

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No. 224 of 2014

Dated: 27th April, 2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

M/s. Puri Oil Mills Limited
Jyoti Shikhar, 8 Distt. Centre,
Janakpuri New Delhi – 110 058

...Appellant(s)

Versus

1. Haryana Power Purchase Centre
Sector – 6, Panchkula
Haryana – 124 505

...Respondent(s)

2. Uttar Haryana Bijli Vitran Nigam Ltd.
Vidyut Sadan, Plot No. C 16
Sector – 6, Panchkula
Haryana – 124 505

3. Haryana Renewable Energy Development Agency
SCO-48, Sector 26, Chandigarh – 160 019

4. Haryana Irrigation Department
Sinchai Bhawan, Sector 5,
Panchkula, Haryana – 134 114

5. Haryana Electricity Regulatory Commission
Bays No. 33-36, Sector – 4,
Panchkula – 134 109, Haryana

Counsel for the Appellant (s) : Mr. Akhil Sibal
Ms. Bina Gupta

Mr. Abhay Anand Jena

Counsel for the Respondent(s):

**Mr. M.G. Ramachandran,
Ms. Anushree Bardhan,
Ms. Poorva Saigal,
Ms. Ranjitha Ramachandran,
Ms. Sonia Madan and
Mr. Raghujeet Singh Madan
for R-1 & R-2**

**Mr. P.C. Sharma (Rep.),
Mr. M.K. Arora (Rep.),
Mr. Munish sharma (Rep.) and
Mr. Satisnder Kumar for R-3**

**Ms. Shikha Ohri,
Ms. Meghana Aggarwal and
Mr. Tushar Nagar for R-5**

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Puri Oil Mills Ltd. challenging the order of Haryana Electricity Regulatory Commission ("State Commission") dated 28.07.2014 determining the tariff of two (1.4 MW each) canal based mini-hydro power projects of the Appellant, namely Mussapur and Khukhani in Haryana, with effect from 01.04.2012 for the remainder of the term of Power Purchase Agreement dated 13.08.2010 between the Appellant and Respondent no.1.

2. The Appellant is a generating company. Haryana Power Purchase Centre and Uttar Haryana Bijli Vitran Nigam Ltd., the Distribution Licensee are Respondent no. 1 and 2 respectively. Haryana Renewable Energy Development Agency and Haryana Irrigation Department are Respondent no. 3 and 4 respectively. The State Commission is the Respondent no.5.
3. The brief facts of the case are as under:
 - a) A Memorandum of Understanding was entered into between the Appellant and Respondent no. 3 and 4 for implementation of Small Hydro Power Project on 27.11.2006.
 - b) On 15.05.2007, the State Commission passed order on “Renewable Energy Tariff and other Issues” for the period FY 2007-08 to FY 2011-12. Further order dated 03.10.2007 and 06.11.2009 were passed by the State Commission in the matter of Review Petition filed against the aforesaid order dated 15.05.2007.
 - c) On 13.08.2010, the Appellant entered into a Power Purchase Agreement (“PPA”) with the Respondent no.1 for sale of all energy generated at Appellant’s hydro projects. The tariff at the rate of Rs. 3.67 per kWh with annual escalation of 1.5% was

admissible upto the year 2011-12 as per tariff order dated 03.10.2007 and for remaining duration of the PPA which was executed for 25 years (extendable by another 10 years), the tariff had to be determined by the State Commission subject to the minimum rate of Rs. 3.67 per kWh.

- d) On 17.06.2011, the 1.4 MW Mussapur Mini Hydro Project of the Appellant was commissioned. This was followed by commissioning of 1.4 MW Khukhani project of the Appellant on 30.09.2011.
- e) On commissioning of the projects and subsequent operation, the Appellant realized that there was large circumstantial changes in the capital cost of the project after signing of the PPA. Accordingly, the Appellant filed a petition before the State Commission on 18.06.2011 for redetermination of tariff of the two hydro projects.
- f) A breach occurred on 15.12.2011 at Khukhani project when it was discovered that there was an inherent structural deficiency at the junction between the canal lining originally constructed for a discharge of 3250 cusecs and raised lining for design discharge of 4500 cusecs. As per the Appellant, the knowledge of this

deficiency was privy to the Irrigation Department but they did not share it with the Appellant while vetting the DPR.

