

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

Petition No. 72 of 2021
along with IA No. 04 of 2022
Date of Order: 25.08.2022

Petition under Regulation 68, 69, 70, 71, 72 and other relevant provisions of Chapter XIII of PSERC (Conduct of Business) Regulations 2005 and Section 62 read with Section 86(1)(e) of the Electricity Act 2003 for declaring the FY 2019-20 as the year of commissioning for the Mini Hydel Project commissioned by the petitioner and granting the tariff for the project for sale of electricity to PSPCL in terms thereof and the bidding process carried out by PEDDA, where under a discount of Rs. 1.51/kWh was offered by the petitioner, thus arriving at the net tariff of Rs. 4.72/kWh (Rs. 6.23 - Rs. 1.51)/kWh.

AND

In the matter of: M/s Salasar Hydro Urja Private Limited, Regd. office Village Kulgarhi, Zira-Ferozepur Road. Dist: Ferozepur, Punjab.

...Petitioner

Vs

1. Punjab State Power Corporation Ltd. (PSPCL), The Mall, Patiala
2. Punjab Energy Development Agency (PEDA), Plot No. 1 & 2, Sector 33-D, Chandigarh.
3. Water Resource Department (WRD), Erstwhile

Punjab Irrigation Deptt., Sector-18, Madhya Marg,
Chandigarh

...Respondents

Commission: Mr. Viswajeet Khanna, Chairperson
Mr. Paramjeet Singh, Member

Petitioner: Ms. Meenakshi Singla, Advocate

PSPCL: Ms. Poorva Saigal, Advocate
Sh. Rupinderjit Singh Randhawa, CE/ARR&TR
Sh. Ravi Luthra, SE/TR-2
Sh. Gurvinder Singh, Sr. Xen/TR-5
Sh. Balijinder Pal Singh, AE/TR-5

ORDER:

1. The petitioner has filed the instant petition with the prayer to:
 - i) *Declare the financial year 2019-20 as the year of commissioning for the Mini Hydel Project commissioned by the petitioner and granting the tariff for the project for sale of electricity to the Respondents in terms thereof and the bidding process carried out by Respondent no.2, where under a discount of Rs.1.51/- was offered by the petitioner, thus arriving at a net tariff of Rs.4.72 (Rs.6.23- Rs.1.51= 4.72);*
 - ii) *For passing any other relief in favour of the petitioner as this Hon'ble Commission may deem fit in the facts and circumstances of the case.*
2. Submissions made by the petitioner are summarized as under:
 - a) That the Petitioner, a Company incorporated under the provisions of the Companies Act, is inter alia engaged in the business of setting up and running Hydel projects. The

Respondent No. 1 (PSPCL) is the sole distribution licensee in the State of Punjab and has entered into a power purchase agreement with the Petitioner for its 1.5 MW MHP, Respondent No. 2 (PEDA) is the State Nodal agency in the State of Punjab responsible for development of renewable energy projects in the State and Respondent No. 3 (WRD) is the Department of Government of Punjab taking care of the entire water resources in the State.

- b) That in January 2014, PEDA brought out a Request for Proposal (RfP) for setting up Mini Hydel Projects (MHPs) on BOO basis in Punjab. The petitioner being interested and eligible, participated in the bidding in response to the said RfP and submitted its bid for setting up a 1.5 MW MHP at ChangaliKhurd RD 90000 on Ferozpur Feeder Lower, by offering a discount of Rs. 1.51/- on the bench mark tariff for the year 2013-14 i.e. Rs. 5.16/-, thus, arriving at a net saleable tariff of Rs. 3.65/- KWh. It is pertinent to mention that this discount of Rs.1.51/ KWh was arrived at after carefully considering the difference between the expected PLF of the project in question based on the discharge data and the normative parameters taken for arriving at the levelized normative tariff of Rs.5.16/ KWh, particularly the PLF adopted by CERC for Punjab hydel projects as 30%, which has been further adopted by this Commission.
- c) That consequently, the petitioner was held to be one of the successful bidders and accordingly a Letter Of Award (LOA) dated 11.08.2014 was issued to the Petitioner for Development

of the MHP on Build Operate and Own (BOO) basis, inter-alia stating that:

“2(b) In line with clause 1.6 (Tariff) of RFP Document - Tariff actually payable –

For bidding purpose, the CERC/P SERC tariff for 2013-14 has been taken as the benchmark tariff which is adopted by P SERC and bidder with lowest net tariff after subtracting the discount offered from the benchmark tariff (irrespective of normal or accelerated rate of depreciation) has been selected as L1 bidder. However the developer has been allowed the period of 22 months from the date of signing of Implementation Agreement / 21 months from the date of signing of PPA for the commissioning of the project (Implementation Schedule as per RFP Document), the CERC / P SERC tariff for the actual year of commissioning is not known but will be the base for tariff payments. Therefore, for the purpose of actual payments for the power sold to PSPCL, the net tariff will be the tariff determined by CERC/P SERC for MHPs during the scheduled year of commissioning (including extension duly granted by PED A, if any) less the discount now quoted by the bidder in the bid from the tariff of normal rate of deprecation category. The net tariff so arrived will be the tariff payable to developer for entire period of Power Purchase Agreement (PPA) i.e.35 years.

.....

3.Schedule of Commissioning

.....After signing of the Implementation Agreement (IA), the total time allowed is 22 months. The Power Purchase Agreement (PPA) is to be signed within one month from the signing of IA, as such the stipulated time after signing of PPA is 21 months. As per above, the scheduled date of commissioning of the project comes out to be December, 2016. (F.Y. 2016-17)”.

- d) Thereafter, an IA dated 05.03.2015 was signed with PEDDA and a TPA was signed on 07.04.2015 with Punjab Irrigation Department (PID) and PEDDA. Pursuant to the same, PPA dated 29.04.2015 was entered into with PSPCL, whereby, inter-alia the conditions for sale of power were decided between the parties, the relevant extract of which are reproduced below:-

“2.0.0 Energy Purchase and Sale.

2.1.0 Sale of Energy by Generating Company.

2.1.1 The PSPCL shall purchase and accept all energy made available at the interconnection point from the Generating Company’s Facility, pursuant to the terms and conditions of this agreement approved by the commission in its order dated 30.09.2010 on Suo-Motu petition No. 32/2010 & at the rates approved by the Commission in its order dated 25.06.2013 on Suo-Motu Petition No. 37/2013 which is set out below:-

- (i) Rs.3.65 per unit (Benchmark tariff of Rs. 5.16 per unit for the year 2013-14 (being Tariff With Normal Rate of Depreciation) less discount of Rs. 1.51 per

Kwh) and evaluated as lowest bidder based on which the project has been awarded to the company and the company has agreed to sell all energy generated at the project to PSPCL. However, the company shall be eligible for getting the approved tariff for the project commissioning year as per further tariff order notified by PSERC (Net applicable tariff rate upon adjusting for Normal Depreciation benefit –Discount Rs. 1.51 per Kwh). This tariff shall be applicable for tariff period of 35 years for small hydro projects.”

