.2015. PSPCL vide letter dated 07.12.2015 (received on 08.12.2015) filed reply to the rejoinder of the petitioner with copies sent directly to petitioner and PEDDA. PSPCL requested the Commission to fix another date of hearing due to unavailability of its counsel. The Commission vide its Order dated 09.12.2015 fixed the next date of hearing as 11.12.2015 to hear the final arguments. During hearing on 11.12.2015, it came up that the project was not commissioned till date and the petitioner was allowed last extension by PEDDA to complete and commission the project upto December, 2015. The Commission vide its Order dated 11.12.2015 fixed the next date as 12.01.2016 for hearing further arguments by the parties. The petitioner filed additional affidavit dated 02.01.2016 (received on 04.01.2016) wherein besides other documents, the petitioner filed a letter from PEDDA that its request for extension is under process.

4. During hearing on 12.01.2016, the petitioner filed a copy of letter no. 5109 dated 11.01.2016 issued by PEDDA allowing it to complete and commission the project before 31.03.2016 subject to compliance of all terms & conditions of Implementation Agreement (IA) dated 26.05.2009, Addendum to Tripartite Agreement (TA) dated 08.08.2012 and undertaking of the petitioner in the disclaimer certificate signed on 10.07.2012. The Commission heard the arguments on behalf of the parties at length. Vide Order dated 15.01.2016, the Commission directed the parties to file written submissions by 18.01.2016 and further

directed PSPCL to file rejoinder to the additional affidavit filed by the petitioner by the same date. Hearing of the case was closed. Order was reserved.

5. Gill Acqua filed the written submissions on 19.01.2016. PSPCL neither filed the written submissions nor its response to the additional affidavit of the petitioner by the due date. PEDDA also has not filed the written submissions by the due date.

6. The relevant details of petition in brief are as hereunder:

- i) Pursuant to the NRSE policy, 2006 (policy) of the Govt. of Punjab (GoP), Gill Acqua entered into a Memorandum of Understanding (MoU) on 10.07.2007 with PEDDA to set up the project on the self identified site as per relevant provision(s) in the policy. PEDDA vide allotment letter dated 21.05.2009 allotted the site of the project to the petitioner for development of small hydel project on build, own and operate (BOO) basis in line with the self identified scheme as per policy. As per the allotment letter, the petitioner was mandated to sign an IA and give a fixed percentage of the energy share of saleable electricity to PEDDA.
- ii) Subsequently, Gill Acqua signed the implementation agreement on 26.05.2009 for implementation of the project wherein the conditions for establishing the project were provided. The petitioner also signed the tripartite agreement with PEDDA and Punjab Irrigation Department (PID) on 28.05.2009. The said TA was amended and an addendum was executed on 08.08.2012.
- iii) The Power Purchase Agreement (PPA) for the project with 3 MW installed capacity was signed with Punjab State Electricity Board (now PSPCL) on 04.06.2009. As per PPA, the scheduled

date of synchronization of the project with the grid was 23.09.2010. The tariff for supply of electricity provided in the PPA was ₹ 3.70 per kWh (for the year 2008-09) with 3% annual escalation upto FY 2011-12, as per the rates approved by the Commission in its Order dated 13.12.2007. The last escalated tariff was to remain in force during the remaining term of the PPA with the provision that any enhancement in tariff after the last escalation shall be as determined and approved by the Commission.

- iv) The Commission vide its Order dated 30.09.2010 in petition no. 32 of 2010 (Suo-Motu) determined the levelled tariff for small hydro power projects to be commissioned in FY 2010-11 as ₹ 4.26 per kWh for project capacity below 5 MW and ₹ 3.65 per kWh for 5 to 25 MW capacity projects. Subsequently, the Commission vide its Order dated 19.07.2012 in petition no. 35 of 2012 determined the generic tariff for small hydro power projects to be commissioned during FY 2012-13 as ₹ 4.88 per kWh for below 5 MW capacity projects and ₹ 4.16 per kWh for 5 to 25 MW capacity projects.
- v) Due to reasons beyond the control including flooding of the power house and additional work involved in bank raising activities, the implementation of the project was delayed and vide letter dated 08.12.2014, PEDDA granted extension for completion/commissioning of the project upto December, 2015 subject to compliance of the terms & conditions of the IA and addendum to TA.
- vi) MBL canal was built in 1956 and the project was designed by the petitioner on the basis of construction drawings of 1956. Upon physical verification in 2009-10 after signing of the

