

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

Petition No. 31 of 2019
Date of Order: 29.03.2022

Petition under Section 61 and 62 read with Section 86(1)(e) of the Electricity Act, 2003 and Section 7 of the CERC RE Regulations 2009 adopted by the Commission for Determination of Project Specific Tariff for IPP of 15 MW capacity on BOOT basis at M/s Nawanshahr Cooperative Sugar Mills Ltd., Village Paniar, District Nawanshahr, Punjab.

AND

In the matter of:

Nawanshahr Power Private Limited through its authorised signatory at Nawanshahr co-operative Sugar Mill Ltd. Village Paniar, District. Nawanshahr, Punjab

...Petitioner

Vs

1. Government of Punjab, Department of Science, Technology, Environment and Non-Conventional Energy, Chandigarh.
2. Punjab State Power Corporation Ltd (PSPCL), The Mall, Patiala.
3. Punjab Energy Development Agency (PEDA), Solar Passive Complex, Plot No. 01 & 02, Sector 33D, Chandigarh.

...Respondents

Present:

Mr. Viswajeet Khanna, Chairperson
Ms. Anjuli Chandra, Member
Mr. Paramjeet Singh, Member

ORDER:

1. Nawanshahr Power Private Limited (NPPL) has filed the present petition seeking determination of project specific tariff for its

15 MW non-fossil fuel based co-generation power project at Nawanshahr Co-operative Sugar Mills Limited, with the plea that its plant is independent from the sugar mill and is not primarily related to manufacturing activity of the mill. The plant runs as bagasse based co-generation project for the period it is provided with bagasse by the sugar mill and is a biomass fuelled IPP for the balance period.

2. Notices were issued to the respondents PSPCL & PEDDA and the petition was fixed for hearing on admission on 15.01.2020, however the same was adjourned on the request of counsel of NPPL. The petition was taken up for hearing on 05.02.2020, wherein the Commission decided that notice be also issued to Govt. of Punjab through Secretary, Dept. of Science, Technology, Environment and Non-Conventional Energy, Chandigarh with directions that respondents may file their reply on admissibility of the petition by 01.03.2020 and rejoinder, if any, may be filed by NPPL by 06.03.2020. PSPCL filed its reply on 04.03.2020, however the hearing scheduled for 11.03.2020 was adjourned on the request of the petitioner. PEDDA filed its reply on 16.06.2020. Hearing was held by the Commission on 17.06.2020, wherein the petitioner submitted that it has not received the replies of PSPCL and PEDDA on admission. NPPL requested for grant of time to file rejoinder and the next date of hearing was accordingly scheduled for 08.07.2020. The petitioner failed to submit its rejoinder within the stipulated period and kept on requesting for extension of time for filing the rejoinder and accordingly the hearing on admission was first re-scheduled to 05.08.2020 and then to 09.09.2020. During the hearing held on 09.09.2020, it was observed that the petitioner filed copies of certain judgments only on 08.09.2020 to support its contentions, against

which PSPCL/PEDA sought some time for counter submissions and thus the next date of hearing was scheduled for 23.09.2020 and later re-fixed for 14.10.2020. In the hearing held on 14.10.2020, while arguing its case the petitioner referred to the Commission's Order in the matter of A2Z Infra Engineering Ltd (A2Z) on the issue of re-determination of tariff. The Commission directed the petitioner to file the similarities of its project with A2Z and the hearing was kept for 11.11.2020, which was later adjourned to 09.12.2020 on the petitioner's request. During the hearing held on 09.12.2020, it was observed that the petitioner has failed to file the requisite information and directions were issued to file the same by 18.12.2020. The petitioner filed its written submission dated 21.12.2020 citing certain clauses of its PPA vis-a-vis of A2Z. PSPCL filed its reply on 08.01.2021 and PEDA on 09.02.2021. During the hearing held on 10.02.2021, PSPCL and PEDA requested that they want to address the arguments in length on the issue of maintainability and admission of the petition and thus time was granted accordingly. The next hearing was held on 28.04.2021 and it was observed that the petitioner's conducting counsel was not available and its proxy counsel requested for adjournment of the matter and accordingly the hearing was adjourned to 26.05.2021, where on the final arguments on admission of the petition were heard. After hearing the parties, the petition was admitted vide Order dated 21.06.2021 with directions to parties to complete the pleadings on merits within a month with a copy to each other and the petition was listed for arguments on 28.07.2021. In compliance thereof PSPCL filed its submissions vide mail dated 27.07.2021.

3. In the hearing held on 28.07.2021, petitioner's Counsel requested time to file rejoinder to the reply filed by PSPCL, which

was allowed with directions to file the same by 11.08.2021 with a copy to PSPCL and the petition was listed for hearing on 01.09.2021. NPPL filed the rejoinder dated 30.08.2021 and in the hearing held on 01.09.2021, PSPCL's Counsel requested for time to examine the rejoinder for arguing the matter. Accordingly, the petition was listed for hearing on 06.10.2021, wherein NPPL's counsel requested to adjourn the matter on account of some difficulty and the hearing was deferred to 01.12.2021. However, on PSPCL's request for adjournment the Commission while observing that pleadings are almost complete, fixed the matter for arguments on 12.01.2022. In the hearing held thereon, the Commission observed as under:

“Notice was issued to the Government of Punjab through Secretary, Department of Science, Technology Environment and Non-Conventional Energy, Chandigarh, the Respondent No. 01, vide notice dated 13.02.2020 to appear and file its reply. However, nobody has appeared on behalf of Respondent No. 01. The Respondent No. 01 is proceeded against exparte.”

