

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

Review Petition No. 04 of 2017
in Petition No. 25 of 2016
Date of Order: 21.05.2018

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

In the matter of: Review Petition under Regulation 64 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, praying for review of the order dated 14.02.2017 passed by the Commission in Petition No. 25 of 2016 titled as M/s Abundant Energy Private Ltd. V/s Punjab State Power Corporation Limited and another.

In the matter of: M/s Abundant Energy Private Limited, # 74-A, Taylor Road Amritsar, District Amritsar, through its authorized signatory Sh. Ranbir Singh Chhina, Director of the Company.
...Petitioner

Versus

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

...Respondents

ORDER

The present review petition was filed for reviewing the order dated 14.02.2017 passed by the Commission in Petition No. 25 of 2016. The petitioner has submitted that there are certain mistakes or errors apparent on the face of record, some Force Majeure Events could not be mentioned in the petition and there is mis-appreciation of the facts by the Commission.

2. The Review Petition was admitted by the Commission vide order dated 20.09.2017. PSPCL and PEDDA were directed to file their respective replies by 16.10.2017. The petitioner was directed to file rejoinder, if any, by 03.11.2017. The next date for hearing arguments was fixed as 15.11.2017. PEDDA vide letter no. 6310-12 dated 13.10.2017 filed short reply. PSPCL filed reply to the petition vide memo no. 5288 dated 18.10.2017. The petitioner vide email dated 13.11.2017 requested to adjourn the hearing of the petition for 3-4 days. Acceding to the request of the petitioner, the Commission directed the petitioner to inform the mutually agreed date with other parties either 29.11.2017 or any date falling on Wednesday in the month of January, 2018. After considering the requests of the parties, the Commission fixed next date of hearing as 24.01.2018.

The petitioner during hearing on 24.01.2018 filed rejoinder dated 22.01.2018 to the short reply of PEDDA. After hearing the parties, the Commission vide order dated 01.02.2018 reserved the order. PSPCL was directed to file information / documents with regard to completion and energisation of 11 kV line for the project within a week. The Petitioner was directed to file copy of the letter

sent by PEDDA to PSPCL for allowing evacuation of power from the project through the 11 kV line of the existing 2 MW project of the petitioner and copy of letter sent by Dy. Chief Engineer/DS, Tarn Taran Circle to Chief Engineer/ Planning stating that it is not possible to erect another 11 kV line for the project due to various reasons within a week.

The petitioner vide letter dated 25.01.2018 submitted the copies of letters of PEDDA and PSPCL allowing the evacuation of the power from the project through 11 kV line of the existing 2 MW project. PSPCL, vide reply dated 09.02.2018 in response to the Order dated 01.02.2018, submitted the chronological events for energisation of 11 kV line for evacuation of power from the project to 66 kV Sub Station, Narli.

3. The submissions of the petitioner are summarized as under:

i) Abundant Energy Private Limited (AEPL), the petitioner filed petition No. 25 of 2016 before the Commission on 30.03.2016 under section 86(1)(f) of the Electricity Act, 2003 (Act) read with Regulations 69, 71 and 73 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 and Regulation 85 of Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 as adopted by the Commission vide its Order dated 19.07.2012 in petition no. 35 of 2012 (Suo-Motu), further read with clause 19.1.0 of the Power Purchase Agreement (PPA) dated 31.03.2015 executed between the petitioner and PSPCL. The petitioner prayed for extending the

date of commissioning of the Solar project from 31.01.2016 to 31.08.2016 by maintaining status quo in terms of the applicability of tariff i.e. Rs. 7.68 per kWh granted to the solar project.

- ii) The project is situated in village Chhina Bidhi Chand, District Tarn Taran beyond defense line and very close to the Indo-Pak border. The first Solar Power Project of 2 MW was commissioned within the prescribed time limit and accordingly the petitioner bid for the present plant of 1 MW to be installed adjoining the earlier plant of the petitioner. The petitioner company is a Private Limited Company owned by Sh. Ranbir Singh Chinna, who is from village Chhina Bidhi Chand and an NRI and wanted to do something for his country and village people residing at the border. Due to this reason he decided to first install a 2 MW capacity solar project at his village near the Indo Pak Border. After the project was installed, the petitioner approached PEDDA and Govt. of Punjab and requested to bid for the next project also. The petitioner was assured that it would be provided all help required for successful commissioning of the project. As it was very difficult to construct transmission line adjoining the border, the petitioner was informed by PEDDA that the proposal for pooling transmission is under consideration and at the time the transmission is required the same would be approved. Accordingly, the petitioner agreed for participating in the bid for installing a 1 MW project.
- iii) Due to other Force Majeure Events which were not taken up in the Petition No. 25 of 2016 due to advice of PEDDA, the Plant could not be commissioned before the Scheduled Commissioning Operation

Date (SCOD). The plant was completed on 30.06.2016 and was commissioned on 24.08.2016. The other Force Majeure Events like terrorists attack at Dina Nagar Police Station and Pathankot Air Base were not taken up in Petition No. 25 of 2016 as per the advice given by PEDDA on the ground that if these were taken, then the financial Institutions would not disburse the loan.

- iv) Perusal of para VIII of the order dated 14.02.2017 shows that the Commission was of the opinion that the delay in the execution of the project was on account of the petitioner. While making such opinion, the Commission held that the petitioner did not award the EPC contract till 05.01.2016 & did not execute the loan agreement till 03.02.2016 with IREDA though the loan was sanctioned on 06.11.2015 and the petitioner was invited to execute the same by 04.12.2015 or earlier. The Commission further noted that project was incomplete as per PEDDA's report dated 28.03.2016 and important equipment like solar PV modules & inverter etc. had not reached the site and other important works including cabling were pending. It has further been noted that the petitioner did not approach PSPCL for allowing it to evacuate power through the existing line till June 2016. The disturbances took place in January 2016 and the independent 11 kV line could have been constructed earlier since the land for the project had been purchased by the petitioner in June 2015 and grid feasibility clearance granted by PSPCL in July 2015. The Commission held that the petitioner is liable to pay penalty to PEDDA and also liquidated damages to

PSPCL. Further, the Commission reduced the tariff to Rs. 5.39 per kWh on the basis of lowest tariff arrived in the next year bidding.