IA/PPA, it was found that at many patches, banks of the canal were damaged/lower than the drawings and approval for rectification of the same was granted in August, 2012. As per the addendum to the TA, the additional protective measures for strengthening for safety of the banks as per approved drawings & directions of PID and their maintenance were agreed to be provided by the petitioner at its own cost, which is requested to be allowed as pass through since these works were not within the original scope of work as per the allotment letter/PPA and moreover not related to the project. The entire hydrology risk in respect of the future schemes of PSPCL has been taken by the petitioner. The project construction was commenced in January, 2015 and expected to be completed by December, 2015.

- vii) The renewable energy projects are mandated to be promoted under the provisions of the Act, National Electricity Policy and Tariff Policy. The Commission in its Order dated 13.12.2007 has also provided for enhanced rates for delayed projects as is the case of petitioner's project. The Commission in certain other renewable energy projects like Green Planet Energy Pvt. Ltd., Punjab Biomass Power Ltd., Indian Sucrose Ltd. determined feasible/preferential/promotional tariff. The tariff as per recent RE Regulations when the project is commissioned is applicable. There is a provision in the PPA for determining enhancement in tariff by the Commission.
- viii) In view of Hon'ble Appellate Tribunal for Electricity (Hon'ble APTEL) judgment dated 28.09.2006 in appeal no. 90 of 2006 in case of Rithwik Energy Systems Ltd., the PPA can be reopened to give thrust to renewable energy projects.

- ix) NRSE policy, 2012 provides that tariff for sale of power from the projects under this policy shall be as per Commission's Tariff Orders and governed by renewable energy regulations and revised as per tariff notified for the financial year in which the scheduled date of commissioning falls. Accordingly, the tariff for the projects commissioned in FY 2015-16 i.e. ₹ 5.47 per kWh for projects below 5 MW capacity and ₹ 4.65 per kWh for projects with capacity between 5 and 25 MW are applicable.
- x) The electricity generated by the project and consumed by PSPCL shall count towards compliance of its Renewable Purchase Obligation (RPO). In the ARR petition for FY 2014-15, PSPCL demanded ₹ 141 crore for FY 2013-14 (review) and ₹ 134 crore for FY 2014-15 (proposal) for purchasing Renewable Energy Certificates (RECs) in the event of short supply of electricity from renewable energy sources.
- xi) It is prayed that the tariff for the power to be supplied by the petitioner from the project be revised under the PPA and aligned with the tariff determined under the latest Tariff Orders passed by the Commission and NRSE policy, 2012. It is further prayed that the project may be treated as being established under NRSE policy, 2012 in view of the revised commissioning timelines ratified by PEDDA.

7. The reply of PEDDA, in brief, is as under:

- i) The Orders of the Commission dated 30.09.2010 and 19.07.2012 determining generic preferential tariffs for renewable energy projects including small hydro projects for FY 2010-11 and FY 2012-13 respectively were applicable only to the projects for which PPAs were yet to be signed and were to

be commissioned in the respective years. The Commission had similarly determined the generic tariff for the projects to be commissioned in FY 2011-12 in its Order dated 31.10.2011.

The petitioner neither submitted any comments/suggestions nor attended public hearings in response to the staff paper issued by the Commission inviting comments/suggestions from the stake holders in the due process of the said Orders.

- ii) The background of signing the addendum to the TA is as under:
 - a) In the Detailed Project Report (DPR), the project was conceived as a self identified project by the petitioner by utilizing the steep slope in MBL offtaking from UBDC RD 11000 to its outfall in the Beas river by raising the embankments so as to create gentle slope by raising the FSL of the MBL.
 - b) PID approved the drawings relating to the execution of the project vide letter dated 17.02.2011 subject to the signing of the addendum to the TA regarding the deviation of FSL. The NRSE policy, 2006 required the developers to maintain design FSL for optimum utilization of the water sources for power generation in terms of the policy. However, in the DPR, the FSL was proposed to be above the design FSL by the petitioner, which was accepted by PID. The addendum to the TA was signed on 08.08.2012.
 - c) Due to change in FSL there was likelihood of change in hydrology of the canals of the area. To safeguard the interest of the State, the developer was asked to submit disclaimer certificate that no claim of any kind shall be lodged against PEDDA, PID or any other department of State Govt./State Govt. for any loss incurred/to be incurred on account of

change in hydrology or on account of time taken for completion of approval procedure till signing of the addendum to the TA. Further, to keep the sanctity of the IA/TA/PPA intact, it was included in the disclaimer certificate that the petitioner will complete the project within 455 days from the signing of addendum to TA and accordingly the completion date of the project worked out as 07.11.2013.