Thereafter, the learned counsel for the petitioner as well as PEDDA addressed arguments at length. However, Sh. Amal Nair, Advocate, appearing for PSPCL submitted that the arguing counsel, Sh. Anand K Ganesan, Advocate is busy in some other matter and requested for an adjournment. Accordingly, the petition was listed for 23.02.2022. Whereon, after hearing the learned counsel for the parties, the Order was reserved.

4. Submissions of the Petitioner(NPPL)

4.1 Submissions of NPPL are summarized as under:

- a) That it is running a 15 MW capacity non-fossil fuel based co-

generation power project at Nawanshahr Co-operative Sugar Mills Limited. The project was scheduled to be commissioned on 12.12.2014; however it was commissioned on 27.07.2017 due to the reasons beyond the control of NPPL.

- b) That the ownership, management, operation and control of generating plant lies with it and is independent of the sugar mill except that the generating plant is to supply steam and electricity to the sugar mill. The project runs as a bagasse based cogeneration project for 150 days during the crushing season and for 60 days during the off season it is being run as biomass based Independent Power Project with biomass as fuel and its average PLF comes to 53%. It is submitted that only 42% of the requirement of bagasse is fulfilled by the sugar mill and rest has to be arranged independently by the generating company. It is also using rice straw (parali) as fuel and thereby helping in reduction of pollution. Further, the plant is set-up in separate land provided by the sugar mill. Thus, its project cannot be categorized a cogeneration project and the generic tariff for bagasse based cogeneration project cannot be made applicable to NPPL and project specific tariff is required to be determined.
- c) That Capital Cost of the project may be taken as Rs. 607.17 lac/MW, considering base capital cost of Rs. 610.80 lac/MW with adjustment of cost of land at Rs. 25 lac/acre. Interest rate be taken as 11.50% on the term loan of Rs. 51.29 crore availed from IREDA and Depreciation be taken as 6.67% per year for determining the project specific tariff.
- d) That the Commission has been determining the generic tariff for co-generation projects for FY 2012-17 with State specific

deviations with normative aggregate plant load factor of 80%; with 53% through bagasse and 27% through biomass fuel. But for FY 2017-20, the Commission adopted the CERC Regulations without any deviation and determined the generic tariff for cogeneration projects with bagasse fuel only considering 53% plant load factor.

- e) NPPL project got commissioned in FY 2017-18 and the generic tariff determined by the Commission for FY 2017-18 does not match the profile of NPPL project and hence a project specific tariff needs to be determined.
- f) That Section 61 and 86 (1)(e) of Electricity Act 2003 mandates the Commission to promote co-generation and generation of electricity from renewable energy sources. Tariff Policy and National Electricity Policy also lays emphasis on promotion of renewable sources of energy and thus the PPA can be reopened for promoting such generation sources.

4.2 Further, vide submissions dated 21.12.2020, NPPL pleaded that:

- a) PPAs can be re-opened for determination of tariff dehors the tariff stipulated in the PPA, citing the following Judgments:
 - (i) Junagadh Power Pvt. Ltd. Vs GUVNL 2013 APTEL 137,
 - (ii) GUVNL Vs Green Infra Corporate Wind Power Ltd 2013 APTEL 15, and
 - (iii) GUVNL Vs Tarini Infrastructure Ltd &Ors (2016) 8 SCC.
- b) CERC RE Regulation 42 read with 49(2) provides that cogeneration plant using biomass fuel is entitled to variable cost of biomass. Further, Regulation 7 provides the categories

for determination of project specific tariff and NPPLs project would be covered under Regulation 7 (a)(viii) as the Commission has not fixed the tariff under this category of generic tariff.

c) The Commission had determined the project specific tariff for A2Z Company in an identical matter and the same was upheld by Hon'ble APTEL. Further, in response to the query made by the Commission, NPPL tabulated some provisions similar to A2Z in its PPA.

4.3 NPPL also pleaded that the category of non-fossil fuel based co-generation project was no longer there in the Order of the Commission with regard to generic tariff for FY 2017-18 wherein generic tariff was determined only for bagasse based cogeneration projects. However, the Commission in its Order dated 13.09.2019 in petition no. 17 of 2019 (suo-motu) provided a foot note for projects using both biomass and bagasse as fuel. NPPL also pleaded that the delay in filing of the petition by around two years should not come in the way of determination of project specific tariff.

4.4 In its rejoinder filed on 31.08.2021, NPPL while reiterating its earlier pleadings submitted that:

a) Petitioner is not seeking to change the nature of plant from Co-gen to an IPP. The nature of its plant cannot be categorized a typical Co-gen for its distinct features as held by Hon'ble APTEL in the case of A2Z (PSPCL vs PSERC-Appeal No. 92 of 2012).When the project was envisaged it was not established as a typical co-generation project and therefore the tariff for non-fossil fuel based co-generation plant cannot be considered as the applicable tariff.