- e) That despite there being an obligation on the PID (now WRD) to provide land for the project on lease to PEDDA and subsequently on sub-lease to the petitioner, the land lease could not be executed due to a defect in the title of the land as some part thereof was not on the name of the department due to which PID was unable to execute the land lease. The land records were got corrected in May 2017 and the land sublease was executed by PEDDA with the petitioner on 25.10.2017. That it is pertinent to mention here that without entering into a lease deed for the land on which the proposed project was to be setup, the petitioner could not proceed with the development of the proposed project. Even the statutory clearances/financial closure could not have been applied for by the petitioner in the absence of allocation of land under lease /sublease to the petitioner for the project in question. After obtaining the lease /sublease, the petitioner applied for the requisite clearances and only thereafter could take up the required construction activity.

- f) That thereafter, on persuasion by the petitioner, PEDDA vide communication dated 31.10.2017, extended the time limit for commissioning of the project till 24.02.2019, subject to compliance of all the terms & conditions of IA, TPA & PPA.
- g) Thereafter, the petitioner immediately started the work and obtained requisite permissions including feasibility clearance from PSPCL. However, despite completing most of the work, it could not get the canal closure for completion of the remaining canal works essential for achieving the commissioning of the project:
- h) The petitioner made repeated requests to PID/WRD vide communications dated 19.04.2018, 13.08.2018, 04.12.2018 and 09.09.2019. The matter was discussed at the personal level and perused with PEDDA too for pressing upon the PID to allow the canal closure. WRD vide its letter dated 24.09.2019 while referring to the above mentioned letters, confirmed that most of the work of the project has been completed except the canal work. The relevant extract is reproduced below:-

“

In this regard, under signed during general inspection of Ferozpur Feeder Lower it has been observed that the power house portion of the project sited as subject as well as its intake and tail race portion is almost ready except some minor short comings which have been pointed out to your representative at site and connectivity of intake and trail race system with the Main Canal Ferozepur Feeder lower race to be done, for which canal closure is required.

Keeping in view the urgency of the matter, this office is requesting the higher offices to arrange the canal closure at the earliest. Closure dates will be intimated in the due course after their approval.

.....”

- i) That further, vide letter dated 27.09.2019 it requested WRD for canal closure to complete the construction of power house. It was specifically stated that the MHP under reference is otherwise ready for commissioning. WRD vide letter dated 27.09.2019 intimated that the canal closure will be expectedly made available from 20.03.2020 to 10.04.2020. Thereafter, WRD vide letter dated 12.03.2020 intimated that the Canal closure has been approved by the authorities for the period 05.04.2020 to 25.04.2020 for completing the canal works with regard to the MHP. However, the canal closure did not take place due to outbreak of Covid-19 pandemic. Thereafter, on partial withdrawal of Covid restrictions, the petitioner vide letters dated 22.06.2020 and 21.10.2020 again requested for canal closure to complete the project and also mentioning with regard to losses being suffered by the petitioner due to inordinate delay in the commissioning of the project.
- j) That thereafter, the petitioner vide letter dated 14.12.2020, replied to the letter dated 23.11.2020 of PID /WRD, whereby the petitioner inter-alia submitted that the advice for exploring alternate measure to complete canal work without disturbing the flow of water in the canal is technically not possible as canal work under flowing water cannot be carried out and suggested that in case canal closure for 20-25 days is not possible, then

the closure may be granted in two or three phases of smaller duration.

- k) The petitioner requested PEDDA to further extend the time limit for completion of the MHP due to non-closure of canal by WRD. PEDDA vide letter dated 24.12.2020 extended the time limit for commissioning of the project till 31.05.2021, subject to the compliance of all the terms and conditions of IA/TPA/PPA.
- l) The petitioner vide letter dated 04.01.2021 again requested WRD for canal closure. Ultimately, WRD vide its letter dated 12.03.2021 rendered the canal closure from 05.04.2021 to 25.04.2021 (21 days). Thereafter, the petitioner duly carried out the pending canal works for completion of the project on 25.04.2021 and synchronization of the project to PSPCL grid sub-station was made on 21.06.2021. Since then the power is being injected into PSPCL's grid continuously.
- m) That, in case the canal closure had been granted at an earlier date or on 24.09.2019 or a month thereafter or any suitable date within the FY 2019-20, the project in question would certainly have been commissioned and synchronized within FY 2019-20. Thus, for the delay caused by PID in giving canal closure, the petitioner cannot be penalized, as for the year 2021-22 the tariff is yet to be determined by the Commission and in the meanwhile tariff for the year 2020-21 i.e. Rs. 4.30 per KWh declared for MHPs is prevailing. Hence, the petitioner after offering the discount of Rs. 1.51/- would fetch Rs. 2.79/KWh, which is totally unviable and the MHP of the petitioner will not be able to sustain financially. It is worth mentioning that the

benchmark tariff at the time of bidding was considered as Rs.5.16/ KWh.

- n) That the petitioner most respectfully states that it is entitled for the tariff for the FY 2019-20, as the MHP of the petitioner was complete in all respects apart from the canal works, which is itself evident from the letter dated 24.09.2019 issued by PID. In case the canal closure would have been granted to the petitioner, timely, the project would have completed within F.Y. 2019-20 itself and accordingly would have been granted with a tariff of Rs. 6.23 /- and after offering the discount of Rs. 1.51/- would fetch Rs. 4.72 /KWh, which would have been a viable tariff for the petitioner to run its MHP.
- o) That at the time of bidding for the project that benchmark tariff was taken as Rs. 5.16/KWh and accordingly while calculating viability on the basis of the said benchmark tariff, the petitioner bid for a discount of Rs. 1.51/-. Now, in case the tariff for the year 2020-21 is considered for the project of the petitioner i.e. Rs.4.30/- KWh, the petitioner will not be able to offer discount of Rs. 1.51/- since it will not be able to sustain its MHP by selling the power at a meager tariff of Rs. 2.79/- to PSPCL.
- p) That the petitioner respectfully prays that the petitioner has incurred a total expenditure of Rs.16.80 Crores approximately as the project cost excluding a contingent liability of Rs.2.19 Crores and in case that too culminates into a clear liability, the total expenditure incurred would scale upto Rs.19.00 Crores for setting up the 1.5 MW MHP in question. The petitioner humbly submits that major expenses have been incurred upto the FY. 2019-20 and had the canal closure been rendered timely, it

would have certainly completed/commissioned the project within the FY 2019-20 itself. Hence, the petitioner is entitled for the tariff for the FY 2019-20 and any tariff below Rs. 6.23 /- i.e. tariff for FY 2019-20 would not be viable for the petitioner for running the MHP in question. The petitioner in terms of the LOA/IA/PPA has to offer a discount of Rs. 1.51/- and would only fetch a net Rs. 4.72 /KWh with the 2019-20 tariff of Rs. 6.23/kWh.

