

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

I.A. No.26 of 2017
in Petition No. 13 of 2017
Date of Order: 21.06.2017

Present: **Shri D.S. Bains, Chairman**
Shri S.S. Sarna, Member

In the matter of: Petition under Section 86(1) (f) of the Electricity Act, 2003 to disputes arising under the Implementation Agreement (IA) dated 30.11.2015 executed between Photon Ojas Private Limited (Petitioner/POPL) and Punjab Energy Development Agency (Respondent No.2)/PEDA read along with the provisions of the Power Purchase Agreement (PPA) dated 13.01.2016, executed between POPL and the Punjab State Power Corporation Limited (Respondent No.1)/PSPCL) as the successor entity on unbundling of PSEB.

AND

In the matter of: Photon Ojas Pvt. Limited having its Registered Office at 8th Floor, Statesman House, Barakhamba Road, New Delhi-100001 through its Authorized Signatory Mr. Vaibhav Sharma, who has been duly authorized vide Board Resolution dated February 18, 2017

.... Petitioner

Versus

1. Punjab State Power Corporation Limited, (PSPCL)
2. Punjab Energy Development Agency, (PEDA)
3. Syndicate Bank Limited, Arunachal Building, 19, Barakhamba Road, New Delhi through its Manager.

....Respondents

ORDER

The applicant-petitioner filed petition No.13 of 2017 under Section 86(1)(f) of the Electricity Act, 2003 pertaining to the Implementation Agreement dated 30.11.2015 executed between Photon Ojas Pvt. Limited and Punjab Energy Development Agency read along with the provisions of Power Purchase Agreement dated 13.01.2016 executed between the applicant-petitioner and the Punjab State Power Corporation Ltd. The applicant-petitioner filed the petition in the matter of failure and / or refusal of PEDA to accept claim of Photon Ojas Pvt. Limited for extension of time in achieving the scheduled Commercial Operation Date of the project under the PPA which occasioned on account of Force-Majeure even(s) having adverse implications and delay on the part of PEDA in approving / incorporating new sites under the I.A. for commissioning of the project and the delay in grant of technical feasibility thereby delaying the commissioning of the entire project. Applicant-petitioner also filed an I.A. No.03 of 2017 along with the petition. The petition was taken up for admission on 07.03.2017 and after hearing the parties, vide order dated 08.03.2017, the parties were directed to maintain the status quo in the meantime. PEDA was directed not to encash the remaining performance bank guarantee to the tune of Rs.3.50 Cr. further directing not to terminate the Letter of Allotment, Implementation Agreement as well as PPA till the next date of hearing.

The matter was taken up for hearing on 11.04.2017 and during the hearing, PEDA filed an I.A. No.13 of 2017 seeking prior adjudication of the issues raised in the I.A. before proceeding any

further in the matter. The PEDDA alleged in the I.A. that Advocate for the petitioner is from the office of Counsel of the PSERC who is appearing before the same Commission against PEDDA while representing the petitioner, which is totally unethical, wrong and prejudicial to the rights / interests of PEDDA. It was also alleged that the petition is barred by the jurisdiction of the Commission. The I.A. No.13 of 2017 has been disposed of vide order dated 06.06.2017.

During the hearing on 23.05.2017, the Applicant – petitioner filed the present I.A. No.26 of 2017 under Section 158 of the Electricity Act, 2003 read with regulation 20 of PSERC (Conduct of Business) Regulations, 2005, seeking reference of the disputes to arbitration. The applicant-petitioner has submitted that

1) The respondent No.1 and 2 are engaging in dilatory tactics and not proceeding with the petition in a bonafide manner. The respondents have taken multifarious and misconceived objections solely to obfuscate issues as canvassed by the petitioner. The said objections are not tenable on the face of it, but the respondents are adamant not to file reply to the main petition and are delaying the adjudication of the matter on merits.

ii) That the conduct of the respondents is contrary to law as also being contrary to the rights of the applicant-petitioner under the I.A. and PPA, the issues canvassed in the petition may be referred to and determined by an Arbitrator as nominated and appointed by the Commission in terms of section 158 read with section 86(1)(f) of the Electricity Act, 2003.

iii) That keeping in view that the arbitral proceedings initiated under section 158 of the Electricity Act, 2003 are subject to provisions

of the Arbitration and Conciliation Act, 1996 and that the Arbitration Act, 1996 has been amended in 2015, whereby, amongst other things, 5th and 7th schedule have been added to the Arbitration Act, 1996, the Arbitrator so nominated is required to be in conformity with the amended provisions of the Arbitration Act, 1996.

iv) That the request of the applicant-petitioner is in consonance with Regulation 20 of the PSERC (Conduct of Business) Regulations, 2005 as well as Article 14 of I.A. and Article 16 of PPA and a conjoint reading of the clauses of agreements read with the provisions of Electricity Act, 2003 reveals that the best course available in the peculiar facts and circumstances of this case is to refer the matter to arbitrator(s).

