



ASSAM ELECTRICITY REGULATORY COMMISSION

FILE NO. AERC. 311/2008/Pt-I

PETITION NO. 11/2013

ORDER SHEET

31.07.2013

Before the Assam Electricity Regulatory Commission

ASEB Campus, Dwarandhar,
G. S. Road, Sixth Mile, Guwahati – 781 022

Petition No. 11/2013

M/s Pahumara Hydel Power Company Private Limited (PHPCPL)

Represented by :

1. Mr. D. Kedia
2. Mr. A. Swami
3. Mr. G. Jaina

—— Petitioner

– Vs –

M/s Assam Power Distribution Company Limited (APDCL)

Represented by :

1. Mr. M. K. Adhikary, DGM (Com)
2. Mr. K. Goswami, AGM (T)

—— Respondent

In the matter of

Review Petition filed by the Petitioner for
reviewing the tariff order dated 05.10.2009

BEFORE

Shri T. Chatterjee
Member,
AERC

Dr. R. K. Gogoi
Member & Chairperson (Officiating),
AERC

ORDER

Background :

On 16.10.2008, M/s Pahumara Hydel Power Company Private Ltd. (PHPCPL) filed a petition before the Commission along with DPR prepared by IIT, Roorkee and MoU made with the then Lower Assam Electricity Distribution Company Limited for approval of tariff for 2 MW capacity hydro project located at Laugaon in Bodo Territorial Council, Baksa District, Assam (Petition No. 7/2008). The Commission issued a tariff order on 05.10.2009 approving levellised tariff of ₹ 2.911/kWh. Date of commissioning of the project was March, 2010 as mentioned in the MoU.

On 02.06.2010, M/s Pahumara Hydel Power Company Pvt. Ltd. filed a review petition (Petition No. 2/2010) requesting to approve the enhanced tariff to ₹ 3.20/kWh. After detailed deliberations, the Commission issued a speaking order on 15.09.2010 maintaining the same tariff as per earlier order dated

05.10.2009, with a provision to review the tariff at the time of COD based on the submission of data.

A Power Purchase Agreement (PPA) was signed between Assam Power Distribution Company Limited (APDCL) and M/s Pahumara Hydel Power Company Private Limited (PHPCPL) on 30.08.2011. In clause 29(b) of the PPA, it was mentioned that the Director of Agnipa Energo Pvt. Ltd. is the Nodal Agency for implementing this agreement on behalf of Pahumara Hydel Power Company Pvt. Ltd. and accordingly their address for correspondence is made in clause 32 of PPA as "The Director, Agnipa Energo Private Limited, C/o Pahumara Hydel Power Company Pvt. Ltd., 57, B. K. Kakati Road, Arya Chowk, 2nd Floor, R. K. Complex, P.O. Rehabari, Guwahati – 781008".

The Nodal Agency submitted the status report of the 2 MW Pahumara Hydel Power Project on September, 2011 to the Commission, wherein it was stated that the tentative commissioning of the project was May, 2013.

Instant Review Petition :

On 21.09.2012 M/s Pahumara Hydel Power Company Pvt. Ltd. had submitted a petition to review the tariff for Pahumara Hydro Power Project (2.4 MW) from ₹ 2.911/kWh to ₹ 3.45/kWh, by an affidavit mentioning as "Approval of Tariff and Power Purchase Agreement between Pahumara Hydel Power Company Private Ltd. and Lower Assam Electricity Distribution Company Ltd. for purchase of power from Pahumara Hydro Electric Project of 2.4 MW capacity making "Lower Assam Electricity Distribution Company" as respondent.

The address of the Petitioner/Applicant is shown as :

M/s Pahumara Hydel Power Company Pvt. Ltd.
C/o Agnipa Energo Private Limited,
2nd Floor, R. K. Complex,
57, B. K. Kakati Road, Arya Chowk,
P.O. Rehabari, Guwahati – 781008

As normal practice, the petition was sent to the APDCL, with whom the PPA was signed, for their comments as the company viz. Lower Assam Electricity Distribution Company is already merged with APDCL.

In their reply, APDCL agreed to be respondent instead of Lower Assam Electricity Distribution Company. APDCL also highlighted that since M/s Agnipa Energo Pvt. Ltd. is a Nodal Agency implementing the project of Pahumara Hydel Power Company Pvt. Ltd. (as per PPA), they are not sure of the background of the petition. In view of this complex background, the respondent requested the Commission to examine its legal implications.

While critically examining the petition, the respondent pointed out that the original DPR for 2 MW Pahumara Hydel Power Company Pvt. Ltd. was prepared by IIT, Roorkee, but while submitting the review petition, the petitioner has submitted another DPR in support of their petition prepared by M/s Agnipa Energo Pvt. Ltd. The respondent submitted that any modification in the DPR is required to be made by the original party i.e. IIT, Roorkee in conformity with the original agreement readily vis-a-vis any physical change.

Finally, the respondent prayed to the Commission not to admit the petition.

In the affidavit filed by the petitioner, it is mentioned that the DPR prepared by IIT Roorkee was submitted by the APPDCL for obtaining various clearances and approval from the Government/Semi Government bodies etc.

While implementing the project, M/s Agnipa Energo Pvt. Ltd. has prepared the DPR of their own.

Hearing of the Petition :

After careful consideration of the submissions made by M/s Pahumara Hydel Power Company Pvt. Ltd. and Assam Power Distribution Company Ltd., the Commission has decided to hear the petitioner in person for admission of the petition on 30.07.2013. Due notices were served to the petitioner and respondent. The Commission initiated the hearing with a brief background of the petition. The Commission asked the petitioner to clarify the modus operandi of M/s Pahumara Hydel Power Company Pvt. Ltd. vis-a-vis M/s Agnipa Energo Pvt. Ltd. with M/s Ashok Anil Consortium.

