

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

**Review Petition No. 02 of 2021
in Petition No. 41 of 2020
Date of Order: 02.11.2021**

Review application under Section 94(f) of the Electricity Act, 2003 read with Rules 64 & 69 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 for reviewing/recalling the Order of the Commission dated 12.04.2021 passed in Petition No. 41 of 2020 titled as M/s Indian Sucrose Ltd. Vs Punjab State Power Corporation Ltd. & another and to allow petition No. 41 of 2020.

In the matter of: M/s Indian Sucrose Ltd. having its registered office at G.T Road, Mukerian, District Hoshiarpur, Punjab.

Petitioner

Versus

1. Punjab State Power Corporation Limited (PSPCL), The Mall, Patiala.
2. Punjab Energy Development Agency (PEDA), Solar Passive Complex, Plot Nos. 1 & 2, Sector 33-D, Chandigarh.

Respondents

Present: Sh. Viswajeet Khanna, Chairperson
Ms. Anjuli Chandra, Member
Sh. Paramjeet Singh, Member

ORDER

M/s Indian Sucrose Limited has filed the present review petition for reviewing/recalling the order dated 12.04.2021 passed by the Commission in Petition No. 41 of 2020, wherein the Commission disposed of the petition regarding the termination of PPA dated

23.12.2016 and supplementary PPA dated 05.02.2019, for sale of upto 30 MW surplus power to PSPCL from its 40 MW co-generation Power Project at Mukerian, district Hoshiarpur, with the observation that, “it is pertinent to note that Power Procurement from the said project has not yet been approved by the Commission. In such a situation, the Power Purchase Agreement between the two consenting parties is the governing document.” The Commission also referred to Article “16.0.0 DISPUTES AND ARBITRATION” of the PPA providing for that “All Disputes between the Parties arising out of or in connection with this Agreement which the Parties are unable to resolve by mutual discussions shall be determined by arbitration.

2. The review petition was taken up for hearing on admission on 16.06.2021, wherein the respondents PSPCL & PEDDA were directed to file their respective reply on the issue of maintainability of the same. In response to thereof, PEDDA vide its reply dated 05.07.2021 submitted that the relief claimed by the petitioner in the present matter is the sole discretion of the Commission and it is empowered under section 86 (1)(f) of the Electricity Act 2003, to adjudicate between generating company and distribution licensee. PSPCL also vide its reply dated 06.07.2021 submitted that the instant dispute is covered under Section 86(1)(f) of the Electricity Act 2003 and the Commission has the power to adjudicate upon the same. PSPCL also cited the Hon'ble Supreme Court Judgment in GUVNL Vs Essar Power Limited (2008) 4 SCC 755 wherein it has been held that the Regulatory Commissions have the power to adjudicate on all the disputes under Section 86 of the Electricity Act 2003.

3. In the hearing for admission on 07.07.2021, the learned counsels for the parties addressed their respective arguments. In view of the

submissions by all the parties for the adjudication of the instant dispute by the Commission, the Review Petition was admitted vide order dated 14.07.2021 and Petition No. 41 of 2020 was revived for adjudication in the matter with directions that, preliminary submissions in Petition 41 of 2020 are already on record of the Commission. Parties can submit additional submissions, if any, within two weeks with copies to each other and the rejoinders to the same, if any, can be filed thereafter within one week with copies to each other.

4. During the hearing on 18.08.2021, the petitioner requested for time to file an application for proper adjudication of the issues and the Commission allowed the same to be filed within a week and reply to the application by the respondents within a week thereafter. The petitioner filed IA No. 19 of 2021, wherein, the petitioner has submitted:-

- a) That at the time of filing the review application the second wave of Covid-19 pandemic had not hit India. However, during the pendency of the review application, due to the devastating effect of second wave of Covid-19 the entire country was forced again into a complete lockdown. The country is still struggling to come back to normalcy after the second wave and the Hon'ble Supreme Court vide order dated 27.04.2021 again extended the period of limitation. The second wave of Covid-19 Pandemic has had a cascading effect to the various phases of supply and erection of equipment leading to the additional delay in completion of the project. The supplier of various equipment have requested for additional time till January, 2022 for supply and erection of the said essential equipment. Similarly, the supplier of the critical main steam line valve has informed, as on 30.08.2021, that the supply of the said equipment cannot be effected before 25.01.2022 and has therefore sought additional time.

