

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA**

Case No. HERC/PRO-5 of 2019

**Date of Hearing : 25.04.2019
Date of Order : 10.05.2019**

In the Matter of

Application seeking intervention of the Commission under section 86 (1)(e) & (f) and section 142 & 146 of the Electricity Act, 2003 read with Reg. 64(3) of HERC Regulation No. 23/2010 and implementation of order passed by the Commission in petition no. HERC/PRO-24 of 2015 dated 20.01.2016.

Petitioner

M/s Siwana Solar Power Projects Pvt. Ltd.

Respondent

Haryana Power Purchase Centre (HPPC)

Present On behalf of the Petitioner

1. Sh. R. K. Jain, Advisor

Present On behalf of the Respondent

1. Sh. Shubham Arya, Advocate, HPPC
2. Sh. Gaurav Gupta, Xen, HPPC
3. Smt. Seema Sadana, AE, HPPC

Quorum

**Shri Jagjeet Singh, Chairman
Shri Pravindra Singh Chauhan, Member**

ORDER

Brief Background of the Case

1. The Petitioner has filed the instant petition seeking intervention of the Commission under section 86 (1)(e) & (f) and section 142 & 146 of the Electricity Act, 2003 read with Reg. 64(3) of HERC Regulation No. 23/2010 and implementation of order passed by the Commission in petition no. HERC/PRO-24 of 2015 dated 20.01.2016.
2. The Petitioner has submitted as under:-

- i) That M/s Siwana Solar Power Projects Pvt. Ltd. has set up a 5 MW Solar Power Project in Village Mithi of Distt. Bhiwani.
- ii) That Haryana State Government vide Notification No. 22/69/2005-5P dated 25.11.2005 notified "Policy for promoting generation of electricity through Renewable Energy Sources." As per this policy the power generated by the renewable energy sources is to be purchased by the State Power Utilities at rates determined by the State Commission.
- iii) That the Haryana Electricity Regulatory Commission vide Regulations No. 23/2010/1st Amendment/2011 dated 05.09.2011 made specific provision regarding purchase of power from renewable energy generating stations located in Haryana, which reads as under:-
- "(3) In case the renewable energy generating company offers to sell energy generated by it from its renewable energy generating station located in Haryana to the distribution licensee at the rates determined by the Commission, the distribution licensee shall not refuse to purchase power from such generating company, without prior approval of the Commission."*
- iv) That in view of the delay in signing of Power Purchase Agreement by the distribution licensee, the Petitioner approached the Commission seeking suitable directions to expedite the signing of the PPA. The Commission vide its order dated 05.11.2013 in the case of M/s Siwana Solar Power Projects Pvt. Ltd. Vs HPPC gave following directions:-
- "The Commission is in an advanced stage of passing an order determining tariff from renewable energy power projects to be commissioned in FY 2013-14. Accordingly, the Commission directs HPPC/ Discoms to conclude the PPA with the Petitioner at the tariff determined by the Commission for the projects to be commissioned in FY 2013-14 provided the Petitioner undertakes that he shall start generation by 31st March, 2014"*
- v) That in spite of best efforts made by the Petitioner Company, the PPA could not be concluded till Feb. 2014, leaving hardly any time for the completion of the project by the scheduled date of 31st March, 2014.
- vi) That the Respondent Nigam made submissions before the Commission vide office Memo. No. Ch.-42/HPPC/SE/C&R-1/T-26F dated 11.12.2013. The Commission after considering the above submissions made by the

Respondent reiterated its directions vide Memo. No. 3467/HERC/Tariff/PPA-Siwana Solar dated 19.12.2013, as under:-

“Regarding signing of PPA with Siwana Solar Power Project Private Limited, you are directed to sign the PPA in the next one week with a stipulation that the project developer shall start generating and supplying power before 31.03.2014. In case he fails to do so, the tariff to be determined by the Commission for FY 2014-15 onwards shall apply. Further, in case the project developer fails to generate and supply power before 30.06.2014, the PPA shall lapse.

It is made clear that if HPPC fails to sign PPA in the next one week with the above stipulations, the Commission may initiate action against the officer concerned for non-compliance of its orders.”

- vii) That the PPA was signed on 21.02.2014, although this PPA had many peculiarities which were in violation to the PPA approved by Commission. Some of such provisions were as follows:-

Clause 4.1 Sale of Energy by Company:

The HPPC shall purchase and accept all energy available at the Delivery point from the Company’s facility, pursuant to the terms and conditions of this agreement as per the amount claimed by the Company for the energy delivered for sale (including captive/auxiliary consumption of Solar Power generated less the energy imported by IPP) of electricity generated from Solar PV Crystalline Power Plant valid for a period of 25 years during the Billing period at the following tariff whichever is the lowest rate out of the following three options:

- a) *Generic tariff decided by HERC i.e. Rs.7.94 for FY 2013-14 in case the plant is commissioned before 31.03.2014 or Rs.7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.06.2014.*
- b) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015.*
- c) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015, as per solar policy of Govt. of Haryana.”*

In addition, no provision was made for various important ingredients of any Power Purchase Agreement, like, Payment Security Mechanism

(PSM), Deemed Generation benefit, exemption from transmission/wheeling charges, etc.

- viii) That in view of various reasons causing delay in execution of the project, the Petitioner Company again approached the Commission through Petition No. HERC/PRO-56 of 2014 seeking following major reliefs:-
- I. *Hon'ble Commission may kindly give suitable directions to the Respondent to amend Clause 4.1 of the PPA to bring it in line with the directions issued through its order dated 05.11.2013 i.e. tariff to be paid to the Project Developer as per the Generic Tariff decided by the HERC;*
 - II. *Hon'ble Commission may kindly allow extension for completion of the project by 6 months i.e. to be completed before 31.12.2014.*
- ix) That the Commission considered the above request and appreciating the efforts made by the Petitioner Company granted following relief vide order dated 29.09.2014:-
- "The Commission reiterates that the objective of this Commission is to bring the project into generation hence a practical view, given the facts and circumstances of the case, needs to be taken in the matter especially in view of the fact that the Electricity Act, 2003 has made it obligatory on the part of the Commission to promote renewable sources of power generation.*
- In view of the above discussions and the fact that the RE tariff order for FY 2014-15 has been issued, the Commission allows time upto 31st December, 2014 to the Petitioner to bring the project into generation. Thereafter, there shall be no further relaxation and the PPA shall lapse. Further as the project is likely to be commissioned in FY 2014-15, the tariff determined by this Commission for such projects for FY 2014-15 shall be the applicable tariff."*
- x) That the Commission determined the Generic Tariff for Renewable Energy Projects to be commissioned during FY 2014-15 vide order dated 13.08.2014. As per this order, the first year tariff for Solar PV (Crystalline) Projects was determined as Rs. 9.93/kWh with a levelized tariff over the life of the project as Rs.7.45/kWh.
- xi) That based on the conjoint reading of the above two orders, it was clear that the tariff for the Project of the Petitioner Company was to be as determined by

the Commission through its order dated 13.08.2014. Accordingly, the Petitioner Company raised first Bills for the sale of power to the Respondents vide Invoice Nos. SSPPPL/HPPC/14-15 dated 11.03.2015 (for the period 31.12.2014 to 11.03.2015) and dated 01.04.2015 (for the period 11.03.2015 to 01.04.2015). The tariff charged was Rs.9.93/kWh as approved by the Commission vide order dated 13.08.2014.

- xii) That the Respondents instead of making payment as per the approved tariff, made illegal deductions and paid the bills at much lower tariff rate of Rs.6.44.
- xiii) That the Petitioner being aggrieved by the action of the Respondent filed Petition No. HERC/PRO-24 of 2015, with the following prayers:-

(i) To direct the Respondent No.1 to pay for the energy injected by the Petitioner at the tariff approved by the Commission vide its Generic Tariff Order dated 13.08.2014;

(ii) To direct the Respondent No.1 not to deduct any wheeling charges for the Solar Power Project of the Petitioner; and

(iii) To direct the Respondent No.1 to allow deemed generation benefit for the period when power is not injected into the system due to the fault of the Respondent Nigam beyond 87.6 hours a year, allowed by the Commission.

- xiv) That the Commission after considering the views of the Petitioner and the Respondents decided the matter vide its order dated 20.01.2016. The operative part of the order regarding tariff to be paid to the Petitioner Company read as under:-

“This Order of this Commission has not been challenged by any parties and, as such, has attained finality. In view of the above, the issue regarding the amendment of Clauses 2.1.41 and 4.1 of the PPA relating to applicable Tariff needs no further adjudication and the tariff payable to the generator by HPPC shall be as per the provisions of the PPA.