2. The respondent No.2 PEDDA has filed reply to the application submitting that –

i) It is the considered case of the petitioner that the petition has been filed under section 86(1)(f) of the Electricity Act, 2003. As per the provisions of section 86(1)(f) of the Electricity Act, the State Commission is empowered to adjudicate upon the dispute between the generation company and the distributing agency only, however, in the present case the applicant-petitioner has claimed relief against PEDDA purporting as if a dispute has arisen between PEDDA and petitioner. PEDDA is neither the generating company nor the Distribution Licensee and is only the State Nodal Agency which has allocated the project to the petitioner on behalf of the State Government and section 86(1)(f) of the Electricity Act does not empower the State Commission to adjudicate upon the dispute, if

any, arising between the State Government and the Project Developer.

ii) That on one hand the petitioner has invoked the jurisdiction of the State Commission and on the other hand has simultaneously made a request to PEDDA, while invoking the clause of the Implementation Agreement to refer the matter for arbitration vide communication dated 09.05.2017 and apparently it is a considered case of the petitioner-applicant that arbitration under the clauses of the Implementation Agreement would be the right remedy as per the law and the petition under section 86(1)(f) is not maintainable against PEDDA.

iii) That the petitioner-applicant has indulged in forum shopping and is trying to evade the imposition of extension fees / penalty / termination as per the clauses of the Implementation Agreement on account of material breach of terms and conditions of the I.A. and in view of the submissions of PEDDA, the I.A. No.26 of 2017 in Petition No.13 of 2017 deserves to be dismissed.

3. Respondent No.1, PSPCL and Respondent No.3, Syndicate Bank, have not submitted any reply to the I.A. No.26 of 2017 in petition No.13 of 2017. PSPCL has not raised any objection for referring the matter to arbitrator(s).

We have examined the submissions made by the applicant-petitioner, the reply filed by respondent No.2 and the submissions made by the parties at the time of arguments.

Observations and decision of the Commission:

The applicant-petitioner has filed I.A.No.26 of 2017 in petition No.13 of 2017 under section 158 of the Electricity Act, 2003 read with

regulation 20 of PSERC (Conduct of Business) Regulations, 2005 seeking reference of disputes to arbitration. The applicant-petitioner filed petition No.13 of 2017 under Section 86(1)(f) of the Electricity Act, 2003 in relation to disputes arising under the Implementation Agreement dated 30.11.2015 executed between Photon Ojas Private Limited and Punjab Energy Development Agency read with the provisions of Power Purchase Agreement dated 13.01.2016 executed between the applicant-petitioner and Punjab State Power Corporation Limited. It has been contended by the applicant-petitioner that failure and / or refusal of PEDDA to accept the claim of the petitioner for extension of time in achieving the scheduled Commercial Operation Date of the project under the I.A. read along with PPA occasioned on account of force-majeure event(s), PEDDA's delay in approving / incorporating new sites under the I.A. for commissioning of the project, delay on account of PEDDA / PSPCL in grant of technical feasibility in respect of the said sites and not amending the I.A. and PPA delayed the commissioning of the entire project. The applicant-petitioner has requested the Commission to nominate and refer the issues canvassed in the petition to arbitration. The respondent PEDDA while refuting the contention of the applicant-petitioner has mainly contended that the jurisdiction of the State Commission is not attracted as section 86(1)(f) of the Electricity Act, 2003 is empowered to adjudicate upon the dispute between the generation company and the distribution agency only whereas in the present case the relief has been claimed against PEDDA as if a dispute has arisen between PEDDA and the petitioner. PEDDA is neither the generating company nor the distribution agency and allocated the project to the petitioner

on behalf of the State Government and section 86(1)(f) of the Electricity Act does not empower the State Commission to adjudicate upon the dispute arising between the State Government and the Project Developer.

It will be relevant to examine the facts of the present matter and provisions of law applicable in this regard. The Commission observes that some of the Articles / clauses of the Implementation Agreement dated 30.11.2015 executed between the petitioner and PEDDA are relevant to the issue. These read as under:-

- 3(C)** However, if the project COD crosses beyond 31st March 2017, then this tariff shall cease to exist and the Developer will be bound to get the tariff re-determined from the PSERC.
- 4.4** The company shall enter into a Power Purchase Agreement with PSPCL which shall remain in force for a period of 25 (Twenty five) years from the date of commissioning of the project. The PSPCL shall purchase the power generated from the project as per the terms and conditions of PPA to be signed by the company with PSPCL.
- 10.5 (ix)** In case the commissioning of the project is delayed due to force-majeure conditions stated above and the same are accepted by the competent authority, the due dates for encashment of performance security and imposition of liquidated damages shall be

extended accordingly. In case the delay affects the COD of the project and it gets extended to the next financial year, then the tariff payable shall be as determined by PSERC.