b) That the time sought by the PSPCL in executing the subsequent / supplementary PPA be added to the extension of time granted for commissioning the project as it is only after the subsequent PPA is executed, the Single Line Diagram (SLD) of our 66 KV Switch Yard with Metering CT/PT drawings would be approved by PSPCL and only after the approval of drawings the purchase order for Metering CT/PT can be placed, which would take at least two months to arrive at site. Then the Metering CT/PT will be sent to PSPCL Laboratory for testing & calibration before installation. It is therefore prayed that the second prayer in the review application be amended as to read as under:

“With a further prayer to allow Petition No.41/2020 and prayer under Clause 10.1.0 of the PPA and the provisions under Rule 73 of Regulation 2005 for extension of time upto 28.02.2022 and further as maybe extended from time to time by the Government of India, Ministry of New and Renewable Energy (MNRE) and the Hon’ble Supreme Court due to Covid-19 pandemic for commissioning of the petitioner Company’s Non-fossil fuel based 40 MW Co-generation Power Project with applicable tariff of Rs.6.22 per kWh.

It is further prayed that time taken by respondent No. 1 in executing the subsequent/supplementary PPA be added to the extension granted to the petitioner by this Hon’ble Commission.”

5. PSPCL filed reply to the IA denying the contentions and the allegations raised in the amendment application. PSPCL, reiterating its earlier submissions has further submitted that:-

a) That the application to extend the period of commissioning the project is misconceived and is liable to be dismissed. The

petitioner is not entitled for any extension since the PPA stands validly terminated as on 08.10.2020 and the petitioner had sought extension of time for commissioning upto 31.10.2021 in Petition No. 41 of 2020. The petitioner had failed to commission the project within the stipulate period as agreed in the supplementary PPA dated 05.02.2019 and is now seeking an extension of time till 28.02.2022 and beyond i.e. for a period of almost two years from the SCOD agreed to between the parties.

- b) That the petitioner has been unable to establish how COVID-19 and the alleged restrictions on construction and other activities, delayed the commissioning of the project. The petitioner has already sought for extension upto 31.10.2021 before the spread of COVID-19 and even after the spread of COVID-19 the petitioner had sought for extension till 31.10.2021. The issues with contractors or sub-contractors are not grounds for extension; it is responsibility of the petitioner to ensure that work was done within the time and to deal with the contractors or sub-contractors. The time taken for negotiations on price and time cannot be claimed as reasons for extension.
- c) That the petitioner had not issued any notice for force majeure to either PEDA or PSPCL and in the absence of such notice, the petitioner is not entitled to claim any relief on account of force majeure conditions due to COVID-19 pandemic. PSPCL has relied in this regard on the decision dated 29.05.2020 of the Hon'ble High Court of Delhi in case of Halliburton Offshore Services Inc-v- Vedanta Limited and

Ors. in OMP (I) (COMM) No. 88 of 2020 wherein it was held as under:-

“The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition. The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non performance due to the epidemic/pandemic.

- d) That in Para 1(iv) of the Application, the Petitioner is contending that “if the supply of materials and erection thereafter of the equipment is completed by the suppliers by January 2022, the petitioners shall be able to achieve commissioning of the project by 28.02.2022”. Therefore, the Petitioner is still not certain of its expected commissioning date.
- e) That even assuming that the Petitioner would be entitled to an extension on account of COVID-19 by virtue of the office Memorandum dated 13.08.2020 issued by MNRE, the relief, if any, is only valid for the period of 5 months from 25.03.2020 to 24.08.2020. Since the SCOD of the Project was 30.03.2020, the extended SCOD could be only till 29.08.2020. Therefore, even with the benefit of the extension as stipulated by the MNRE OM, the Petitioner has not achieved the commercial operation till 29.08.2020. Therefore, there is no question of any further extension on

account of the second wave of the pandemic w.e.f. 01.04.2021 till 15.05.2021 or otherwise.