Further, during the course of arguments, the Commission suggested that the year to year tariff should be worked out corresponding to the levelized tariff of Rs. 6.44 per unit and the year to year tariff so worked out be paid to the Petitioner by Respondent No. 1. This proposal was agreed to by the Respondent No. 1. Accordingly, the Commission

directs Respondent No. 1 to work out the year to year tariff for 25 years corresponding to the levelised tariff of Rs. 6.44 per unit and pay the tariff to the Petitioner so worked out for the relevant year.”

- xv) That in spite of repeated requests made by the Petitioner, the Respondent did not comply with the above directions by the Commission and continued to pay at the levelised tariff of Rs.6.44. Due to non-compliance of the order passed by Commission dated 20.01.2016 by the Respondent, Petitioner Company had to suffer severe financial hardship and due to lack of adequate cash flow from the Project it was not able to discharge its loan repayment liability to the Bankers.
- xvi) That the petitioner Company filed an Appeal in Hon'ble APTEL against the order of the Commission dated 20.01.2016 under section 111 of the Electricity Act, 2003 as Appeal No. 150 of 2016 and is pending consideration of the Hon'ble Tribunal.
- xvii) That in the meanwhile, the Respondent filed Petition No. HERC/PRO-6 of 2016 in the matter of “Petition/application for approval of draft PPA signed with four Solar Power Developers selected through Tender under NIT No. 51”. This was the same NIT based on which the levelised tariff of Solar Power was discovered as Rs.6.44/kWh and Commission allowed to the Petitioner vide order dated 20.01.2016.
- xviii) The above Petition was considered by Commission and order passed on 12.09.2016/04.10.2016. Through this order the Commission nullified the bidding process undertaken by the Respondent under NIT No. 51 on the ground that the Standard Bidding Process was not followed by the Respondent. Relevant portions of the order are reproduced hereunder:-

“In the present case there is some confusion created regarding existence of Standard Bidding Document (SBD). HPPC, in response to the queries of the Commission did submit SBD and the deviations made by them. However, at a later stage the said SBD turned out to be a draft which was never finalized and notified by the MNRE. As far as this Commission is concerned the SBD submitted by HPPC has been considered as the benchmark. Besides the SBD, what does exist, is the MNRE Guidelines for procurement of RE power by competitive bidding.

It is well established that the objective of the competitive bidding is to protect and balance the interest of all the parties concerned i.e.

the distribution licensees, the bidders and the consumer. In other words, the entire competitive bidding process is not only to discover the tariff but also to discover the supplier who would be able to supply the required quantum of power to the procurer in timely manner.

In the present case, the NIT in question admittedly incorporated quite a few clauses which impinged upon the very objectives of inviting competitive bidding for procurement of Solar Power on a long term basis. Further, the statutory requirement of recommendations of the 'Evaluation Committee' on the reasonableness of the tariff so discovered was never fulfilled. The significance of the recommendations of the evaluation committee ought not to be diluted. As given the limited number of private players in the market, the tariff discovered through competitive bidding may not always be aligned to the market. Thus, the Commission, in the present case, did not have the benefit of the mandatory report of the evaluation committee.

The Commission is also constrained to take a somewhat liberal view given the predicament of the petitioner and the bidders in view of the provisions in the National and Haryana State Policy for Promotion of Solar Power.

As per the Ministry of New & Renewable Energy (MNRE), Government of India (GoI), Haryana has Solar Potential of 4.56 GWp. As against the said potential as on March, 2016 only 12 MW has been commissioned in Haryana and another 200 MW has been allotted under the State Solar Policy. Further, at 3% Solar RPO by the year 2022 about 1300 MW Solar Power is required and if the RPO is scaled up to 8% in line with the National Tariff Policy, 2016 the Solar Power requirement shall be about 3200 MW including the target of 1600 MW Rooftop capacity. It is therefore evident that the Solar Power Capacity addition has to be stepped up in the State.

Given the position discussed above and the fact that this Commission, on many occasions, has emphasized the need for procurement of RE Power by the Discoms as well as taken serious note of shortfall in both Solar as well as Non-Solar RPO. Hence, to balance the equity on both sides the Commission Orders as under:-

- i) In order to restore HPPC and the successful bidders to their initial status, HPPC shall restore the bank guarantee, if not already done, as well as CPG amount without any other cost i.e. interest etc.*
 - ii) However, in the case of the successful bidders who have already commissioned their plants or are nearing completion (more than 80% complete) under the PPA executed by HPPC, and are willing, may explore the possibilities for arriving at an equitable and reasonable solution to arrive at a tariff aligned to the prevailing market conditions subject to the ceiling of the project cost determined by CERC for the FY 2016-17 in accordance with the 6.4 (3) of the National Tariff Policy, 2016 and HERC RE Regulations in vogue as the projects are likely to be commissioned during FY 2016-17 only. In such an event HPPC, shall submit the outcome arrived at for the consideration and Order of the Commission, before 30th September, 2016.*
 - iii) In case of successful bidder(s), other than those covered in point no. ii above, the PPAs are not approved. HPPC, if required, may invite fresh bids after following the due process prescribed for the purpose and these bidders may be given preference in the next round of fresh bids to be called by the Power Utilities in the State. The developer shall be allowed to supply the quantity of power for which the PPA has already been signed and at the rate allowed to the successful bidder in that round of procurement of Solar power.”*
- xix) That in view of the above order passed by the Commission, the price claimed to have been discovered against NIT No. 51 became void ab-initio and could not be considered with reference to Clause 4.1 (b) of the PPA dated 21.02.2014. In these circumstances the tariff to be allowed to the Petitioner Company as per Clause 4.1 (a) of the PPA has to be made applicable as per the Generic Tariff determined by the Commission for the projects getting commissioned during FY 2014-15 vide order dated 13.08.2014.
- xx) That in the meanwhile, the Respondents to Petition No. HERC/PRO-6 of 2016 in the matter of “Petition/application for approval of draft PPA signed with four

Solar Power Developers selected through Tender under NIT No. 51” filed Appeal No. 278 of 2016 (M/s JBM Solar Power Pvt. Ltd. and Appeal No. 307 of 2016 (M/s Subhash Infra Engineers Pvt. Ltd. & M/s Utrecht Solar Pvt. Ltd.) in Hon’ble Appellate Tribunal of Electricity.

- xxi) That Hon’ble Tribunal passed an order dated 13.12.2016 as an interim arrangement, without expressing any opinion on the merits of the appeals, and allowed tariff of Rs.5.68/kWh to the Appellants.
- xxii) That Hon’ble Tribunal after going in the merits of the appeals passed the final order on 09.03.2018. The operative part of the said order is reproduced as under:-

“The Impugned Order (Common Order dated 12.09.2016/ 4.10.2016) on the file of the Haryana Electricity Regulatory Commission is hereby set aside to the extent stated above and is remanded to allow the PPAs signed between the Appellants and the Respondent No. 2 as held at preceding paragraph 12. e(x) above in the interest of justice and equity. The IA No. 573 of 2016 is disposed of as such.”