- v) The petitioner was called to sign the PPA on 31.03.2015 by PSPCL and it was shocked and surprised to see that PSPCL has inserted a new clause bearing No. 35 in the PPA, which was not the part of the PPA provided in the RfP document. The aforesaid new clause 35 as inserted in the PPA is as under:

“PPA shall be effective & binding on the parties only upon approval of the PPA by the PSERC & the PPA shall be subject to such conditions as may be stipulated by the PSERC while granting such approval.”

The Petitioner objected the same. PSPCL should have got the PPA approved from the Commission before its date of execution and it was now uncertain as to how much additional time will be required by PSPCL in obtaining the approval of the Commission. The Petitioner was however assured by the Respondents that the approval from the Commission shall be obtained in 5-7 days time. The petitioner was however made aware of the fact that it has to sign the PPA in the current form as the approval of the PPA from the Commission is yet to be obtained. The Petitioner was left with no option but to sign the PPA. The insertion of clause 35 in the PPA rendered it practically ineffective and non bankable, until it is approved by the Commission. PSPCL filed Petition No. 21 of 2015 seeking Commission's approval to procure electricity and also to approve the PPA. The Commission vide its order dated 11.05.2015 allowed the petition and approved the PPA. During this

period of 41 days, the project and financial closure activities could not be progressed due to uncertainty / non-bankability of the PPA i.e. for reasons beyond the control of the petitioner. The Commission has discarded this ground of the petitioner without giving any reason.

- vi) After the PPA was approved by the Commission, the petitioner immediately entered into a contract dated 13-5-2015 with an EPC contractor M/s Optimistic Green Energy Pvt. Ltd., Amritsar. A payment of Rs. 1 Lakh was made to the said EPC contractor on 14.05.2015 and thereafter various payments were made in May, 2015.
- vii) For the purpose of civil construction, the EPC contractor brings labour which lives at the plant site. The house of the petitioner is adjoining to the plant site and Indo-Pak Border. The EPC contractor started the construction work in the month of July, 2015 but on 27.07.2015 there was a terrorist attack at Dina Nagar Police Station in Gurdaspur District in which four police men and 3 civilians died besides three terrorists. After the said attack, Border Security Force was asked to increase vigil in the Border Area. District Magistrate, Tarn Taran passed order dated 27.07.2015 under section 144 Cr.P.C. and completely stopped all activities including walking etc. in the 500 meters area near the International Border from 5 pm to 7 am from 29.07.2015 to 24.09.2015. Laborers left the plant site in fear and EPC contractor also refused to work in the absence of labour. The restrictions imposed by DM

were extended upto 12.07.2016. Deputy Commissioner, Tarn Taran and Commandant BSF have both given letters to this effect.

viii) The petitioner after receiving the letter from the EPC contractor regarding refusal to work talked telephonically with PEDDA and informed PEDDA about the situation prevalent at the border and that labour of the EPC contractor had run away, and that the EPC contractor is not ready to complete the work. PEDDA asked the petitioner to wait for some time and in case EPC contractor does not come back, then to engage another EPC contractor. PEDDA also intimated not to send anything in writing showing border conditions otherwise no financial institution would give financial assistance to the petitioner. So the petitioner did not give anything in writing as advised by PEDDA.

ix) The petitioner waited for one month for the tension at the border to reduce and the labour of the EPC contractor to come back so that the work could be started. But the EPC contractor did not come back and the petitioner at his own level got some part of the civil work completed and thereafter engaged another EPC contractor M/s Gensol Engineering Pvt. Ltd. and a contract was executed on 24.08.2015. The total contract was given for Rs. 5.25 crore. The scope of Contractor included Engineering, Procurement, Construction & Commissioning (EPC) of SPV modules, grid tie solar inverters, cables, structures, balance civil work and electrical balance of system as per conditions of PEDDA and PSPCL. The petitioner applied for financial assistance from IREDA in the month of August, 2015, and deposited the processing fee. The EPC

contractor was also required to liaison with IREDA as per the said agreement. The petitioner paid Rs. 7.5 lakh as advance for starting the work to EPC contractor.

- x) There was unrest in the State of Punjab on account of desecration of Holy Sri Guru Granth Sahib on 14.10.2015. The Commission discarded the said plea on the ground that no evidence was produced by the petitioner in this regard. PEDDA and PSPCL also opposed this issue by saying that this incident happened about 100 km away from the project site. Two incidents had happened with one in Faridkot and another in village Bath in District Tarn Taran. Thereafter, Sarbat Khalsa was called on 10.11.2015 in village Chabha, which is very close to the plant site. The District Magistrate, Tarn Taran passed orders under section 144 of Cr.P.C. dated 04.11.2015 ordering for 'Thikri Pehra' in the villages from 04.11.2015 to 31.12.2015. Due to the said incidents and restrictions imposed on the border, the movement of the labour which migrated from other states was not free and the labour was too scared to work in those conditions. As a result, the EPC contractor also failed to complete the work and left the work in between in the month of December, 2015.
- xi) The petitioner again requested its earlier EPC contractor M/s Optimistic Green Energy Pvt. Ltd. and entered into a new contract dated 05.01.2016. The finding of the Commission that petitioner gave EPC contract only on 05.01.2016 is not correct. The petitioner did not mention the facts of the Indo-Pak border because PEDDA specifically told not to bring these facts in writing

on the ground that in case it is shown that the plant is on the border fence, then no financial institution would finance the plant. Due to said reason, the petitioner did not inform PEDDA, PSPCL or IREDA and in the petition about the said facts.

xii) From the date of first EPC contract i.e. 13.05.2015 to the third EPC contract dated 05.01.2016, very few works could be done due to the restrictions on movement at the Border which amounts to Force Majeure event and the petitioner is entitled to get the benefit of this event. On 02.01.2016, there was a terrorist attack at the Pathankot Air Force Station, a part of the Western Air Command, Indian Air Force. After this attack, again the vigil at the border areas was increased. The movement was already restricted in the border area. The petitioner did not annex the photos because it was told by PEDDA (Sh. Balour Singh and M.P. Singh) that in case the financial institutions learnt that the project is immediately at the border, then no financial institution would finance the project.