A representative from the petitioner clarified that M/s PHPCPL was formed as a Special Purpose Vehicle (SPV) by the Assam Power Projects Development Company Private Limited (APPDCPL), a Joint Venture between IL&FS-IDC and Government of Assam for development of the Pahumara Small Hydroelectric Project. Ashok Anil Consortium is the promoter of the project which was formed for participating in the bidding process for development of the said project. It was stated that M/s Agnipa Energo Private Limited (AEPL) is a 100% subsidiary company of Ashok Anil Consortium for implementing the aforementioned project. It was further mentioned that on 31.03.2010, the shares of M/s PHPCPL were transferred to the members of the Ashok Anil Consortium.

The petitioner informed the Commission that it had already submitted an affidavit clarifying the issue on 02.05.2013. It was further stated that the land lease agreement with the State Irrigation Department was signed with M/s Agnipa Energo Private Limited (AEPL).

Representatives from the respondent expressed concern that since the Power Purchase Agreement (PPA) with the Distribution Company from the Pahumara SHP was signed with M/s PHPCPL, therefore, agreement with the State Irrigation Department in the name of the implementing Company i.e M/s AEPL may lead to legal complications in the future.

The petitioner stated that they were contemplating to merge the two companies, M/s PHPCPL and M/s AEPL into a single entity.

The Commission then asked the petitioner to make additional oral submissions, if any.

The petitioner stated that the construction costs of the project have increased over the years due to delay in implementing the project not attributable to the petitioner. It was stated that the setback was mainly on account of delay in signing the land lease agreement for the project with the Government of Assam. Besides, it was informed that loan sanctioned by NEDFI was cancelled due to delay in signing of Implementation Agreement, G.O.A., Land Lease Agreement with the Irrigation Department, G.O.A. and PPA with APDCL (which were the pre-disbursement conditions for the NEDFI loan) which resulted in delay and cost overrun.

It was stated by the petitioner that, although the Bank of India, Guwahati sanctioned a term loan of Rs. 10.00 Cr. for the project at the interest rate of 14%, leaving a gap of 25% debt financing as per revised estimate.

The Commission then asked the respondent to make their submissions, if any.

Responding to the contentions of the petitioner, the respondent stated that the petitioners had submitted review petition (Petition No. 2/2010) against the tariff order of the Commission dated 05.10.2009 and the Commission in its order dated 15.09.2010 kept the tariff order unaltered with a provision for reviewing

the same at the time of commercial operation of the project. The respondent contended that there is no scope for admitting another petition for revision of tariff of the Pahumara project at this stage when the Commission reaffirmed the tariff order dated 05.10.2009 against the review tariff petition (No. 2/2010) of the petitioner. Any further review petition therefore, may not be accepted at present. The respondent further stated that since the Commission has already asked the petitioner in its order dated 15.09.2010 to approach the Commission for reviewing the tariff at the time of COD, the petitioner may do the same with all necessary documents to claim any enhancement in tariff only after commercial operation of the project. The respondent insisted that the reasons for delay and all other factors including indexation of costs may be examined at the time of commercial operation. The respondent further stated that the original petition was for capacity of 2 MW and this is the name plate rating. Continuous overloading of the machines by 20% as recommended by the Consultant is a subject to be decided by the petitioner. However, the respondent stated that APDCL is prepared to absorb any additional energy that may be generated from the project.

Discussion and Order :

The Commission heard both the parties.

The above background strongly suggests that the Petitioner Company is burdened with misjoinder of parties in the process which may lead to legal complications in the future. That apart, most pertinent question before the Commission is that the Commission is to follow the Regulations framed for conduct of proceedings before it and the relevant Regulations in this regard is the AERC (Conduct of Business) Regulations, 2004. Where Proviso 34(1) of the Regulations clearly states as follows :-

“Any person aggrieved by a decision or order of the Commission, from which no appeal is preferred or allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decision/ order was passed by the Commission or on account of some mistake or error apparent from the face of record, or for any other sufficient reason, may apply for review of such order within 60 days of the date of decision/ order of the Commission.”

To entertain/admit the present Review Petition, in point of fact, the Commission has no jurisdiction which amounts to Second Review of the Commission's order after a lapse of more than 2 years. The Petitioner Company has also failed to submit a Petition for condonation of delay in filing the second Review with valid grounds at least for passing an appropriate order in terms of law, justice and fair play. As such, the present petition is also incomplete in material particulars and barred by the law of limitation.

The fact remains that the Petitioner Company filed a Review Petition against the Tariff Order passed by the Commission on 05.10.2009 and the said Petition was numbered as Review Petition No. 2/2010 and the Review Petition was disposed of by a speaking order by the Commission on 15.09.2010. In the said order, in the concluding para, the Commission specifically observed as follows :-

“The Commission heard both the parties. Taking note of the above facts, the Commission is of the considered opinion that it would be prudent to keep the order of the Commission dated 05.10.2009 unaltered at present. However, the Commission may consider for reviewing the tariff at the

time of commercial date of operation (COD) based on the submission of data, and any other information as required by the Commission at that time.”

Therefore, the Commission asserts that the order above still holds the field for all practical purposes and all concerned are to punctually observe the said order and carried into execution.

In the above view of the whole matter, the Commission found the instant petition devoid of any merit and liable to be dismissed.

In the result, the Review Petition is dismissed at the admission stage.

Inform all concerned.

Sd/-
(T. Chatterjee)
Member, AERC

Sd/-
(Dr. R. K. Gogoi)
Member & Chairperson (Officiating),
AERC