- g) The State Commission by order dated 12.04.2012 dismissed the aforesaid petition with liberty to the Appellant to file petition for determination of tariff with case specific supporting data which would be applicable from a prospective date as the tariff by the State Commission's order dated 15.05.2007 was valid only for a period of 5 years.
- h) Aggrieved by the aforesaid order of the State Commission, the Appellant filed an Appeal bearing Appeal no. 90 of 2013 before this Tribunal. The Tribunal by judgment dated 09.04.2014 partly allowed the Appeal. The Tribunal did not allow reopening of the PPA and redetermination of tariff. However, the Tribunal observed that the State Commission had already given liberty to the Appellant to approach State Commission for redetermination of tariff prospectively after completion of earlier control period in March 2012. Accordingly, the Appellant may approach the State Commission with supporting documents for determination of the tariff with prospective effect.

- i) The Appellant in the meantime had already approached the State Commission by way of the tariff petitions in respect of the two mini hydro projects for review of their respective tariffs for period starting from 01.04.2012.
 - j) The State Commission on 28.07.2014 passed the impugned order rejecting the claims of the Appellant for increased capital costs, O&M expenses and CUF. The Appellant also deducted the capital subsidy availed by the Appellant and determined tariff at rate below the minimum tariff rate of Rs. 3.67 per kWh agreed between the parties under the PPA.
 - k) Aggrieved by the impugned order dated 28.07.2014, the Appellant has filed this Appeal.
4. The Appellant has made the following submissions:-
- a) The tariff as determined is contrary to the terms of the PPA entered into between the Appellant and Respondent no.1 and approved by the State Commission.
 - b) The State Commission has determined levelled tariff of Rs. 2.99 per kWh in the impugned order which is contrary to terms of Article 3.1.2 of the PPA under which the tariff for the period 01.04.2012 onwards is expressly made "subject to a minimum

Rs. 3.67 per kWh". The tariff as determined by the State Commission falls below the minimum tariff as agreed in the PPA.

- c) The impugned order fails to articulate any discernible principle while fixing the value of various tariff components, which constitute the eventual tariff as determined by the State Commission in the impugned order. The State Commission has determined the capital cost, ROE and depreciation on the basis of generic tariff order dated 15.05.2007, while determining auxiliary consumption, O&M expenses, interest on loan, interest on working capital and capital subsidy on the basis of State Commission's Tariff Regulations 2010. As for PLF/CUF, it has been determined on the basis of project specific norm. The mix and match approach to determination of various tariff components by applying the tariff order dated 15.05.2007, Tariff Regulations 2010 and a project specific norm followed by the State Commission is arbitrary.
- d) As per Tariff Regulations 2010, the PPAs signed on the basis of tariff order dated 15.05.2007 and 06.11.2009 for renewable energy before Notification of the Regulations shall remain valid for the tariff period as per the PPA and such cases shall not be

reopened in view of the norms provided in these Regulations. However, after the Notification of these Regulations, the aforesaid orders of the Commission shall not remain effective.

- e) In view of above it is not permissible for the State Commission to apply the values of the various tariff parameters as determined by the State Commission in its order dated 15.05.2007 without determination afresh.
- f) Since for the tariff passed in question, the Tariff Regulations, 2010 are operative, ordinarily, the values of the various tariff parameters ought to be determined in accordance with the said Regulations except for capital cost, which may be determined on a project specific basis. Thus, capital cost on project specific basis while determining all other tariff components as per the Tariff Regulations, 2010 is justified and appropriate. There is fundamental difference between capital cost, which is initial and fixed investment into the project which does not vary during the life of the project and other tariff components such as CUF/PLF and O&M expenses, which are variable in nature and keep changing on actual basis during the life time of the project. The State Commission vide order dated 31.10.2007 had expressly held that

certain parameters including capital cost would be honoured in subsequent years for the projects such as those of the Appellant.