xiii) The Commission while passing the order dated 14.02.2017 held that the petitioner acted very poorly while getting sanction letter from the IREDA and also failed to sign the requisite documents with IREDA though IREDA had asked for the same. The petitioner applied for the loan from IREDA as early as 12.08.2015 and deposited processing fees but the loan was sanctioned by IREDA on 06.11.2015. Regarding signing the loan agreement and other documents, the petitioner went to Delhi but IREDA did not give time for signing those documents. Some of the mails and

messages sent to IREDA shows that there was no fault on the part of the petitioner in delaying the signing of the loan papers. Those mails and messages were not placed on record because in that case the petitioner would not have got the disbursement.

xiv) The Commission while calculating the delay in commissioning the project noted that there is a delay of 187 days as the project was commissioned on 24.08.2016. In para VIII of the order dated 14.02.2017, the Commission has noted that the project was synchronized with the grid on 24.08.2016. Though the plant was ready on 30.06.2016, the 11 kV line for evacuation of power was not in position. But the delay from 30.06.2016 to 24.08.2016 has also been put on the petitioner. The plant of the petitioner was complete on 30.06.2016 and if we count delay upto the date when plant was ready then there is a delay of 151 days from the date of Scheduled date of Commissioning i.e. 31.01.2016 and for the purpose of tariff, which was valid upto 31.03.2016, there is a delay of 91 days only.

xv) The findings of the Commission on the issue of transmission line are wrong. The petitioner was informed by PEDDA and PSPCL that there is a provision of "Pooling Point" where more than one Solar PV Project could be connected to a common transmission line. PEDDA and PSPCL were aware that it is difficult to have transmission line adjoining the border. As there already existed a transmission line for the earlier project of the petitioner, so there was no need to have another transmission line and this is the reason that the petitioner never asked PSPCL to have

transmission line. As the plant was near completion, the petitioner wrote letters dated 31.05.2016 to PEDDA and 06.06.2016 to Chief Engineer/ DS, Border Zone, PSPCL, Amritsar requesting for allowing the petitioner to evacuate the power from the existing transmission line. In this regard, the petitioner filed an additional affidavit before the Commission dated 24.10.2016. The Commission in its Order dated 14.02.2017 held that the transmission line could be constructed earlier as the tension started at the border after Pathankot attack. After the Dina Nagar attack on 27.07.2015, the tension started at the border and the transmission line could not be constructed. As such, the finding of the Commission that the petitioner caused delay in asking the PSPCL to put transmission line is not correct.

xvi) The Commission in its Order dated 14.02.2017 noted the fact that the plant was ready on 30.06.2016. The Commission further directed PSPCL to charge liquidated damages from the petitioner from 01.04.2016 to 30.06.2016. The Commission further held that because the plant was commissioned only on 24.08.2016, so the petitioner is not entitled to get the original tariff but a lower tariff. The petitioner has completed the project on 30.06.2016. Due to the restrictions on the border, the EPC contractors were not able to complete the work and it amounts to force majeure event. So the petitioner is entitled to get the benefit of extension of COD and same tariff for which its bid was accepted.

xvii) The Commission determined the tariff of the petitioner taking into account the bids for the next financial year. The Commission

determined the tariff of the petitioner on the basis of bids wherein the lowest tariff was Rs. 5.09 per kWh against the generic tariff of Rs. 7.04 per kWh. These calculations were not as per law. The Commission erred and missed the fact that the project for which rate was Rs. 5.09 is a 50 MW project and parameters of 50 MW project are totally different from the project of 1 MW. The cost of 50 MW project would be different than project of 1 MW. The interest cost, modules cost and other costs would be much cheaper for 50 MW project than 1 MW project.

xviii) The tariff in the next bidding was valid upto 31.03.2017 whereas the petitioner had completed its project upto 30.06.2016. This aspect was not considered by the Commission while determining the tariff for the petitioner. The Commission was bound to determine the tariff on the basis of cost method. The Commission was required to ask the petitioner to demonstrate the cost incurred by it on the project and if the petitioner had saved on account of delayed completion of project, then the tariff could be reduced according to reduction in cost and not otherwise. In actual fact, the petitioner incurred a higher cost than what was proposed in the DPR. The petitioner is entitled to get the same tariff for which the bid was accepted.

xix) In Order dated 11.05.2015 passed by the PSERC in petition no. 21 of 2015 it was stated that in case the project is not commissioned by 31.03.2016 then the tariff would be determined by the Commission. So the Commission has to determine the tariff on the basis of cost method and there is no procedure to grant the

tariff on the basis of new lowest bidded tariff arrived for the next year. The tariff of the petitioner was not the lowest tariff and as such there was no reason to compare the tariff with the lowest tariff arrived at during the next year on the basis of bids.

- xx) The tariff fixed by the Commission is so low that the petitioner would not be able to even pay the installments of the loan taken from IREDA. The petitioner stated that in such a situation the account would be declared NPA and the plant would be closed.
- xxi) The tariff was offered by the petitioner on the basis of cost shown in DPR. But after the decision of the Commission, the petitioner has been burdened with Rs. 40 lakh of Performance Bank Guarantee, Rs. 18 lakh liquidated damages and Rs. 15 lakh of litigation cost. The project cost increased by about Rs. 75 lakh which has increased the equity share of the developer and made the project financially unviable.
- xxii) There were force majeure events which caused delay in completion of the project and same has to be condoned by the Commission and the scheduled date of commissioning has to be extended accordingly. As such PEDA and PSPCL are not entitled to get any penalty or liquidated damages from the petitioner and to this extent also the order is required to be reviewed and recalled.
- xxiii) The petitioner has not filed any other such or similar review against the impugned order. The petitioner has not filed any appeal against the impugned order before Hon'ble APTEL but reserves its right to file an appropriate appeal before Hon'ble APTEL on merit of the case if so required.

xxiv) The order passed by the Commission in petition no. 25 of 2016 may kindly be reviewed and recalled.

