

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

**Petition No.53 of 2011
Date of Order: 11.09.2014**

In the matter of: Petition under Section 86-1A, 86-1B, 79(4), 86(3), 86(4) of the Electricity Act 2003 and Regulation 46 of PSERC (Conduct of Business) Regulations AND MOU dated 28.7.2010 for Extension Unit at Rajpura and MOU dated 4.10.2010 for Extension Unit at Talwandi Sabo.

AND

In the matter of: Shri Gurnek Singh Brar, # 1, Ranjit Bagh, Opp: Modi Mandir, Patiala-147001

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

ORDER

Er Gurnek Singh Brar, a retired Superintending Engineer of erstwhile, Punjab State Electricity Board (PSEB), filed this petition. His submissions are summed up as under:-

(i) PSEB carried out competitive biddings under Section 63 of the Electricity Act, 2003 (Case 2) for 3 x 660 MW Talwandi Sabo Thermal Project and 2 x 660 MW Rajpura Thermal Project. PSEB signed Power Purchase Agreement (PPA) dated 01.09.2008 with lowest bidder i.e. Sterlite Energy Limited (SEL) and TSPL, a Special Purpose Vehicle set up by PSEB was transferred to SEL on the same date. PSEB filed Petition No.20 of 2008 before the Commission for adoption of levelised tariff or ₹2.8643 per unit for the lowest bid, which was approved by the Commission vide Order dated 14.01.2009. Similarly PSEB filed Petition No.8 of 2010 for approval of the Power Purchase Agreement (PPA) dated 18.01.2010

for 2 x 660 MW Rajpura Thermal Project at lowest bid rate of ₹2.89 per unit of the L & T Power Development Limited, which was approved by the Commission vide Order dated 14.07.2010. Capacity of this project was enhanced to 2 x 700 MW as per a provision in the PPA. These thermal projects were taken up for execution by SEL and L & T Power Development Limited on 01.09.2008 and 18.01.2010 respectively.

2. Government of Punjab (GoP) notified the Power Generation Policy, 2010 (Policy) on 21.06.2010, which contains a provision for expansion plan (additional capacity) for power projects allotted on BOO basis under Case-2 guidelines of Government of India (GoI). Punjab State Power Corporation Limited (PSPCL) (one of the successor entities of erstwhile PSEB after 16.04.2010) signed a Memorandum of Understanding (MoU) on 28.07.2010 with Nabha Power Limited (NPL), a Special Purpose Vehicle set up by PSEB and taken over by L & T as per terms of PPA, for setting up an additional unit of 700 MW at Rajpura. Under the same provision of the Policy, PSPCL signed MoU on 04.10.2010 with TSPL for setting up one additional 660 MW unit at Talwandi Sabo.

3. As per para 10.3 of the Policy, the approval of MoU is required to be taken by the developer from the Commission. No such petition has been filed before the Commission in this regard.

4. The petitioner submitted that in case of Talwandi Sabo Thermal Project, the MoU seeks to add one more Unit of 660 MW to the project which is a post tender development by which the project capacity is being increased from 3 x 660 MW to 4 x 660 MW. Had the bidding carried out for a project of 4 x 660 MW instead of 3 x 660 MW project size, then certainly lower tariff would have been quoted. The action is not in order on the following grounds:

- “(a) The extension unit (unit 4 or the 4th unit) would use common facilities of units 1 to 3 (main project) and thus give cheaper

generation because of lower cost per MW. However, the developer is free to sell 85% of the capacity as merchant power and thereby earn huge profits by way of unit 4 riding piggyback on units 1 to 3 with lower generation cost (fixed charges).