- f) That the reliance sought to be placed on the Order dated 27.04.2021 of the Hon'ble Supreme Court, as a justification for extension of the timelines of commissioning under the PPA, is misconceived. The said Order was passed by the Hon'ble Supreme Court extending the period of limitation for instituting proceedings before the Competent Authority/Court/Commission/Tribunal and can, by no stretch be extended to include the timelines prescribed in the PPA/Supplementary PPA between the parties. The issue has to be considered in terms of the agreement between the parties.

6. PEDDA filed its reply reiterating its earlier submissions and further submitted that the relief claimed in the present matter is the sole discretion of the Commission and the Commission may pass appropriate orders as deemed fit in the facts and circumstances of the case. PEDDA submitted that the IA is still valid and they are willing to consider the request for extension, since it is promoting the renewable energy project and want it to be commissioned.

7. In the hearing on 29.09.2021, the learned counsel for the parties addressed the arguments at length which reiterated their respective assertions filed in the petition and in their replies and rejoinders. After hearing the parties, the Order was reserved with directions to the parties that they may also file their respective written arguments within a week.

8. Observations and Decision of the Commission

The Commission has carefully gone through the petition, review petition, replies of PSPCL & PEDDA, rejoinders/IA by the petitioner and other

submissions made by the parties. The Commission observes that, the petitioner is disputing the PSPCL's order/letter dated 08.10.2020 terminating the PPA/Supplementary PPA for sale of power from its Co-generation Power Project and is seeking grant of extension in period of commissioning of the project. The observations and decision of the Commission are as under:

8.1 The issue of the termination notice issued by PSPCL

The petitioner is pleading that non-commissioning of the project does not come under the 'event of default' under the Agreement, since as per the definition of 'Duration' and provisions of clause 12, the Agreement would come into force after the commissioning of the project. Its obligations as mentioned in clause 13 would start only after commissioning is achieved by the Generating Firm. The petitioner submitted that the only ground for termination on account of non-commissioning is available under clause 13.6.0 of the Agreement, in the event of non-starting of generating facility even after 3 years from the SCOD.

Whereas, PSPCL has objected to the said interpretation with the submission stating that in such a case it would mean that the Agreement does not come into force on the signing of Agreement, which is incorrect. It was submitted that PSPCL had rightly issued the termination notice, as non-commissioning within the stipulated time mutually agreed upon between the parties is a breach of material obligation by the Petitioner and therefore squarely covered under clause 13.1.0 (c) of the Agreement as an 'event of default'. PSPCL has also contested the Petitioner's plea that the ground for termination in case of delay in commissioning is available only under clause 13.6.0 of the Agreement i.e. if it fails to

commission the project even after 3 years from the SCOD. PSPCL has contended that the said provision does not cover default termination, under which the PPA can be terminated by either party for any reason of default. If this argument of the Petitioner is accepted, it would tantamount to providing an automatic extension of three years in the SCOD.

The Commission refers to the said provisions of the Agreement and decides as under:

a) The term “Duration of the Agreement” is defined in the Agreement as under:

“Duration of the Agreement” means 20(twenty) years from the date of Commissioning of the project as per clause-12 of the Agreement.”

And, clause-12 of the Agreement specifies as under:

“12.0.0 TERM of THE AGREEMENT

12.1.0 Except where terminated by default, this Agreement shall remain in force for a period of 20 (Twenty) years from the date of commissioning of the Project which could be extended through mutual agreement.”

