

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION,
SHIMLA

Suo Motto Case No. ____ of 2010

In the matter of:-

Amendments in the Model Power Purchase Agreement
(approved in case No. 2 of 2002) for Small Hydro Electric
Projects upto 5 MW and including 5 MW capacity being
executed by the Independent Power Producers in the private
sector in the State of Himachal Pradesh.

CORAM
YOGESH KHANNA
CHAIRMAN

The following were present in the hearing held at Shimla on the
3rd July, 2010: -

For Respondents/Intervenors-

HIMURJA

Sh. K.L.Thakur,XEN

H.P. State Electricity Board

Sh. J.P.Kalta,
C.E. (Comml.)

Sh. R.K. Punshi
Consultant

Sh. Des Raj
Director (SERC&Tariff)

ORDER

Dated 26.7.2010

(The matter was heard on the 3rd July, 2010 and order reserved)

The key role of the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as “the HPERC” or the “Commission”) is to regulate the working of the electricity industry in the State of Himachal Pradesh. Section 86 of the Electricity Act, 2003 (36 of 2003), delineates the functions of the State Electricity Regulatory Commission. By virtue of clause (b) of sub-section (1) of the said section, purchase and procurement process (including procurement/purchase price) of the distribution licensee is required to be regulated by the Commission in discharge of its mandatory functions. To achieve this objective the H.P. State Electricity Board, under clause (c) of sub-

section (1) of section 22 of the Electricity Regulatory Commissions Act, 1998, (now repealed) read with guidelines issued by the Commission for preparation of Power Purchase Agreement of the Small Hydro Projects (SHPP) upto 5 MW, filed a petition with the Commission on Feb., 8, 2002 for approval of Model Power Purchase Agreement (MPPA) for projects upto including 5 MW being executed by the Independent Power Producers (IPPs) in the private sector in the State of Himachal Pradesh. The Commission, after the due process of public participation, approved the Model PPA subject to the modifications as stipulated in chapter 7 of Commission's order titled "Model Power Purchase Agreement for SHPs upto 5 MW" dated 24th March, 2003. Thereafter, in the exercise of the rights vested in direction No. 38 of Chapter 7, titled "Direction and Orders", of the order dated 24th March, 2003, the Commission issued first amendment order and directions on 12th Jan., 2004 and then another modification of section 10.7.2 of Model PPA with respect to "buy out" option was issued by the Commission on 7th May, 2004. The aforesaid amendments were issued by the Commission based on the petitions filed by the stakeholders and also under the powers conferred and rights vested by direction No. 38 of the order on Model PPA dated 24th March, 2003, which stipulates as under:-

"The Commission reserves the right to review and modify the provisions of the Model PPA as more experience is gained in the implementation and performance of the specific PPAs in future. Such changes in the Model PPA, however, would have only the prospective effect."

2. Keeping in view the policy changes made by the State Govt., change on account of the sHPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensees) Regulation, 2007 and Commission order on Small Hydro Projects and Tariff and other Related Issues dated 18th Dec., 2007, the Commission after prior publication and public hearing suo-moto issued another amendment to Modal PPA through an order dated 6th March, 2009.

3. In order to impart more clarity, consistency with the Act, to facilitate funding to the IPP, to incorporate the directions issued in Commission's order on SHPs dated 9th Feb., 2010 and on account of APTEL order dated 18th Sept., 2009, the Commission under the direction no. 38 (ibid) proposed further amendments/ modifications in the Model PPA as under.

(a) Amendments in the recital of the PPA, para 1

The para 1 of the recital stipulates as under:

*M/s, a Generating Company within the meaning under Section 2(28) of The Act, 2003, and registered under the Company Act, 1956 having its registered office at and having its head office at....., (hereinafter referred to as the "Company", which expression shall, unless repugnant to the context or meaning thereof, also include their successors, permitted assigns legal representatives), through Sh. _____, who is duly authorized by the Company vide their resolution dated _____ (Annexure-1) to execute this agreement, of the **First Part**;*

The above para requires modification on account of amendment proposed hereinafter in the definition of "Company" in clause 2.2.16 of the Model PPA.

(b) Clause 2.2.16 of the model PPA

The clause 2.2.16 of model PPA defines "Company" as under:
"Company" means M/s, a Generating Company with in the meaning under Section 2(28) of the Electricity Act, 2003, and registered under the Company Act, 1956 having its registered office at and having its head office at....., and shall unless repugnant to the context or meaning thereof, also include their successors, permitted assigns legal representatives"

Cclause 2.2.35 of the Model PPA and section 2(28) of the Electricity Act, 2003, defines "Generating Company" as under: -

"Generating Company" means any Company or a body corporate or a association or a body of individuals, weather incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station".

From above it is clear that a Generating Company need not to be registered under Company Act, 1956. Therefore, this necessitates amendments in the clause 2.2.16 of Model PPA.