The relevant Paragraph 12. e (x) of the order read as under:-

12. e (x) *“In view of the facts and circumstances of the case, we are of the considered opinion that the PPAs signed between the Appellants and Respondent No. 2 be allowed by the State Commission at the tariff of Rs. 5.68/kWh (without accelerate depreciation) determined by CERC for FY 2016-17.”*

- xxiii) That the above order passed by Hon’ble Tribunal had no relevance to the Petitioner. The main features of the above order need to be appreciated i.e.
- (i) the tariff allowed by Hon’ble Tribunal was for the Developers who were party to Appeals mentioned in the order.
 - (ii) the tariff was not an outcome of the bidding process undertaken by the Respondent Nigam but the adoption of a tariff determined by CERC.
 - (iii) the tariff determined by CERC was for projects getting commissioned in FY 2016-17 and not for the projects already commissioned in earlier years.
- xxiv) That the project of the Petitioner Company was commissioned in the year FY 2015-16 and not FY 2016-17. Therefore, the above tariff was not relevant to the project of the Petitioner Company.

xxv) That the Respondent did not obey/comply with the directions/orders of the Commission dated 20.01.2016, which had clearly laid down the tariff to be paid to the Petitioner Company, as under:-

“Accordingly, the Commission directs Respondent No. 1 to work out the year to year tariff for 25 years corresponding to the levelised tariff of Rs. 6.44 per unit and pay the tariff to the Petitioner so worked out for the relevant year.”

xxvi) That the Respondent instead of complying with the above order/directions, initially continued to pay @ Rs.6.44 (the levelised tariff) without working out the year to year tariff in gross violation of the directions of the Commission. Much to the discomfort of the Petitioner, the Respondent went a step further and stopped making payments of the bills of the Petitioner since January 2018 and instead started considering the tariff for the project of the Petitioner Company as Rs. 5.68/kWh, since the commissioning of the project i.e. right from 30.05.2015 against the tariff of Rs.6.44/kWh allowed by the Commission vide order dated 20.01.2016. The Respondent even did not feel necessity of getting the order of the Commission dated 20.01.2016 amended from the Commission or obtain a fresh order on the tariff to be allowed to the Petitioner.

xxvii) That as on date following bills of the Petitioner Company are pending for payment:-

Bill No. & Date	Period	Amount as per bill	Payment made
SSPPL/HPPC/17-18/04	July 2017	54,25,122	39,83,784
SSPPL/HPPC/17-18/05	Aug. 2017	51,42,815	37,76,480
SSPPL/HPPC/17-18/06	Sept. 2017	52,73,050	38,72,114
SSPPL/HPPC/17-18/07	Oct. 2017	54,10,338	39,72,965
SSPPL/HPPC/17-18/08	Nov. 2017	41,50,139	30,47,537
SSPPL/HPPC/17-18/09	Dec. 2017	39,33,345	28,88,340
SSPPL/HPPC/17-18/010	Jan. 2018	44,25,868	0
SSPPL/HPPC/17-18/011	Feb. 2018	49,09,972	0
SSPPL/HPPC/17-18/012	March 2018	61,51,826	0
SSPPL/HPPC/18-19/01	Apr. 2018	60,51,826	0
SSPPL/HPPC/18-19/02	May 2018	60,03,678	0
SSPPL/HPPC/18-19/03	June 2018	34,22,931	0
SSPPL/HPPC/18-19/04	July 2018	27,53,605	0
SSPPL/HPPC/18-19/05	Aug. 2018	28,01,489	0
Total		6,58,99,919	2,15,41,220

xxviii) That the Respondents stopped making payments since July 2017 and on enquiry it was gathered that they are adjusting the previous bills paid at the HERC approved rate of Rs.6.44/kWh and that allowed by Hon'ble APTEL in Appeal No. 278/2016 and 307/2016 vide order dated 09.03.2018. To the surprise of the Petitioner, the Respondents were also adjusting interest on the so called excess amount paid to the Petitioner.

xxix) That the action taken by the Respondents is totally in violation of the orders passed by the Commission dated 20.01.2016 and the contents of the PPA entered into between the parties on 21.12.2014. We may draw attention of this Commission to the relevant portions of these documents:-

a) The PPA signed with the approval of the Commission dated 21.02.2014 provided as under:-

Clause 4.1 Sale of Energy by Company:

The HPPC shall purchase and accept all energy available at the Delivery point from the Company's facility, pursuant to the terms and conditions of this agreement as per the amount claimed by the Company for the energy delivered for sale (including captive/auxiliary consumption of Solar Power generated less the energy imported by IPP) of electricity generated from Solar PV Crystalline Power Plant valid for a period of 25 years during the Billing period at the following tariff whichever is the lowest rate out of the following three options:

- a) *Generic tariff decided by HERC i.e. Rs.7.94 for FY 2013-14 in case the plant is commissioned before 31.03.2014 or Rs.7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.06.2014.*
- b) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015.*
- c) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015, as per solar policy of Govt. of Haryana."*

b) The Commission order dated 20.01.2016 read as under,

"This Order of this Commission has not been challenged by any parties and, as such, has attained finality. In view of the above, the issue regarding the amendment of Clauses 2.1.41 and 4.1 of the PPA relating to applicable Tariff needs no further adjudication and the tariff

payable to the generator by HPPC shall be as per the provisions of the PPA.

Further, during the course of arguments, the Commission suggested that the year to year tariff should be worked out corresponding to the levelised tariff of Rs. 6.44 per unit and the year to year tariff so worked out be paid to the Petitioner by Respondent No. 1. This proposal was agreed to by the Respondent No. 1. Accordingly, the Commission directs Respondent No. 1 to work out the year to year tariff for 25 years corresponding to the levelised tariff of Rs. 6.44 per unit and pay the tariff to the Petitioner so worked out for the relevant year.

- xxx) That in view of the above order/directions of the Commission dated 20.01.2016, the Respondents were required to take action as per the above directions i.e. to work out the year to year tariff for 25 years corresponding to the levelised tariff of Rs.6.44 per unit and pay the tariff so worked out for the relevant year to the Petitioner. The Respondent failed to take the above action and as such violated the orders passed by the Commission, which makes it liable for punishment under section 142 and 146 of the Electricity Act, 2003. These provisions under the Act read as under,

“Section 142. (Punishment for non-compliance of directions by Appropriate Commission):- *In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.*

Section 146. (Punishment for non-compliance of orders or directions):- *Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one lakh*

rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to five thousand rupees for every day during which the failure continues after conviction of the first such offence”

- xxxi) That conjoint reading of the above provisions under the Act it is a clear violation of the orders/directions of the Commission and the Respondents deserve to be punished as per the above provisions of the Act.
- xxxii) That while the Respondents were acting totally against the order/directions given by the Commission, they went a completely derogatory step further when they stopped making payments of the Invoices raised by the Petitioner since July 2017 and even adjusting the earlier payments assuming the tariff as Rs.5.68/kWh for the Petitioner’s project and interest on so called extra payments. As already stated above the Respondent owes payment of Rs. 4,43,58,699 (Rs. Four Crore, forty three lakh, fifty eight thousand, six hundred ninety nine only) till the raising of Invoice for the month of Aug. 2018, in addition to the interest for delay in payment as per the PPA.
- xxxiii) That the above action of the Respondent in assuming the tariff of the Petitioner’s project as Rs.5.68/kWh is again in violation of the order passed by the Commission dated 20.01.2016, but even against the basic provisions of the PPA.
- xxxiv) That the Commission may kindly look at the genesis and order/directions of the Hon’ble Tribunal dated 09.03.2018 passed in Appeal No. 278 of 2016 (M/s JBM Solar Power Pvt. Ltd. and Appeal No. 307 of 2016 (M/s Subhash Infra Engineers Pvt. Ltd. & M/s Utrecht Solar Pvt. Ltd). The order was in totally different matters and the linking of the two issues is not only illegal but in gross violation of the orders of the Commission dated 20.01.2016 and that of the order of the Hon’ble Tribunal dated 09.03.2018.
- xxxv) That while the order passed by the Commission dated 20.01.2016 in Petition No. HERC/PRO-24 of 2015 filed by the Petitioner was regarding tariff to be paid for the power sold by the Petitioner to the Respondents, and the Appeal Nos. 278/2016 and 307/2016 were filed by Appellants challenging the common order of the Commission dated 12.09.2016/04.10.2016 passed in Petition No. HERC/PRO-6 of 2016.
- xxxvi) That as per Clause 4.1 of the PPA, the tariff to be allowed to the Petitioner was to be the lowest of the 3 options i.e.

- a) *Generic tariff decided by HERC i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.03.2014 or Rs.7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.06.2014.*

The Commission determined generic tariff for Solar PV Crystalline projects commissioned in 2014-15 as Rs. 9.93/kWh for 1st year and Rs.7.45/kWh as the levelised tariff vide order dated 13.08.2014. As per this clause of the PPA, this tariff should have been given to the Petitioner.

- b) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015.*

The Respondent (HPPC) did initiate long term tender process for purchase of 50 MW +/- 10% in April 2014. Total offers of 124 MW were received from various bidders/developers. These bids were opened on 23.02.2015. The lowest tariff quoted was Rs.6.50/kWh for 1 MW. During negotiations, the L1 bidder with a capacity of 1 MW offered to lower the tariff to Rs.6.44/kWh. This price was offered to other bidders and finally the Respondent could tie up capacity of 23 MW as against the bidding for 50 MW. Letters of Intent were issued to these successful bidders and followed by signing of the PPAs during the period Feb.-June 2015.