- b) NPPL is seeking determination of project specific tariff on the ground that not only it is an IPP but also on the ground that there is no generic tariff defined for a power plant using both bagasse and biomass as fuel for generation of power.
- c) The reliance placed by PSPCL on the judgment of the Supreme Court does not support the contention raised by it rather it support the view that Courts must lean in favour of flexibility and not read in inviolability in terms of the PPA in so far as tariff stipulated therein, as approved by the Commission, is concerned.

5. Submissions of PSPCL

5.1 PSPCL submitted its reply to the petition vides memo no. 5276/TR-5/950 dated 03.03.2020. The contentions of PSPCL are, in brief, as under:

- a) That NPPL is seeking reopening of the PPA, re-determination of higher tariff and change in nature of its project from cogeneration to non-cogeneration which is not permissible and hence the petition is not maintainable.
- b) That pursuant to the Expression of Interest (EoI) invited by the Punjab State Federation of Cooperative Sugar Mills Ltd for setting up cogeneration power plants, NPPL submitted its offer on 12.11.2008 for setting up of a cogeneration plant within the premises of Nawanshahr Co-operative Sugar Mill and thereby the project was awarded to NPPL vide Assignment Order dated 12.12.2008, wherein it was also mentioned that NPPL is free to use biomass or any other fuel for operating the plant but at its own risk and cost. Thereafter, Memorandum of Understanding (MoU), Implementation Agreement (IA) and Power Purchase

Agreement (PPA) were also executed as a cogeneration power plant. The project was scheduled for commissioning in 2014, however it got commissioned on 27.07.2017 and thus the applicable tariff for the project was Rs. 6.29/kWh with 5% escalation in variable tariff per annum.

- c) That the presumption that the performance of the contract has become onerous as tariff is inadequate and requires amendments deals with the commercial arrangement and the consumers of the State cannot be burdened on this account.
- d) That it is a settled principle that PPA is a binding agreement and cannot be reopened as now settled by Hon'ble Supreme Court in various judgments. In the matter of GUVNL Vs Solar Semiconductor Power Co. (India) Ltd. (2017) 16 SCC 498, it was held that it is not within the powers of the Commission to exercise its inherent jurisdiction to extend the control period to the advantage of the project proponent and to the disadvantage of GUVNL who are governed by the terms and conditions of the Contract. The Judgment stresses on the sanctity of the terms of the PPA. In another judgment, in the matter of GUVNL Vs EMCO Ltd & Anr (2016) 11 SCC 182, it has been held that the PPA does not give any option to opt out of the terms of the PPA.
- e) That the NPPL's project is a cogeneration plant as per section 2(12) of the Electricity Act 2003 as it produces more than two forms of useful energy. NPPL cannot claim that the term cogeneration is merely a nomenclature.
- f) That NPPL cannot be allowed to raise this ground of contention at a belated stage after having agreed and willingly entered into a PPA with PSPCL.

5.2 PSPCL filed additional written submissions on 08.01.2021 with regard to the similarities referred by NPPL with A2Z, objecting to the contention raised by NPPL that the PPA in the case of A2Z is the same as that of NPPL. It was submitted that the PPA with A2Z had a specific clause to the effect that the Order of the Commission in the petition filed by the generator would be binding on the parties. On account of this specific clause, the tariff of A2Z was re-determined and such an action was also supported by Hon'ble APTEL in its judgment dated 25.12.2014 in Appeal No. 92 of 2012. Further, PSPCL reiterated its stand that PPA is a binding agreement and cannot be unilaterally amended and the contract cannot be avoided as its performance has become onerous. The Hon'ble APTEL had previously held that PPAs could be reopened but such law has been reversed by Hon'ble Supreme Court subsequently.

5.3 Further, PSPCL in its reply dated 27.07.2021, while reiterating that the Petitioner is seeking reopening of the PPA entered into between the parties and to re-determine the tariff to a higher level by seeking to change the very nature of the generating station from a cogeneration plant to an IPP, submitted as under:

- a) The project was envisaged and established as a Cogen plant. The Punjab State Federation of Co-operative Sugar Mills Ltd (Sugarfed) had invited EOI for investment in setting up co-generation power plants in co-operative sugar mills on BOOT basis. The petitioner submitted a detailed financial and technical proposal for setting up of a co-gen power plant within the premises of Nawanshahr Co-operative sugar mill and upon selection, the project was

awarded through assignment Order dated 12.12.2008 for setting up of a Co-Generation plant. Thereafter a MOU dated 12.01.2009 was signed between the petitioner and Nawanshahr Co-operative Sugar Mills envisaging the setting up of bagasse/bio-mass based Co-generation plant. On 13.11.2013 an IA was entered into between the petitioner and GOP/PEDA for setting up of a Bagasse/Biomass based Co-generation power project of capacity 15 MW and PPA dated 21.07.2014 was signed with PSPCL to sell up to 13.5 MW of its surplus power generated from their Co-generation facility, with SCOD of the project as 12.12.2014. However, the project was commissioned on 27.07.2017 and is getting the Tariff as applicable for Bagasse based Cogen Projects commissioned during FY 2017-18 i.e. Rs. 6.29/kWh (FC 2.74+ VC 3.55 with escalation factor of 5 % p.a.).