4. The submissions dated 13.10.2017 of PEDDA, in brief, are as under:

- i) The petitioner has wrongly invoked jurisdiction of the Commission while filing the review petition, as the grounds mentioned are unsustainable. The petitioner is seeking review of the order dated 14.02.2017 on the purported grounds that there is misappreciation of facts by the Commission and certain mistakes or error apparent on the face of record in the order passed by the Commission. The Commission while considering all the aspects of the matter has rightly adjudicated the matter in terms of order dated 14.02.2017. Therefore, the review petition is not maintainable and bad both in terms of de-jure and de-facto and is liable to be dismissed.
- ii) PEDDA vehemently denies that the petitioner could not take recourse to some force majeure events as per the advice of the officials of PEDDA. The petitioner by filing the review petition made a bald allegation so as to cover up its sins and wrongs and miserably failed to prove its case. Hence, no reliance can be placed upon the false and purported assertions made by the petitioner.
- iii) The review petition can only be filed within 60 days of the date of decision / order of the Commission, on the discovery of new matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced at the time when the

decision/ order was passed by the Commission or on account of some mistake or error apparent on the face of record, or for any other sufficient reasons, may apply for review order. However, in the present review petition the claim of the petitioner is neither based upon the discovery of new matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by the petitioner at the time when the decision / order was passed by the Commission. There does not exist any justifiable cause for the petitioner to invoke the review jurisdiction of the Commission under Regulation 64 of the PSERC (Conduct of Business) Regulations, 2005.

iv) The petitioner while filing the review petition under the review regulations has made an attempt to get the petition no. 25 of 2016 for fresh consideration which is totally impermissible as the same stands adjudicated vide order dated 14.02.2017. The petition filed by the petitioner deserves to be dismissed with exemplary costs.

5. The submissions dated 18.10.2017 of PSPCL, in brief, are summarized as under:

i) The review petition is not maintainable under Regulation 64 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 because none of the grounds specified under Regulation 64 are made out. The petitioner has again raised the same very points which were raised in the main petition and after long proceedings spanning over almost one year, all these grounds were argued and ultimately rejected by the Commission vide order dated 14.02.2017.

- ii) The review petition cannot be entertained as the same is against basic principle of legal jurisprudence known as res judicata which means that the matters once adjudicated and settled attain finality and are binding on the parties. The review jurisdiction can only be exercised in a very limited space and only on specific error points but in the instant case the petitioner has tried to re-agitate the matter de novo by once again raising the same points which were already adjudicated in the main petition.
- iii) PSPCL has already contested the petition no. 25 of 2016 and filed detailed reply thereto rejecting each and every contention of the petitioner on the basis of actual, factual and legal position. The submissions made by PSPCL were accepted by the Commission and on the basis of the same, Order dated 14.02.2017 was passed.
- iv) The dispute pertains to 1 MW solar power plant to be commissioned at village Chhina Bidhi Chand District Tarn Taran by the petitioner on or before 30.01.2016 but was delayed on account of negligence and incapability of the petitioner and was actually commissioned on 24.08.2016. The petitioner in petition no. 25 of 2016 took same pleas of force majeure events which were not accepted by the Commission because the same did not fall under Clause 19 of the PPA and moreover, the same were held to be too farfetched, untenable and flimsy in nature.
- v) The petitioner is taking contradictory positions. While on one hand the petitioner is cleverly laying the blame at the doorstep of PEDDA and also on his counsel for not taking plea of some more force

majeure events and thereby admitting follies and weaknesses in his own case whereas on the other hand he is blaming the Commission for committing mistakes or error apparent on the face of record and mis-appreciation of facts. The arguments of the petitioner are perverse and preposterous and only an attempt to justify the filing of the instant review petition because otherwise there is no factual and legal basis for him to approach the Commission under Regulation 64.

- vi) The terrorist attack in Gurdaspur on 27.07.2015 is not a force majeure event under Clause 19 of the PPA. Moreover, the said incident was prior to the filing of the petition no. 25 of 2016 and if in any case the petitioner had any grievance, the same should have been raised at that time. Despite possessing the knowledge of the incident, when the petitioner did not chose to raise the same at the time of the petition, he is disentitled from raising the same under Regulation 64 and therefore, the instant review petition is liable to be dismissed.
- vii) The issue of transmission line was raised by the petitioner in the petition no. 25 of 2016 which was not accepted by the Commission. The review petition is not maintainable because no ground has been made out under Regulation 64 for allowing the review of the earlier order dated 14.02.2017.
- viii) The events mentioned by the petitioner including the new ones are not force majeure events as required under Clause 19 of the PPA. The petitioner is only trying to juggle up the facts and make

some ground for review. PSPCL requested the Commission to dismiss the review petition with exemplary costs.

6. The petitioner filed rejoinders dated 22.01.2018 to the replies filed by PEDDA and PSPCL. The submissions made in both the rejoinders, in brief, are as under:

- i) The petitioner filed the review petition with reasons but PEDDA failed to rebut the same. PEDDA alleged that the petitioner while filing review petition has made bald allegation so as to cover up its sins and wrongs. PEDDA has failed to mention what were the sins or wrongs committed by the petitioner which it wanted to cover up. As such review petition deserves to be allowed.
- ii) The review petition has been filed on the ground that there is misappreciation of the facts by the Commission and there are certain mistakes or errors apparent on the face of record and there are certain evidences / documents which could not be produced by the petitioner despite due diligence and there were some more force majeure events which could not be taken in the petition as per the advice of PEDDA and counsel of the applicant, though, these reasons are apparent from the facts mentioned in the petition. PEDDA failed to reply the same and made bald assertions in its reply. The petitioner shared each information with PEDDA, being a nodal agency. When PEDDA told the petitioner to desist from raising these grounds then the petitioner had no other option except to follow the same. The reply filed by PSPCL is wrong and vague.

7. **Commission's Observations, Findings and Decision**

The Commission has carefully gone through the Review Petition, replies thereto by PEDDA & PSPCL, rejoinder to the reply of PEDDA by the petitioner and other submissions. In the Review Petition the petitioner prayed that in view of the submissions made in the Review Petition, the Order dated 14.02.2017 passed by the Commission in petition no. 25 of 2016 may be reviewed & recalled and the relief claimed in the petition may be granted.