- (b) There is no provision of case-2 guidelines for adding additional units and extending the competitive bid tariff of the main project to the extension unit. Under MOU, 10% of power from unit 4 would be sold to PSPCL at the bid rate of the main project, units 1 to 3. There is no such provision in case-2 guidelines of Govt. of India. RFP or PPA for such a tariff mechanism.
- (c) Unit-4 was not subject to competitive biddings. It is nowhere envisaged in the tariff policy of the Govt. of India or case-2 guidelines that stage-1 of a project would have a tariff under section 63 (case-2) while the extension project would have 85% merchant capacity while deriving the benefit of common facilities of the stage-1.
- (d) Even if 100% power from the extension unit (unit-4) were to be given to PSPCL at the competitive bid rate of the units 1 to 3, the developer would still be a gainer due to the economy of scale by which the tariff of a 4 x 660 MW project would be lower than the tariff of a 3 x 660 MW project. By contrast the MOU allows the developer to sell 85% capacity of the 4th unit on merchant basis which amounts to giving a huge financial concession to the developer that was nowhere envisaged or permitted under case-2 guidelines or section 63 of Electricity Act 2003.
- (e) The MOU provides for the following mechanism for the sale of power from the extension unit.
 - i) 5% to PSPCL at fuel cost (i.e. fixed charges not payable)
 - ii) 10% to PSPCL at competitive bid rate of units 1 to 3 (stage-1)

- iii) 85% capacity at the disposal of the developer as merchant sale.

This is basically a decision as to how much power is to be sold to which party at which tariff. These are primarily tariff related issues which are in the exclusive jurisdiction of the PSERC. Neither PSPCL nor Govt. of Punjab has any jurisdiction or authority under the Act to decide the tariff matters. Section 86 (1) A of the Act gives the power of tariff determination exclusively to the SERC and neither the DISCOM nor the Govt. have any authority or jurisdiction to decide the tariff from the generating station. The MOU contains specific provision for tariff from 5%, and 10% of capacity of the extension units which neither PSPCL nor the Govt. of Punjab is competent to determine or decide.

- (f) The MOU in fact extends the tariff decided by the Commission vide its order dated 14.1.2009 to the extension unit No.4 of the project (5% at variable rate and 10% at bid rate of stage 1). It is not within the competence or purview of power of PSPCL or Govt. to unilaterally extend the tariff order of Commission dated 14.1.09 to the extension unit-4 of the project. This is an outright encroachment of the power and jurisdiction of the Commission.
- (g) The Commission while issuing the order dated 14.1.2009 took into consideration that project was of 3 x 660 MW with competitive bidding under case-2 guidelines. As the Commission was satisfied that the case-2 guidelines had been correctly applied, the Commission adopted the competitive bid tariff u/s 63. With the addition of a 4th unit, using common facilities of stage/1 units 1 to 3, there is a clear deviation from the case-2 guidelines and in fact the very basis on which the order dated 14.1.2009 was issued has been shaken. The tariff of units-1 to 3 should be reduced but since

the competitive bidding had already been concluded, there is no way to reopen the same. The basis on which the Commission order dated 14.1.2009 was issued has been vitiated by means of the post tender development of adding the 4th unit for which there is no remedy or solution under the case-2 competitive bidding guidelines. The only alternative is to adhere to the tender specifications contained in the RFQ, RFT documents and to avoid changing the goal posts after the conclusion of the tender and the award of the project”.

5. The position is ditto in the case of Rajpura Thermal Plant and therefore, the objections (a) to (g) of para 4, are equally applicable for this Project also.

6. The petitioner has further submitted that while the National Electricity Policy states that 15% of the capacity of unit may be kept aside for merchant sale, the GoP Policy for extension unit allows 85% of the capacity for merchant sale which is contradicting the National Electricity Policy. The petitioner has stated that the trade off has some benefits for GoP / PSPCL which are :

- (i) 5% power at variable charge
- (ii) 10% power at the bid rate for stage-1

The petitioner also submitted that these are tariff matters and only the Commission has jurisdiction in the matters relating to tariff. The petitioner has extensively described the provisions of National Tariff Policy and the Electricity Act, 2003 and has submitted that MOU for Talwandi and Rajpura extension units is not compatible with the provisions of the Act. Under the Act, the tariff is determined either u/s 62 (cost plus basis) or u/s 63 (competitive bidding basis). The MOU provides that 5% capacity of extension units to have tariff based on variable rate and 10% capacity on bid rate of stage-1. This methodology does not come within the scope of either section 62 or section 63 of the Electricity Act, 2003. In this case only provision of section 61 (a) is to be relied upon, which stipulates that the State Commissions are to be guided by the principles and

methodology specified by CERC, which has advised Gol that only competitive bidding be adopted.

