

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of filing of petition u/s 62(4) of the Electricity Act, 2003 seeking modification and consequential effects in various Generic Tariff Orders for energy generated by wind energy generators over and above normative Capacity Utilization Factor (CUF).

Petition No. 06/2019

ORDER

(Date of Order: 7th February, 2019)

**M.P. Power Management Company Ltd.,
Shakti Bhawan, Rampur, Jabalpur – 482008**

- Petitioner

Shri R. K. Thukral, AGM, Shri G.L.Pandey, DGM and Shri Aditya Vijay Singh, Advocate, appeared on behalf of the petitioner.

2. The petitioner has filed the instant petition under section 62(4) of the Electricity Act, 2003 for seeking modification and consequential effects in various Generic Tariff Orders for energy generated by wind energy generators over and above normative Capacity Utilization Factor (CUF), wherein the petitioner has prayed as under:

- (i) Condone the unintended delay on the part of petitioner in filing of the instant petition and accept this petition for judicious hearings, in the broader interests of the consumers so as to avoid undue adverse financial impacts on the distribution companies on account of paying full normative tariff for the energy supplied over and above normative CUF;
- (ii) Suitably modify the generic tariff orders, as mentioned in para no. 4 hereinbefore, to the effect that the petitioner has the option of first right of refusal of the energy supplied in excess to the prescribed normative CUF and even if upon such refusal if such excessive power is injected into the grid, then the petitioner may not be liable to make payment for the same;
- (iii) And in the other situation, if the petitioner opts to procure power beyond normative CUF, such incremental power shall be settled annually at reduced tariff, which may be determined by Hon'ble Commission and which may be equal to or less than the tariff for inadvertent flow of energy into the grid;
- (iv) Review Tariff order dated 26.03.2013 considering normative base CUF as 23% in place of 20% and corresponding tariff varying from 23% to 30% CUF at interval of 1% may be determined, on the basis of actual performance and normative CUF of 23% as considered by Hon'ble Commission in wind tariff order dated 17.03.2016;
- (v) The Hon'ble Commission may further be pleased to direct the parties to amend the respective Power Purchase Agreements accordingly; and
- (vi) Any other relief, as deemed proper, may be granted in favor of the petitioner.

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3. The case was listed for motion hearing on 30th January' 2019. During the motion hearing, the petitioner restated the contents of the petition.

4. The Commission observed that the petitioner is seeking review of tariff order dated 26.03.2013 for wind electric generators considering normative based CUF as 23% in place of 20% and corresponding tariff varying from 23% to 30% CUF at an interval of 1% on the basis of actual performance and normative CUF of 23% as considered by the Commission in Wind Tariff Order dated 17.03.2016. It has also been requested to direct the parties to amend the respective Power Purchase Agreements accordingly. The Commission noted that the tariff order dated 26.03.2013 in which the generic tariff for supply of electricity by wind power plants to the distribution licensee was determined, did not contemplate any re-visitation or re-determination of the tariff during the life of the project of 25 years on account of any variations of actual over any of the normative parameters. The PPA has no renewal/revision/review clause empowering the Commission to revise the tariff. The PPAs executed by the petitioner and the generators and their conduct of acting upon such agreements over a long period bind them to adhere to the rights and obligations stated in the agreements. The parties are bound to the terms and conditions of the agreements after signing the PPAs. Conditions of the contract cannot be altered/ avoided on presumption or assumption of the parties. The parties to the contract are not at liberty to amend/ alter the terms of contract on the ground that the terms of contracts may not be beneficial to one of the parties at a later stage.

5. The Article on 'Tariff, Billing and Payment' of the PPA clearly states the firm tariff. The relevant extract of the Article of the PPA is reproduced below:

“ The Tariff rates shall be firm for the project life and will not vary with fluctuation in exchange rate or on account of changes in taxes or any other reason whatsoever.”