- q) That the petitioner submits that at the time of calling of the bids in the year 2013-14, the normative project cost and PLF was taken as Rs. 600 lacs and 30% respectively for determination of generic levelized tariff for small hydro projects (except hilly states) by CERC and the same was adopted by the Commission. With these parameters, the tariff was worked out at Rs. 5.16/ KWh. The petitioner, after making an assumption on the likely/achievable PLF and cost of construction etc, submitted a bid with a discount of Rs.1.51/ KWh. The Commission kept on adopting the normative parameters of the CERC for SHPs for determination of generic tariff till the year of 2019-20. However, from 2020-21 onwards, the Commission adopted a different yardstick with regard to PLF of the SHPs in the state of Punjab and the PLF was kept at 40% instead of 30%. PSERC also adopted the revised Useful Life of the Project as 40 Years as per CERC Regulations from 2020-21 onward against 35 years applicable till 2019-20 (Petitioner's PPA is also for 35 years) and consequently the generic tariff for the year 20-21 and 21-22 have been reduced to Rs. 4.30/Kwh (notified) and

4.31/ KWh (Staff paper) respectively against Rs. 6.23/- for FY 2019-20.

- r) The capital cost for 2020-21 and 2021-22 has been taken as Rs. 780 lacs. It is pertinent to state that the PPA of the petitioner is for 35 years whereas the tariff of 2021-22 is for 40 years duration. Thus, another mechanism proposed by the petitioner in the present matter to render a just and equitable tariff for the project under reference would be calculating the tariff in terms of the normative capital costs assumed by the Commission proportionately for both the years under consideration i.e. tariff of Rs. 5.16/ KWh was kept against normative capital cost of Rs. 6 Crores for the year 2013-14, Thus, calculating the tariff on the basis of the current year capital costs in proportion thereto would arrived at Rs.6.70/ KWh and after deducting the discount offered of Rs.1.51/ KWh the net salable tariff would arrived at Rs.5.19/ KWh. (Rs.5.16/ KWh ÷ Rs.6 Crores x Rs.7.80 Crores = Rs.6.70/ KWh- Rs.1.51/ KWh = Rs.5.19/ KWh).
- s) That in case the petitioner is not granted the tariff based on the year 2019-20, the petitioner shall not be able to run the MHP on account of non-viability and thus, the petitioner shall suffer an irreparable loss.
- 3.** The petition was taken up for hearing on admission on 05.01.2022. After hearing the learned counsel for the petitioner, the petition was admitted vide Commission's Order dated 12.01.2022, with directions to the respondents to file their replies to the petition within four weeks and the petitioner to file its rejoinder thereafter within a week.

4. The petitioner filed an IA dated 24.01.2022, praying for urgent listing and for grant of an interim tariff, enabling it to raise the energy bill for the energy already exported to PSPCL till the pendency of the present matter subject to its outcome, and to direct PSPCL to immediately pay the energy bills raised by it at the interim tariff rendered by the Commission. While, reiterating its claim for the applicable tariff of FY 2019-20, it was submitted that:
- a) In the absence of declaration of the tariff for its MHP for sale of power to PSPCL, the petitioner is unable to raise any bill upon PSPCL despite exporting about 30,44,460 units till 31.12.2021.
 - b) It has incurred a sum of Rs. 17 Crore (approx) as the project cost for setting up the MHP and out of the same Rs. 13 Crore (approx) has been arranged from financing arrangements, the repayment of which shall start from February 2022.
 - c) In case, it is not paid for the energy already exported, the petitioner shall be unable to pay the loan amount, which shall eventually lead to the closure of the project, causing irreparable loss and injury to the petitioner. Thus rendering an interim tariff for enabling the petitioner to raise the bill for the energy already exported is of utmost need for the survival of the project.
 - d) That the petitioner has a prima-facie case and balance of convenience in the matter lies in its favour.
5. PEDA vide its reply dated 17.03.2022, while reiterating the sequence of events as detailed by the petitioner submitted that, "Rendering tariff for sale of power from the power projects falls under the domain of the Commission. The Commission to take an appropriate decision in this matter, as it deems fit."

6. PSPCL submitted its reply on 28.04.2022. The same is summarized as under:

- a) That the petitioner was selected to develop the project pursuant to the bidding process initiated by PEDDA. Clause 1.6 of the RFP providing for tariff, states that for the purpose of actual payments for the power sold to PSPCL, the net tariff will be the tariff determined by CERC/PSERC for MHPs during the scheduled year of commissioning (including extension duly granted by PEDDA) less the discount quoted by the bidder.
- b) On 21.02.2014, the petitioner submitted its response to PEDDA wherein it provided its unconditional and unqualified acceptance to the terms of the RFP. The relevant extracts of the said response is as under:

“3. We give our unconditional acceptance to the RfP, dated 21/02/2014 and IA, TPA & Land Lease Agreement attached thereto, issued by the PEDDA. In token of our acceptance to the RfP & IA, we have signed a declaration for acceptance of terms and conditions thereof. We shall ensure that the IA & TPA is executed as per the provisions of the RfP and provisions thereof shall be binding on us. Further, we confirm that that the Project shall be commissioned within 22 months from signing of IA/21 months of the date of signing of PPA.

....

5. We have submitted our response to RfP strictly as per Section-6 (formats) of the RfP, without any deviations, conditions and without mentioning any assumptions or notes in the said formats.

6. Acceptance

We hereby agree and accept that the decision made by PEDDA in respect of any matter regarding or arising out of the RfP shall be binding on us. We hereby expressly waive any and all claims in respect of this process.”