- g) The project specific capital cost in excess of Rs.10.25 crores per MW can be considered as the State Commission in its order dated 12.04.2012 and the Tribunal in order dated 09.04.2014 had granted liberty to the Appellant to place case specific data on capital cost before the State Commission for redetermination of tariff for subsequent period from 01.04.2012 onwards. The Appellant would not be precluded in any manner from justifying the actual capital cost incurred for the tariff determination from 01.04.2012 onwards for which no specific tariff was agreed in the PPA. Moreover at the time of passing the order dated 12.04.2012 by the State Commission, some of the material viz. inquiry report of Committee of Chief Engineers of Irrigation Department, final report of NIT Kurukshetra and final report of Commission constituted for recommendations on the issues of augmentation of canal that has now been placed before the State Commission in support of higher capital cost was not available before the State Commission at that time. Further capital cost as per DPR has also not been considered.

- h) The Appellant would not have any objection to the finding of the State Commission regarding O&M expenses as per the Tariff Regulations, 2010 if its contention regarding adoption of capital cost as per actuals and other norms as per the 2010 Regulations is accepted. However, if this is not accepted then the O&M expenses should be determined on project specific basis.
- i) The PLF/CUF ought to be considered as 56% in accordance with the Tariff Regulations, 2010. The State commission has decided the project specific PLF/CUF of 70% without calling upon the Appellant to submit water discharge data or any case specific data during the proceedings before the Commission. The water discharge data from the Irrigation Department at the canal head would not be reliable basis to determine PLF/CUF in as much as the project sites are situated at a distance of around 30 km downstream in case of Mussapur project and 19 km downstream in case of Khukhani project from the canal head. If the Tribunal is not persuaded to hold that the CUF/PLF should be as per the Tariff Regulations 2010, then liberty may be granted to the Appellant to place the relevant specific data before the State Commission.

- j) ROE ought to be determined as per the Tariff Regulations 2010 as it is more beneficial to the Appellant compared to that decided in order dated 15.05.2007. Therefore it will not be inconsistent with order dated 03.10.2007 stating that ROE decided in the order dated 15.05.2007 would be honoured.
 - k) The State Commission ought not to have considered the capital subsidy while deciding the tariff. This is against the principle of natural justice as no hearing was conducted on this issue. Till 31.03.2012, the capital cost was determined without any deduction of capital subsidy from the capital cost. According to the order dated 15.05.2007 as well as 03.10.2007, the various tariff parameters including, capital cost were to be 'honoured' in the subsequent years.
 - l) It has also been submitted that for a similar small hydro canal based power plant which was commissioned prior to 31.03.2012, with identical provisions for tariff determination, the State Commission has determined a levellised tariff of Rs. 3.98 per kWh for the project life of 35 years with effect from 01.04.2012 as compared to Rs. 2.99 per kWh in case of Appellant.
5. The Respondent no.1 has in its reply submissions stated as under:

- a) The Appellant has claimed higher capital cost primarily on account of cost incurred on the strengthening of canal lining. This claim was specifically rejected by the State Commission and the Tribunal in earlier orders dated 12.04.2012 and 09.04.2014 respectively. Further, the State Commission in the impugned order has noted the reply filed by the Irrigation Department stating that the breach in canal has been caused due to fault of the Appellant. Therefore, additional expenses on this account cannot be passed on to the consumers.
- b) The liberty granted to the Appellant by the State Commission in order dated 12.04.2012 and the Tribunal in order dated 09.04.2014 was restricted to interest rate, auxiliary consumption, ROE, PLF/CUF, deemed generation and depreciation and not repair and maintenance of canal and capital cost of the project.
- c) The capital cost for mini hydro project of below 5 MW capacity provided in the Tariff Regulations, 2010 framed by the State Commission at Rs. 5.5 crore per MW is much less than the capital cost of Rs. 10.25 crores per MW allowed to the Appellant. The Tariff Regulations 2010 have been framed on the basis of industry standards and the Appellant has not provided any

justification for the unreasonably high capital cost of its projects.