6. Neither wind tariff order nor the PPA has any revision clause empowering the State Commission to revise the tariff. Once the PPA is executed, the single party cannot have the power to alter any terms of the PPA except through mutual consent of both the parties. Section 64(6) of the Electricity Act, 2003 states that the tariff order shall continue to be in force only during the period specified in the tariff order. Tariff order having lived its life and having been replaced by a fresh tariff

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order is not allowed for revision and revisit under Section 62(4) of the Electricity Act, 2003. In the similar type of case, the Appellate Tribunal in its judgment dated 10.04.2012 in Appeal No. 165 of 2012 (UHBVNL Vs. HERC & Ors) held that:

- “(i) Power developers have made huge investments in establishing power plants pursuant to the Tariff Order of the State Commission (HERC).*
- (ii) The said investment was on the basis of tariff determined by the State Commission and a PPA was executed incorporating the Order of the State Commission for sale of Solar Power.*
- (iii) Therefore, tariff being too high cannot be a ground of challenging the Order of the State Commission determining the tariff of Solar Power plants.”*

7. It is also relevant to quote Para 177 (3)(h) of the order of Hon’ble APTEL in Appeal No. 279 of 2013, in which case Gujarat Urja Vikas Nigam was Appellant and Gujarat Electricity Regulatory Commission and Solar Generators were Respondents, which is as follows:

“When it was not established by the Appellant that there is a legal right available to the Appellant to seek re-determination of tariff by re-opening the PPA, the State Commission would not be expected to revisit the generic tariff thereby to discountenance the project developers and consequently discourage future investment in the Sector.”

8. The petitioner is seeking the review of tariff order dated 26/3/2013, while control period of that tariff order is already over and tariff order for new control period is applicable. As per the act of limitation also such type of review is not applicable after three years which is barred by limitation. The said tariff have been accepted by all the parties and acted upon accordingly. The petitioner could not sought to review the tariff after generators have acted upon the same and the tariff order dated 26.03.2013 was fully accepted by the parties without any reservations.

9. In view of the findings above, the Commission is not in a position to consider the prayer of the petitioner at Para (iv) and (v) of the petition regarding review of tariff order dated 26.03.2013 and directions to the parties to amend the respective PPA accordingly. As per the reasons stated above, it is also not possible for the Commission to consider the prayer at Para (ii) to modify the generic tariff orders to the effect that the petitioner will have the option of first right of refusal of energy supplied in excess to the normative CUF and in case of injection of excess power into the grid then no liability of payment by the petitioner.

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10. Further, in respect of changes sought in CUF in the tariff order for wind electric generators, the Commission is of the view that the generic tariff orders were issued considering the average CUF computed during previous years along with estimation of improved CUF in future years due to technological developments. Accordingly, the Power Purchase Agreements were executed during the respective control periods by the petitioner with the developers for the complete life of the project. The petitioner's plea is that the Guidelines issued by the Ministry of Power vide Resolution dated 08.12.2017 also recognize a reduced tariff for availability of power more than the maximum CUF and also for procurer's first right of refusal for such power. As per para 7.2.3 of the aforesaid guidelines (as quoted by the petitioner itself), *provision to this effect shall be clearly indicated in the RfS document*. This means that such specific provision should be made in the Power Purchase Agreement and the developer should know in advance (i.e. before execution of Power Purchase Agreement) the reduction in tariff in case actual CUF is more than the CUF as per the Power Purchase Agreement/Tariff Order. This is not the case with any of the tariff order/Power Purchase Agreement mentioned in the petition. As such, the plea is not tenable. Further in the petition, the petitioner could not demonstrate that the average CUF in the State of Madhya Pradesh during the period from 1.4.2013 to 31.03.2016 works out to more than 23%. The revision of generic tariff on the basis of selected cases registering more CUF than normative CUF is not in order.

11. The Commission has observed that the petitioner is seeking the review of the Commission's various generic Tariff Orders for which either the control period has already been expired long back or the control periods are going to end by March 2019. In view of the issues discussed in foregoing paras, the prayer of the petitioner cannot be considered. However, the petitioner is free to submit comments/suggestions, if any, as and when an approach paper for determination of tariff for the ensuing control period is issued.

12. With the aforesaid directions, the petition no. 06/2019 stands disposed of.

Ordered accordingly.

(Mukul Dhariwal)
Member

(Dr. Dev Raj Birdi)
Chairman