The Commission is of the view that the above definition read with the clause-12, refers to the validity of the Agreement. In case the petitioners plea that the “Agreement” would come into force only after the commissioning of the project is accepted, then the very applicability of the Agreement till the commissioning of the project would become questionable and there would be no ground for the instant adjudication. However, petitioner argument on the applicability of clause 13 of the PPA being possible and allowable only after the

commissioning of the project also needs to be examined and interpreted.

b) The relevant provisions under Clause 13.0 of the Agreement, specify as under:

“ 13.0.0 Events of Default and Termination

13.1.0 The occurrence of any or combination of the following events at any time during the term of this Agreement shall constitute an Event of Default by the Generating Firm:-

- a)*
- b)*
- c) Failure or refusal by the Generating Firm to perform its material obligations under this Agreement.*

.....

13.3.0 ...If an Event of Default by either party extends for a period of sixty (60) calendar days after receipt of any written notice of such Event of Default from the non-Defaulting party, then the non-defaulting party may, at its option, terminate this agreement by delivering written notice of such termination to the party in default.

i)

ii) If the default pertains to the Generating Firm the PSPCL may at its option:

a) Require the Generating Firm to cure the default and resume supply to the PSPCL within sixty (60) days of receipt of notice from the PSPCL.

b) If the Generating Firm is unable to cure the default and resume supply within the stipulated time frame and in consequence thereof, the project is sold or transferred or assigned to any third party. In compliance with the provisions of any

agreement(s) executed by the Generating Firm with any third party for raising equity/debt for the project or in terms of the implementation Agreement executed with PEDDA, require such third party to cure such Generating Firm Default and resume supply from the Generating Facility to the PSPCL for the remaining Term of the Agreement.

c) Terminate the Agreement.

.....
13.6.0 *Either the PSPCL or the Generating Firm may terminate this Agreement upon notice to the other party, if the Generating Facility fails to begin producing electric energy within three (3) years from the Scheduled commercial operational date.”*

PSPCL has issued notice of default and termination to the petitioner citing event of default and failure to meet material obligation under clause 13.1.0(c). The Commission observes that the clause 13.1.0 of the Agreement listing the “Events of Default” by the generating firm, under sub-clause (c) specifies the “failure by the Generating Firm” to perform its “material obligations” under the Agreement” as an “event of default”. However, the term “material obligation” is not defined in the agreement. The Agreement under clause 13.3.0 (ii) further specifies the options available to PSPCL in the event of default by the petitioner; wherein the options are of curing default and to “resume supply to PSPCL” by the generating firm or by the third party (to which the project is so assigned) are made available under sub-clauses (a) and (b) respectively. Thereafter, the option of termination is provided only under sub-clause (c).

Further, a provision for termination of the Agreement, by either party, is also incorporated under clause 13.6.0, in case the Generating Facility fails to commission the project within three years from the SCOD.

The Commission is of the view that all the relevant provisions of an agreement need to be read in conjunction and reliance cannot be placed on selective reading of the same. The complete reading of clause 13 of the Agreement indicates that provisions of clause 13.3.0(ii) are applicable in the event of failure to “resume supply” by the Generator. Thus, this clause of event of default and failure to meet material obligations are obviously only applicable post commissioning of the project since the word “resume” necessarily implies the factum of supply of power having started and subsequently stopped, which was then required to be “resumed”. All other clauses in 13.1.0 indicating types of events of default by the generator also deal with issues which can occur post commissioning and starting generation.

On the other hand, clause 13.6.0 pertains only to the event of failure to commission the project, wherein a period of three years from the date of SCOD is mandated before the termination clause can be invoked. Accordingly, the Commission is of the view that issuance of notices of default and termination of Agreement by PSPCL under sub-clause (c) of clause 13.3.0 (ii) of the Agreement is not in order. Hence the notice is held invalid and against the provisions of PPA and is thus set aside. Thus, the PPA signed in 2016 and supplementary PPA of 2019 remain valid and there is no reason to have another supplementary PPA as prayed for by the Petitioner.