- iii) The NRSE policy, 2012 does not have specific provisions with regard to fixation of tariff for project having IAs/PPAs signed under NRSE policy, 2006 and not commissioned till the notification of NRSE policy, 2012. As projected by the petitioner, the Commission has not been revising the tariff of small hydro projects. Infact, the Commission determined generic preferential tariff every year including FYs 2013-14, 2014-15 and 2015-16 which was applicable to the renewable energy projects for which PPAs were yet to be signed and the projects were to be commissioned in the respective year.
- iv) PEDDA issued default-cum-termination notice no.14387 dated 21.11.2014 to the petitioner. In response to the said notice, the petitioner vide letter dated 05.12.2014 requested PEDDA to review the notice and grant extension for completion of the project in view of certain unavoidable reasons beyond its control due to which project has been delayed. PEDDA allowed the petitioner to complete and commission the project by December, 2015 subject to all the terms & conditions of IA, addendum to TA and undertaking of the petitioner in the disclaimer certificate.

The extension in time for completion of the project does not entitle the project to be shifted from NRSE policy, 2006 to NRSE policy, 2012. In case this extension was not approved, the petitioner would not have been eligible for incentives under the NRSE policies as claimed by the petitioner.

- v) The petitioner has contended that one of the reasons for additional cost/delays is the bank raising activities due to old drawings given to it. In this regard, it is submitted that rather the requirement to raise the bank(s) of the canal was due to proposed raising of the FSL above the design FSL in the DPR submitted by Gill Acqua. It was a self identified site which was physically checked/surveyed by the developer before submitting the proposal for the project for approval to PEDDA.
- vi) The tariff provided in the NRSE policy, 2006 for small hydro projects was independent of the actual completed cost of the project. The generic tariff in the orders of the Commission is based on normative capital cost independent of actual completed cost of the projects. The project specific tariffs for such technologies are not to be determined by the Commission as per RE Tariff Regulations.
- vii) As per the information submitted by the petitioner to PEDDA, the commencement of the project had begun much earlier to the date (January, 2015) mentioned by the petitioner in the petition.
- viii) The case of Punjab Biomass Pvt. Ltd. quoted by the petitioner in support of his contention for revision of tariff is diversely placed and not relevant. In that case, two part tariff including escalable variable component was to be determined by the Commission, being a biomass project using biomass as fuel, whereas the petitioner's project is a small hydro project with

single part tariff without any yearly fuel cost escalation component. Also, there is no similarity between the petitioner's project and the project of Indian Sucrose Ltd.

ix) The extensions in time period allowed by PEDDA for commissioning of the project upto December, 2015 were subject to terms & conditions of the IA, TA, addendum to TA, disclaimer certificate etc.

8. The reply of PSPCL, in brief, is as under:

i) The petitioner is not entitled to any revision in tariff over and above agreed to in the PPA. The project has been unduly delayed and PSPCL, at present, is procuring electricity at a much lower cost from renewable energy generators through competitive bidding process inviting reverse bidding with the tariff determined by the Commission as the reference by PEDDA. This is in line with the mandate of the Tariff Policy. The last PPA entered into by PSPCL under such process on 29.04.2015 with Salasar Hydro Urja Pvt. Ltd. was at a tariff of ₹ 3.65 per kWh discounted against the benchmark tariff of ₹ 5.16 per kWh determined by the Commission for FY 2013-14 for small hydro projects. This tariff is lower than the tariff provided in the PPA dated 04.06.2009 entered into with the petitioner. The petitioner can not benefit out of its own delay and claim higher tariff particularly when there is no escalable variable component involved. In the PPA, there is no provision for determination of tariff afresh by the Commission. The provision in the PPA pertains only for enhancement in the existing tariff, if the need arises. As there is no variable cost, the escalation provided in the PPA can only be on account of statutory levies/other factors

for which escalation is required. The reason that the tariff determined and agreed to is not commercially convenient, can not be a ground for increase in tariff in favour of the petitioner, especially, when the tariff provided in the PPA in the year 2009 is higher than the tariff discovered in the competitive bidding process in the year 2015-16.