- b) It is clear from the above, that the Project was envisaged and established as a co-generation plant. The petitioner's project produces steam for the use of the sugar mill in addition to electricity and this category of the project is categorized as a co-generation plant as per definition contained in Section 2(12) of the Act, and is not a non-co-generation plant. The submission of the petitioner that it is partly a co-generation plant and partly an independent power plant is erroneous since the PPA does not capture any such arrangement.
- c) It is denied that there are any project specific features which enable the petitioner to lay claim for a project specific tariff or to deviate from the agreed upon terms of the PPA.

The contractual arrangement entered into by the petitioner had envisaged that the petitioner can make use of biomass, but at its own costs and risks. Relevant extract of the Assignment Order dated 12.12.2008 is as under:

“(17) In addition to bagasse, you will be free to use biomass or any other fuel for operating the plant at your risk and costs.”

The MOU dated 12.01.2009 also envisages as under:

“8.1(j) SIL shall be entitled to use biomass or any other fuel in addition to bagasse, (but except garbage or sewage derivatives etc. which can cause any kind of smell or health hazard in the sugar mill vicinity) for operating the Cogen Plant, at its sole risk and costs.”

In view thereof, the petitioner is free to use biomass or any other allowed non-conventional source of energy but at its own costs and risks. This was agreed to by the petitioner and it cannot be the case of the petitioner that it is deviating from the agreed terms and conditions because the terms as agreed have now become onerous to perform.

- d) That, the petitioner having signed and executed the PPA as a co-gen plant, cannot rescind from the same and seek unilateral amendment in the terms of the PPA. It is a well settled principle of law that a contract cannot be sought to be avoided, merely because the performance of the same has become onerous.
- e) That the Hon'ble Supreme Court Judgment dated 25.10.2017 in the matter of GUVNL Vs Solar

Semiconductor Power (2017) 16 SCC 498, has held as under:

“64....As rightly contended by the learned senior counsel for the appellant the State Commission in exercise of its power under Section 62 of the Act, may conceivably re-determine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.

SANCTITY OF POWER PURCHASE AGREEMENT

65..... Merely because in PPA, tariff rate as per Tariff Order (2010) is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company-respondent No. 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.”

The Hon'ble Supreme Court has held that, even if the Tariff can be conceivably re-determined, PSPCL cannot thereafter be forced to procure power from the petitioner based on such tariff. In case the tariff of NPPL's project is re-determined, PSPCL shall be under no obligation to procure power from NPPL.

6. Submissions of PEDDA

6.1 PEDDA vide its submissions dated 15.06.2020 has submitted that:

- a) The petition filed by NPPL is bad both in terms of de-jure and de-facto law and the petition deserves to be dismissed. NPPL has wrongly invoked the jurisdiction of the

Commission while concealing/misrepresenting the facts to seek undue benefit. NPPL is seeking project specific tariff to which it is not entitled, on the basis of parameters assumed by it and without appending any supporting document.

- b) NPPL vide its letter dated 09.05.2012, approached PEDDA to sign an MOU for sale of power from its proposed 15 MW bagasse based cogeneration plant further to the allotment made by SUGARFED for setting up a 12/15 MW Bagasse based Co-generation Plant at Nawanshahar Co-operative Sugar Mill and submitted the relevant documents i.e. DPR, Assignment Order etc. The signing of the MoU was a pre-requisite under NRSE Policy 2006 which was for setting up of a bagasse based cogeneration project. Even the feasibility clearance is with regard to a cogeneration project. The MoU was executed on 17.08.2012 and thereafter NPPL vide its letter dated 25.10.2013 sought extension of MOU validity for signing of the Implementation Agreement for setting up the Bagasse/Biomass based cogeneration project. Subsequently, the Implementation Agreement was executed on 03.11.2013 and the PPA was executed on 21.07.2015.
- c) The project of NPPL was to be commissioned within 395 days from the date of execution of PPA. However, NPPL vide its letter dated 15.06.2017 requested PEDDA to grant an extension of COD up to 31.08.2017 for obtaining synchronization from PSPCL. PEDDA allowed the same without impinging on the terms of the agreement.
- d) NPPL's project does not qualify under the eligibility criteria as per CERC Regulations for seeking determination of project specific tariff, as generic tariff is being determined for

the same. NPPL, in order to avail undue benefit of a higher tariff, is now trying to project itself as a biomass based IPP.

6.2 Further, vide additional written submissions dated 09.02.2021, with regard to its reply on the similarities referred to by NPPL with A2Z Ltd., PEDDA while reiterating that NPPL's project is a cogeneration project and cannot be termed as an IPP, submitted as under:

- a) PSPCL has filed a SLP before the Hon'ble Supreme Court against the judgment of Hon'ble APTEL in which the Order of the Commission declaring A2Z plant as an IPP was upheld. Thus, it shall be appropriate to await the final decision of the Hon'ble Supreme Court.
- b) A2Z represented the Govt. of Punjab vide its letter dated 27.05.2020 seeking relocation of its power plants adjacent to its RDF generating facility along with terminating the existing agreements. The PPA has been terminated by PSPCL vide its letter dated 28.01.2021 on account of non-generation of power since March 2020. Therefore, drawing parity with such a project does not seem to be justified.