- c) On 11.08.2014, the petitioner was issued Letter of Award (LOA) upon selection as successful bidder. Clause 2(b) of the LOA *inter alia* reads as under:

“In line with clause 1. 6 (Tariff) of RFP Document-Tariff actually payable-

For bidding purpose, the CERC/PSERC tariff for adopted by PSERC and bidder with lowest net tariff after (irrespective of normal or accelerated rate of depreciation) has been selected as L1 bidder. However, the developer has been allowed the period of 22 months from the date of signing of Implementation Agreement/21 months from the date of signing of PPA for the commissioning of the project (Implementation Schedule as per RFP Document), the CERC/PSERC tariff for the actual year of commissioning is not known but will be the base for tariff payments. Therefore, for the purpose of actual payments for the power sold to PSPCL, the net tariff will be the tariff determined by CERC/PSERC for MHPs during the scheduled year of commissioning (including extension duly granted by PEDAs, if any) less the discount now quoted by the bidder in the bid from the tariff of normal rate of depreciation category. The net tariff so arrived will be the tariff payable to developer for entire period of Power Purchase Agreement (PPA) i.e. 35 years.”

[Emphasis supplied]

- d) On 05.03.2015, in consideration of the LOA, PEDAs executed the I.A. dated 05.03.2015 with the petitioner and, on 29.04.2015, a Power Purchase Agreement (**PPA**) was entered into between the petitioner and PSPCL. Clause 10.0.1 of the PPA reads as under:

“10.0.0 COMMISSIONING OF GENERATING FACILITY

10.1.0The Generating Company shall commission the Generating Facility (which shall be scheduled Date of Commercial Operation) and synchronize with the PSPCL’s Grid within 22 months from the signing date of Implementation Agreement (IA). Therefore, the scheduled date of commissioning for the project or any extension allowed by PEDAs, as the case may be. The PEDAs shall allow such extension only with the approval of competent authority and will take appropriate decision watching the interest of PSPCL in case of refixing higher tariff, if any by PSERC during the year when the company will start injecting power in PSPCL System. In such cases of extension both parties shall sign Supplementary Agreement for the applicable tariff.”

- e) In terms of the above bidding documents, the petitioner was required to commission the project within 21 months from the date of signing of the PPA and the tariff, as prevalent on the

date of actual commissioning will be made applicable to the power generated and supplied by the petitioner to the PSPCL. In terms of the PPA, the Scheduled Commissioning date was required to be achieved on or before 29.01.2017 and, therefore, the tariff for FY 2016-17 was to be made applicable to the petitioner. However, the petitioner's project achieved commercial operation as on 21.06.2021, when the power was injected for the first time into the Grid. In view of the above, the tariff applicable to the petitioner would be the tariff determined by the CERC/this Commission for FY 2021-22 minus the discount offered by the petitioner.

- f) The Commission vide order dated 08.07.2021 in Petition No. 34/2021 has continued the tariff determined for FY 2020-21 to FY 2021-22 till the finalization of generic tariff for FY 2021-22. The tariff of Rs. 4.30 per unit for FY 2020-21 has been determined by this Commission vide order dated 18.09.2020 passed in Petition No. 26 of 2020. In the above order dated 18.09.2020 this Commission has adopted the CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2020 with one state specific amendment, i.e., CUF as 40 percent for Small Hydro Projects.
- g) In view of the above, the tariff applicable to the petitioner for the energy generated and supplied to the PSPCL is Rs. 2.79 per unit (i.e., generic tariff for FY 2021-22; Rs. 4.30 per unit minus the discount of Rs. 1.51 per unit based on which the petitioner was selected in the bidding process).
- h) As against the above, the case of the petitioner is that it should be granted the tariff corresponding to FY 2019-20 i.e., Rs. 6.23 per unit minus Rs. 1.51 per unit. The above claim of the

petitioner is misconceived and outside the scope of the bidding documents including the PPA. It is submitted that petitioner cannot be allowed to pick and choose the Financial Year which is more conducive and beneficial to the petitioner, at the cost of the consumers in the State of Punjab. It cannot be that the commissioning of the project occurs in the FY 2021-22, i.e., on 21.06.2021 but the petitioner receives higher tariff applicable for FY 2019-20.

- i) As stated hereinabove, the scheme of the bidding document is such that the petitioner will be granted the tariff prevalent as on the actual date of commissioning of the project. The Scheduled Commissioning date of the Project is 21 months from the date of signing of PPA, i.e. 29.01.2017 as specified in the PPA. The petitioner could not commission the project by 29.01.2017 and sought extensions from the PEDDA from time to time. The final extension was granted by PEDDA vide letter dated 24.12.2020, till 31.05.2021. The petitioner, after having sought and having been granted such extensions and the benefit accruing thereof on account of such extension, namely, non-encashment of performance security and/or termination of the PPA, cannot now seek a deemed date of commissioning to avail the benefit of higher tariff. The provisions and definitions in the LOA, I.A. and PPA in respect of tariff are without any exception inasmuch the actual year of commissioning is to be taken as the base for tariff payments. In this regard, the Hon'ble Supreme Court in the matter of **State Industrial Development & Investment Corpn.-v-Diamond & Gem Development Corpn. Ltd.**, (2013) 5 SCC 470, has *inter alia* has held as under:

“IV. Interpretation of the terms of contract

23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely.”

[Emphasis supplied]

- j) It is submitted that the petitioner had unequivocally accepted the terms of the bidding documents without any reservations. The same has to be given its natural legal consequence. The petitioner cannot, now, seek from this Commission to, alter the terms of bidding documents having once accepted the same terms unconditionally and unequivocally. In this regard, reliance is placed on the Constitutional bench judgment of the Hon'ble Supreme Court in the matter of **Har Shankar-v-Excise & Taxation Commr.**, (1975) 1 SCC 737, which has *inter alia* held as under:

“16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the

auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.”

[Emphasis supplied]

- k) The contention of the petitioner that the base tariff for the FY 2020-21 cannot be made applicable to the petitioner as the

parameters of the tariff determination has been modified is wrong and baseless for the reason that the bidding documents had nowhere specified that the parameters adopted by the Central Commission while determining the tariff for FY 2013-14 will remain constant or that the tariff for FY 2013-14 will remain constant in perpetuity. To the contrary, it has been clearly stated in the bidding documents that the tariff (which is not known) for the year of commissioning will be made applicable to the petitioner (Refer Clause 2 (b) of the LoA dated 11.08.2014). The petitioner accepted the bid with open eyes and cannot seek to wriggle out of the same when the tariff is not as beneficial to the petitioner. The risks as well as the reward of the bid are to the account of the petitioner.