- ii) The petitioner set up the project on the self identified site. The entire due diligence and other risks were that of the petitioner. It was petitioner's responsibility to examine the suitability of site and other conditions affecting the project.
- iii) The tariff provided in the PPA signed on 04.06.2009 was as determined by the Commission in its Order dated 13.12.2007. The project was to be commissioned by 23.09.2010. Despite that the petitioner did not take any steps towards construction and commissioning of the project. The construction was started only in January, 2015. The petitioner can not be allowed to invoke force majeure conditions for delay in completion of the project as suggested, being a self identified project. The petitioner can not be allowed to claim certain rights under NRSE policy, 2006 as adopted by the Commission in its Order dated 13.12.2007 & the PPA and claim tariff under NRSE policy, 2012 which has no application to the facts of the present case.
- iv) The petitioner's reference to the Orders dated 30.09.2010, 19.07.2012 and 24.07.2015 of the Commission has no application to the facts of the present case. The addendum to TA dated 08.08.2012 specifically provides that the entire risk is of the petitioner. The extension for completion of the project was granted by PEDDA subject to the original terms & conditions of IA and addendum to TA. The petitioner is seeking to take

advantage of the extension granted to it by PEDA while seeking to wriggle out of the conditions for such extension including the obligations under the agreement.

- v) The Commission has only been determining the tariff for the projects to be established from time to time and has in no manner directed that all existing PPAs irrespective of the facts and circumstances of the case are to be reopened to provide a higher tariff. It is wrong to allege that delay in the project is due to force majeure reasons and beyond the control of the petitioner. The project site was self identified by the petitioner and the risk of the site can not be passed on to PSPCL or consumers of the State. There can be no claim for additional cost and expenses to be allowed in the tariff. The beginning of construction of the project in January, 2015 is only for reasons attributable to the petitioner. The inefficiencies, negligence and defaults of the petitioner can not be loaded on to the consumers of the State. The financial distress or the agreement being onerous to perform is no ground for seeking variation of the contract.
- vi) The mandate in the Act to promote renewable sources of energy can not be an excuse to wipe out the contractual rights and obligations or burden the consumers. The National Electricity Policy and Tariff Policy relied upon by the petitioner provide that, in future, electricity is to be procured through competitive bidding process. Also, the reliance of the petitioner on certain portions of the Commission's Order dated 13.12.2007 is misconceived. The cases of Green Planet Energy Pvt. Ltd. and Punjab Biomass Power Ltd. do not have any application in the present case, rather support the case of

PSPCL. The Commission recognized that under ordinary circumstances PPAs ought not to be reopened. It was due to substantial increase in variable cost that the same was revised and no higher capital cost was allowed. Further, there is no similarity of the petitioner's case with that of Indian Sucrose Ltd.

The case of Rithwik Energy is also not applicable to the present case. Today, the settled law by Hon'ble Supreme Court of India as pronounced in case of Bangalore Electricity Supply Company Ltd. versus Konark Power Ltd. civil appeal no. 5612 of 2012 dated 28.04.2015 relating to non-conventional energy projects, is that the re-determination of tariff can only be prior to the execution of the PPA and once the PPA has been signed, the same is binding on the parties and the tariff therein can not be varied.

vii) The manner of RPO compliance is the prerogative of PSPCL taking into account the mandate of the Commission and interest of the consumers at large and petitioner can not claim higher tariff because of that. The tariff now being claimed by the petitioner would put substantial burden on the consumers in the State. The petitioner is not entitled to higher tariff leave alone the tariff determined by the Commission in its Order dated 24.07.2015 or as per NRSE policy, 2012.