The Commission has carefully gone through the grounds on which review has been sought and observes as under:

A) The Petitioner has submitted as under:-

- i) The Petitioner filed Petition No. 25 of 2016 on 30.03.2016 and prayed for extending the date of commissioning of the project from 31.01.2016 to 31.08.2016 by maintaining status quo in terms of the applicability of tariff i.e. Rs. 7.68 / kWh. The project was completed on 30.06.2016. The project is situated in Vill. Chhina Bidhi Chand, District Tarn Taran and is situated beyond defence line and is very close to Indo-Pak Border. The Petitioner is having another 2 MW project which was commissioned in-time and accordingly bid for present 1 MW project adjoining the earlier 2 MW project.
- ii) The project could not be commissioned as per scheduled COD of 30.01.2016 due to certain Force Majeure events which were mentioned in the Petition. The same was completed on

30.06.2016 and commissioned on 24.08.2016. Though there were some more force majeure events like terrorists attack at Dina Nagar Police Station and Pathankot Air Base etc., but the same could not be taken by the Petitioner as per the advice given by officials of PEDA on the ground that if these are taken then the Financial Institutions would not disburse the loan. Accordingly, the Commission's order dated 14.02.2017 in the petition needs to be reviewed.

iii) The Petitioner has reiterated most of the grounds on which the relief has been sought in the review petition. The petitioner has further submitted as under:

a) The Petitioner is having a house just adjoining the project land and Indo-Pak Border. EPC contractor was allowed to use the said house for providing accommodation to the labour. The EPC contractor started the work in July, 2015. However, on 27.07.2015, there was a terrorist attack at Dina Nagar Police Station in Gurdaspur District. Thereafter, the District Magistrate, Tarn Taran issued order dated 27.07.2015 under section 144 Cr.P.C. and completely stopped all activities in the 500 meter area near the International Border from 5 PM to 7 AM from 29.07.2015 to 24.09.2015. Thereafter the labourers left the plant site in fear and EPC contractor refused to work in the absence of labour. The restrictions imposed by the District Magistrate were extended and the same continued upto 12.07.2016 as one after another disturbing events happened.

The Deputy Commissioner, Tarn Taran and Commandant BSF have also issued letters appreciating the efforts made by the Petitioner in setting up the project against heavy odds. The said events have also been mentioned in the aforesaid letters. The EPC contractor vide letter dated 02.08.2015 intimated that due to continuous problems of routine checking and curfew at site by defence personnels, it is unable to complete the work. Thereafter, the Petitioner informed PEDDA about the situation prevalent at the Border and that the EPC contractor was not ready to complete the work. PEDDA asked the petitioner to wait for some time and engage another EPC contractor in case the earlier EPC contractor does not come back. PEDDA also informed the petitioner not to submit anything in writing showing the border conditions. In that case, no financial institution would give financial assistance to the petitioner. Therefore, the petitioner did not give anything in writing to PEDDA as advised by it. Accordingly, the petitioner also did not mention the above said facts in the petition.

- b) The Petitioner engaged another EPC contractor on 24.08.2015. The financial assistance was applied to IREDA in August, 2015.
- c) The unrest started in the State of Punjab on 14.10.2015 due to desecration of Holy Sri Guru Granth Sahib. The Commission discarded this plea in the petition on the ground that no evidence was produced by the petitioner in this regard. PEDDA and PSPCL also opposed this issue by saying that this incident happened about 100 Km away from the project site. In fact two

incidents happened, one in Faridkot and another in village Bath in District Tarn Taran itself and whole Punjab was affected. Thereafter, Sarbat Khalsa was called on 10.11.2015 in village Chabhal, which is also very close to the plant site. Further, by looking at the intensity of the incident, the District Magistrate Tarn Taran passed order under section 144 of Cr.P.C. dated 04.11.2015 ordering for 'Thikri Pehra' in the villages from 04.11.2015 to 31.12.2015.

- d) Due to the above said incidents and due to the restrictions imposed on the border, the movement of the specialized labour which migrated from other states was not free and the labour scared to work in those conditions. As a result, the new EPC contractor also failed to complete the work and left the work in between in the month of December, 2015. Thereafter, the petitioner entered into a new contract with old EPC contractor on 05.01.2016. Therefore, the finding of the Commission that the petitioner gave EPC contract on 05.01.2016 is incorrect.
- e) That very little work could be done from the date of 1st EPC contract i.e. 13.05.2015 to the 3rd EPC contract dated 05.01.2016 due to the restrictions on movement at Border Area and this amounts to Force Majeure event and the petitioner is entitled to get the benefit of this event.
- f) There was a terrorist attack at the Pathankot Air Force Station on 02.01.2016. After this attack again the vigil at the border areas was increased. The movement was already restricted in the border area.

- g) The petitioner applied for the loan from IREDA on 12.08.2015 and deposited processing fees but the loan was sanctioned by IREDA on 06.11.2015. The petitioner was ready for signing loan agreement and other documents but IREDA was not willing to sign the same. The mails and messages in this regard were not placed on record because in that case the petitioner would not have got the disbursement.
- h) The Commission calculated the delay for the project as 187 days considering the date of synchronization / commissioning of the project as 24.08.2016. The Commission held in its order that though the plant was ready on 30.06.2016, the 11 kV line for evacuation of power was not in position. Therefore, the delay from 30.06.2016 to 24.08.2016 has been held to be on the part of the petitioner. It is submitted that the finding of the Commission on the issue of transmission line is wrong and against the actual facts. The petitioner was informed by the officials of PEDDA and PSPCL that there is a provision of 'Pooling Point' where more than one Solar PV Power Projects may connect to a common transmission line. The petitioner did not take anything in writing from PEDDA / PSPCL in this regard. The transmission line has already been existing for the petitioner's earlier project of 2 MW capacity adjoining the 1 MW project. It is difficult to construct transmission line adjoining the border. In view of the aforesaid, there was no need for another transmission line. Accordingly, when the project was near completion, the petitioner vide letter date 06.06.2016 requested

PSPCL to allow evacuation of power from the project through the existing transmission line. However, the Commission in its order held that the line could have been constructed earlier as the tension started at the border only after Pathankot attack. It is submitted that the tension started at the border after the Dina Nagar attack on 27.07.2015 and the transmission line could not be constructed. As such, the finding of the Commission in this regard is not correct. The project was completed on 30.06.2016. The petitioner was not able to complete the project earlier due to Force Majeure events and is entitled to get the benefit of extension of COD and same tariff for which its bid was accepted.