(c) Clause 3.2 of Article 3

The clause 3.2 of the model PPA stipulates as under:

"For the purpose of this Article the construction period means a maximum period of (...) months from the date of financial closure. The construction schedule to this effect is as per schedule-I of this agreement. The company shall

also furnish to the Board half yearly progress reports by 31st March and 30th September every year indicating achievements vis-à-vis the targets, Spillage, if any, and the remedial actions intended to be taken”.

However, It was observed during scrutiny of PPAs the construction schedule bar chart provided with PPA in some cases is silent about the financial closure and also Himurja has been approving the construction schedules without the provision of financial closure. Therefore, would it be appropriate that the construction period be delinked with financial closure and linked with the construction schedule approved by the nodal agency. This would facilitate faster execution of the PPA and IPPs can approach institutions for financing, as the approved PPA is a pre requisite document required by the financial institutions to finance the project. Therefore the Clause 3.2 needs to be amended suitably..

(d) Clauses 6.2, 6.4 and 16.5

The clause 6.2 of model PPA stipulates as under:

“The Board shall pay for the Net Saleable Energy delivered by the Company to the Board at the Inter Connection point at a fixed rate of Rs. 2.87 (rupees two and eighty seven paise) per Kilowatt hour”.

The tariff has been revised from Rs. 2.87 to Rs.2.95 vide Commission’s Order dated 9th Feb., 2010.

Therefore, Clauses 6.2, 6.4 and 16.5 need to be amended accordingly.

(e) Clause 8.8 of Article 8 i.e “BILLING AND PAYMENT”

The Clause 8.8 of the model PPA stipulates as under:

“ Any statutory taxes, levy, duties, cess or any other kind of imposition(s) including tax on generation of electricity whatsoever imposed / charges by any government (Central/State) and / or any other local bodies / authorities on generation of electricity, after the effective date, shall be reimbursed by the Board to the Company on the quantum of Net Saleable Energy”.

Clause 8.8, currently provides for any statutory taxes, levy, duties, cess or any other kind of imposition(s) including tax on generation of electricity imposed by the Government/ local bodies/ authorities on generation of electricity, but is salient about post tariff changes in the taxes which were considered during the tariff determination. Therefore, clause 8.8 needs to be amended suitably.

4. Accordingly the Commission proposed the following amendments in the Model PPA: -

(a) The para 1 of the recital of the Model PPA, shall be substituted as under: -

“M/s, a Company which have signed Implementation Agreement with the Government of Himachal Pardesh and is having its registered office at(hereinafter referred to as “the Company”, which expression shall, unless repugnant to the context or meaning thereof, also include their successors, permitted assigns legal representatives),through Sh._____, who is duly authorized by the Company vide their resolution dated_____(Annexure-1)to execute this agreement, of the **First Part;**”.

(b) In article 2 i.e. “Definitions and Interpretation”-

The existing clause 2.2.16 shall be substituted as under: -

“Company” means M/s, which have signed Implementation Agreement with Government of Himachal Pardesh and is having its registered office at and shall unless repugnant to the context or meaning thereof, also include their successors, permitted assigns legal representatives;

(c) In Article 3 in clause 3.2 the existing first two sentences, the following sentences shall be substituted, namely:

“For the purpose of this article, the construction period means a maximum period of (____) months as per the construction schedule i.e. Schedule -I of this Agreement ”.

(d) In clauses 6.2 and 6.4, for the figures, brackets and words “2.87 (rupees two and eighty seven paise)” the figures, brackets and words “2.95 (rupees two and ninety five paise)” shall be substituted.

(e) The existing clause 8.8 shall be substituted as under: -

“Any statutory taxes, levy, duties, cess or any other kind of imposition(s) including tax on generation of electricity whatsoever imposed / charges by any Government (Central/ State) and / or any other

local bodies / authorities, after the Effective Date, shall, taking into consideration the general or special order made by the Commission, be reimbursed by the Board to the Company on the quantum of Net Saleable Energy”; and

(f) In clause 16.5, for figure “2. 87”, the figure “2.95” shall be substituted.

5. In relation to the proposed modifications, the public objections/suggestions were invited, by making insertion in the leading newspapers i.e. the Indian Express and Amar-Ujala dated 2nd April, 2010. The draft of the proposed amendments was also made available to the various stakeholders (including the State Government; HPSEB) and the Consumer Representative and the text of the draft proposal was also made available on the HPERC Website: www.hperc.org. The comments received were from HPSEB Ltd and Shri P.N. Bharwaj the Consumer Representative. Shri P.N. Bharwaj, Consumer Representative stressed that while care has been taken to elaborate on levy, taxes, duties, cess of all kinds, he feels it will clarify matters, if matter relating to *“Free electricity to be supplied to the State by IPPs”* is also included in the *Explanation to Clause 8.8*.

Objections and suggestions made on behalf of the HPSEB.

