

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
AT PANCHKULA**

Case No. HERC/PRO-15 of 2016

Date of Hearing : 20.02.2019

Date of Order : 08.03.2019

In the Matters of

Application under section 86(1)(b) of the Electricity Act, 2003 for the approval of the Commission for procuring of power at regulated tariff from Chanju-I, 36 MW, Himachal Pradesh, Sikkim: Draft PPA for approval.

Petitioner

Haryana Power Purchase Centre, Panchkula

Present On behalf of the Petitioner

1. Shri. S.K. Goyal for M/s IA Hydro Energy Pvt. Ltd.
2. Shri Rajiv Mishra, Xen, HPPC.
3. Shri Ravi Juneja, AEE, HPPC.

Quorum

Shri Jagjeet Singh, Chairman
Shri Pravindra Singh Chauhan, Member

ORDER

1. **Brief Background:** The Haryana Power Purchase Centre (HPPC) vide memo no. Ch-31/CE/HPPC/SE/C&R-I/PPA-150 dated 22.05.2018, had submitted the draft PPA with M/s. IA Hydro Energy Pvt. Ltd., agreed upon by both the parties, for approval of the Commission for procurement of power from Chanju-I, (36 MW), Himachal Pradesh, in compliance to the order of the Commission dated 10.04.2018, wherein the Commission had directed HPPC to recast the PPA based on the format and other terms as in line with the PPA approved by the Commission in case of Teesta-III, Sikkim.
2. Subsequently, HPPC vide memo no. Ch-97/CE/HPPC/SE/C&R-I/Tashiding/PPA-147 dated 04.06.2018, intimated that Steering Committee of Power Planning (SCPP) in its 45th meeting held under the Chairmanship of ACS/Power, GoH, on 15.05.2018 has decided to incorporate the time period of 30 days in the Exit Clause (clause no. 9.1.3 (ii)(b)) of the PPA for capping

the exit option in the PPA after initial determination of tariff by the HERC, as under:-

“both the parties shall give their concurrence for acceptance within 30 days of initial determination of tariff by the Commission”.

3. The case was heard by the Commission on 20.02.2019 as scheduled. HPPC filed its written submission vide its memo no. Ch-64/CE/HPPC/SE/C&R-I/PPA-147 dated 18.02.2019, as under:-

“

- a) That Commission vide memo no. 4041/HERC/Tariff dated 19.12.2018, had directed to submit the acceptance of all four Hydro Power developers to amend clause in 9.1.3 (ii) (b) of signed PPA's, as under:-
“both the parties shall give their concurrence for acceptance within 30 days of initial determination of tariff by the Commission”.

Accordingly, the matter was deliberated in detail and decided that the clause 3.3.2 needs to be amended for exit clause option without touching the clause 9.1.3(ii) (b) . The same is required to be modified as under:

| Draft PPA Clause | Amended Clause |
|--|---|
| <p>Clause 3.3.2 The Purchaser/ Company will have the right to terminate this Agreement in case the tariff determined by the Commission initially pursuant to the Petition filed by the Company under HERC Tariff Regulations in compliance of condition precedent at clause 3.1.1(ii), is not acceptable.</p> | <p>Clause 3.3.2 The Purchaser/ Company will have the right to terminate this Agreement within 30 days of the order regarding initial determination of tariff by HERC pursuant to the First Tariff Petition filed by the Company under HERC Tariff Regulations in compliance of condition precedent at clause 3.1.1(ii) if the tariff so determined by the Commission is not acceptable.</p> |
| <p>9.1.3 (ii)(b) If the initial tariff determined by the Commission is not acceptable to the Purchaser/ Company and this Agreement is terminated under Clause 3.3.2, no differential shall be paid (i.e. Tariff determined /approved by the Commission over and above the Average Power Purchase cost) for the power already supplied.</p> | <p style="text-align: center;">No Change</p> |

- b) **Regarding wheeling charges definition:** the reference is invited to the purchaser obligations wherein all the wheeling charges and losses need to be borne by the purchaser so, in line with the same, the definition of

wheeling charges need to be aligned with Electricity Act,2003, so the same is required to be amended as under:

| Draft PPA Clause | Amended Clause |
|---|--|
| <p>Wheeling Charges means the wheeling energy / charges and losses to be paid by the Generator/Purchaser to STU / CTU, as the case may be, for transmission of power from Delivery Point to the Purchaser's State periphery, and to be paid/reimbursed by Purchaser for the capacity of the plant after adjusting the normative auxiliary consumption, transformation loss & free power to the State</p> | <p>Wheeling Charges means the wheeling charges to be paid by the Generator/Purchaser to STU / CTU, as the case may be, for transmission of power from Delivery Point to the Purchaser's State periphery, and to be paid/reimbursed by Purchaser for the capacity of the plant after adjusting the normative auxiliary consumption, transformation loss & free power to the State.</p> |