As there were no standard/approved procedure/documents issued by the Central Commission, the Respondents followed the draft bidding documents as a reference. Various clarifications were asked for by the Commission of these documents but before getting final approval from the Commission, the Respondents went ahead with the bidding process based on the unapproved draft documents. However, the Commission had given a go ahead signal with clear directions to file the outcome of the bidding process to the Commission for approval of the PPAs.

When the PPAs were submitted by the Respondents to the Commission for approval vide Petition No. HERC/PRO-6 of 2016, the Commission deliberated on the contents of the Petition and the operative order passed by the Commission (in view of the casting vote exercised by Hon'ble Chairman of the Commission) dated 12.09.2016/04.10.2016 read as under:-

- i) *In order to restore HPPC and the successful bidders to their initial status, HPPC shall restore the bank guarantee, if not already done, as well as CPG amount without any other cost i.e. interest etc.*
- ii) *However, in the case of the successful bidders who have already commissioned their plants or are nearing completion (more than 80% complete) under the PPA executed by HPPC, and are willing, may explore the possibilities for arriving at an equitable and reasonable solution to arrive at a tariff aligned to the prevailing market conditions subject to the ceiling of the project cost determined by CERC for the FY 2016-17 in accordance with the 6.4 (3) of the National Tariff Policy, 2016 and HERC RE Regulations in vogue as the projects are likely to be commissioned during FY 2016-17 only. In such an event HPPC, shall submit the outcome arrived at for the consideration and Order of the Commission, before 30th September, 2016.*
- iii) *In case of successful bidder(s), other than those covered in point no. ii above, the PPAs are not approved. HPPC, if required, may invite fresh bids after following the due process prescribed for the purpose and these bidders may be given preference in the next round of fresh bids to be called by the Power Utilities in the State. The developer shall be allowed to supply the quantity of power for which the PPA has already been signed and at the rate allowed to the successful bidder in that round of procurement of Solar power.*

It needs to be appreciated that the Commission had made some of the basic observations and held that the Respondent had not followed the standard bidding guidelines of the Government of India and even there were deviations which were not approved by the Commission. Therefore the power procurement against this tendering process was rejected. Hence the rates determined against this bidding process were not in line with the provision under the PPA.

There is another important factor to be considered that the tariff allowed by the Hon'ble Tribunal through Appeal Nos. 278 & 307 of 2016 was not an outcome of the bidding process of the

Respondents and nowhere the process followed was approved but it was an adoption of the tariff determined by Hon'ble CERC for 2016-17. This tariff does not fall in the gambit of the PPA Clause 4.1(b) referred to above. Hence it cannot be made applicable to the Petitioner Company.

c) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015, as per solar policy of Govt. of Haryana.*

As HAREDA did not exercise this option and hence this was not applicable to the Petitioner.

xxxvii) That the generic tariff for PV Solar Power Plants commissioned/to be commissioned during 2014-15 was determined by the Commission vide order dated 13.08.2014 and as per this order, the Petitioner was to be paid on the basis of levelized tariff of Rs.7.45/kWh. However, as per the subsequent order of the Commission dated 20.01.16 in Petition No. HERC/PRO-24 of 2015, the levelized tariff to be paid to the Petitioner Company was Rs. 6.44. Even this levelized tariff was to be reworked out over the 25 years period of the PPA and the Respondents were directed to pay year to year tariff based on the above levelized tariff. The Respondents clearly violated the directions/order of the Commission and continued making payments at the flat rate of Rs.6.44 till December 2017.

xxxviii) That the list of violations committed by the Respondents, as under:-

- a) The Respondents failed to pay for the energy sold by the Petitioner Company at the generic tariff determined by Commission for projects commissioned during 2014-15 vide order dated 13.08.2014;
- b) The Respondents started paying for the energy supplied by the Petitioner Company @ Rs.6.44/kWh inspite of the directions given by the Commission dated 20.01.2016 for allowing payments on the year to year tariff to be worked out with levelized tariff of Rs.6.44;
- c) Once the Commission held the bidding process of the Respondents against NIT for procurement of 50 MW solar power not conducted in terms of section 63 of the Electricity Act and not following the standard

bidding guidelines of the Government of India and hence rejected the power procurement, the tariff to be allowed to the Petitioner Company should have been as per the generic tariff determined by the Commission vide order dated 13.08.2014. This was thus a serious omission on the part of the Respondents. If the Respondents had some reservations/ confusion on the tariff, they should have approached the Commission to decide the matter.

- d) The tariff allowed by the Hon'ble Tribunal in Appeal Nos. 278 & 307 of 2016 to the Appellants in the Appeal was not based on the bidding process followed by the Respondents but as determined by Hon'ble CERC for the projects commissioned during 2016-17. Thus it was an adoption of the tariff determined by the Hon'ble Central Commission for FY 2016-17 and not as envisaged in Clause 4.1(b) of the PPA entered between the Petitioner Company and the Respondents. Thus it was totally irrelevant for the project of the Petitioner Company.
- e) The action of the Respondents in applying the tariff, as determined by the Hon'ble Central Commission for 2016-17 and as allowed by the Hon'ble Tribunal to the Appellants in Appeal Nos. 278 & 307 of 2016 is in total violation of the directions given by the Commission on the tariff to be paid for the power supplied by the Petitioner Company from the solar project and hence punishable under section 142 & 146 of the Electricity Act, 2003.
- f) The action of the Respondents in withholding the payments of the Petitioner Company and making adjustments out of the pending bills of the Petitioner Company is again a gross violation of the provisions under the legally entered PPA with the Petitioner Company, duly approved by the Commission and hence punishable under law.
- g) That the Petitioner request the Commission to take serious cognizance of the repeated violations made by the Respondents and to initiate punitive action as provided under section 142 & 146 of the EA-2003.
- h) That the Petitioner submit for kind intervention of the Commission to save it from severe perpetual/successive financial loss.

xxxix) That the following prayers have been made:-

- a) To accept the petition in its present form;

- b) To initiate action under section 142 of Electricity Act, 2003 against the Respondent for non-implementation of the directions given by the Commission vide orders dated 13.08.2014 and 20.01.2016;
- c) To direct the Respondent to pay for the energy injected by the Petitioner at the tariff rates approved by the Commission through its Generic Tariff order dated 13.08.2014;
- d) To allow payment of interest on the amount wrongfully withheld by the Respondent in violation of the order passed by the Commission dated 20.01.2016;
- e) May give any other relief, so deemed fit, in the present case.

Proceedings in the Case

- 3. On preliminary examination of the petition filed by M/s Siwana Solar Power Projects Ltd., the Commission vide memo no. 4725-26/HERC/Tariff 22.02.2019, sought the reply to petition filed by the petitioner from the Respondent (HPPC).
- 4. In response, HPPC filed its reply, submitting as under:-
 - 1) That the Petitioner has filed the instant Petition under Section 142 of the Electricity Act, 2003 praying for initiation of action against the Respondent for the alleged non-implementation of the direction given by the Commission vide orders dated 13.08.2014 and 20.01.2016 and further praying for the generic levelised tariff of Rs. 7.45 per unit to be paid to the Petitioner.
 - 2) That there is no merit whatsoever in the present petition filed under Section 142 of the Electricity Act, 2003. HPPC has acted in accordance with the orders dated 30.08.2014 and 20.01.2016 passed by the Commission wherein in regard to the tariff admissible to the Petitioner, the the Commission had approved the tariff admissible under the PPA dated 21.02.2014. The PPA provides as under:
“2.1.41 “Tariff” means the rate payable by HPPC for every kWh of net delivered energy at the delivery point and accepted by Solar Power Developer. The tariff shall be the lowest rate out of the following three options:

- a) *Generic tariff decided by HERC i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.3.2014 or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.6.2014*
- b) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015*
- c) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015., as per solar policy of Govt. of Haryana*

However, the lowest tariff from the above will provisionally be paid to the firm at the time of Commissioning and the final lowest tariff as and when discovered out of the above three options will be payable with effect from the date of commissioning.

Note: The deadline for decision of tariff in respect of ii) & iii) above shall be 31.12.2015

.....

4.1. Sale of Energy by Company:

The HPPC shall purchase and accept all energy made available at the Delivery point from the Company's facility, pursuant to the terms and conditions of this agreement as per the amount claimed by the Company for the energy delivered for sale (including captive/ auxiliary consumption of Solar Power generated less the energy imported by IPP) of electricity generated from Solar PV crystalline Power Plant valid for a period of 25 years during the Billing period at the following tariff whichever is the lowest rate out of the following three options:

- a) *Generic tariff decided by HERC i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.3.2014 or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.6.2014*
- b) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015.*
- c) *The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015., as per solar policy of Govt. of Haryana*

However, the lowest tariff from the above will provisionally be paid to the firm at the time of Commissioning and the final lowest tariff as and when discovered out of the above three options will be payable with effect from the date of commissioning. The deadline for decision of tariff in respect of b) & c) above shall be 31.12.2015."