8.2 Prayer for extension in the period of commissioning:

The petitioner is seeking extension in the period of commissioning of the project with the agreed tariff of Rs. 6.22 per kWh. The prayer in Petition 41 of 2020 as well as in the instant Review Petition initially was for grant of extension upto 31.10.2021. The same has been revised by the Petitioner vide IA 19 of 2021 for extending the period of commissioning upto 28.02.2022 and further in case more time is taken by PSPCL in signing another supplementary PPA. Since the Commission has already held that the earlier PPA signed in 2016 and the supplementary PPA signed in 2019 are still valid, there seems no reason to sign another PPA now. The petitioner's plea for extension upto 28.02.2022 is examined below.

The Petitioner has submitted that it has invested a substantial amount of over Rs. 100 crore already and the project is 90% complete as on date of filing of the Review Petition. It sincerely wants to complete the project, but due to the reasons which were beyond its control as indicated in the petition/review, the project could not be commissioned till now and will take some more time. It was also submitted that as per clause 10.1.0 of the PPA and supplementary PPA, PEDDA is competent to extend the Commissioning date of the project; accordingly the petitioner had also sent a request letter dated 17.08.2020 to PEDDA for extension of SCOD upto 31.10.2021, with a copy of the same to PSPCL.

However, PSPCL is contending that the petitioner is not entitled for any extension since the PPA stands validly terminated on 08.10.2020. PSPCL also referred to the decision of Hon'ble Supreme

Court in Gujarat Urja Vikas Nigam Limited Vs Solar Semiconductor Power Company (India) Private Limited and Another (2017) 16 SCC 498, holding as under:

“Commissioning of a project is the act to be performed in terms of the obligations under the PPA and that is between the producer and the purchaser viz. Respondent 1 and the 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 an extension of the control period under the inherent powers of the Commission.”

PSPCL has also submitted that under the Agreement, extension if any, can only be granted by PEDA keeping in mind the interest of PSPCL. The Petitioner approached PEDA on 17.08.2020 seeking extension after issuance of the default notice by the PSPCL. PEDA forwarded a copy the Petitioner's letter dated 17.08.2020 to PSPCL on 25.09.2020 for their response and has not yet granted an extension.

The Commission observes that it has held the termination notice issued by PSPCL to be unjustified and invalid in the above paras. The Commission is also aware of the adverse effects of the Covid-pandemic and restrictions imposed by the Governments to control the spread of same. Considering the adverse impact of Covid-19, MNRE has also allowed extension to all RE projects under implementation through RE Implementing Agencies designated by the MNRE or under

various schemes of the MNRE and also advised the State Agencies to consider the same. Further, the Commission notes that the terms and conditions of Power Purchase Agreements entered into by the parties specify that the date of commissioning can be extended by PEDDA, which has already, unequivocally, submitted at the bar and in written submissions that the IA is still valid, and that it is willing to grant the extension as required, since it is promoting the renewable energy project. The Commission is also conscious of the fact that, PSPCL is still substantially deficient in RPO compliance and is not able to meet with its Renewable Purchase Obligations and has sought exemptions and reduction of RPO Compliance requirements from the Commission over the last couple of years. Moreover, the power from the project after the renegotiated and reduced rate of Rs.6.22 per kWh as defined in the supplementary PPA signed in 2019, is economical as compared to the applicable generic tariff of Rs. 6.69 per kWh for FY 2020-21 and other comparable Bagasse based projects whose PPAs with PSPCL already stand approved by the Commission vide Order dated 16.12.2020 in petition no. 17 of 2020 filed by PSPCL seeking the Commission's approval. Accordingly, keeping in view the mandate to promote generation of electricity from renewable sources of energy given under the Electricity Act, the Commission based on PEDDA's willingness to grant extension, allows the petitioner to commission the project by 28.02.2022, the revised date sought by the petitioner and endorsed by PEDDA. PEDDA may appropriately amend their IA as per their submission and

PSPCL may extend the required support for technical clearances to ensure commissioning by 28.02.2022.

The review petition along with IA is disposed of accordingly.

Sd/-
(Paramjeet Singh)
Member

Sd/-
(Anjuli Chandra)
Member

Sd/-
(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: 02.11.2021