7. Findings and Decision of the Commission

The Commission has carefully gone through the petition, replies of the respondents and additional submissions/arguments made by the parties. The petitioner NPPL signed a PPA with PSPCL for sale of surplus power from its 15 MW Co-generation Plant at Nawanshahr Co-operative Sugar Mills Limited at the applicable generic tariff for the project commissioning year i.e. FY 2017-18 with the provision for annual escalation of 5% in the variable charge. The petitioner is seeking re-determination of the said tariff and has petitioned the Commission for allowing it a project

specific tariff; with the plea that the generic tariff specified for Co-generation projects for FY 2017-18 does not suit its profile and its PPA with PSPCL can be re-opened de hors the tariff stipulated therein. However, the respondents PSPCL and PEDDA are countering the said plea. The findings and decision of the Commission are as under:

7.1 Whether the PPA can be re-opened unilaterally for re-determination of tariff stipulated in the PPA?

The petitioner's plea is that Section 61 and 86 (1)(e) of Electricity Act 2003 mandates the Commission to promote cogeneration and generation of electricity from renewable energy sources and thus the PPA can be reopened for promoting such generation sources for determination of tariff de hors the tariff stipulated in the PPA. Whereas, PSPCL while countering the same also objected to the very admissibility of the petition with the contention that a PPA is a binding agreement which cannot be opened/amended unilaterally. As both the parties have cited various Court judgments to argue their respective view, the Commission examines the same hereunder:

a) Judgments cited by NPPL:

- i) Junagadh Power Pvt Ltd Vs GUVNL 2013 APTEL 137 and GUVNL Vs Tarini Infrastructure Ltd Pvt Ltd & Ors. (2016) 8 SCC:

The Commission observes that, the Hon'ble Apex court in its Order dated 05.07.2016, has dealt the matter of Junagadh Power Limited also with the matter of Tarini Infrastructure Limited in the case titled GUVNL Vs Tarini Infrastructure Ltd. (Civil Appeal No. 5875 of 2012) with

Junagadh Power Projects Pvt. Ltd. (Civil Appeal Nos. 1973-1974 of 2014) as here under:

“10.....In the present case, admittedly, the tariff incorporated in the PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.

11. In the State of Gujarat, currently, the Gujarat Electricity Regulatory Commission (multi-year tariff) Regulations, 2016 govern the fixation of tariff by the State Commission...

12. Not only the tariff fixed is subject to periodic review, furthermore the above Regulations provide for taking into consideration the force majeure events. Any force majeure is considered as an uncontrollable factor. In fact Regulation 23 provides that the approved aggregate gain or loss on account of uncontrollable factor shall be passed through as an adjustment in the tariff over such period as may be specified in the Order of the Commission.

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14. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life.....

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16. All the above would suggest that in view of Section 86(1) (b) the Court must lean in favour of flexibility and not read inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present

opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898....”

The issues involved herein were that; Tarini Infrastructure Limited having two small hydro power projects in the State of Gujarat and a PPA with GUVNL, sought an increase in the tariff on the ground that though under the Agreement, power was to be evacuated at the nearest sub-station, it was later required to lay the lines for evacuation up to a point involving a total distance of 23 Kms instead of the originally envisaged 4 Kms, causing additional infrastructure cost of about Rs. 10 crore not envisaged in the Agreement.

And, Junagadh Power Projects Limited having a biomass based power generation plant and a PPA with GUVNL, sought revision of the biomass fuel cost to Rs. 3000 per MT and consequential re-determination of the tariff incorporated in the PPA, earlier approved by the State Commission on the basis of cost of biomass at Rs. 1600 per MT with escalation of 5% per annum. In said case, the Hon'ble Court while observing that the tariff incorporated in the PPA between the generating company and the distribution licensee is the tariff fixed by the State Commission in exercise of its statutory powers, has noted that in the State of Gujarat, currently the GERC (Multi-Year Tariff) Regulations 2016 govern the fixation of tariff; wherein not only the tariff fixed is subject to periodic review, it provides for taking into consideration the force majeure events as an uncontrollable factor.

- ii) GUVNL Vs Green Infra Corporate Wind Power Ltd 2013 APTEL 15; wherein, it has been held as under:

“72. In the ultimate analysis, therefore, we are of the view that the Appellant's contention that the wind energy generator's petitions praying for determination of project specific tariff on the ground that they are not availing of the accelerated depreciation benefit are not maintainable deserves to be rejected and is accordingly rejected. Execution of a PPA subsequent to the generic tariff order accepting the tariff fixed therein would not bar wind energy generator from filing a petition for modification of tariff on the ground that it is not availing of the accelerated depreciation benefit, because the said order categorically gives such an option to the wind energy generator. Moreover, the said order is not challenged and has, therefore, become final. The wind energy generators' petitions are, therefore, maintainable. Even otherwise, keeping the facts of this case aside, we find no fetters in law on the power of the Appropriate Commission to undertake such exercise. We have already referred to the provisions of the Electricity Act which permit the Appropriate Commission to amend the tariff order. These statutory provisions have a purpose. They are meant to give certain amount of flexibility to the Appropriate Commissions. They have been empowered to amend or revoke the tariff because exigencies of a situation may demand such an exercise. In the circumstances, we hold that there is no bar on the Appropriate Commission preventing it from entertaining a petition for modification of tariff after execution of a PPA...”