9. In the rejoinder to PSPCL's reply, the petitioner reiterated its submissions in the petition. Relying on Hon'ble APTEL's judgment in appeal no.198, 199, 200 and 291 of 2014 dated 28.09.2015 and earlier judgments in appeal no.132 of 2012, 29 of 2011 & few others, the petitioner submitted that it has been held that State Commissions have power and jurisdiction to reopen the concluded

PPAs between the generating companies and distribution licensees. The petitioner further submitted that the delay in the execution of the project can not be attributed to it or termed as deliberate. It was due to reasons beyond the control of the petitioner. The petitioner vide letter dated 25.06.2013 had informed PSPCL regarding development in the construction work of the project and about the intimation sent to PEDDA about the revised commissioning schedule of the project as April, 2014. PSPCL vide letter dated 17.07.2013 acknowledged substantial project work having been carried out and requested the petitioner to take up the matter for extension of commissioning schedule with PEDDA. Initially, the completion of the project was rescheduled to November, 2013 owing to time taken in approval of drawings by PID. Thereafter, the commissioning was rescheduled to April, 2014 owing to flooding of the site and delay in providing evacuation facility by PSPCL. After issuing show cause notice in 11/2014, PEDDA allowed further extension upto December, 2015. The project is now on its way to commissioning by the approved timeline.

In the rejoinder to PEDDA's reply, the petitioner reiterated its submissions in the petition. The petitioner further submitted that the commissioning date of the project was rescheduled to November, 2013, April, 2014 and to December, 2015 due to flooding of project site during 2014 and additional work of raising the banks. Since the commissioning date has been extended by PEDDA, there is a case for making annual generic tariff applicable to the project. It is the prerogative of the Commission to consider revision of tariff in case the commissioning of the project has been delayed due to genuine difficulties. It is requested for tariff enhancement on account of escalated capital expenditure.

10. In reply to the rejoinder, PSPCL has reiterated its submissions in the reply to the petition. PSPCL submitted that in the rejoinder, the petitioner has sought to improve upon its case and seek to place on record various submissions which were not part of the petition filed by it. PSPCL submitted that it is a well settled principle of law that rejoinder is only to the specific contents of the reply. PSPCL has refuted the submissions of the petitioner in the rejoinder and submitted that the petitioner conceived the project based on old drawings without any inspection, investigation, assessment etc. The consumers of the State can not be burdened because of petitioner's negligence. Thereafter, the petitioner proceeded with the project after giving the disclaimer certificate. PEDDA allowed the extensions in commissioning schedule subject to compliance of all terms & conditions of the IA, PPA, TA, addendum to TA etc. The petitioner can not claim delay in construction of transmission/evacuation line by PSPCL as a cause of the delay for commissioning the project, the generating station having itself not been commissioned. The petitioner did not participate in the competitive bidding process but chose to continue with the PPA. Under the circumstances, it can not avoid the terms & conditions of the PPA.

11. In the additional affidavit, the petitioner submitted that PEDDA is the competent authority for extension in commissioning schedule and granted the same after considering the submissions by the petitioner in respect of the same having been sought due to reasons beyond its control. The petitioner, citing a few judgments, further submitted that revised tariff can be allowed by the

Commission before achieving the commercial operation date of the project.

Findings and Decision

12. The Commission has carefully gone through the petition, reply, rejoinder, sur-rejoinder filed by the parties and additional affidavit & written submissions of the petitioner. The Commission notes that Gill Acqua has prayed (i) for revising the tariff provided in the PPA signed with PSPCL on 04.06.2009 for supply of electricity from its 3.8 MW (3 MW as per PPA) small hydro project, to align the same with the tariff determined under the latest Tariff Orders and (ii) to consider the project under NRSE policy, 2012, which was originally allotted as per the provisions of NRSE policy, 2006, in view of the revised commissioning timelines allowed by PEDDA.

The Commission further notes that the project was conceived as a self identified project under NRSE policy, 2006 and PEDDA allotted the same to the petitioner on build, own and operate basis and signed an implementation agreement with the petitioner on 26.05.2009. A tripartite agreement was signed amongst the petitioner, PEDDA and the Punjab Irrigation Department on 28.05.2009. The PPA was signed with the erstwhile PSEB (now PSPCL) on 04.06.2009. As per the PPA, the project was scheduled to be synchronized with the grid on 23.09.2010. As per the PPA, the tariff payable by PSPCL for procuring electricity from the project was ₹ 3.70 per kWh (FY 2008-09) with annual escalation of 3% upto FY 2011-12 meaning thereby that the tariff in the year of commissioning i.e. FY 2010-11 would be ₹ 3.93 per kWh and ₹ 4.04 per kWh for FY 2011-12. The last escalated tariff

i.e. ₹ 4.04 per kWh was to continue for the remaining term of the PPA, unless considered by the Commission for enhancement.