“The Board would like to submit that as per the orders of the Hon’ble Appellate dated 18.9.2009, the promoters of hydel power in the State of Himachal Pradesh as well as the Himachal Pradesh Electricity Board shall be entitled to apply to the Commission for fixing project specific capital cost for any project in case the normative capital cost of Rs.6.5 Crore per MW is not suitable to either of them. Similarly, if the Capacity Utilisation Factor(CUF) of 45% for a specific project is contested by either party, it may approach the Commission with the site specific Capacity Utilisation Factor(CUF). In almost all the 51 No. PPAs executed by the Board the CUF is more than 45% as per the approved DPR and the TEC. Also the per MW capital cost in most of the cases is much lower than Rs.6.5 Crore as per the DPR/TEC approved by the competent authority. As such the generic CUF of 45% and 6.5 per MW cost, on the basis of which the levellised tariff of Rs. 2.87 is applicable for

the present and the same is proposed to be further amended to Rs.2.95 per unit, is not suitable to the Board and in light of the judgment of the Hon'ble Appellate and the available data for the per MW cost and the CUF is specific for all the PPAs executed. There is every possibility of reduction in the p.u. rates from Rs.2.87, instead of the proposed increase to Rs.2.95”.

6. The Commission held the public hearing on 3rd July, 2010 at the Commission Court room at Shimla, in which the representatives of the HPSEB and HIMURJA. were present. Only one stakeholder i.e. representative of HPSEB Ltd., reiterated consideration of their written submissions already submitted. Sh. J.P. Kalta, Chief Engineer (Comml.) representing the HPSEB Ltd during the public hearing further stressed for the need of the Model PPA for the projects above 5MW upto 25 MW.

7. The Commission observes that the issue of royalty has been adequately addressed taken in the tariff model and subsequently in the supplementary order dated 10th Feb., 2010 and therefore, the issue raised by Sh. P.N. Bhardwaj, Consumer Representative it is not required to be considered in the Model PPA.

8. On the issue raised by HPSEB Ltd in relation to the necessity of having model PPA for projects above 5MW to 25 MW, the Commission points out that in its order on petition No. 14/2003 dated 29-03-2004 Commission has already addressed this issue as under-

“ Extend provisions of the Commission’s order of 24-3-2003 and 12-1-2004 to all the small hydro power projects upto and including 25 MW except the provisions relating to the tariff and 12% free power wherever already settled bilaterally between the IPPs and the GoHP.”

In relation to other comments raised on behalf of the Board, the Commission acknowledges the implication of APTEL order dated 18-9-2009 and accordingly proposed amendments to clauses 6.2; 6.4 and 16.5 of the PPA have been modified to include the specific project tariff as may be fixed by the Commission.

9. The Commission, after carefully hearing and examining the comments/objections of the stakeholders, in exercise of the powers vested in under clause (b) of sub-section (1) of section 86 of the Electricity Act, 2003, read with clause

38 of the Model PPA, hereby orders the modifications in the Model Power Purchase Agreement, as under. .

- (a) In the recital of Model PPA para 1, shall be substituted as under: -
“M/s, a Company which have signed Implementation Agreement with the Government of Himachal Pardesh and is having its registered office at(hereinafter referred to as “the Company”, which expression shall, unless repugnant to the context or meaning thereof, also include their successors, permitted assigns legal representatives),through Sh._____, who is duly authorized by the Company vide their resolution dated_____(Annexure-1)to execute this agreement, of the **First Part;**”.
- (b) In Article 2 i.e. “Definitions and Interpretation”-
For the existing clause 2.2.16 shall be substituted, as under:-
“Company” means M/s, which have signed Implementation Agreement with Government of Himachal Pardesh and is having its registered office at and shall, unless repugnant to the context or meaning thereof, also include their successors, permitted assigns legal representatives”;
- (c) In clause 3.2 of Article 3, for the existing first two sentences, the following words shall be substituted, namely: -
“For the purpose of this article, the construction period means a maximum period of (____) months as per the construction schedule i.e. Schedule -I of this Agreement ”.
- (d) In clauses 6.2 for the figures, brackets and words “2.87 (rupees two and eighty seven paise) per kilowatt hour ”,the figures, brackets and words “2.95 (rupees two and ninety five paise) per kilowatt hour or, in a case where projects specific tariff is fixed at the option of either of the parties to the agreement, the tariff as may be determined by the Commission” shall be substituted.
- (e) In clause 6.4 for the figures, brackets and words “2.87 (rupees two and eighty seven paise) per unit on monthly basis”, shall be substituted by the figures, brackets and words “2.95 (rupees two and ninety five paise) per unit on monthly basis or, in a case where projects specific tariff is

fixed at the option of either of the parties to the agreement, the tariff as may be determined by the Commission”.

- (f) the existing clause 8.8 shall be substituted as under :-
“Any statutory taxes, levy, duties, cess or any other kind of imposition(s) including tax on generation of electricity whatsoever imposed / charges by any Government (Central/ State) and / or any other local bodies / authorities on generation of electricity, after the Effective Date, shall, after taking into consideration the general or special order made by the Commission, be payable by the respective party”; and
- (g) In clause 16.5, for figure “2.87 per kwh, the figure and words “2.95 per kwh or, in a case where projects specific tariff is fixed at the option of either of the parties to the agreement, the tariff as may be determined by the Commission” shall be substituted.

It is, hereby further ordered that the said modifications in the Model PPA shall come into force with immediate effect.

(Yogesh Khanna)
Chairman