- 3) That the payment of tariff at Rs. 5.68 per unit in place of Rs. 6.44 per unit is in accordance with the above clause in the PPA upon the decision dated 09.03.2018 by the Hon'ble Appellate Tribunal for Electricity (hereinafter

referred to as 'the Hon'ble Tribunal') in Appeal No. 278 of 2016 concerning JBM Solar Private Limited and other Solar Power Developers.

- 4) That the issues raised by the Petitioner in the present Petition are the same issues which are pending before the Hon'ble Tribunal in Appeal No. 150 of 2016 filed by the Petitioner challenging the order dated 20.01.2016 passed by this Commission. The matter has been heard by the Hon'ble Tribunal and the judgment has been reserved by the Hon'ble Tribunal on 22.02.2019.
- 5) That filing of the present Petition during the pendency of the above appeal is an abuse of process of the Court, the conduct of the Petitioner lacks bonafide and the Petition is liable to be dismissed with exemplary cost.
- 6) Save as otherwise expressly admitted in the present reply, it is stated that the contents of the Petition are misconceived, wrong and are denied. Before making the submissions on the specific issues raised in the Petition, HPPC is placing submissions on admissibility of the present petition filed under Section 142 of the Electricity Act, 2003.
- 7) The Petitioner has, primarily, contended that HPPC is liable to pay Rs. 6.44 per unit in terms of the order dated 20.01.2016 passed in Petition No. HERC/PRO-24 of 2015 and the judgment dated 09.03.2018 passed by the Hon'ble Tribunal in Appeal No. 278 of 2016- JBM Solar Private Limited –v- Haryana Electricity Regulatory Commission is not applicable to the facts of the present case.
- 8) The above contention of the Petitioner is baseless and wrong, amongst others, for the following reasons:
 - a. The Petitioner and HPPC entered into a PPA dated 21.02.2014 for sale and supply of power to be generated from 5 MW solar power plant established by the Petitioner.
 - b. The PPA dated 21.02.2014 has been approved by the State Commission vide Memo. No. 4698/HERC/Tariff/PPA-Siwana Solar dated 21.02.2014. The Memo, inter-alia, reads as under:

“The Commission has considered the draft PPA and approves the same with the condition that the generator shall start generating and supplying power before 31.3.2014. In case he fails to do so, the tariff for FY 2014-15 onwards shall apply subject to clause

2.1.41 of the PPA. In case the generator fails to generate and supply by 30.6.2014, the PPA shall lapse.

HPPC may sign the PPA as approved by the Commission and submit a copy signed by both the parties to the Commission.”

- c. Thus, after the approval of the PPA by the Commission, the PPA became valid and binding between the parties.
- d. In terms of the Clause 2.1.41 and 4.1 of the PPA, the lowest of the tariff quoted and approved in the first long-term bidding floated by HPPC/HAREDA till 31.12.2015 or the generic tariff determined by the Commission for the relevant period shall be applicable to the Petitioner.
- e. On 16.04.2014, HPPC floated Notice Inviting Tender (NIT) No. 51/CE/HPPC for purchase of 50 MW solar power. In the said NIT, HPPC has entered into PPAs with 4 Nos. of Solar Power Developers whereby HPPC has been able to procure 23 MW of solar power through four Nos. solar power developers at a tariff of Rs. 6.44/kwh which was the lowest discovered price quoted and accepted by the bidders. As per the terms of PPA entered with the Petitioner, HPPC started making payment at the tariff of Rs. 6.44 per kWh against the monthly energy bills raised by the Petitioner.
- f. However, HPPC had filed a Petition bearing No. Case No PRO-06 of 2016 before the Commission for approval of the PPAs entered into with the 4 Solar Power Developers.
- g. Vide the order dated 12.09.2016, the Commission did not approve the competitive bidding process and the Power Purchase Agreements (PPAs) entered into by HPPC with the selected bidders on the ground that the process and the PPAs are not in line with the competitive bidding guidelines for renewable energy generation under Section 63 of the Electricity Act, 2003, the deviations were not approved by the State Commission and hence the power purchases are not valid.
- h. The order dated 12.09.2016 passed by the State Commission was challenged by various bidders, including JBM Solar Private Limited before this Hon'ble Tribunal.
- i. On 09.03.2018, this Hon'ble Tribunal was pleased to allow the Appeal being Appeal No. 278 of 2016 filed by JBM Solar Private Limited and

directed the State Commission to approve the PPAs signed between HPPC and the selected bidder at a lower tariff of Rs. 5.68 per kWh in line with the generic tariff determined by the Central Electricity Regulatory Commission for the Financial Year 2016-17. (Pages 1 to 39 of the Compilation of Judgments). The Hon'ble Tribunal, inter-alia, reads as under:

“(ix) Considering the circumstances of the case equitably and the fact that the Solar Power Projects have been established by the Appellants and in terms of Section 86 (1) (e) of the Act, the power generation from renewable sources of energy need to be promoted, it would be appropriate to approve the PPAs between the Appellants and the Respondent No. 2 for procurement of solar power at the tariff of Rs. 5.68/kWh (without accelerated depreciation) as allowed in the interim Orders dated 13.12.2016 and 29.3.2017 of this Tribunal.

.....
(x) In view of the facts and circumstances of the case, we are of the considered opinion that the PPAs signed between the Appellants and Respondent No. 2 be allowed by the State Commission at the tariff of Rs. 5.68/kWh (without accelerate depreciation) determined by CERC for FY 2016-17.”

NOTE: The order dated 09.03.2018 has been challenged by the Solar Power Developers before the Hon'ble Supreme Court.

- j. By virtue of the above, the order dated 12.09.2016 passed by this Commission stood merged with the order dated 09.03.2018 passed by the Hon'ble Tribunal and the tariff approved in the bidding process can only be Rs. 5.68 per unit. This Commission has passed the consequential order on 10.01.2019 holding, inter-alia, as under:

“4. The Commission observes that the Hon'ble APTEL has remanded the matter back to HERC to allow the PPAs signed between the Appellants and the Respondent No. 2 as held at preceding paragraph 12.e) x) above in the interest of justice and equity. Accordingly, in order to complete the procedural requirement, the Commission hereby confirms the Order passed by Hon'ble Appellate Tribunal for Electricity for implementation of the same by the Discoms. Additionally, the Commission has taken note of the Civil Appeals (5962, 5869, 5843 7296 of 2018) preferred by the Solar Power Developers in the Hon'ble Supreme Court against the judgment dated 09.03.2018 passed by the Hon'ble Appellate Tribunal for Electricity. Hence, the present consequential order is subject to any interim / final order that the

Hon'ble Supreme Court may pass in the Civil Appeals (supra). HPPC is directed to keep the Commission informed regarding the outcome of the same and also submit a copy of signed PPA within 15 days from the date of this Order."

- 9) In terms of the above and in accordance with the provisions of the PPA entered into with the Petitioner, HPPC respectfully submits that it is entitled to adjust the tariff both for the past period i.e. from the COD of the Plant and for future in accordance with the decision dated 09.03.2018 of the Hon'ble Appellate Tribunal i.e. Rs 5.68 per unit.
- 10) The other contentions and the arguments sought to be raised in regard to the non-applicability to the order dated 09.03.2018 passed in the JBM Solar matter to the facts of the present case have been raised before the Hon'ble Tribunal in Appeal No. 150 of 2016 filed by the Petitioner before the Hon'ble Tribunal challenging the order dated 20.01.2016.
- 11) That the present Petition is not maintainable when the Hon'ble Tribunal is seized of the matter. The decision of the Hon'ble Tribunal would be binding upon the Petitioner and HPPC, subject to the challenge before the Hon'ble Supreme Court.
- 12) Even otherwise, the scope of Section 142 of the Electricity Act, 2003 is limited and has been settled. The proceedings of Section 142 of the Electricity Act, 2003 cannot be invoked by the Petitioner for alleged non-payment of dues. The payment or non-payment of money due from HPPC and the disputes in regard to the same cannot form part of the proceedings for penal action under Section 142 of the Electricity Act, 2003. The said provision cannot be used by Petitioner for effecting recovery of its dues.
- 13) Section 142 proceedings are for deliberate and willful violation of the provisions of the Act, Regulations and directions of the Commission and not for enforcing an order passed by the Commission for valid reasons as stated hereinabove. In this regard, reference may be made to the following decisions:-
 - a. The Hon'ble Supreme Court in R.N. Dey and Ors. –v- Bhagyabati Pramanik and Ors. (2000) 4 SCC 400, inter-alia, held as under:

"7. We may reiterate that the weapon of contempt is not to be used in abundance or misused. Normally, it cannot be used for execution of

the decree or implementation of an order for which alternative remedy in law is provided for. Discretion given to the court is to be exercised for maintenance of the court's dignity and majesty of law. Further, an aggrieved party has no right to insist that the court should exercise such jurisdiction as contempt is between a contemner and the court. It is true that in the present case, the High Court has kept the matter pending and has ordered that it should be heard along with the first appeal. But, at the same time, it is to be noticed that under the coercion of contempt proceeding, appellants cannot be directed to pay the compensation amount which they are disputing by asserting that claimants were not the owners of the property in question and that decree was obtained by suppressing the material fact and by fraud. Even presuming that the claimants are entitled to recover the amount of compensation as awarded by the trial court as no stay order is granted by the High Court, at the most they are entitled to recover the same by executing the said award wherein the State can or may contend that the award is a nullity. In such a situation, as there was no wilful or deliberate disobedience of the order, the initiation of contempt proceedings was wholly unjustified.

8. Further, the decree-holder, who does not take steps to execute the decree in accordance with the procedure prescribed by law, should not be encouraged to invoke contempt jurisdiction of the court for non-satisfaction of the money decree. In land acquisition cases when a decree is passed the State is in the position of a judgment-debtor and hence the court should not normally lend help to a party who refuses to take legally-provided steps for executing the decree. At any rate, the court should be slow to haul up officers of the Government for contempt for non-satisfaction of such money decree.”

- b. In the decision dated 13.09.2007, the Hon'ble Tribunal in Appeal No. 115 of 2007- B.M.Verma–v- Uttarakhand Electricity Regulatory Commission, inter-alia, held as under:-

“9. We are shocked to see how Commission has totally gone wrong both in the matter of procedure and in the matter of approach. The Commission entirely lost sight of the fact that it was proceeding to take criminal action and accordingly the basic principles of criminal law and procedure should not have been lost sight of. We are not saying that the Commission was required to follow the strict procedure of Criminal Procedure Code. But the basic principles could not have been ignored, a proposition to which the respondent counsel agreed.

10. Firstly, mens rea is the basic ingredient of any offence. Mere non-compliance with an order could not be sufficient to take penal action.

It was necessary for the Commission to obtain evidence of mens rea or culpable state of mind before holding the appellant guilty of a punishable offence. A mere failure to meet a deadline in complying with an order cannot be an offence. Section 142 of The Electricity Act 2003 does not create an absolute offence.

11. Secondly, the burden of proof has to be on prosecution and not on the defense. It appears from the order that it was appellant who was made to prove his innocence rather than the prosecution made to prove the guilt. Only when mens rea was established could the Commission shift the onus on the appellant. But the Commission from the very outset proceeded with a presumption of guilt and put the entire onus on the appellant. This is entirely against all principles of criminal justice.”

- c. In the decision dated 15.05.2017, the Hon'ble Tribunal in Appeal No. 103 of 2017 and Batch- BSES Rajdhani Power Limited –v- The Secretary, Delhi Electricity Regulatory Commission, inter-alia, held as under:

“14.5 Let us examine the procedure to be followed for issuing a notice under Section 142 of Electricity Act, 2003. The Section 142 of Electricity Act, 2003 is quoted below:

142. Punishment for non-compliance of directions by Appropriate Commission. – In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made there under, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.

21. In the 2004 (2) SC 783 Karnataka Rare Earth and Another vs. Senior Geologist, Department of Mines & Geology and another the Hon'ble Court held as under:

“An order imposing penalty for failure to carry out the statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation”.

22. *The Hon'ble Supreme Court in these decisions has culled out the following mandatory requirements to be satisfied especially in the penalty proceedings:*

i. It is quite essential that a party facing the penalty proceedings should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of the natural justice

ii. A show cause notice is the foundation on which the Department has to built-up its case. Therefore, a show cause notice shall contain the allegations. If the allegations in the show cause notice are not specific, or vague or unintelligible, then that can be taken as a ground to hold that the said notice was not legally valid as it had not given adequate opportunity to the person concerned to meet the allegations indicated in the show cause notice.

iii. The first and foremost principle is what is known as audi alteram partem rule. The notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Adequate time has to be given to the person concerned so as to enable him to make his representation to meet the allegations contained in the notice. In the absence of the notice of the kind and such reasonable opportunity, the final order passed becomes wholly vitiated.

iv. The principles of natural justice are those which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

25. *The perusal of this section would reveal that the State Commission should follow the following procedure before finding the person guilty of violation of provisions or directions and imposing the penalty as contemplated under Section 142 of the act:*

“(i) When a complaint or a Petition is filed by a person before the Appropriate Commission against a person for taking action under Section 142 of the Act or when an information is received, the Appropriate Commission has to first find out as to whether there are prima facie allegations in the petition or complaint or information received, that the person has contravened the relevant provisions or violated the directions issued by the Appropriate Commission. In other words, the Appropriate Commission, before entertaining the petition or complaint for taking action under Section 142 of the Act, at the outset has to satisfy itself by applying its mind as to whether the allegations contained in the said Petition or complaint or information would constitute contravention or violation of any of the provisions of

the Act or rules or regulations made there under or directions issued by the Appropriate Commission which necessitates the issuance of show cause notice to conduct inquiry under section 142 of the Act. Thus, the satisfaction to entertain the complaint is first and foremost requirement.

(ii) After arriving at such a satisfaction, the Appropriate Commission shall entertain the petition and issue notice to the person concerned intimating that the Appropriate Commission is satisfied with the particulars of the specific allegations that the person concerned has violated the provisions or directions and calling upon him to show cause as to why that person be not proceeded with under section 142 of the Act and why the penalty be not imposed upon him for such allegation of the contravention or a violation thereby, the Appropriate Commission is mandated to give opportunity to the said person to offer his explanation through his reply to the charge levelled against him referred in the show cause notice by giving sufficient time.

(iii) On receipt of the said explanation offered by the person concerned, the Appropriate Commission has to scrutinize and find out as to whether his explanation is satisfactory or not. If it is satisfied, it may drop the proceedings under Section 142 of the Act. On the other hand, if the Appropriate Commission feels that the explanation is not satisfactory, the Appropriate Commission can summon him to appear before the Commission and frame the specific charges in his presence and intimate him that the Appropriate Commission propose to conduct inquiry with regard to those charges and give opportunity to the person concerned of hearing to offer his further explanation and to produce materials to disapprove those charges.

(iv) After considering the reply and evidence available on record and after hearing the parties, the Appropriate Commission then has to find out as to whether those charges framed against him have been proved or not in the light of the submission and the evidence produced by the person concerned. If the Appropriate Commission is of the opinion that the charges framed are not proved, the proceedings at that stage can be dropped. On the contrary, if the Appropriate Commission is satisfied that those charges have been proved, it may find him guilty and impose penalty.

26. The above procedure in penalty proceedings would clearly indicate that the State Commission shall first find out the prima facie satisfaction and then issue show cause notice to the person concerned who has to file reply and thereafter the State Commission has to frame charges and give further opportunity to the person concerned to place materials to disprove the charges and then decide the case on the basis of the evidence available on record.

27. From the above, it is clear that the State Commission has to arrive at prima facie satisfaction, that it is a fit case for initiation of Section 142 of the proceedings and then it has to record its satisfaction in the show cause notice in respect of the specific allegations and send it to the person for the purpose of giving an opportunity to such a person to defend or rebut such specific allegation. These procedures are contemplated to follow the principle of natural justice by giving full opportunity to the Appellant to defend the allegation.

28. Thus, there are two phases. (i) One is to arrive at a satisfaction to issue show cause notice while initiating penalty proceedings and (ii) Next is, after issuance of the show cause notice, the person must be heard to arrive at a satisfaction whether such contravention has actually been committed or not. Only then, the State Commission can come to the conclusion whether to find him guilty or not under Section 142 of the Act.