- i) The Commission while calculating the reduced tariff of the petitioner has taken into account the fresh bids received against the next financial year. The Commission noted that as per fresh bids the lowest tariff is Rs. 5.09 per kWh against the generic tariff of Rs. 7.04. On this basis, the Commission determined the tariff of the project. This calculation was not as per law. The Commission erred and missed the fact that the project for which rate was Rs. 5.09 is a 50 MW project. Parameters of 50 MW project are totally different from the project of 1 MW and its per MW cost would be less than the cost of the project of 1 MW.

Once this Commission has held that the petitioner is not entitled to get the earlier tariff, then the Commission was bound to determine the tariff on the basis of cost method. The Commission was required to ask the petitioner to demonstrate

the cost incurred by it on the project and if the petitioner had saved on account of delayed completion of the project, then the tariff could be reduced according to reduction in cost and not otherwise. It is submitted that the petitioner has actually incurred more cost than the cost proposed in the DPR. A certificate in this regard has been issued by the Chartered Accountant. It is further submitted that the tariff of the petitioner was not the lowest tariff and as such, there was no reason to compare the same with the lowest tariff arrived at during the next year on the basis of bids.

- j) With the decision of the Commission, the petitioner has been burdened with Rs. 40 lakh of PBG, Rs. 18 lakh liquidated damages and Rs. 15 lakh of litigation cost. The project cost has thus increased by Rs. 73 lakh approx. As per tariff fixed by the Commission for the project, the petitioner would not be able to pay the instalments of IREDA and the project would be declared NPA, which would be a National loss.

The petitioner has prayed that in view of the above submissions, the order dated 14.02.2017 passed by the Commission in petition no. 25 of 2016 may be reviewed and recalled and the petitioner may be allowed the relief claimed in the petition.

B) PEDDA has submitted as under:-

- i) It is not correct that the petitioner could not cite some force majeure events as per the advice of the officials of PEDDA.

- ii) The review petition can only be filed on the discovery of new and important matter or evidence which could not be produced at the time when the order was passed or on account of some mistake or error or for any other sufficient reason within 60 days of the date of order of the Commission. However, the claim of the petitioner is neither based upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by the petitioner at the time when the order was passed by the Commission nor the petitioner has been able to successfully demonstrate existence of any error apparent on record. The review petition is not maintainable. Further, the review petition is time barred.

C) PSPCL has submitted as under:

- i) The review petition is not maintainable under Regulation 64 of PSERC (Conduct and Business) Regulations, 2005.
- ii) The petitioner again raised the same points in the review petition as were raised in the petition. All the grounds were argued and the same were rejected by the Commission in its Order dated 14.02.2017.
- iii) The review petition cannot be entertained as the same is against basic legal principles. The matters once adjudicated and settled attain finality and are binding on the parties.
- iv) The review jurisdiction can only be exercised on specific error points. However, in the instant case the petitioner has once

again raised the same points which were already adjudicated in the main petition.

- v) The raising of new event of 'terrorist attack at Dina Nagar, Gurdaspur' as a Force Majeure event is misconceived as the said event did not affect the local conditions responsible for execution of the project. This event cannot be categorised as a Force Majeure event under clause-19 of the PPA.
- vi) The terrorist attack at Dina Nagar, Gurdaspur occurred on 27.07.2015, much prior to the filing of the petition. The petition was decided on 14.02.2017 and the petitioner had ample time to raise the same in the petition. The petitioner is trying to cover up his mistakes or negligence by blaming PEDDA and his previous counsel for not having raised the said issue earlier in the main petition.
- vii) The petitioner has no fresh ground under Regulation 64 to seek a review.
- viii) The argument of the petitioner that it did not raise the issue of terrorist attack at Dina Nagar, Gurdaspur earlier because it was told by PEDDA not to raise the same, is legally untenable and unbelievable.
- ix) The incident of terrorist attack at Pathankot Air Force Station occurred on 27.07.2015, much prior to the filing of the petition. The said event is not a Force Majeure event under clause 19 of the PPA. If the petitioner had any grievance, the same should have been raised at the time of filing of the main petition.

The Commission notes that the petitioner has submitted that some Force Majeure Events could not be mentioned in the petition and has accordingly sought relief on this account. The petitioner has further submitted that though there were some more force majeure events like terrorists attack at Dina Nagar Police Station and Pathankot Air Base etc., but the same could not be taken by the Petitioner in the petition as per the advice given by officials of PEDDA on the ground that if these are taken then the Financial Institutions would not disburse the loan. The Commission notes that the petitioner has submitted that the project could not be commissioned upto scheduled COD of 30.01.2016 due to certain Force Majeure events and the same was completed on 30.06.2016 and commissioned on 24.08.2016. The Commission further notes that the project is situated in Vill. Chhina Bidhi Chand, District Tarn Taran and is situated beyond defence line and is very close to Indo-Pak Border as submitted by the petitioner. The petitioner has submitted that he has a house just adjoining the project land and Indo-Pak Border. EPC contractor was allowed to use the said house for providing accommodation to the labour. The EPC contract for the project was given to the first contractor on 13.05.2015 and the contractor started the work in July, 2015. However, on 27.07.2015, there was a terrorist attack at Dina Nagar Police Station in Gurdaspur District. Thereafter, the District Magistrate, Tarn Taran issued order dated 27.07.2015 under section 144 Cr.P.C. and completely stopped all activities in the 500 meter area near the International Border from 5 PM to 7 AM from 29.07.2015 to 24.09.2015. Thereafter the labourers left the plant site