As submitted by the petitioner, the project got delayed because the drawings of the canal on which the project was to be set up, provided by PEDDA/PID, were old and the embankments of the canal had been damaged over the period of time and needed to be repaired and raised. PEDDA has refuted the above and submitted that rather the requirement to raise the banks of the canal was due to the raising of the FSL above the design FSL in the DPR submitted by Gill Aqua. PEDDA submitted that the NRSE policy, 2006 required the developers to maintain the design FSL for optimum utilization of water for power generation. However, in the DPR submitted by the petitioner, the FSL was proposed to be above the design FSL. It was a self identified site which was physically checked/surveyed by the developer before submitting the proposal to PEDDA. The matter was taken up with PID who accepted the design of the petitioner. An addendum to the tripartite agreement was signed on 08.08.2012 wherein the petitioner agreed to provide additional protective measures and carry out maintenance of banks etc., at its cost. In the said addendum, the petitioner also agreed that it is fully aware of the future schemes of PSEB (now PSPCL) & PID and reiterated that the entire hydrology risk due to this shall be to its account. The petitioner also signed an undertaking in the disclaimer certificate on 10.07.2012 that the company will not lodge any claim on PEDDA, PID or any department of State Govt./State Govt. for any kind of loss incurred/to be incurred on account of any change in hydrology of the canal after the approval of drawings, time taken for completion of approval procedure till signing of the addendum to the tripartite agreement

and complete the project within 455 days from signing the said addendum. Accordingly, the revised date of commissioning worked out as 07.11.2013.

As contended by the petitioner, the project site was flooded during construction in the year 2014. Due to additional work of raising the banks and flooding of project site, PEDDA was approached in December, 2014 to extend the date of commissioning upto December, 2015, which was allowed by PEDDA subject to compliance of all the terms & conditions of the IA, addendum to TA and undertaking in the disclaimer certificate. In December, 2015, another extension has been sought by the petitioner upto 31.03.2016 and allowed by PEDDA subject to compliance of similar conditions, as imposed while granting the earlier extensions. The case of the petitioner is that the project could not be completed due to force majeure/conditions beyond its control and that PEDDA has been granting extensions in commissioning of the project after due consideration of its submissions. However, PEDDA has submitted that it has been allowing the said extensions subject to compliance of the terms & conditions of the IA, addendum to TA and undertaking in the disclaimer certificate. The extension in time does not entitle the project to be shifted from NRSE policy, 2006 to NRSE policy, 2012. PEDDA has further submitted that in case the extensions were not approved, the petitioner would not have been eligible for incentives under the NRSE policy. PSPCL has submitted that the petitioner set up the project on the self identified site. The entire due diligence and other risks were that of the petitioner as also the responsibility to examine the suitability of site and other conditions affecting the project. Being self indentified project, the petitioner

can not be allowed any benefit to compensate for delay in completion of the project on the grounds as pleaded. The petitioner can not claim certain rights under NRSE policy, 2006 and claim tariff under NRSE policy, 2012. PSPCL further contended that the addendum to the TA specifically provided that the entire risk is that of the petitioner. The petitioner is seeking to take advantage of the extensions granted to it by PEDDA for commissioning of the project.

Considering the discussion above, the Commission is of the view that the petitioner can not take advantage arguing that the drawings were old or the site was unsuitable. The site being self identified, it was the responsibility of the petitioner to exercise due diligence and satisfy itself completely of various constraints before submitting its proposal to PEDDA for allotment of the project. The tariff determined by the Commission in its Order dated 13.12.2007 applicable then, was also in place in advance. There was no compulsion on the part of the petitioner to sign any of the documents/agreements without fully satisfying itself of various factors/constraints. In the addendum to the tripartite agreement and the undertaking in the disclaimer certificate, the petitioner even took over the entire hydrology risks of the future projects and also agreed not to lodge any claim due to delay in approvals. While agreeing to commission the project in 455 days from the date of signing the addendum to the TA on 08.08.2012 i.e. 07.11.2013, the petitioner never raised the issue of revising the tariff. Thereafter, it is only in December, 2014, after issue of show cause notice by PEDDA, that the petitioner requested PEDDA for extension in completion of the

project upto December, 2015 which was again granted by PEDA in good faith, as stated, so as not to deprive the petitioner of the benefits/incentives under the NRSE policy, 2012. Accordingly, grant of extensions by PEDA in completion of the project does not entitle the petitioner to claim revision in tariff.