The Power Purchase Agreement dated 13.01.2016 executed between M/s Photon Ojas Private Limited and PSPCL clearly stipulates in its recital clauses (c), (d), Article 16.2.0 and 35.0.0, as under:-

- c) This Power Purchase Agreement is being signed with M/s Photon Ojas Private Limited i.e. SPV Company of M/s Photon Ultraware Pvt. Ltd. Statesman House, 8th Floor, Barakhamba Road, New Delhi pursuant to the signing of the Implementation Agreement by the company with PEDDA.
 - d) Implementation Agreement signed by M/s Photon Ultraware Pvt. Ltd. Statesman House, 8th Floor, Barakhamba Road, New Delhi with PEDDA shall be treated as an integral part of the Power Purchase Agreement. All the clauses and regulatory norms applicable to the Implementation Agreement shall be unequivocally applicable to the Power Purchase Agreement in letter and spirit.
- 16.2.0 In the event that the parties are unable to resolve any dispute or claim relating to or

arising under this agreement as stated above which are falling under the provision of Electricity Act, 2003 shall be dealt as per provisions of Electricity Act, 2003.

35.0.0 The PPA shall be effective and binding on the parties only upon approval of the PPA by the Hon'ble PSERC and the PPA shall be subject to such conditions as may be stipulated by the Hon'ble PSERC while granting such approval.

Section 86 (1) (f) of the Electricity Act, pertaining to the Functions of State Commission, reads as under:-

“adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration.”

The issue as to the jurisdiction of the Commission in this regard has already been examined and decided by the Commission in its order dated 25.01.2017 in Petition No. 9 of 2016 and order dated 11.05.2015 in Petition No.23 of 2015. In Petition No.9 of 2016, the Commission has expressed its view as under:-

“In this regard, the Commission notes that in para 14 of its Order dated 11.05.2015 in petition no. 23 of 2015, the Commission expressed its view as under:

“..... Also, since IA is a part of the PPA as submitted by PSPCL during the hearing on 05.05.2015, the Commission is of the view that various clauses of IA and PPA are to be read together and are complimentary.”

In the recital on page-2 of the PPA under clause (d), it is clearly mentioned that Implementation Agreement signed by the petitioner with PEDDA shall be treated as an integral part of the Power Purchase Agreement and all the clauses and regulatory norms applicable to the IA shall be unequivocally applicable to the PPA in letter and spirit. In view of the above, the Commission holds that the submissions made by PSPCL and PEDDA in this regard are devoid of any merit and no cognizance of the same is required to be taken.

With regard to PEDDA's submission that the petition is not maintainable as there exists an arbitration clause in the contractual documents, the petitioner has submitted that the said issue has already been decided by the Commission in its Order dated 12.04.2016 in IA no. 19 of 2016 in petition no. 21 of 2016 & IA no. 14 of 2016. The Commission notes that in the said petition/IAs, the same issue had been raised and the Commission in its Order dated 12.04.2016 held that it was devoid of merit. The Commission holds the same view in the instant petition as well."

Having established that PSERC has jurisdiction to decide the matter, the Commission turned its attention to the issue regarding arbitration. Section 158 of the Electricity Act, 2003 pertaining to Arbitration reads as under:-

158. Arbitration. – “Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996).”

Regulation 20 (1) of PSERC (Conduct of Business) Regulations, 2005 pertaining to adjudication / arbitration of disputes reads as under:

“The adjudication or arbitration of disputes which under the Act are within the scope and jurisdiction of the Commission may be commenced on an application made by any of the parties to the dispute.”

It will be worthwhile to mention that PEDDA invited the proposals through its Request for Proposal (RFP) prescribing the eligibility, technical and commercial terms and conditions etc. for selection of bidders for undertaking development of Solar PV Power Plants in the State of Punjab, the Letter of Award was issued by PEDDA, Implementation Agreement was executed between PEDDA and the Project Developer and the PPA was executed between PSPCL and the Project Developer. In this process the Implementation Agreement signed with PEDDA is treated as an integral part of the Power Purchase Agreement and all the clauses and regulatory norms applicable to the Implementation Agreement are unequivocally

applicable to the Power Purchase Agreement in letter and spirit. Therefore, PEDDA cannot escape its obligations and duties arising thereunder. The terms and conditions of the PPA are to be approved by the Commission. The tariff is also determined by the Commission.

Thus, in view of the above, the objections raised by PEDDA are not tenable. The request of the applicant-petitioner is accepted and the Commission decides to refer the dispute between the petitioner and the respondents for Arbitration. The parties may submit a panel of at least three names of the arbitrators on or before 30.06.2017.

The facts of I.A.No.27 of 2017 in Petition No.14 of 2017 and I.A. No.28 of 2017 in Petition No.15 of 2017 are similar to the facts in I.A.No.26 of 2017 in Petition No.13 of 2017, therefore, the I.A.No.27 of 2017 in Petition No.14 of 2017 and I.A. No.28 of 2017 in Petition No.15 of 2017 are also disposed of in terms of the order passed in I.A.No.26 of 2017 in Petition No.13 of 2017.

The interim orders passed by the Commission directing the parties to maintain status quo and restraining PEDDA from encashing the performance bank guarantee(s) and terminating the LOA, I.A. and PPA in the above petitions shall remain in force till any order is passed by the Arbitrator(s) in the arbitration proceedings in this regard.

Sd/-

(S.S. Sarna)
Member

Sd/-

(D. S. Bains)
Chairman

Chandigarh
Dated: 21.06.2017