The Appellant has already been allowed a very high capital cost and any cost beyond such cost should not be allowed.

- d) The O&M expenses of Rs. 17 lakhs per MW with annual escalation of 5.72% as per the Tariff Regulations 2010 have correctly been allowed as the norms have been based on industry standard. The additional O&M expenses on maintenance of canal 2 km upstream and 2 km downstream which was specifically rejected in earlier proceedings cannot be reconsidered. The maintenance of canals was the responsibility of the Appellant as per the MOU entered into by the Appellant.
- e) PLF/CUF has been decided as per the actual data. The Appellant has claimed a lower PLF/CUF without providing any actual data.
- f) The reduction of capital cost by capital subsidy has been specifically provided for in the Tariff Regulations 2010. Even otherwise, reduction of capital cost by capital subsidy is justified as it has been actually received by the Appellant and benefit of higher capital cost than the Tariff Regulations 2010 has been allowed to the Appellant.

- g) It is admitted that the Appellant is entitled to minimum tariff as per the PPA.
6. We have heard Mr. Akhil Sibal, Learned Counsel for the Appellant, Shri M G Ramachandran, Learned Counsel for the Respondent no.1 and Ms. Shikha Ohri, Learned Counsel or the State Commission. On the basis of the contentions of the parties, the following questions would arise for our consideration:
- (i) Whether the Appellant based on actual expenditure incurred is entitled to claim capital cost higher than that allowed by the State Commission as per tariff order dated 15.05.2007?**
 - (ii) Whether the Appellant is entitled to determination of tariff as per the financial and operational norms as per the Tariff Regulations 2010, except for capital cost?**
 - (iii) Whether the Appellant is entitled to project specific O&M expenses as claimed by the Appellant?**
 - (iv) Whether the Appellant is entitled to PLF/CUF of its small hydel projects as per the Tariff Regulations 2010?**
 - (v) Whether the Appellant is entitled to Return on Equity as per the Tariff Regulations 2010?**

- (vi) **Has the State Commission erred by accounting for the capital subsidy granted to the Appellant by the Central Government for determination of tariff?**
- (vii) **Has the State Commission erred by determining the tariff below Rs. 3.67 per kWh in contravention to the PPA entered into between the parties?**
7. **Let us examine the first issue regarding capital cost.**
8. We find that the issue regarding determination of capital cost has been dealt with comprehensively in the judgment of this Tribunal dated 09.04.2014 in Appeal no. 90 of 2013 filed by the Appellant to challenge order dated 12.04.2012 passed by the State Commission.
9. The contention of the Appellant before this Tribunal in Appeal no. 90 of 2013 was that capital cost of the projects has increased for reason such as condition imposed by Irrigation Department for repair and maintenance of canal lining and maintenance and upkeep of canal 2 km upstream and 2 km downstream of the project. In addition, cost of strengthening of canal banks has been passed on the Appellant and there was a breach in canal which occurred on 15.12.2011. None of these factors were shared with the Appellant. There was also inherent deficiency in canal lining which could be ascertained after ponding in

the canal after commissioning of the project. Further, due to flat terrain in Haryana there are low water heads which require more civil works. As a result the actual capital cost incurred on the projects was much higher.

10. The Tribunal after considering the above issues in Appeal no. 90 of 2013 held as under: -

“17. The State Commission vide order dated 15.5.2007 determined the preferential tariff for mini hydro power projects. Subsequently, the Appellant willingly entered into PPA for sale of power from its hydel project with the distribution licensee agreeing for the supply of energy at the tariff as determined by the State Commission by order dated 15.5.2007.