- c) That the Generators (Chuzachen Hydro Electric Power Project, Jorethang Loop Hydro Electric Power Project, Tashiding Hydro Electric Power Project, Chanju-I Hydro Electric Power Project) have given consent to the above amendments.
- d) That the Project developers at Jorethang & Tashiding were requested to demonstrate the capacity in lean season as per Regulation as agreed in the draft PPA for the capacity mentioned in the PPA i.e. 105.6MW &106.7MW respectively. The Generators viz Jorethang & Tashiding in the meeting with CE/HPPC had clarified that the project capacity of 96 MW & 97 MW respectively along with the overload capacity of 10%. Therefore, the capacity of the projects needs to be treated as 96 MW & 97 MW which is the rated capacity of machines instead of 105.6 MW & 106.7 MW appearing in the PPA, with the overload capacity of 10%, for projects at Jorethang & Tashiding, respectively. Accordingly, the signed draft PPA needs to be amended.
- e) That the term of the PPA approved by the Commission is at levelised tariff for 35 years for the generators, whereas the projects have already commissioned before the start of power, hence the PPA duration cannot be for 35 years but for the residual life of the project from the date of start of scheduling the power, the same is tabulated here as under:

| Name of the Project | Contract ed Capacity (MW) | Date of source approval | CoD | Date of Starting Scheduling of Power | Duration of the project from COD as per I.A. Agreement | Duration of PPA with HPPC |
|--|---------------------------|-------------------------|----------|--------------------------------------|--|---------------------------|
| Chuzachen HEP (East Distt. Sikkim) 110 MW (2 x 55 MW) HEP (Petition No. HERC/PRO-24 of 2017) M/s Gati Infra Pvt. Ltd. Ltd (Developer) | 110 | 13.11.17 | 18.05.13 | 14.05.18 | 35 Year | 30 Years |
| Tashiding HEP (West Distt. Sikkim) 97 MW (2 x 48.5 MW) (Petition No. HERC/PRO-25 of 2017) Shiga Energy Pvt. Ltd. (Developer) | 97 | 30.11.17 | 06.11.17 | 18.05.18 | 35 Year | 34 Years 6 Months |
| Jorethang HEP (South, Distt. Sikkim) 96 MW (2 x 48MW) (Petition No. HERC/PRO-26 of 2017) Dans Energy Pvt. Ltd. (Developer) | 96 | 13.11.17 | 30.09.15 | 17.05.18 | 35 Year | 32 Years 4 Months |
| Chanju -1 HEP 36 MW (Petition No. HERC/PRO-15 of 2016) I A Energy Pvt. Ltd. (Developer) | 36 | 10.04.17 | 23.02.17 | 01.06.18 | 35 Year | 35 Years |

Accordingly, the duration of PPA shall be as mentioned above and needs to be incorporated in the PPA.”

4. The representative of the generator M/s. IA Hydro Energy Private Ltd., present during the hearing, gave written submission vide letter no. IAHEPL/2018-19/0157 dated 20.02.2019. M/s. IA Hydro Energy Private Ltd., submitted as under:-

“

- a) Regarding reimbursement of Transmission/ Distribution losses as per actual:-

As per IAHEPL offer dated 17" June, 2017, the Transmission/Distribution losses as per actual shall be reimbursed by HPPC and accordingly Levelised Tariff @ Rs. 4.50 per Unit ex-Generating Bus has also been approved by this Commission for sale of power.

While signing of PPA, the ceiling limit for Transmission/Distribution losses upto maximum @ 2% is imposed by HPPC whereas IAHEPL is incurring total Transmission/Distribution losses @ 4.75%, therefore, ceiling limit in Transmission/ Distribution losses of STU beyond 2% is not at all justified because Transmission/ Distribution losses to Himachal Pradesh being

made as per prevailing regulations of HPERC which is beyond the control of IAHEPL. The reimbursement of Transmission/ Distribution losses as per actual i.e. @ 4.75% may be considered.

b) Regarding reimbursement of Wheeling charges as per actual:-

At present, IAHEPL is paying wheeling charges to HPSEB @ 65 paise per unit for transmission of power from delivery point (Ex-Generating Bus) up to the sub-station of CTU at Himachal State periphery for injection of power into Grid.