The issue involved herein was that the tariff rate specified in the PPA was as determined by the Commission considering the benefit of accelerated depreciation. The wind energy generator was seeking re-determination of the same on the ground of not availing the accelerated depreciation and the Commission's said order categorically providing for such an option to the wind generators.

b) Judgments cited by PSPCL:

GUVNL Vs Solar Semiconductor Power Co. (India) Ltd. (2017) 16 SCC 498 and GUVNL Vs EMCO Ltd &Anr (2016) 11 SCC 182:

The Commission refers to Hon'ble Apex Court judgment dated 25.10.2017 in the matter of GUVNL vs Solar Semiconductor Power Company (India) Private Limited (Civil Appeal No. 6399 of 2016), wherein comments on its judgment in case of GUVNL Vs EMCO Ltd are also incorporated; The Hon'ble Court has held as under:

"KURIAN, J.

25. *The question before us is whether the Commission has the power to extend the control period provided under the tariff order.*

26. *However, while addressing another grey area as to whether the Commission has the power to amend tariff despite the terms of the PPA, this Court in Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and others, after analyzing scheme of the Act, has answered the question in affirmative.*

27. *The scheme of the Act has been analyzed at paragraphs 12 and 16, which read as follows:*

"12.

In the present case, admittedly, the tariff incorporated in PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.

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16. When the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of PPA in the case of Junagadh.

That apart, modification of the tariff on account of air-cooled condensers and denying the same on account of claimed inadequate pricing of biogas fuel is itself contradictory. (Emphasis supplied)

28. There is also a pointed reference to the decision of this Court in *EMCO (supra)* at paragraph-21, which reads as follows:

“21. In Gujarat Urja Vikas Nigam Ltd. v. EMCO Ltd. the power purchaser sought the benefit of a second tariff order made effective to projects commissioned after 29-1-2012 (the power purchaser had commissioned its project on 2-3-2012) though under PPA it was to be governed by the first tariff order of January 2010. Under the first tariff order for such projects which were not commissioned on or before the date fixed under the said order, namely, 31-11-2011 the tariff payable was to be determined by the Gujarat Electricity Regulatory Commission. The power producer in the above case did not seek determination of a separate tariff but what was sought was a declaration that the second tariff order dated 27-1-2012 applicable to PPA(s) after 29-1-2012 would be applicable. It is in this context that this Court had taken the view that the power producer would not be relieved of its contractual obligations under PPA.” (Emphasis supplied)

29. Having referred to the above decisions, we shall now make an independent endeavor to analyze the present case in the context of factual matrix and the relevant statutory provisions. An amendment to tariff by the Regulatory Commission is permitted under Section 62(4) read with Section 64(6) of the Act. Section 86(1)(a) clothes the Commission with the power to determine the tariff and under Section 86(1)(b), it is for the Commission to regulate the price at which electricity is to be procured from the generating companies. Section 86 (1)(e) deals with promoting co-generation and generation of electricity from renewable sources of energy. Therefore, there cannot be any quarrel with regard to the power conferred on the Commission with regard to fixation of tariff for the electricity procured from the generating companies or amendment thereof in the given circumstances.

32.....

151. ...However, the Commission is enjoined with powers to issue appropriate orders in the interest of justice and for preventing abuse of

process of the Commission, to the extent not otherwise provided for under the Act or Rules. In other words, the inherent power of the Commission is available to it for exercise only in those areas where the Act or Rules are silent.

.....

35. *This Court should be specially careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions “protecting interest of consumers” and Section 61(d) requires that the interests of the consumers are to be safeguarded when the Appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.*

36. *The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser, viz., the respondent no.1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be a extension of the control period under the inherent powers of the Commission.*

.....

38. *However, we make it clear that this judgment or orders of the Appellate Tribunal or Commission shall not stand in the way of the Respondent no.1 taking recourse to the liberty available to them for re-determining of tariff if otherwise permissible under law and in which case it will be open to the parties to take all available contentions before the Commission.”*

“R. BANUMATHI, J.

14. Under Regulations 80 to 82, the inherent powers of the State Commission are saved. Under Regulation 80, which is akin to Section 151 CPC, the power of the State Commission is only intended to regulate the conduct of the Commission, that is, to regulate its own procedure. That power cannot travel beyond its own procedure so as to alter the terms and conditions of the PPA entered into between the parties to grant substantive relief to the first respondent by extending the control period of Tariff Order (2010) beyond 28.01.2012.

.....

17. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between the GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.

.....

22. It is contended that Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, tariff rate as per Tariff Order (2010) is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company-respondent No. 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.

23. In *Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another* (2016) 11 SCC 182, facts were similar and the question of law raised was whether by passing the terms and conditions of PPA, respondent can assail the sanctity of PPA. This Court held that Power Producer cannot go against the terms of the PPA and that as per the terms of the PPA, in case, the first respondent is not able to commence the generation of electricity within the 'control period' the first respondent will be entitled only for lower of the tariffs.