18. According to the Appellant, the State Commission while fixing the tariff by order dated 15.5.2007 was aware that the hydro projects in Haryana are basically canal based having low head which require substantial civil work.

19. We notice from order dated 15.5.2007 of the State Commission that the stakeholders in their comments submitted to the State Commission during the public hearing had highlighted that the hydro project in Haryana basically being canal based with very low head required substantial civil works and consequently it would lead to escalation in the project cost. The State Commission after consideration of the submissions of the stakeholder decided capital cost of Rs. 10.25 Cr./MW for mini hydro projects. We find that the Central Commission in its 2009 Tariff Regulations for renewable energy sources has allowed capital cost of Rs. 5.5 Cr./MW for similar projects in the State of Haryana. Thus, the State Commission has after taking into consideration the objections and suggestions of the stakeholder has allowed capital cost which is substantially higher than that allowed by the Central Commission.

20. *According to the Appellant additional cost was incurred due to damage of the canal after raising the water head in the canal at the time of commissioning of the power project, poor condition of the canal and the condition subsequently imposed by the Irrigation Department for operation and maintenance of the canal two km. upstream and two km. downstream of the hydro project. We notice that the responsibility of strengthening works of the canal banks to facilitate ponding of water in the canal was that of the Appellant and the Appellant had adequate time to study and carry out due diligence of the condition of the canal from the date of entering into a MoU with the State Government on 27.11.2006 and signing of the PPA on 13.8.2010. The Appellant itself had admitted that while approving the drawings the Irrigation Department had indicated that O&M of the canal two kilometers upstream and two kilometers downstream would be the responsibility of the Appellant. We are, therefore, not convinced about the claim of the Appellant for additional capital cost as we feel that the capital cost decided by the State Commission while determining the tariff by order dated 15.5.2007 is reasonably high taking into consideration the high cost for canal based hydro projects in Haryana.”*
11. We find that the Tribunal in Appeal no. 90 of 2013 has examined the contentions of the Appellant for higher capital cost and decided that capital cost as determined by the State Commission in order dated 15.05.2007 is reasonably high taking into consideration the high costs for canal based hydro projects in Haryana. The Tribunal specifically rejected the claim of higher cost due to poor condition of canal and conditions imposed by the Irrigation Department for upkeep of the canal. The Appellant is now claiming higher capital cost on the same grounds which were specifically rejected and decided by this Tribunal

- against the Appellant in Appeal no. 90 of 2013. It is now not open for the Appellant to raise the same issue again which had been specifically rejected by this Tribunal.
12. Capital cost of the project is decided after commissioning of the project. Once final capital cost has been determined it is not redetermined. The liberty granted by this Tribunal in judgment in appeal no. 90 of 2013 for tariff determination after completion of control period ending 31.03.2012 cannot be used for redetermination of capital cost for the same reasons which had been specifically rejected by this Tribunal.
 13. In view of above we do not find any reason to interfere with decision of State Commission to retain capital cost at Rs. 10.25 crores per MW as decided by tariff order dated 15.05.2007.
 14. **The second issue is regarding application of Regulations 2010.**
 15. The Tariff Regulations 2010 stipulate that PPA signed by the Distribution Licensee(s) on the basis of tariff determined by the Commission in its orders dated 15.05.2007 and 06.11.2009 on renewable energy before the notification of these regulations shall remain valid for the tariff period as per the PPA. Such cases shall not be reopened in view of norms provided in these regulations. However, after notification of these Regulations, the aforesaid orders of the

Commission shall not remain effective. We find that in the PPA entered into between the Distribution Licensee and the Appellant, it was agreed that the tariff for the period upto 31.03.2012 will be Rs. 3.67 per kWh (base year 2007-08) with annual escalation of 1.5% and for remaining duration of the agreement the purchase price shall be decided and notified by the State Commission subject to minimum of Rs. 3.67 per kWh. The PPA was based on order dated 15.05.2007 wherein the State Commission had approved tariff for a period of 5 years. The order dated 15.05.2007 did not indicate the tariff which would be applicable after the period of five years.