Thought, while signing of PPA between HPPC & IAHEPL the ceiling limit for Wheeling/ Transmission losses at 2% has been imposed by HPPC, however, nothing is specified about payment of wheeling charges in cash. Moreover, the Commission has approved Levelised Tariff @ Rs. 4.50 per Unit Ex-Generating Bus for 35 years, therefore, the wheeling charges payable from the delivery point to the substation of CTU at Himachal State periphery to be paid / reimbursed by HPPC as per actuals in line with power transmission agreement signed by IAHEPL with Himachal State Government and wheeling charges approved by HPERC from time to time. The reimbursement of wheeling charges @ 65 paise per Unit may be considered by HPPC to IAHEPL as per actual.

c) Provisional Tariff: (Clause No. 9.1.3(ii)(b)):-

If the initial tariff determined by the Commission is not acceptable to the Purchaser/ Company and this Agreement is terminated under Clause 3.3.2, no differential shall be paid (i.e. Tariff determined/approved by the Commission over and above the Average Power Purchase cost) for the power already supplied. This clause is not at all justified, since it is against natural justice. Therefore it needs to be amended suitably

d) Capital Cost for determination of tariff: (Clause No. 9.1.4):-

This clause is required to be substituted strictly as per order passed by this Commission. Moreover we never agreed to exclude any cost overrun arising out of flash flood, geological surprises etc encountered during the construction or on account of force majeure events from the capital cost to be considered for tariff determination. However, in lieu of above, we have offered bare minimum levelised tariff @ Rs 4 50 per unit, hence there will be no impact on tariff due to the same.”

5. Subsequently, HPPC vide its letter no. Ch-65/CE/HPPC/SE/C&R-I dated 23.02.2019 reiterated that the "Exit Clause" has been agreed by both the parties (HPPC and Generators) which is the sole base to proceed further in the matter for approval of PPA and start the supply of power. HPPC further submitted that the said clause provides the balance of convenience to both the parties to protect their interest, in case the same is not protected the option of exit from the contract is still there. The same also bounds the generators to come with clean hands for tariff approval in the matter. Accordingly, HPPC has requested to retain the "Exit Clause" while approving the PPA's in the matter.
6. The Commission has considered the additional submissions made by HPPC and M/s. IA Hydro Energy Pvt. Ltd. vis-à-vis the signed draft PPA and Order of the Commission dated 10.04.2018, as under:-
- a) Clause 3.3.2 & Clause 9.1.3 (ii)(b):** The Commission considered the exit clause of 30 days sought in clause 3.3.2 of the PPA. The Commission also observed that the ceiling tariff has already been decided by the Commission in its Order dated 10.04.2018. The generator is already giving power supply at the average power purchase cost (APPC) to be adjusted against the final tariff determined by the Commission. Thus, both HPPC and generators have fair idea of the range within which the tariff shall be determined by the Commission. In case the tariff to be determined by the Commission exceeds the ceiling tariff agreed upon, the applicable tariff is to be capped at the ceiling tariff. Thus, retaining unprecedented exit clause is likely to put at risk both the parties i.e. the HPPC regarding quantum of power from the much needed Hydro sources as well as the generator for their such exit.
- In view of the above, the Commission is of the considered view that the exit provision sought in clause 3.3.2 of the PPA is unprecedented. Accordingly, clause 3.3.2 and 9.1.3 (ii) (b) contained in the draft PPA shall be removed. Needless to point out that in case of any difficulty to either party arising from the tariff or for that matter any other dispute, mechanism for seeking relief is available under the relevant clause of the Electricity Act, 2003.**

In terms of the above, the issue raised by the Generator at point no. 4.c above is also addressed.

- b) Clause 1.1 regarding Wheeling Charges:** The Commission considered changes sought by HPPC in clause 1.1 of the PPA, regarding wheeling charges. The Commission further observed that Clause 9.2.5 of the PPA specifies that *“The wheeling charges payable from the delivery point to the Sub-station or CTU at Himachal State Periphery at which power shall be injected, if applicable, shall be subject to a maximum of 2% of the energy transmitted as per the agreement signed/ to be signed by the Company with State Government of Himachal. Any increase in wheeling charges beyond 2% of the energy transmitted at any time during the tenure of this Agreement shall be borne by the Company.”*

The Commission has further considered the submissions of the generator at point no. 4.a & 4.b above, wherein it has been submitted that the Himachal Pradesh is already charging the Transmission/Distribution losses @ 4.75% and is already paying wheeling charges to HPSEB @ 65 paise per unit for transmission of power from delivery point (Ex-Generating Bus) up to the sub-station of CTU at Himachal State periphery for injection of power into Grid.

The Commission has examined both the clauses and observes that delivery point is the generator’s switchyard. However, the Commission in its Order dated 10.04.2018 (HERC/PRO-15 of 2016), while granting the source approval, observed the following at para 8:-

“.....The Commission however observes that there would be additional costs on account of wheeling/ Transmission charges to be paid to the State Utility of Himachal Pradesh. As such, in order to address the issue raised by the intervener, HPPC may ensure that the negotiated price is reasonable and that they would not be able to source power at a rate lower than that of the projects selected by them.”