Thus, it became evident that the show cause notice should contain (i) specific allegations of violation, (ii) prima facie satisfaction over the said allegations (iii) issuance of show cause notice in respect of specific allegations by way of giving an opportunity to the concerned person to rebut those allegations. All these three ingredients must find place in the notice which is a show cause notice.

- 14) That the tariff of Rs. 5.68 per unit is rightly being paid by HPPC in terms of the judgment dated 09.03.2018 passed by the Hon'ble in Appeal No. 278 of 2016- JBM Solar Private Limited –v- Haryana Electricity Regulatory Commission and the present Petition is liable to be dismissed.
- 15) In any event, the Petition filed is not maintainable during the pendency of the Appeal being No. 150 of 2016 filed by the Petitioner before the Hon'ble Tribunal.
- 16) For the reasons mentioned above, the Petition filed be dismissed.

5. Per-contra, the Petitioner filed its rejoinder to the reply filed by the Respondent. In the rejoinder, the Petitioner has mainly reiterated the contents of its main petition. The rejoinder filed by the Petitioner has been summarized as under:-
 - i. That the Respondent has tried to link the orders passed by the Hon'ble Tribunal on a totally different matter and against the Appeals filed by Parties who are not even concerned about this Petition in any manner. The

Respondent had floated NIT No. 51 for purchase of solar power through competitive bidding procedure. The Respondent selected 4 of the bidders against this NIT and approached this Commission through Petition No. HERC/PRO-6 of 2016 for approval of draft PPAs signed with these Solar Power Developers.

- ii. That the Commission decided the above Petition vide order dated 12.09.2016/04.10.2016 and Commission nullified the bidding process undertaken by the Respondent under NIT No. 51 on the ground that the Standard Bidding Process was not followed by the Respondent.
- iii. That aggrieved by the above order of this Commission, two of the Bidders i.e. M/s JBM Solar Power Pvt. Ltd. and M/s Subhash Infra Engineers Pvt. Ltd. & M/s Utrecht Solar Pvt. Ltd, filed Appeal No. 278 of 2016 and Appeal No. 307 of 2016 in Hon'ble Appellate Tribunal of Electricity. The Petitioner was not a party at any stage either in the original Petition No. HERC/PRO-6 of 2016 filed by the Respondent before the Commission or subsequent Appeals filed by the two of the bidders against the order of the Commission. Hence it would be totally absurd to link the Petitioner with the orders passed by the Hon'ble Tribunal on these Appeals.
- iv. That there was another important factor which was completely overlooked by the Respondent is the provision under Clause 4.1 of the PPA, as reproduced in Para 2 of this Rejoinder. The last para of this Clause is very important as it specifically mentioned that "the deadline for decision of tariff in respect of b) & c) above shall be 31.12.2015". As per this provision in the PPA, the last date for taking decision as to the lowest tariff, quoted and accepted in the first long term tender floated by HPPC or HAREDA, was 31.12.2015. As the Respondent failed to decide the quoted and accepted tariff of the solar power by that date, these two alternatives were not applicable to the Petitioner.
- v. That in view of the fact that out of the three alternatives for deciding the tariff to be paid to the Petitioner under the PPA, the latter two becoming redundant as on 31.12.2015, the only alternative to decide the permissible tariff for the Project of the Petitioner was the Generic Tariff decided by Hon'ble Commission for the projects getting commissioned during FY 2015-

16.

- vi. That under these circumstances the Respondent was bound by the PPA to pay the Petitioner as per the Generic Tariff for Solar PV Projects as determined vide order dated 13.08.2014.
- vii. That the Respondent has failed to obey the order passed by the Commission dated 20.01.2016, which read as, *“Accordingly, the Commission directs Respondent No. 1 to work out the year to year tariff for 25 years corresponding to the levelised tariff of Rs. 6.44 per unit and pay the tariff to the Petitioner so worked out for the relevant year.”* This alone, is a sufficient ground to take action against the Respondent as per applicable laws.
- viii. That the Respondent, rather went a step further to disobey the above directions, when it suo moto applied the tariff allowed by the Hon’ble Tribunal vide interim order dated 13.12.2016 (followed by final order dated 09.03.2018) on to the Petitioner from date of commissioning of the project and even made recoveries from the bills already paid with interest. The Respondent failed to take necessary orders from this Commission to amend the directions issued vide Commission’s earlier order dated 20.01.2016. How could the order passed by the Hon’ble Tribunal in a totally different Appeal, for totally different parties, be made applicable to the Petitioner?
- ix. That the Respondent also miserably failed to notice the following important parts the order of Hon’ble Tribunal,
 - a) Hon’ble Tribunal did not approve the bidding process followed by the Respondent against NIT No. 51;
 - b) Hon’ble Tribunal simply allowed the generic tariff determined by CERC for the projects commissioned during FY 2016-17;
- x. That the tariff allowed as per Hon’ble Tribunal order dated 09.03.2018 could not, by any stretch of imagination, be termed as the “lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015” as envisaged under Clause 4.1 (b) of the PPA. Moreover, the decision on

lowest tariff was neither an outcome of the competitive bidding route nor taken within the deadline for taking decision of lowest tariff in respect of b) & c) of Clause 4.1 of the PPA. Thus the action taken by the Respondent in making payment for power supplied by the Petitioner at a rate other than the generic tariff approved by the Commission was a blatant dis-obedience of directions given by the Commission and Respondent is liable for necessary action as per law.

- xi. That the consequential order passed by the Commission vide order dated 10.01.19 is also not applicable to the Petitioner as these were specific to the Appellants (in Appeal No. 278 of 2016 filed by JBM Solar Private Limited) who had signed PPAs with the Respondents. Even otherwise, the Respondent has accepted the fact that even the order passed by Hon'ble Tribunal has been challenged by the Appellants before the Hon'ble Supreme Court of India and hence even the tariff allowed by the Hon'ble Tribunal to the Appellants in the aforesaid Appeal has not yet reached finality.
- xii. That the fact about filing of Appeal No. 150 of 2016 before the Hon'ble Tribunal was duly mentioned by the Petitioner in Para No. 16 of the Main Petition. The instant Appeal was filed against the order passed by this Commission in Petition No. HERC/PRO-24 of 2015 dated 20.01.2016. The matter agitated through that Appeal was the fixation of levelised tariff of Rs.6.44/unit for the Petitioner. In any case the instant Appeal pending before the Hon'ble Tribunal did not permit the Respondent to disobey the directions of the Commission dated 20.01.2016.
- xiii. That with regard to the action to be taken for disobeying the directions contained in order dated 20.01.2016 under the relevant provisions of Section 142 of the Electricity Act, 2003, the mode and procedure is rightly to be decided by this Commission. None of the judgments quoted by the Respondent can stop this Hon'ble Commission from taking appropriate action against the Respondent.
- xiv. That while taking benefit of any case law the essential pre-conditions are, (i) the circumstances of the decided cases and the case in hand have to be similar in nature, (ii) the ratio of judgment has to be applicable to the instant

case. The Respondent has failed to prove the above two essential conditions and hence these are not applicable to the present Petition.

xv. That the Petitioner has exhibited sufficient grounds to establish that the action of the Respondent was a blatant disobedience of the orders passed by this Commission and hence punishable under Section 142 of the EA-2003 i.e.

(i) in disobeying the directions contained in the order passed by this Commission dated 20.01.2016, which read as under:-

“Accordingly, the Commission directs Respondent No. 1 to work out the year to year tariff for 25 years corresponding to the levelised tariff of Rs. 6.44 per unit and pay the tariff to the Petitioner so worked out for the relevant year.”

(ii) and further in making payments to the Petitioner at the rate of Rs.5.68/unit from the date of commissioning of the Project of the Petitioner totally in violation of the terms of the PPA and that of the aforesaid order of the Hon’ble Commission dated 20.01.2016,

6. The Commission heard the case on 25.04.2019 and observed that the petition has been filed under section 86 (1)(e) & (f) and section 142 & 146 of the Electricity Act, 2003. The fee prescribed in point no. 14 (Adjudication of dispute under section 86(1)(f) or under section 35) of the revised schedule of fee mentioned in Regulation No. HERC/10/2005/2nd Amendment/2016 is Rs. 2,00,000/-. However, the petition has been filed along with deposit of filing fee amounting to Rs. 35,000/-. Accordingly, the Commission vide its Interim Order dated 01.05.2019, directed the Petitioner to deposit the shortfall in the filing fee i.e. Rs. 1,65,000/- in respect of the present Petition, before the same is considered by the Commission on merit.