24. The first respondent placed reliance upon *Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and Others* (2016) 8 SCC 743. In the said case, this Court was faced with the substantial question of law viz. whether the tariff fixed under a PPA (Power Purchase Agreement) is sacrosanct and inviolable and beyond review and correction by the State Electricity Regulatory Commission...

This Court held that Section 86(1)(b) of Act empowers State Commission to regulate price of sale and purchase of electricity between generating companies and distribution licensees through agreements for power, produced for distribution and supply and that the state commission has power to re-determine the tariff rate when the tariff rate mentioned in the PPA between generating company and distribution licensee was fixed by State Regulatory Commission in exercise of its statutory powers..."

In above said Judgment, the Hon'ble Court, while holding that, the Commission cannot use its inherent power to extend the control period provided under the Tariff Order also clarified its earlier judgment made in the matter of GUVNL vs Tarini with Junagadh. Thus, it can be inferred that; the Commission cannot invoke its inherent jurisdiction to alter the terms of the contract between the parties so as to prejudice the interest of the distribution licensee and ultimately the consumers; merely because in PPA, tariff rate as per Tariff Order is incorporated. However, the said tariff rate can be reviewed by the Commission, if public interest dictated by the surrounding events and circumstances require a review of the same and

the provision(s) for the same exists in the Commission's relevant Order/Regulations.

Accordingly, the instant petition was admitted with directions to parties to complete the pleadings on merits. The same are examined in the following Paras.

7.2 Whether the generic tariff for FY 2017-18, as determined for Co-generation projects under the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations 2017 and adopted by the Commission, also cover the projects similar to NPPL's project or a project specific tariff is required to be determined for the same?

NPPL's plea is that, its project got commissioned in FY 2017-18 and is eligible for getting the applicable tariff for the project commissioning year as determined by the Commission. But for FY 2017-20, the Commission adopted the CERC Regulations without any deviation and determined the generic tariff for cogeneration projects with bagasse fuel only considering 53% plant load factor, which does not match the profile of NPPL project and hence a project specific tariff needs to be determined. Whereas, the respondents PSPCL/PEDA are contending that its project does not qualify for project specific tariff as it was envisaged, allocated, established and contracted for as a Co-generation project based on bagasse as the primary fuel with the option to use other fuels at its own risk and costs.

The Commission observes that;

- a) The Project Assignment Order issued by Sugar fed, MOU (executed between the petitioner and Nawanshahr Co-operative Sugar Mills) and Implementation

Agreement(entered into between the petitioner and GOP/PEDA); provides for setting up of a 15 MW non-fossil (bagasse/biomass) fuel based co-generation power project at Nawanshahr Co-operative Sugar Mills Limited with the provision that, in addition to bagasse it will be free to use biomass or any other fuel for operating the plant, at its risk and costs. Thereafter, PPA dated 21.07.2014 was signed by the petitioner with PSPCL for sale of its surplus power, which specifies as under:

“1.0.0 Definitions

.....
‘Project’ means the 15 MW Co-generation Plant.....

2.0.0 ENERGY PURCHASE AND SALE

2.1.1 The PSPCL shall purchase and accept all energy made available at the interconnection point from the Co-generation facility, pursuant to the terms and conditions of this Agreement at the rates approved by the Commission:

i) The applicable tariff for Non-Fossil Fuel based co-generation project is Rs. 5.70/- per kWh (Rs. 2.04/- per kWh for levelized fixed tariff+Rs. 3.66/- per kWh for variable cost) as applicable to projects to be commissioned in FY 2013-14. However, the Company shall be eligible for getting the applicable tariff for the project commissioning year as per further tariff orders notified by PSERC.”

In view of the above, it emerges that the project under consideration was envisaged, allocated, established and contracted for as non-fossil fuel based co-generation power project with bagasse as the primary fuel. Also, the Detailed Project Report (DPR) submitted by NPPL to PEDA vides its letter dated 09.05.2012 provides as under:

“Cogeneration Project

...During off-season or non-crushing season the plant, shall

operate for 160 days on saved bagasse and purchase bagasse/biomass. It is envisaged that the Cogen Plant will operate & export power for 300 days per annum.

It is envisaged to procure a required quantity of bagasse from external sources: this can also be offset by purchasing other biomass materials available in the mill surrounding areas. In fact any additional biomass available and its usage will enhance the viability of the project.”

Thus, indicating that the project was envisaged to run on bagasse (in house as well as from external sources) with the option to offset-the purchase of bagasse from external sources with other biomass materials available in the mill surrounding areas to enhance its viability.

- b) Further, the project was commissioned on 27.07.2017 and is thus entitled to the applicable Tariff as determined by the Commission for FY 2017-18. The Commission refers to its Order dated: 31.10.2017 in Petition No. 50 of 2017, vide which, after following the due process, it adopted the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations 2017 as well as the levellized generic Tariff determined there under for RE Power Projects for FY 2017-18. The Commission refers to the said CERC Regulations, which specifies as under:

“45. Plant Load Factor

(1) For the purpose of determining fixed charge, the PLF for non- fossil fuel based cogeneration projects shall be computed on the basis of plant availability for number of operating days considering operations during crushing season and off-season as specified under clause (2) below and load factor of 92%.