Accordingly, in line with the ibid Order of the Commission, HPPC and the Generator agreed to cap the Wheeling charges & losses to 2% as per clause 9.2.5 of the signed draft PPA. The said acceptance having created a binding enforceable obligations interse between the parties, there can be no change in the agreed contractual terms at the later stage, which

has the effect of increased financial burden on the consumers. The financial parameters are essential term of the contract and a contractual agreement can be novated only by consensus of the signatory parties of the contract. The Commission cannot elect to substitute the consensual acts of the contracting parties, when any such substitution has a far reaching financial implications and increased financial burden on the consumers. Agreeing to any such demand would compromise larger public interest in order to secure windfall gain for the generator who had voluntarily, consciously and willingly agreed to a particular tariff.

The Commission observed that the definition of wheeling charges includes losses. Therefore, changing the definition of wheeling charges will result in the exclusion of losses from the capping of 2% of the energy transmitted. **However, considering the submission of the generator that nothing has been specified about payment of wheeling charges in cash, the Commission directs that wheeling charges actually incurred by the generators in cash shall not be subjected to the capping of 2% and shall be reimbursed as such. The Commission is of the considered view that granting relaxation in the provision already contained in the signed draft PPA is not justified. Accordingly, the following shall be added to Clause 9.2.5 of the PPA:-**

“wheeling charges actually incurred by the generators in cash shall not be subjected to the capping of 2% and shall be reimbursed as such.”

c) Clause 9.1.4 Capital cost for determination of tariff:-

The Commission considered the objection of the generator regarding the provision in the signed draft PPA to exclude any cost overrun arising out of flash flood, geological surprises etc encountered during the construction or on account of force majeure events from the capital cost to be considered for tariff determination, as the same is already factored in the negotiated ceiling tariff of Rs. 4.50/unit offered by them.

In order to examine the objection raised by the Generator, the Commission further referred its Order dated 10.04.2018 in case no HERC/PRO-15 of 2016, wherein the following was observed:-

“The Commission observes that the original project cost of 36 MW Chanju HEP as per the Techno Economic Clearance (TEC) given by HPSEB was Rs 295.09 crores. It is further observed that due to time overrun arising out of flash floods and geological surprises during construction, the project cost increased to Rs 482.39 crores. The developer is yet to obtain revised TEC from HPSEB. The Commission observes that the revised cost works out to Rs. 13.39 Crore / MW which is on the higher side compared to other Hydro projects recently cleared by the Commission. In respect of other Hydro projects recently cleared by the Commission the Developers had agreed to forego cost overrun arising out of such time overruns due to Force Majeure events. Hence, HPPC / Discoms may seek upfront commitment from the Generator to exclude the cost over runs on account of Force Majeure events.”

The Commission is also constrained to observe that in respect of other Hydro Projects in Sikkim and whose power procurement was approved by the Commission along with the procurement of power from this project of Himachal Pradesh, the generators have voluntarily foregone the cost overrun due to delay in achieving CoD. Moreover, the generator has agreed to the clause in the signed draft PPA submitted to the Commission. Now, it is not open to the generator to shift its stand and dispute the already agreed clause without any plausible reason or change of circumstances /happening of any such event thereafter. **Accordingly, the Commission considers that clause 9.1.4 of the signed draft PPA is in agreement with the Order of the Commission dated 10.04.2018 and does not warrant any change.**

7. Further, the Commission has perused the signed PPA/reply filed in the matter vis-a-vis the Order dated 10.04.2018 approving the procurement of power from IA Hydro Energy Project and terms contained in the PPA approved by the Commission for Teesta III Sikkim, observes that the following terms of the signed PPA also needs to amended/incorporated, suitably in the approved PPA:-

a) Clause 1.1: Auxiliary consumption:-

The following term shall be added, in line with the relevant provision in the approved PPA of Teesta III, Sikkim:-

“Provided that the same shall not exceed the auxiliary consumption limit specified by clause 37 (6) of CERC (Terms & Conditions of Tariff) Regulations, 2014.”

b) Clause 9.9: Breakdown of the grid and payment:-

The following term shall be added:-

“Provided that no such payment shall be made if such an eventuality arise on account of force majeure events mentioned in Chapter 10 of the PPA.”

Clause 7.7 shall also be amended accordingly.

8. In view of the above discussions, Commission approves the PPA subject to the amendment approved in the present Order.
9. The petition is accordingly disposed of. HPPC / Discoms shall submit a signed copy of the PPA for the record of the Commission within two weeks from the date of this Order.

This Order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 8th March, 2019.

Date: 08.03.2019
Place: Panchkula

(Pravindra Singh Chauhan)
Member

(Jagjeet Singh)
Chairman