7. The prayer of the petitioner is reproduced below:-

- “1. It is prayed that the Commission may be pleased to pass orders on the MOU dated 4.10.2010 (Talwandi Sabo) and MOU dated 28.7.2010 (Rajpura) that
- i) The MOUs contravenes sec. 5.1 of tariff policy as confirmed through statutory advice of CERC to Govt. of India dated Jun-2010 and Sep.-2010.
 - ii) The post tender development of allowing extension units is not permissible u/s 63/ case-2 guidelines and thereby disapproved.
 - iii) That the rates approved by the Commission in its order dated 4.10.2010 (Talwandi Sabo) and dated 28.7.2010 (Rajpura) are not feasible or permitted to be extended to the additional / extension units as these units are not covered under case-2 bidding of sec. 63.
 - iv) That neither Govt. of Punjab nor PSPCL have the jurisdiction or authority under any provision of the Act to specify tariff related parameters such as %age of capacity and the rates applicable on that capacity in respect of extension units.
 - v) That the determination of 5% power at variable rate and 10% at the bid rate of stage-1 is not covered under any provision of PSERC CBR or PSERC Terms and conditions for determination of Tariff Regulations or under any provision of the Act or policy under the Act and thus disapproved.
 - vi) That the determination of 5% and 10% power quantum for extension units is under a totally non-transparent method which is against sec. 86 (3) of the Act and PSERC CBR 46 (1).

- vii) On the above stated grounds, both the MOUs for extension units at Talwandi Sabo and Rajpura be disapproved by the Commission”.

8. The petition was admitted vide Order dated 21.09.2011 and Government of Punjab, Department of Power (GoP) and PSPCL were made respondents. The respondents were directed to file reply by 08.11.2011 with advance copy to the petitioner.

9. Meanwhile the petitioner filed additional submissions dated 30.09.2011 by which it was sought to place on record additional documents, which are according to the petitioner directly relevant to the petition. Copy of these additional submissions was supplied to the respondents vide Order dated 17.11.2011 and the respondents were directed to file reply to the petition and the additional submissions by 15.12.2011.

10. PSPCL filed reply vide No.5575 dated 12.12.2011. The petitioner filed rejoinder by way of written submissions dated 14.12.2011. The Commission vide Order dated 21.12.2011 directed the respondents to file reply to the written submissions dated 14.12.2011 of the petitioner by 24.01.2012. Again GoP was directed vide Order dated 06.02.2012 to file reply by 06.03.2012 and PSPCL was also directed to file reply to the additional submissions by 06.03.2012. In compliance with Order dated 06.02.2012, PSPCL filed reply dated 02.03.2012 vide Chief Engineer/ARR & TR memo No.5174 dated 02.03.2012.

11. After considering the record on file, the Commission passed the following Order on 16.03.2012 :

“PSPCL has filed additional submission in reply to additional submissions of the petitioner in compliance to Order dated 06.02.2012 of the Commission vide C.E./ARR & TR memo No.5174/Sr.Xen/TR-5/492 dated 02.03.2012. The petitioner has

filed his response to PSPCL affidavit dated 02.03.2012 during hearing.

The Commission notes that the policy enabling execution of MOU which is subject matter of this petition; is under challenge in Public Interest Litigation (PIL) before Hon'ble Punjab and Haryana High Court in CWP No.4945 of 2011. The Commission, therefore, decides to adjourn this petition sine die to await the decision of the Hon'ble Punjab and Haryana High Court in CWP No.4945 of 2011”.

The petition remained sine die from 16.03.2012 to 03.06.2014, when it was taken up for hearing again in view of Hon'ble High Court decision dated 04.04.2014 in CWP No.4945 of 2011 received in the Commission on 29.04.2014. The petitioner filed a submission dated 03.06.2014 that some issues raised in the petition have not been covered in the decision dated 04.04.2014 of Hon'ble High Court and are required to be adjudicated by the Commission, therefore the GoP and PSPCL be directed to file replies in detail. The Commission after hearing the petitioner, GoP and PSPCL on 03.06.2014 directed the GoP and PSPCL vide Order dated 04.06.2014 to file a comprehensive reply by 08.07.2014.

12. PSPCL filed comprehensive reply dated 11.07.2014 with copy to the petitioner. GoP, Department of Power filed letter dated 15th July, 2014 stating therein that reply of PSPCL be treated as the reply of the Government also. None appeared for the petitioner on 15.07.2014. The petitioner however filed a brief counter reply dated 04.08.2014. After hearing the parties on 05.08.2014, further hearing was closed and Order was reserved. The petitioner on his own filed written submissions dated 08.08.2014.