The petitioner, while submitting that the project was delayed due to reasons beyond its control and that PEDA allowed various extensions in the commissioning schedule of the project, has prayed for allowing the tariff for its project as determined by the Commission for small hydro projects to be commissioned in FY 2015-16 as ₹ 5.47 per kWh. The petitioner submitted that the Commission determined the levellised tariffs for small hydro projects in various years. Also, the Commission provided for considering enhancement in tariff rates for delayed projects in its Order dated 13.12.2007. The petitioner cited various cases stating that the Commission has allowed revised tariffs in such cases. The petitioner has pleaded that the project is entitled to the tariff determined by the Commission for FY 2015-16 under the provisions in the NRSE policy, 2012. The petitioner has further submitted that the electricity procured and consumed by PSPCL from its project shall contribute towards the RPO compliance for which PSPCL demanded ₹ 141 crore for FY 2013-14 in review and ₹ 134 crore in the proposal for FY 2014-15 in its ARR for FY 2014-15.

In reply, PEDA submitted that the generic tariffs determined by the Commission every year are applicable in a particular year, only for the projects for which PPAs were yet to be signed. PEDA further submitted that the petitioner neither submitted any

comments nor attended the public hearings held for completing the due process undertaken by the Commission in the petitions for determination of tariff for renewable energy projects. In respect of the projects cited by the petitioner where the Commission revised the tariff, PEDDA contended that the revision in tariff for such cases is diversely placed. In those cases, two part tariff including escalable variable component was to be determined by the Commission, the projects being biomass projects using biomass as fuel whereas the petitioner's project was in the category of small hydro projects with single part tariff without the provision for any yearly fuel cost escalation component.

PSPCL submitted that the petitioner is not entitled to any revision/enhancement in tariff over and above agreed in the PPA. The project has been unduly delayed and PSPCL, at present, is procuring electricity at a cheaper rate through competitive bidding process as per the mandate under the Tariff Policy. PSPCL further submitted that it entered into a PPA on 29.04.2015 for supply of electricity by a small hydro project at a tariff of ₹ 3.65 per kWh after invitation and finalization of bids by PEDDA on the basis of discount to be offered by the bidders on the tariff of ₹ 5.16 per kWh determined by the Commission for small hydro projects for FY 2013-14. PSPCL has argued that this tariff of ₹ 3.65 per kWh is even less than the tariff of ₹ 3.70 per kWh (FY 2008-09) provided in the PPA with 3% escalation every year upto 2011-12. The petitioner can not benefit out of its own delay and claim higher tariff especially when there is no escalable fuel cost component involved. PSPCL has further contended that merely because the tariff as per PPA is not commercially convenient to the petitioner, it can not be a ground for increase in tariff in favour of the petitioner.

The petitioner did not participate in the competitive bidding process and chose to continue with the PPA and hence can not avoid the terms & conditions of the PPA. The Commission has been determining the tariff for the projects to be commissioned from time to time and in no manner directed that all existing PPAs, irrespective of the facts and circumstances of the case, are to be reopened to provide higher tariff. PSPCL contended that the specific cases quoted by the petitioner stating that tariff in such cases was revised/enhanced by the Commission in fact support the case of PSPCL in as much that the Commission recognized in such cases that PPAs ought not be reopened under ordinary circumstances. It was only due to substantial increase in variable cost that the same was allowed and no higher capital cost was allowed. PSPCL has argued that Hon'ble Supreme Court of India in appeal no. 5612 of 2012 has ruled that re-determination of tariff can only be prior to the signing of the PPA, which once signed, would be binding on the parties and the tariff therein can not be altered. PSPCL has further argued that there is no provision in the PPA for revising the tariff for the project. The relevant clause in the PPA relates to only enhancement in tariff provided therein.