in fear and EPC contractor refused to work in the absence of labour. The restrictions imposed by the District Magistrate were extended and the same continued upto 12.07.2016 as one after another disturbing events happened. The Deputy Commissioner, Tarn Taran and Commandant BSF have also issued letters appreciating the efforts made by the Petitioner in setting up the project against heavy odds. The said events have also been mentioned in the aforesaid letters. The EPC contractor vide letter dated 02.08.2015 intimated that due to continuous problems of routine checking and curfew at site by defence personnels, he was unable to complete the work. Thereafter, the Petitioner informed PEDDA about the situation prevalent at the Border and that the EPC contractor was not ready to complete the work. PEDDA asked the petitioner to wait for some time and engage another EPC contractor in case the earlier EPC contractor does not come back. PEDDA also informed the petitioner not to submit anything in writing showing the border conditions, because in those circumstances, no financial institution would give financial assistance to the petitioner. Therefore, the petitioner did not give anything in writing to PEDDA as advised by it. Accordingly, the petitioner also did not mention the above said facts in the petition. The petitioner submitted that it engaged another EPC contractor on 24.08.2015. The petitioner further submitted that the unrest started in the State of Punjab on 14.10.2015 due to desecration of Holy Sri Guru Granth Sahib. The Commission discarded this plea in the petition on the ground that no evidence was produced by the petitioner in this regard. PEDDA and PSPCL also opposed this issue

by saying that this incident happened about 100 Km away from the project site. The petitioner submitted that in fact two incidents occurred, one in Faridkot and another in village Bath in District Tarn Taran itself and the whole Punjab was affected. Thereafter, Sarbat Khalsa was called on 10.11.2015 in village Chabhal, which is also very close to the plant site. Further, the District Magistrate Tarn Taran passed order under section 144 of Cr.P.C. dated 04.11.2015 ordering for 'Thikri Pehra' in the villages from 04.11.2015 to 31.12.2015. The Commission notes that the petitioner has submitted that due to the above said incidents and due to the restrictions imposed on the border, the movement of the specialized labour which migrated from other states was restricted and the labour was too scared to work in those conditions. As a result, the new EPC contractor also failed to complete the work and left the work in between in the month of December, 2015. The petitioner submitted that thereafter, it entered into a new contract with old EPC contractor on 05.01.2016. The petitioner has further submitted that in view of the above facts, the finding of the Commission that it gave EPC contract on 05.01.2016 is incorrect.

The Commission notes that the petitioner has submitted that he has three EPC contractors one from 13.05.2015 to 02.08.2015, second from 24.08.2015 to December, 2015 and third from 05.01.2016 to 30.06.2016. These contractors left because of the tense situation at the border. Neither the attack on Dinanagar or Pathankot can be denied. Movement was restricted on the border between 27.07.2015 and 12.07.2016. This is borne out by the orders

of the District Magistrate and the letter of the BSF Commandant which evidence was not available with petitioner at the time when he first approached the Commission.

As regards the construction of transmission line, the petitioner has submitted that the 11kV transmission line was already existing for the petitioner's earlier project of 2 MW capacity adjoining the 1 MW project. The petitioner submitted that it is difficult to construct transmission line adjoining the border. In view of the aforesaid, there was no need for another transmission line. Accordingly, when the project was near completion, the petitioner vide letter date 06.06.2016 requested PSPCL to allow evacuation of power from the project through the existing transmission line. However, the Commission in its order held that the line could have been constructed earlier as the tension started at the border only after Pathankot attack. In this regard the petitioner submitted that the tension started at the border after the Dina Nagar attack on 27.07.2015 and the transmission line could not be constructed. The petitioner submitted that, as such, the finding of the Commission in this regard is not correct. The project was completed on 30.06.2016 and the project was commissioned on 24.08.2016 after the PSPCL allowed the use of already existing 11kV line of 2 MW project for evacuation of power from this 1 MW project. The petitioner submitted that it was not able to complete the project earlier due to Force Majeure events and is entitled to get the benefit of extension of COD and same tariff for which its bid was accepted.

As regards the tariff allowed by the Commission, the petitioner has submitted that the Commission while calculating the reduced tariff of the petitioner has taken into account the fresh bids received against the next financial year. The Commission noted that as per fresh bids the lowest tariff is Rs. 5.09 per kWh against the generic tariff of Rs. 7.04. On this basis, the Commission determined the tariff of the project. The petitioner submitted that this calculation was not as per law. The petitioner has further submitted that the Commission erred and missed the fact that the project for which rate was Rs. 5.09 is a 50 MW project. Parameters of 50 MW project are totally different from the project of 1 MW and its per MW cost would be less than the cost of the project of 1 MW. The petitioner further submitted that once this Commission has held that the petitioner is not entitled to get the earlier tariff, then the Commission was bound to determine the tariff on the basis of cost method. The petitioner submitted that it incurred more cost than the cost proposed in the DPR and a certificate in this regard has been issued by the Chartered Accountant.

The petitioner has prayed that in view of the above submissions, the order dated 14.02.2017 passed by the Commission in petition no. 25 of 2016 may be reviewed and recalled and the petitioner may be allowed the relief claimed in the petition.

The Commission notes that PSPCL and PEDDA in their submissions as detailed above have opposed the review of the order dated 14.02.2017 in the petition.

After carefully considering the submissions of the parties, the Commission observes that the 1 MW Solar PV Power project of the

petitioner is located in the close proximity to the Indo-Pak Border and due to incidents of terrorist attacks on Dina Nagar Police Station & Pathankot Airbase, section 144 of Cr.PC was in force from 27.07.2015 to 12.07.2016 for almost one year in the area including the area where petitioner's project is located. The Commission notes that the petitioner has also submitted the documentary evidence of the same in the form of copies of the orders issued by the District Magistrate, Tarn Taran. The Commission specifically takes note of the D.O. letter dated 15.03.2017 and 16.03.2017 issued by Commandant, BSF and Deputy Commissioner, Tarn Taran. The Commandant, BSF in his letter has mentioned that the project is in the close vicinity of International border, which is even clearly visible from Zero line at the Indo-Pak Border. The area is highly sensitive from security point of view and inspite of all threats and challenges of anti-National elements, the power plant has been established for the benefit of local population residing in the remotest part of the Nation ahead of Army defences. It has been further mentioned that the plant has been established even during high alert and restricted movement at the border due to Dinanagar and Pathankot incident. The Deputy Commissioner, Tarn Taran has mentioned in the letter that the project has been established just at stone's throw from LOC (Indo-Pak International Border) against heavy odds. It has been further mentioned in the letter that in the recent past the state of Punjab in general and the border villages of district Tarn Taran suffered a lot due to infiltration from Pak side and surgical strikes. As a results, the district administration has taken number of precautionary measures

by means of imposing section 144 Cr.PC along the Border belt of District Tarn Taran on following events:-