16. The tariff for remaining period of PPA with effect from 01.04.2012 has now been redetermined by impugned order dated 28.07.2014. According to the Tariff Regulations 2010 the orders dated 15.05.2007 and 06.11.2009 shall not remain effective after the notification of the 2010 Regulations and, therefore, tariff for period from 01.04.2012 has to be determined based on the operational and financial norms specified in the Tariff Regulations 2010 as no tariff has been agreed in the PPA between the parties beyond 31.03.2012. The Tariff Regulations 2010 expressly prohibit reopening of the cases in view of norms provided in these Regulations. However, in the present case

there is no reopening of the PPA. The PPA itself provides for determination of tariff for contract period after 2011-12 by the State Commission. After notification of Tariff Regulations 2010 the operational and financial norms decided by order dated 15.05.2007 will not be valid. However, the capital cost which was adopted for the first year of tariff on commissioning of the plants prior to 01.04.2012 cannot be redetermined. Accordingly, all operational and financial norms as specified in the Tariff Regulations 2010 shall be applicable to the Appellant.

17. The third issue is regarding O&M expenses.

18. Learned Counsel for the Appellant has argued that O&M expenses as decided by the State Commission as per Tariff Regulations, 2010 are acceptable if all other normative parameters except capital cost are also decided as per the Regulations. If this principle is not followed then the O&M expenses should be allowed as per actuals.
19. In view of our findings on the second issue the O&M expenses as per Tariff Regulations, 2010 as decided by the State Commission in the impugned order will be applicable.
20. The Appellant's claim for higher O&M expenses on account of upkeep of canals and weakness in canal banks and maintenance of canal 2 km

upstream and downstream has been specifically rejected by this Tribunal in judgment in Appeal no. 90 of 2013. Therefore, higher O&M as per actuals shall not be applicable.

- 21. The fourth and fifth issues are regarding PLF/CUF and Return on Equity.**
22. In view of our findings in the second issue, the PLF/CUF and ROE shall be allowed as per the Tariff Regulations 2010.
- 23. The sixth issue is regarding accounting of capital subsidy granted to the Appellant by the Central Government in determination of tariff.**
24. We feel that all operational and financial parameters for redetermination of tariff have to be based on the 2010 Regulations. Therefore, the capital subsidy has also to be accounted for in determination of tariff with effect from 01.04.2012 as the capital subsidy has been actually availed by the Appellant.
- 25. The seventh issue is regarding determination of tariff below Rs. 3.67 per kWh in contravention to the PPA.**
26. It has been fairly conceded by the Respondent no.1 that the tariff beyond 2011-12 for the remaining duration of the agreement will be subject to a minimum of Rs. 3.67 per kWh as per the provision of PPA.

- We find that the PPA has a provision for minimum tariff of Rs. 3.67 per kWh beyond 2011-12 for the remaining period of the agreement. As per the Tariff Regulations 2010 also the terms of PPA have to be honoured. Therefore, the State Commission shall consider the same while determining the tariff.
27. In view of above the State Commission is directed to redetermine the tariff as per the directions given in this judgment. The State Commission shall consider all the operational and financial norms as per the Tariff Regulations 2010 except the capital cost.
28. The Appeal is allowed in part and the impugned order is set aside. The State Commission shall pass consequential order within 3 months of the date of this judgment. No order as to cost. However, in the interim period the Appellant shall be entitled to a tariff of Rs. 3.67 per unit, the minimum tariff agreed in the PPA.
29. Pronounced in the open court on this **27th day of April, 2015.**

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Justice Ranjana P. Desai)
Chairperson