- l) Further, the contention of the petitioner that the tariff for FY 2020-21 would not be feasible is irrelevant, as in claiming so, the petitioner is seeking a revision of the express terms of the contract on grounds of onerousness. It is a settled law that there cannot be any revision in express terms of the contract merely because the performance has become onerous. More so when such circumstances constitutes, precisely, the assumption of the risk, which the petitioner undertook while agreeing to the express terms of the contract. In this context, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of **Energy Watchdog-v-Central Electricity Regulatory Commission**, (2017) 14 SCC 80 which reiterated the settled position in **Alopi Parshad & Sons Ltd.-v-Union of India**, AIR 1960 SC 588, inter alia as under:

“37. *In Alopi Parshad & Sons Ltd. v. Union of India [Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793: AIR 1960 SC 588], this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events, which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices, which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.*

38. *Similarly, in Naihati Jute Mills Ltd. v. Khyaliram Jagannath [Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968) 1 SCR 821 : AIR 1968 SC 522], this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghosev. Mugneeram Bangur & Co. [Satyabrata Ghosev. Mugneeram Bangur & Co., 1954 SCR 310: AIR 1954 SC 44] Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.”*

- m) In specific, the petitioner has claimed that the CUF has been changed from 30% to 40% in the order dated 18.09.2020 passed by the Commission and therefore the base tariff for FY 2020-21 cannot be made applicable to the Project. The above contention is baseless as the change has been made by the Commission while considering the weighted average CUF of the projects commissioned in the State of Punjab. The petitioner itself, from the date of commissioning i.e., 21.06.2021 to 28.02.2022, has been operating its plant with the CUF of 47.64% (Average PLF upto 252 days). Since October 2021 till Feb, 2022, the petitioner's Plant has in fact been operating with a CUF of 62.68%. Further, the actual CUF of similarly placed developer, namely, M/s P.R. Gurdittiwala Hydro Power Pvt. Ltd., operating nearby the petitioner's Plant for FY 2019-20, 2020-21 & 2021-22 has been 58.20%, 55.40% and 41.06% respectively.
- n) It is submitted that grant of base tariff of FY 2019-20, as sought for by the petitioner would lead to an absurd position wherein the petitioner having not established its plant in FY 2019-20 would reap the benefits of higher tariff but on the other hand, PSPCL having been deprived of renewable power from the petitioner's project for FY 2019-20 and having been constrained to purchase renewable energy certificates to comply with Renewable Purchase Obligations (RPO) besides paying a relatively higher tariff, would have to pay the tariff as applicable for the FY 2019-20. In this regard, it is relevant to note that the PSPCL had purchased Renewable Energy Certificates (REC) amounting to Rs. 104.59 Crores during the Financial Years 2016-17 to 2018-19.

- o) In view of the above, the claim made by the petitioner is liable to be rejected. It is submitted that the petitioner is only liable for the tariff of Rs. 2.79 per unit. (i.e., Rs. 4.30 per unit minus Rs. 1.51 per unit) as per the express terms of the PPA and the bidding documents and the Orders of the Hon'ble Commission.
7. Water Resource Dept. (Harike Canal Div, Ferozepur) submitted its reply on 01.06.2022, submitting as under:
- a) The tariff related issues are related to PSPCL and as such, there is no role attributable to WRD.
- b) The mini power project of the petitioner is under the jurisdiction of Ferozepur Canal Circle and regulated & controlled by Harike Canal Div. The Ferozepur feeder canal originates from Harike head works, which provide irrigation & drinking water to several districts of Punjab and mainly Rajasthan. Thus, it is a perennial canal, which runs throughout the year. It's an inter-state canal, operated in coordination with canal dept. of Punjab & Rajasthan.
- c) The petitioner wrote to the Harike Canal Division on 13.08.2018 that the work of power house portion is completed and requested for canal closure. It then reapplied for canal closure on 04.12.2018 & 09.09.2019. EE, Harike Canal Div. assessed the exact condition and observed that the power house of the project as well as its intakes & tail race system was almost ready except some minor defects and directed it to remove the same.
- d) The expected closure of Ferozepur feeder from 20.03.2020 to 10.04.2020 was informed to the petitioner vide letter dated 27.09.2019. However, CE, Water Resources (North), Hanumangarh, Rajasthan vide its letter dated 05.03.2020 gave

the scheduled closure of Bikaner Canal from 05.04.2020 to 25.04.2020 which was informed to the petitioner by Harike Canal Division.

- e) During the closure period, the State of Punjab was beset by an epidemic. During this 200-300 people had to come together to work on the project, which was not approved by the local administration. The petitioner could not start its work during the period of closure and thus informed Harike Canal Div. through letter dated 22.06.2020. The petitioner demanded re-closure of the canal vide its letter dated 21.10.2020 but due to demand for canal water, the canal closure could not be given. The petitioner was informed vide letter dated 12.03.2021 about the detention of total 21 days from 05.04.2021 to 25.04.2021 with the direction that work should be completed within this period. The work required for commissioning was completed within the stipulated period.
- f) The petitioner has no right to claim any type of compensation from PID for not rendering canal closure as the supplies in the canal are run and regulated as per demand/supply of canal water and strictly as mandated in Northern India Canal & Drainage Act 1873 wherein condition no. 9 of TPA states that the Company shall have no right to claim any compensation from PID/PEDA.
- 8.** The petitioner filed their rejoinder dated 06.07.2022 to PSPCL's reply. While reiterating the submissions made in the petition, it has further stated as under:
- a) That, its project completion was delayed, first on account of delays in the execution of land lease/sub-lease by PID/WRD through PEDDA and then due to the delay in the canal closure by

PID/WRD. Despite being ready for commissioning during the FY 2019-20, the project could not be commissioned on account of the delay in canal closure, as conceded by PID/WRD in its reply. Thus, the petitioner cannot be burdened for the reasons beyond the reasonable control of the petitioner and is duly entitled for the tariff for the Year 2019-20 minus the discount offered by the petitioner.

- b) The case laws referred by PSPCL in case of State Industrial Development & Investment Corporation vs. Diamond & Gem Development Corp Ltd, Har Shankar vs. Excise & Taxation Commissioner and Energy Watchdog vs. CERC shall not be applicable to the facts of the present case. It is reiterated that the above said judgements do not deal with a case wherein the faults and deficiencies are attributable to the principal employers themselves, as in the present case. The delay is not attributable to the petitioner, rather it is the respondents who could not fulfil their obligations as per the contracts. In the case in hand, all the three agreements i.e. I.A., TPA and PPA are part and parcel of each other and PSPCL cannot seek benefit by offering a lower tariff to the petitioner on account of the delay caused in the commissioning of the project due to exigencies of PID/WRD.
- c) PSPCL has reproduced the CUF of the power plant for 252 days and for 5 months. In fact, during the 11 month (from 31st June 2021 to 30th May 2022) CUF works out as 48.82%. The normative CUF as per the RfP/Regulations for Generic RE tariff of Rs 5.16/unit applicable at the time of bidding for the year 2013-14 was 30% and the Capital cost was 6.23 Cr/MW. After considering the Design CUF as per data available and the likely

capital cost to be incurred (which worked out to be much higher than Rs 6.23 Cr/MW), the petitioner offered a discount of Rs 1.51/unit on the generic tariff. Had the Generic tariff in the bid document been considered with a CUF of 40%, the discount offered by the petitioner would have been much lower than the figure of Rs 1.51/unit. The same discount of Rs 1.51/unit cannot be considered for Generic tariff worked out based on 40% CUF. Since PSPCL is insisting on the discount quoted in the bid, as such we are entitled to be allowed generic tariff at 30% CUF.