- i) Restrictive measures under section 144 Cr. PC of 1973 were imposed along with border belt after terrorists attacked in Dinanagar, District Gurdaspur on 27th July, 2015 from 27.07.2015 to 12.07.2016.
- ii) After the terrorists attack at Air force Station Pathankot on 2nd January, 2016 high alert was announced in District Tarn Taran and restrictive measures under Section 144 Cr. PC of 1973 were imposed on border belt.
- iii) To control the tense situation and unrest arising out of desecration of Sri Guru Granth Sahib Ji in village Bath, District Tarn Taran, orders under section 3 (1) of Punjab Villages and Small Towns-Patrol Act 1918 and U/s 144 Cr. PC of 1973 were imposed.
- iv) Again on 10th November, 2015 orders Under Section 3(1) of Punjab Villages and small Towns-Patrol Act 1918 and U/s 144 Cr. PC of 1973 were imposed when huge gathering was called by Sarabat Khalsa in Village Chabba, Near Tarn Taran.
- v) Government directed the dwellers along the 10 Kms of Indo-Pak Border, District Tarn Taran to evacuate the Border after the Surgical Strike by Army and orders 3(1) of Punjab Villages and small Towns Patrol Act 1918 and U/s 144 Cr. PC of 1973 were imposed in District Tarn Taran.

The Deputy Commissioner, Tarn Taran has commended the efforts of the petitioner and stated that inspite of all the hurdles and

problems the company managed to install the project against all aforesaid heavy odds and supply the power to the most needed areas of District Tarn Taran.

The Commission has carefully gone through the contents of the above letters of the Deputy Commissioner, Tarn Taran and Commandant, BSF which amply clarifies the circumstances prevalent at the project site during the period 27.07.2015 to 12.07.2016.

Further, the petitioner deposited Rs. 25.00 lakh with PSPCL on 15.08.2016 for the construction of 11 kV line by PSPCL for his 1 MW project. As per PSPCL's submissions dated 09.02.2018, the 11kV line constructed by PSPCL for the petitioner's project was cleared for energization by Chief Electrical Inspector, Govt. of Punjab on 29.01.2018 and the same was energized on 30.01.2018. The Commission notes that PSPCL itself has taken more than seventeen months for the construction of 11 kV line for the petitioner's project and that too during the period when section 144 Cr. PC was not in force.

The Commission observes that review of an order / decision can be sought by an aggrieved person if there is discovery of any new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person or could not be produced by him at the time when the Order was passed by the Commission or on account of some mistake on the face of record. The Commission notes that section 94 (1) (f) of the Electricity Act, 2003 provides for the Commission to review its decisions, directions and orders.

Regulation 64 of the PSERC (Conduct of Business) Regulations, 2005 pertaining to the Review of the decisions / directions and orders, stipulates that

“Any person aggrieved by a decision or order of the Commission, from which no appeal is preferred or allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decision / order was passed by the Commission or on account of some mistake or error apparent on the face of record, or for any other sufficient reason, may apply for review of such order within 60 days of the date of decision / order of the Commission.”

Keeping the above in view and the submissions made by the parties, the Commission notes that the petitioner has brought out the new facts such as imposition of Section 144 of Cr.PC from 27.07.2015 to 12.07.2016 alongwith border belt which included the area of the project site, after incidents of terrorists attack. The Commission further notes that the petitioner has submitted that it could not produce this fact in the petition due to reasons as submitted by the petitioner in detail in the foregoing paras. The Commission is of the view that it would be appropriate to review its order dated 14.02.2017 in Petition No. 25 of 2016 in the interest of justice and accordingly decides to review the said order.

The Commission observes that the project has been established against heavy odds near the Indo-Pak Border, although it has taken more time than the scheduled

commissioning on 30.01.2016. The project was commissioned on 24.08.2016. The Commission observes that the petitioner has submitted that from time to time it brought to the knowledge of PEDA the peculiar circumstances prevailing in the area of project site which were causing hurdles in timely execution of the project. The Commission is of the view that the circumstances as detailed above were beyond the control of the petitioner due to which delay occurred in completion / commissioning of the project. The Commission notes that the said circumstances did not arise out of the fault of the petitioner and accordingly it is entitled to relief under Force Majeure in terms of provisions in the IA / PPA.

Keeping the above in view, the Commission allows extension of the scheduled date of commissioning of the project to 24.08.2016. It is further held that there shall be no change in the tariff of ₹7.68 per kWh as provided in the PPA for the project which is payable to the petitioner by PSPCL for purchase of electricity from the project.

PEDA is directed to forthwith refund the amount of Rs. 40.00 lakh forfeited by it through encashment of PBGs submitted by the petitioner, within 7 days from the date of this Order, failing which PEDA will be liable to pay penal interest on the said amount to the petitioner at the rate of 1.25% per month payable on pro-rata basis for each day's delay beyond seven working days. There is no case for levy of any

liquidated damages by PSPCL. If the liquidated damages have already been claimed / adjusted in the bills of the petitioner, the same shall be refunded to the petitioner along with arrears of tariff difference of Rs. 2.29 per kWh (Rs. 7.68 per kWh - Rs. 5.39 per kWh) for the power already supplied to PSPCL. The said arrears / amount of liquidated damages shall be payable to the petitioner within 7 days from the date of this Order, failing which PSPCL will be liable to pay penal interest to the petitioner at the rate of 1.25% per month payable on pro-rata basis for each day's delay beyond seven working days.

The Review Petition is disposed of in terms of the above.

Sd/-
(Anjuli Chandra)
Member

Sd/-
(S.S. Sarna)
Member

Sd/-
(Kusumjit Sidhu)
Chairperson

Chandigarh
Dated: 21.05.2018