7. The Petitioner vide email dated 08.05.2019 intimated that it has duly deposited the shortfall in the filing fee amounting to Rs. 1,65,000/- on 07.05.2019.

Commission’s Analysis and Order

8. The Commission heard the arguments of the parties at length as well as perused the application/reply filed in the matter. The Commission observes that the only grievance of the Petitioner is contravention of the Commission’s

Order dated 13.08.2014 and 20.01.2016 by HPPC. The Commission further observes that generic tariff for the solar projects to be commissioned in the FY 2014-15 and 2015-16 was determined, vide its order dated 13.08.2014, whereas clause no. 2.1.41 and 4.1 of the signed PPA dated 21.02.2014 were upheld in the Order dated 20.01.2016 and directed the HPPC to work out the year to year tariff for 25 years corresponding to the levelled tariff of Rs. 6.44 per unit and pay the tariff to the Petitioner so worked out for the relevant year. It is also pertinent to note that Rs. 6.44 per unit was the tariff discovered through bidding and enforced by HPPC, as per the ibid terms of PPA dated 21.02.2014.

9. In order to examine the claim of the Petitioner, the Commission carefully examined the clause no. 2.1.41 and 4.1 of the signed PPA dated 21.02.2014, reproduced here under:-

“2.1.41 “Tariff” means the rate payable by HPPC for every kWh of net delivered energy at the delivery point and accepted by Solar Power Developer. The tariff shall be the lowest rate out of the following three options:

d) Generic tariff decided by HERC i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.3.2014 or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.6.2014

e) The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015

f) The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015., as per solar policy of Govt. of Haryana

However, the lowest tariff from the above will provisionally be paid to the firm at the time of Commissioning and the final lowest tariff as and when discovered out of the above three options will be payable with effect from the date of commissioning.

Note: The deadline for decision of tariff in respect of ii) & iii) above shall be 31.12.2015

.....

4.1. Sale of Energy by Company:

The HPPC shall purchase and accept all energy made available at the Delivery point from the Company’s facility, pursuant to the terms and conditions of this agreement as per the amount claimed by the Company for the energy delivered for sale (including captive/ auxiliary consumption of Solar Power generated less the energy imported by IPP) of electricity

generated from Solar PV crystalline Power Plant valid for a period of 25 years during the Billing period at the following tariff whichever is the lowest rate out of the following three options:

d) Generic tariff decided by HERC i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.3.2014 or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.6.2014

e) The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015.

f) The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015., as per solar policy of Govt. of Haryana

However, the lowest tariff from the above will provisionally be paid to the firm at the time of Commissioning and the final lowest tariff as and when discovered out of the above three options will be payable with effect from the date of commissioning. The deadline for decision of tariff in respect of b) & c) above shall be 31.12.2015.”

10. The Commission further observed that similar issue raised by the Petitioner so far as applicability of the generic tariff determined by the Commission in its Order dated 13.08.2014 is concerned, has already been settled while deciding petition no. HERC/PRO-51 of 2014 & HERC/PRO-24 of 2015, vide Orders dated 22.07.2014 & 20.01.2016, respectively. The Commission in its Order dated 20.01.2016 has, after considering all facts & circumstances of the case including the Order dated 29.09.2014, decided at para 4.2 as under:-

“The Commission observes that it had approved the PPA for sale of power from 5 MW Solar PV Power Plant of the Petitioner vide letter memo no. 4698/HERC/Tariff/PPA-Siwana Solar dated 21.02.2014 with the condition that the generator shall start generating and supplying power before 31.03.2014 and in case the generator fails to do so, the tariff for 2014-15 onwards shall apply subject to clause 2.1.41 of the PPA. In case the generator fails to generate and supply by 30.06.2014, the PAA shall lapse. This cut-off date was extended to 31.12.2014 vide Order dated 20.09.2014.

.....

..... the issue regarding the amendment of Clauses 2.1.41 and 4.1 of the PPA relating to applicable Tariff needs no further adjudication and the tariff payable to the generator by HPPC shall be as per the provisions of the PPA.

Further, during the course of arguments, the Commission suggested that the year to year tariff should be worked out corresponding to the levellised tariff of Rs. 6.44 per unit and the year to year tariff so worked out be paid to the Petitioner by Respondent No. 1. This proposal was agreed to by the Respondent No. 1. Accordingly, the Commission directs Respondent No. 1 to work out the year to year tariff for 25 years corresponding to the levellised tariff of Rs. 6.44 per unit and pay the tariff to the Petitioner so worked out for the relevant year.”

11. The Commission observes that PPA signed between the parties contains the clause nos. 2.1.41 and 4.1 to the effect that HPPC shall charge lowest of the following tariffs:-
- a) Generic tariff decided by HERC i.e. Rs. 7.94 for FY 2013-14 in case the plant is commissioned before 31.3.2014 or Rs. 7.58 per unit for FY 2014-15 in case the plant is commissioned by 30.6.2014
 - b) The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through competitive bidding to be floated by HPPC till 31.12.2015.
 - c) The lowest tariff quoted and accepted in the first long term tender for purchase of solar power through reverse bidding to be floated by HAREDA till 31.12.2015, as per solar policy of Govt. of Haryana.

Since, the project was delayed and not commissioned by 30.06.2014, the Commission vide its Order dated 29.09.2014, on petition no. HERC/PRO-56 of 2014 filed by M/s. Siwana Solar, allowed the time upto 31.12.2014 and directed that the generic tariff mentioned in clause (a) above shall be substituted by the tariff determined by this Commission for such projects for the FY 2014-15 in its RE tariff order.

The same fact was re-affirmed by the Commission in its Order dated 20.01.2016 while deciding the petition no. HERC/RPO-24 of 2015 filed by M/s. Siwana Solar, upholding the rate of tariff as Rs. 6.44/kWh on the basis of the fact that HPPC had floated tender to purchase 50 MW Solar Power in April 2014 and has signed PPA with four developers on 25.6.2015 for 23MW capacity at the lowest discovered tariff i.e. Rs. 6.44/kWh.

The lowest tariff of Rs. 6.44/-kWh discovered by HPPC through bidding process in April, 2014, has been allowed by the Commission at Rs. 5.68/kWh, on the directions of Hon'ble Appellate Tribunal for Electricity, by passing

consequential Order dated 14.01.2019. However, the same was directed to be subject to the orders of Hon'ble Supreme Court Civil Appeals (5962, 5869, 5843 7296 of 2018) preferred by the Solar Power Developers against the judgment passed by the Hon'ble Appellate Tribunal for Electricity.

12. Admittedly, the Petitioner has filed an appeal against the Order of the Commission dated 20.01.2016, before the Hon'ble Appellate Tribunal for Electricity as Appeal No. 150 of 2016. Therefore, till the decision of the appeal pending before the higher authority, it is not open for the petitioner to re-agitate over the decision taken in the Order dated 20.01.2016 and seek levelized tariff determined vide Order of the Commission dated 13.08.2014.
13. In view of the above discussions, the Commission observes that HPPC was within its rights to settle the energy bills generated by the Petitioner at Rs. 6.44/kWh. The only deviation taken by HPPC is regarding non determination of year to year tariff corresponding to the levelized tariff of Rs. 6.44/kWh, as directed by the Commission in its Order dated 20.01.2016. In this regard, the submission of HPPC that the tariff rate of Rs. 6.44/kWh was discovered through bidding and it was not possible to work back year to year tariff of the same, has been considered by the Commission and the Commission is of the considered opinion that in case of difficulty in the implementation of the Order of the Commission, the appropriate remedy available with HPPC was to seek review from the Commission of its Order. However, presently, that the discovered tariff of Rs. 6.44/kWh has been replaced by Rs. 5.68/kWh, HPPC may refer to the Annexure – 5A of the Hon'ble Central Electricity Regulatory Commission's Order dated 29th April, 2016 in Petition No. SM/03/2016 (Suo-motu) wherein year to year tariff corresponding to the levelized tariff of Rs. 5.68/kWh has been worked out by the CERC. Hence, as an interim arrangement, the year to year tariff shall be payable subject to the judgement of Hon'ble Supreme Court in Civil Appeal nos. 5962, 5869, 5843 7296 of 2018.
14. In terms of the above order, the Petition is accordingly disposed of.

This Order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 10th May, 2019.

Date: 10.05.2019
Place: Panchkula

(Pravindra Singh Chauhan)
Member

(Jagjeet Singh)
Chairman