- d) It is submitted that the comparison made by PSPCL with the Gurditiwala Project is misleading, as the same was commissioned in 2019-20 and has not encountered the delays, escalations and IDC as the petitioner has been subjected to with none of the fault attributable to the petitioner. The hydraulic parameters of the two sites are not identical. Further, the fact of higher CUF as per studies was duly considered while deciding the discount over 30% CUF applicable at the time of bidding. As such, discount is applicable for Generic tariff with 30% CUF and it is unfair on the part of PSPCL to claim the same amount of discount on a CUF of 40%.
- e) It is absurd on the part of PSPCL to blame the petitioner for purchase of RECs or not meeting their RPO commitments when the delay is solely attributable to other parties and not to the petitioner. In fact, the replies of PID and PEDDA reveal that the delays are procedural and were not attributable to the petitioner in any manner.
- f) In light of facts and submissions made above, the petitioner may kindly be granted the reliefs as prayed for in the petition.

9. The matter was taken up for arguments on 20.07.2022. The Ld. Counsel of the petitioner reiterated the submissions made in the petition, IA and its rejoinder. With regard to the Petitioner plea that it is unable to raise any energy bill for the energy being exported to PSPCL, the Commission observed that pending final decision it could have raised provisional bills considering the generic tariff applicable for the year of its actual commissioning as the base tariff, which the Ld Counsel of PSPCL also approved. However, Ld Counsel for PSPCL further observed that the petitioner was required to raise the monthly bills on or before the fifth day of the month as per the PPA and had failed to do so, thus relinquishing their claim to do so now.

Further, Ld. Counsel of PSPCL, while reiterating the contentions made in its reply to the petition, submitted that the issue of the delay in commissioning and consequences of the same could be addressed in terms of the PPA only, and in the absence of any provision for consideration of a deemed date in place of the actual Commissioning, the same would tantamount to alteration/re-writing of the PPA, which is not permissible under the law. Moreover, the gain and loss are part and parcel of a business venture and wondered whether the petitioner would have also agreed to a deemed date entitling it to a lesser tariff, in case the tariff had increased with the time.

10. Findings and Decision of the Commission

The Commission has carefully gone through the submissions and arguments made by the parties. The Commission observes that, the matter of extensions in the period for commissioning and the date of actual commissioning of the project is not in dispute. The issue requiring adjudication is the petitioner's plea for declaration of FY 2019-20 as the deemed year of commissioning and granting the

tariff in terms thereof, for its project actually commissioned in FY 2021-22. PSPCL is opposing the petitioner's plea with the contention that the provision for the same does not exist in the PPA entered into by it with the petitioner and it would tantamount to alteration/re-writing of the PPA, which is not permissible under the law as held by a catena of judgments by the Hon'ble Supreme Court. The findings and decision of the Commission is as under:

10.1 On the issue of interim payment and raising of bills, the Commission find this stand of PSPCL to be harsh and without merit. The petitioner has injected power as per PPA which has been received by PSPCL for its use and hence the Petitioner is entitled to be re-compensated for the same at the rate permissible as per the PPA.

10.2 The petitioner's main plea is that its project (originally scheduled for commissioning in FY 2016-17) got delayed, first on account of delay in the execution of land lease/sub-lease by WRD/PEDA and then due to the delay in the canal closure by WRD. And, despite being ready for commissioning during the FY 2019-20, the project could not be commissioned on account of the delay in canal closure, as conceded by PID/WRD in its reply. Thus, it is duly entitled for the generic tariff for the Year 2019-20 minus the discount offered by it.

The Commission finds some aberrations in the petitioner claim/submissions. Firstly, for the project actually commissioned in FY 2021-22 and citing delays on account of execution of land lease and canal closure, it is claiming relief only on account of the delay in the canal closure by seeking declaration of FY 2019-20 as the deemed commissioning year and not for the delay in execution of the land lease which would remit in seeking deemed declaration of

originally scheduled year of commissioning i.e. FY 2016-17, which was having a lower tariff than the one being claimed by the petitioner for the year 2019-20. Secondly, it is claiming that the project was ready for commissioning during the FY 2019-20, citing WRD letter dated 24.09.2019 as evidence. Whereas, a perusal of the extract of the said letter reproduced in the petition reveals that WRD had pointed out some short comings which the petitioner was required to complete. Further, as gathered from WRDs submissions, the impugned canal is an inter-state canal providing irrigation & drinking water to several districts of Punjab and Rajasthan and is operated in coordination with the canal dept. of Rajasthan. As, is evident from the period of closures allowed, first in from 05.04.2020 to 25.04.2020 (in place of initially informed period of 20.03.2020 to 10.04.2020) and then from 05.04.2021 to 25.04.2021, it appears that the canal closure is feasible only in the month of March & April.

However, before going into the merits of the same, the Commission needs to examine PSPCL contention that contractual provisions agreed to by the petitioner do not have any provision which permits declaration of a year other than the actual year of commissioning, as the deemed year of commissioning. To examine the same, the Commission refers to the relevant provisions of the bidding document (RfP), LoA, IA and PPA:

a) Request for Proposal (RfP)

"1. 6 Tariff:

.....

Tariff actually payable to the selected developer.

For bidding purpose, the CERC tariff for 2013-14 has been taken as the benchmark tariff which is adopted by PSERC as per historical

precedence and bidder with lowest net tariff after subtracting the discount offered from the benchmark tariff (irrespective of normal or accelerated rate of depreciation) will be selected as L1 bidder. However, the developer has been allowed the period of 22 months from the date of signing of IA/21 months from the date of signing of PPA for the commissioning of the project, the CERC tariff for the actual year of commissioning is not known but will be the base for tariff payments. Therefore, for the purpose of actual payments for the power sold to PSPCL, the net tariff will be the tariff determined by CERC/PSERC for MHPs during the scheduled year of commissioning (including extension duly granted by PEDDA) less the discount (irrespective of normal or accelerated rate of depreciation) now quoted by the bidder in the bid for the site submitted against this bidding. The net tariff so arrived will be the tariff payable to developer for entire period of PPA i.e. 35 years.