(2) The number of operating days for different States shall be as follows:

State	Operating Days	PLF (%)
Uttar Pradesh and Andhra Pradesh	120 days (crushing) + 60 days (off-season)=180 days operating days	45%
Tamil Nadu and Maharashtra	180 days (crushing) + 60 days (off-season)=240 days operating days	60%
Other States	150 days (crushing) + 60 days (off-season)=210 days operating days	53%

From above, it is evident that the generic tariff for FY 2017-18 specified by CERC for the Bagasse Based Co-generation Projects and adopted by the Commission, was determined considering PLF of 53% i.e. 210 days operating days (150 days during crushing + 60 days in the off-season).

Thus, NPPL's project with an average PLF of 53%; running on bagasse for 150 days during the crushing season and on biomass for 60 days during the off-season, as per its own admission, is also covered under the said Tariff category. Accordingly, the Commission is of the view that NPPL's plea for determination of a project specific tariff cannot be accepted.

c) For the purpose of clarity and to examine the NPPL's submission that generic tariff for use of biomass in co-generation projects, in terms of CERC Regulations, was not there in the Orders of the Commission for FY 2017-18 and FY 2018-19 and only specified later on for FY 2019-20, the Commission refers to its Order dated: 31.10.2017, which specifies as under:

"10.Analysis of data of power procured by PSPCL from the co-generation projects from FY 2012-13, FY 2013-14, FY 2014-15, FY 2015-16 and FY 2016-17 reveals that overall average PLF of such projects was 17.4%, 16.9%, 15.7%, 22.3% and 28% respectively.

11. In view of above, the Commission decides to adopt and hereby adopts the CERC RE Regulations, 2017 without any modifications

in the norms/parameters for Non-fossil fuel based Co-generation Projects besides adopting the said Regulations for various other RE technologies. Therefore, the levellised generic tariff for FY 2017-18 determined by CERC vide its Order dated 31.05.2017 in petition no. 05/SM/2017 (Suo-Motu) for the RE technologies i.e. Biomass based Power Projects, Biomass Gasifier Power Projects, Biogas based Power Projects, Small Hydro Power Projects and Non-fossil fuel based Co-Generation projects, for the State of Punjab shall be applicable.”

From above, it is evident that vide the said Order the Commission had adopted the CERC Regulations without any modifications and accordingly the generic RE tariff as determined for FY 2017-18 by CERC was made applicable in Punjab. The said matter was also clarified in Petition No. 23 of 2018 in the matter of determination of the Generic Tariff for FY 2018-19 under the objection No. 3 of PSPCL as hereunder:

“Issue No.2: Tariff for Co-generation power Projects using Rice-Straw/ Rice-husk.

In the Staff Paper, the tariff is determined only for Bagasse based Co-generation Power projects whereas the tariff for Co-generation power Projects using Rice Straw or Rice-husk as a fuel has not been determined. The tariff for Co-generation Power Projects using Rice- Straw or Rice-husk as a fuel may also be determined.

View of the Commission

CERC in Regulation 49 (2) of CERC RE Regulations, 2017 specified that for use of biomass other than bagasse in co-generation projects, the biomass prices as specified under Regulation 42 shall be applicable.”

Thus, NPPL’s plea that generic tariff for use of biomass other than bagasse in co-generation projects, in terms of CERC Regulations, was not there in the Order of the Commission with regard to generic tariff for FY 2017-18,

is misplaced. It appears that incorporation of a foot note to clarify the matter in the Commission's Order for FY 2019-20, is being misconstrued by the petitioner as exclusion of the same for FY 2017-18 and FY 2018-19.

7.3 On the issue of parity claimed by the petitioner with that of A2Z case dealt by the Commission in its Order dated 15.03.2012 in Petition 62 of 2011; PSPCL contented that PPA with A2Z was having a specific provision under Article 2.1.1(i) stating that, tariff specified therein shall be subject to the Orders passed by the Commission on the Petition filed by the developer. The Commission refers to the said provision of the PPA, which reads as under:

"2.1.1(i)

The Orders passed by the Hon'ble PSERC on the Petition filed by the developer and clarification on the amendment of IA signed by PEDDA shall be applicable."

And, the reference regarding the same is also incorporated in the Commission's said Order, as under:

"10 (iv) With regard to the submission made by PSPCL that the petitioner has already entered into PPAs for supply of electricity from these plant(s) at tariff determined by the Commission, the Commission takes note that the PPAs already provide that the Orders passed by the Commission on the petition filed by the developer would be applicable...."

The Commission notes that the said provision of the PPA with A2Z, do not exist in NPPL's case. Therefore, the Commission agrees with PSPCL's contention that the PPA in case of A2Z was distinct and different from the PPA entered into by it with NPPL. Thus, the petitioner plea of having parity with the Commission's Order in A2Z case is

not maintainable.

The petition is dismissed accordingly.

Sd/-
(Paramjeet Singh)
Member

Sd/-
(Anjuli Chandra)
Member

Sd/-
(ViswajeetKhanna)
Chairperson

Chandigarh

Dated: 29.03.2022