13. As already mentioned in foregoing paras, the Power Generation Policy 2010 of Government of Punjab had been assailed by way of Civil Writ Petition No.4945 of 2011 before the Hon'ble High Court of Punjab and Haryana at Chandigarh on similar legal grounds. The Hon'ble High Court has decided the

said CWP on 04.04.2014 and has upheld the Power Generation Policy, 2010. This Commission can not go into the same issue again. The Commission has to consider whether MOU signed on 28.07.2010 and 04.10.2010 for extension units at Rajpura and Talwandi Sabo respectively are in accordance with the Policy or not. But it is not the case of the petitioner that these MOUs are not in accordance with the Policy. The plea of the petitioner is that the MOUs are not as per the provisions of the Electricity Act, 2003, especially Section 61 (a), 62 and 63 read with Section 86 thereof, and thus are unimplementable. The perusal of the decision dated 04.04.2014 in CWP No.4945 of 2011, reveals that this question stands settled by the Hon'ble High Court against the petitioner. Further, Article 10.3 of the Policy, provides as under:

“10.3 On concurrence of the Punjab Government, the developer shall be required to sign MOU with Punjab Government nominee viz. Punjab State Power Corporation Limited. Approval of the Appropriate Electricity Regulatory Commission, as required, shall also be taken by the developer”.

The developers have never sought the approval of the Commission after signing the MOUs in year 2010. As such the MOUs have no approval of this Commission in accordance with Article 10.3 of the Policy. The petitioner has brought this petition pre-maturely before this Commission as developers have not yet moved the Commission for seeking approval for MOUs.

The petitioner has in the written submissions dated 08.08.2014 has submitted in paras 8, 9 & 10 as under:-

“8. The tariff of extension units is ultimately to be approved by the commission. As per the Judgment of the Punjab & Haryana High Court, both section 62 as well as section 63 are valid routes for tariff determination. In this case, for approval of tariff of extension unit, section 62 is not applicable since the Punjab Govt. policy on

this matter does not envisaged cost plus method under section 62. Further, section 63 also is not applicable since there was no competitive bidding at all for the extension unit and section 63 can not be applied in a case where there is no competitive bidding at all. It is concluded that in the implementation of Generation Policy of Punjab Govt., the tariff of extension unit can not be decided either under section 62 nor under section 63. Further, the act does not envisaged any other provision or section under which the tariff can be determined. So the Punjab Generation Policy can not be implemented within the framework of the E. Act 2003. On this ground alone, the Commission is in a position to disapprove and reject the PPAs as these conflict with the Act and the tariffs envisaged in the PPAs can not be approved within the frame work of the Act.

9. The Act further does not empower the state govt. to decide / determine the tariff. A fundamental feature of the Act is to distance the govt. from tariff determination and to ensure the framework of an independent regulator. The Govt. policy has resulted in a situation where the govt. is deciding tariff matters which is not permitted or envisaged anywhere in the act.
10. The Commission may therefore disapprove the PPAs signed under the Punjab Generation Policy as these PPAs have tariff matters which are outside the framework of the Electricity Act”.

In this context, the Commission observes that GoP, PSPCL and even the petitioner are not in any doubt that the tariff to be fixed in the PPAs signed between developers and PSPCL are neither at the discretion of the State Government nor at the discretion of parties to PPA but is to be determined and decided by the Commission. The tariff determination is an independent process

under section 62 read with section 86 of the Act. The Commission further observes that so long as section 62 and 63 are on the Statute (The Electricity Act, 2003), procurement of power by the licensees on the tariff determined on cost plus basis (section 62) and tariff discovered through competitive bidding (section 63) are valid. Admittedly no PPAs have been signed by PSPCL and developers till date for extension units at Rajpura and Talwandi Sabo, pursuant to MOUs dated 28.07.2010 and 04.10.2010 respectively. The question of disapproval of PPAs not yet signed, does not arise at this stage.

In the light of above discussion, the Commission finds the petition devoid of any merit and dismisses the same accordingly.

Sd/-
(GurinderJit Singh)
Member

Sd/-
(Virinder Singh)
Member

Sd/-
(Romila Dubey)
Chairperson

Chandigarh
Dated: 11.09.2014