.....
2. Definitions

“Scheduled Commissioning Date” means the actual commissioning date of respective units(s) of the power project where upon the Hydro Project Developer starts injecting power from the power Project to PSPCL grid.

.....
3.23 Commissioning:

Commissioning Schedule and Penalty for Delay in Commissioning:

The company/ developer shall commission the project within 22 (Twenty two) months from the Effective date i.e. signing of IA (21 months from the PPA) in line with “Project Implementation Schedule” as tabulated in clause 3.24 The developer shall make all out efforts to commission the project as per schedule of commissioning provided in implementation agreement. However, in case, there is delay in commissioning of the

project due to reasons not attributable to the company/ developer, PEDDA may consider extension in schedule date of commissioning of the project on submission of documentary evidence by the company and the scheduled date of commissioning shall be extended after approval of the competent authority. Otherwise, in case of failure to achieve below mentioned milestone of Project Implementation Schedule, PEDDA shall encash the Performance Guarantee of the Developer.”

b) Letter of Award (LOA)

“2(b) In line with clause 1.6 (Tariff) of RFP Document - Tariff actually payable – For bidding purpose, the CERC/P SERC tariff for 2013-14 has been taken as the benchmark tariff which is adopted by P SERC and bidder with lowest net tariff after subtracting the discount offered from the benchmark tariff (irrespective of normal or accelerated rate of depreciation) has been selected as L1 bidder. However the developer has been allowed the period of 22 months from the date of signing of Implementation Agreement / 21 months from the date of signing of PPA for the commissioning of the project (Implementation Schedule as per RFP Document), the CERC / P SERC tariff for the actual year of commissioning is not known but will be the base for tariff payments. Therefore, for the purpose of actual payments for the power sold to PSPCL, the net tariff will be the tariff determined by CERC/P SERC for MHPs during the scheduled year of commissioning (including extension duly granted by PEDDA, if any) less the discount now quoted by the bidder in the bid from the tariff of normal rate of depreciation category. The net tariff so arrived will be the tariff payable to the developer for the entire period of Power Purchase Agreement (PPA) i.e. 35 years.”

c) Implementation Agreement (IA)

“1: DEFINITIONS

“Commencement of Commercial Operations/ Scheduled Date of Commercial Operation Date” means the Scheduled Date of synchronization with Grid on which the project shall start delivering Active Power and Reactive Power to PSPCL as per Prudent Utility Practices. This date shall be considered as the commissioning date for the project.

.....

3: Tariff for Sale of Power to PSPCL

- A. The Company has bid for the project at a net tariff of Rs. 3.65 per kWh (Benchmark tariff of Rs. 5.16 per kWh for the year 2013-14 (being Tariff with Normal Rate of Depreciation) less discount of Rs. 1.51 per kWh) and evaluated as lowest bidder based on which the project has been awarded to the Company and Company has agreed to sell all energy generated at the Project to PSPCL.
- B. For the purpose of actual payments for the power sold to PSPCL, the net tariff will be the tariff determined by PSPCL for MHPs during the scheduled year of commissioning (including extension duly granted by PEDDA, if any) less the discount now quoted by the bidder in the bid from the tariff of Normal Rate of Depreciation category. The net tariff so arrived at will be tariff payable to the developer for the entire period of Power Purchase Agreement (PPA) i.e 35 years.

.....

4.2 Effectiveness

.....The developer shall make all out efforts to commission the project as per the schedule of commissioning provided in this agreement. However, in case, there is delay in commissioning of the project due to reasons not attributable to the company/developer, PEDDA may consider extension in the schedule date of commissioning of the project on

submission of documentary evidence by the company and the scheduled date of commissioning shall be extended after approval of competent authority.

.....

6.1 Obligations of PEDAs:

PEDA will provide necessary support including Single Window Clearance to facilitate the development of the projects. This may include facilitation in assisting and advising in respect of obtaining various approvals from the Government Departments. However, it will be the sole responsibility of the Company to obtain such Approvals.

10.5 Obligations of the parties in case of Force Majeure Event:

.....

(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 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.”

d) Power Purchase Agreement (PPA)

“Commencement of Commercial Operations/ Scheduled Date of Commercial Operation Date” means the Scheduled Date of synchronization with Grid on which the project shall start delivering Active Power and Reactive Power to PSPCL as per Prudent Utility Practices.

.....

2.1.1 The PSPCL shall purchase and accept all energy made available at the interconnection point from the Generating Company's Facility, pursuant to the terms and conditions set out below:-

- (i) Rs.3.65 per unit (Benchmark tariff of Rs. 5.16 per unit for the year 2013-14 (being Tariff With Normal Rate of Depreciation) less discount of Rs. 1.51 per Kwh) and evaluated as lowest bidder based on which the project has been awarded to the company and company has agreed to sell all energy generated at the project to PSPCL. However, the company shall be eligible for getting the approved tariff for the project commissioning year as per further tariff order notified by PSERC (Net applicable tariff rate upon adjusting for Normal Depreciation benefit –Discount Rs. 1.51 per Kwh). This tariff shall be applicable for the tariff period of 35 years for small hydro projects.
- (ii) As per RE Regulations the tariff shall remain constant throughout the Tariff Period following the year of commissioning. No additional payment shall on any account be payable by PSPCL.

.....

10.0.0 COMMISSIONING OF GENERATING FACILITY

10.1.0 The Generating Company shall commission the Generating Facility (which shall be Scheduled Date of Commercial Operation) and synchronize with the PSPCL's Grid within 22 months from the signing date of Implementation Agreement (IA). Therefore, the scheduled date of commissioning for this project or any extension allowed by PEDDA, as the case may be. The PEDDA shall allow such extensions only with the approval of competent authority and will take appropriate decision watching the interest of PSPCL in case of refixing higher tariff, if any by

PSERC during the year when company will start injecting power in PSPCL System....”

As evident from the above provisions, the commissioning of the Generating Facility means the scheduled date of synchronization with Grid on which date the project shall start delivering Power to PSPCL. And, while specifying the time lines for same, they also specify the provisions for extension in the schedule in case of exigencies beyond the control of the petitioner. In terms of the same, the petitioner has sought and been given extensions in the period of commissioning of the project, first from the initially envisaged FY 2016-17 to FY 2018-19 and then to FY 2021-22, preventing any penal action against the petitioner for the delay in commissioning e.g. encashment of their performance BG/Security and/or termination of the PPA.

However, no provision exists in the RFP, LOA, IA or PPA under which the plea of the petitioner for declaration of FY 2019-20 as the deemed year of commissioning for the project actually commissioned in FY 2021-22 could be considered.