The Commission notes that in the interregnum from 23.09.2010 i.e. the date of synchronization of the project with the grid as provided in the PPA upto the filing of the petition i.e. August 2015, the petitioner never raised the issue of revising the tariff. During this period, the Commission determined the generic tariffs for renewable energy projects including small hydro every year from FY 2010-11 onwards, applicable to the projects to be commissioned in the particular year. The tariff for small hydro projects of capacity

below 5 MW for FY 2010-11 and FY 2011-12 was determined as ₹ 4.26 per kWh & ₹ 4.49 per kWh respectively against which the tariff as per PPA was ₹ 3.93 per kWh and ₹ 4.04 per kWh. Consideration of various contentions submitted by PEDA and PSPCL tend the Commission to believe that there is no case for revision in tariff for the petitioner's project, leave alone consider it for allowing the tariff determined by the Commission for the year 2015-16. The Commission is of the view that the tariff determined for the projects to be commissioned in a specific year e.g. FY 2015-16 would be applicable when the entire project construction and installation of plant & machinery takes place in the preceding 12 to 18 months. Only then it would be justifiable to allow the tariff corresponding to the capital cost for that year. The Commission notes that the petitioner has claimed that substantial construction had been completed till the year 2013. Had the project been completed in time, its generation would have contributed towards compliance of non-solar RPO of PSPCL. Under the circumstances, the Commission, in no way, can equate the petitioner's project with the one commissioned/to be commissioned in FY 2015-16 where construction activities and installation of plant & machinery has been carried out in recent past. This would be grossly unfair to such projects.

The Commission is mandated under the Act, National Electricity Policy & Tariff Policy framed thereunder to promote renewable energy sources. The fact remains that PSPCL has not been able to procure sufficient quantum of non-solar renewable energy in the past. In the review meetings with the

Commission, PSPCL has been making submissions that the competitive bidding process under taken by it to procure non-solar renewable energy has not been fruitful due to lack of/insufficient response from the bidders. PSPCL has submitted detail of only one project namely, Salasar Hydro Urja Pvt. Ltd. of capacity 1.5 MW where it has signed the PPA on 29.04.2015 at a tariff of ₹ 3.65 per kWh in the process of procuring electricity through competitive bidding process. As per data available with the Commission, PSPCL procured non-solar RECs in FY 2011-12 and FY 2013-14 equivalent to 285.350MU and 483.333MU respectively in order to comply with its non-solar RPO. In the past, PSPCL has been filing petitions in the Commission praying for carry forward of its RPO compliance, particularly non-solar, to the next year.

Considering the aforementioned circumstances & contentions of the parties and taking a holistic view, the Commission is inclined to consider that it may be justifiable to allow a fair compensation in tariff for the petitioner's project. For this, the Commission has considered the tariff applicable in the scheduled year of synchronization of the project with the grid as per the PPA i.e. in FY 2010-11 as ₹ 3.93 per kWh considering the tariff for the year 2008-09 as ₹ 3.70 per kWh escalated at 3% per annum upto FY 2010-11. Applying the conceptual working of indexation mechanism specified in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 adopted by the Commission with State specific modifications vide Order dated 19.07.2012 in petition no. 35 of 2012 (Suo-Motu) and taking the parameters applicable for the

years 2010-11 and 2015-16, the escalation factor works out to 0.083. Accordingly, as per the mandate to the Commission under section 86(1)(e) of the Act to promote generation of electricity from renewable sources of energy in the State, the Commission determines the tariff for the petitioner's project as ₹ 4.26 per kWh $[(3.93) \times (1+0.083)]$ as per provision in clause 2.1.1(i) of the PPA dated 04.06.2009, which would remain applicable for the term of the PPA. Other terms & conditions of the PPA shall remain unchanged.

Further, the petitioner is directed to ensure commissioning of the project before 31.03.2016 as per the last extension granted by PEDDA vide letter dated 11.01.2016. As regards prayer of the petitioner to treat the project being established under NRSE policy, 2012, the same does not fall under the purview of the Commission.

The petition is disposed of in terms of the above.

Sd/-

(Gurinder Jit Singh)
Member

Sd/-

(Romila Dubey)
Chairperson

Chandigarh
Dated: 22.01.2016