Further, the above provisions state that the project has been awarded to the petitioner at a net tariff of Rs.3.65 per unit (Benchmark tariff of Rs. 5.16 per unit for the year 2013-14 with Normal Rate of Depreciation less discount of Rs. 1.51 per Kwh offered in the bid). However, it shall be eligible for getting the approved tariff for the project commissioning year as per further tariff order notified by PSERC (Net applicable tariff rate upon adjusting for Normal Depreciation benefit minus (—)

Discount of Rs. 1.51 per Kwh), which shall be applicable for the period of 35 years.

The Commission observes that the contractual provisions agreed to by the petitioner provide only for the tariff based on the year of commissioning of the project. Provisions of the RFP and LOA clearly state that, *“the CERC /PSERC tariff for the actual year of commissioning is not known but will be the base for tariff payments”*.

The Commission notes Clause 6.1 of the IA where PEDDA clearly specifies that while it would facilitate projects with help in clearance and development, the ultimate responsibility of obtaining all clearances and approvals would be the “sole responsibility” of the developer company. This clause alone negates the argument and prayer of the petitioner where it seeks to blame WRD and PEDDA for the delay in the commissioning of the project.

Moreover, IA in clause 10.5 (ix) states that, *“in case the commissioning of the project is delayed due to force majeure conditions stated therein andin case the delay affects the COD of the project and it gets extended to the next financial year then the tariff payable shall as determined by PSERC”*. Article 10.1.0 of the PPA also seeks to secure PSPCL from paying any higher tariff even in the event of extensions of IA by PEDDA.

Thus, the Commission finds merit in PSPCL’s submission that, the petitioner plea for seeking declaration of FY 2019-20 as the year of commissioning for the project commissioned in FY 2021-22 and granting the tariff in terms thereof,

tantamount to seeking alteration/re-writing of the PPA. The Commission also notes that Hon'ble APTEL in a recent judgment dated in 02.08.2022 in Appeal Nos. 65 & 284 of 2016 has observed that it is settled law that concluded PPAs cannot be reopened so as to vary the terms, there being a sanctity attached to the contracts entered into by the parties of their own volition. This is further reinforced with the force of law in various judgments of the Hon'ble Supreme Court of India some of which are cited above in PSPCL's submissions.

10.3 Change in parameters:

The petitioner has pleaded that at the time of calling of the bids in 2013-14, the normative PLF of 30% was considered for MHPs for determination of generic tariff by CERC, which was adopted by the Commission and the tariff was worked out as Rs. 5.16/kWh. The Commission kept on adopting the same parameters till FY 2019-20. However in FY 2020-21, the Commission adopted a different yardstick, with the PLF considered as 40% instead of 30% and the revised useful life as 40 years instead of 35 years, the generic tariff for FY 2020-21 and & 2021-22 was thus reduced to Rs. 4.30/kWh & Rs. 4.31/kWh (proposed in the staff paper) respectively against the tariff of Rs. 6.23/kWh for FY 2019-20. It was submitted that the petitioner had offered a discount of Rs 1.51/unit on the applicable generic tariff after considering the difference between the expected PLF of the project based on the discharge data and the normative parameters taken for arriving at the levelized normative tariff of Rs. 5.16/kWh, particularly the PLF adopted by CERC/PSERC for Punjab as 30%. Had the CUF in the bid document been considered as 40%, the discount offered by the petitioner would have been

much lower. The same discount of Rs 1.51/unit cannot be considered for Generic tariff worked out based on 40% CUF. In the rejoinder to the reply of PSPCL, while agreeing that CUF of its power plant during the 11 month (from 31st June 2021 to 30th May 2022) works out as 48.82%, the petitioner reiterated that it had offered the discount of Rs 1.51/unit on generic tariff after considering the design CUF of 30% and submitted that as the tariff for FY 2021-22 is yet to be determined, the tariff of FY 2020-21 (i.e. Rs. 4.30/kWh) is prevailing as of today. After offering a discount of Rs. 1.51/kWh, the petitioner would fetch only Rs. 2.79/kWh, which is totally unviable and the project will not be able to sustain financially.

The Commission observes that parameters considered in determination of tariff cannot be expected to remain constant in perpetuity. The parameter(s) ought to keep evolving with time, depending upon the advancements in technology and availability of empirical data. Accordingly, amendment in the useful life and the CUF was made by the Commission considering the CERC RE Tariff Regulations and the prevailing weighted average CUF of projects commissioned in the Punjab.

10.4 Hon'ble Supreme Court Judgements cited by PSPCL:

The Commission also finds the following case Judgements cited by PSPCL quite relevant to the instant case, wherein it has been held as under:

- a) Hon'ble Supreme Court in the matter of Rajasthan State Industrial Development & Investment Corpn. Vs Diamond & Gem Development Corpn. Ltd.& Anr, (2013) 5 SCC 470, has held that, a party cannot claim anything more than what is

covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. The contract has to be interpreted without inserting any outside aid. It is to be interpreted by ascribing the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable it may seem, if the parties have not made it themselves.

- b) Hon'ble Supreme Court in the matter of Har Shankar & Ors. Vs the Dy. Excise & Taxation Commr., (1975) 1 SCC 737, has held, that when the terms and conditions are announced in advance and the participating bidders do so with full knowledge of the commitments which the bid involves, those who contract with open eyes must accept the burdens of the contract along with its benefits. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the venture but that is a normal incident of business transactions. Reciprocal rights and obligations arising out of a contract do not depend for their enforceability upon whether a contracting party finds it either prudent or onerous to abide by the terms of the contract.
- c) Hon'ble Supreme Court in the case of Energy Watchdog vs Central Electricity Regulatory Commission, (2017) 14 SCC 80 has held that, the Contract Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract, at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events, which they did not at all anticipate, for example, a wholly abnormal rise or fall in

prices, which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

In view of the above, the Commission is of the view that, in the absence of the provisions in the agreements/contract entered into by it, the petitioner's prayer to declare the financial year 2019-20 as the year of commissioning and grant of the tariff in terms thereof in place of the actual year of commissioning (i.e, FY 2021-22) as provisioned in the bidding documents and subsequent Agreements entered into by it, is not sustainable. In fact, the terms of the RfP, LoA, IA and PPA overwhelmingly point towards a rejection of the prayer of the petitioner. This position is strongly supported, indeed mandated by various judgments of the Hon'ble Supreme Court of India and Hon'ble APTEL which are cited and discussed above.

In light of the above analysis and discussion, the prayer of the petitioner does not find merit and cannot be sustained and the petition is hence dismissed.

The petition along with the IA No. 04 of 2022 is disposed of accordingly.

Sd/-

**(Paramjeet Singh)
Member**

Sd/-

**(Viswajeet Khanna)
Chairperson**

Chandigarh

Dated: 25.08.2022