

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

Coram:

1. Dr. Pramod Deo, Chairperson
2. Shri R. Krishnamoorthy, Member
3. Shri S. Jayaraman, Member
4. Shri V.S. Verma, Member

**Petition No. 19/2009**

**In the matter of**

Petition under Section 79 (1) (f) of the Electricity Act, 2003 against DVC for non-supply of power allocated to the NCT of Delhi in accordance with PPA dated 24.8.2006 entered into between DVC and Delhi Transco Limited, and thereafter re-assigned to the three DISCOMs of Delhi vide Hon'ble Delhi Electricity Regulatory Commission's order dated 31.3.2007.

**And in the matter of**

1. BSES Rajdhani Power Limited, New Delhi
2. BSES Yamuna Power Limited, Delhi
3. North Delhi Power Limited, Delhi

**Petitioners**

Vs.

1. Damodar Valley Corporation, Kolkata
2. Delhi Transco Limited, New Delhi
3. Ministry of Power, Govt. of India, New Delhi

**Respondents**

**Following were present**

1. Shri Amit Kapoor, Advocate, BSES
2. Shri Mansoor Ali, Advocate, BSES
3. Ms. Shobana Masters, Advocate, NDPL
4. Shri M.G. Ramachandran, Advocate, DVC

**ORDER**

**(Date of Hearing: 28.7.2009)**

The application has been made under clause (f) of sub-section (1) of Section 79 of the Electricity Act, 2003 (hereafter 'the Act') with the following

specific prayers, namely -

“(a) Direct respondents to commence and ensure supply of at least 100 MW power to the NCT of Delhi as per PPA executed/LTOA granted to the Petitioners..

(b) Direct respondents to ensure

(i) supply of 230 MW power when CTPS unit 7 is commissioned and;

(ii) supply of 400 MW power when CTPS unit 8 is commissioned.

(c) Comply with the Central Electricity Regulatory Commission (Open access in Inter-state Transmission) (First Amendment) Regulations, 2005.

(d) Comply with the obligations pertaining to scheduled supply of electricity as per PPA.

(e) Pass any such further order as this Commission may deem just and proper in the circumstances of the case.”

2. Delhi Transco Ltd (hereafter ‘DTL’), the second respondent, on 24.8.2006 entered into an agreement (hereafter ‘the agreement’) with Damodar Valley Corporation (hereafter ‘DVC’), the first respondent, for purchase of different quantum power on a ‘round the clock’ basis to meet the requirements of National Capital Territory of Delhi. In accordance with the agreement, tariff for supply of 100 MW of electricity from December 2006 to September 2007 was to be at the rate negotiated between the parties and thereafter supply was at the rates determined by the Commission. With effect from 1.4.2007, the agreement was assigned to the applicants in terms of the order dated 31.3.2007 passed by the Delhi Electricity Regulatory Commission.

3. It has been alleged that DVC defaulted in making supply of electricity in accordance with the agreement and rather exploited the shortage situation and charged exorbitantly high prices for the short term supply of power to other utilities. The applicants accordingly seek enforcement of the contractual obligations under the agreement.

4. DVC in its reply affidavit dated 11.6.2009 has raised preliminary objections in regard to maintainability of the application. DVC has submitted that there is no privity of contract with the applicants as the agreement was signed by it with DTL who at the time of execution of the agreement was deemed to be a trading licensee, engaged in the business of purchase of electricity for re-sale to the applicants, the distribution licensees within NCT of Delhi. DVC has pointed out that the enforcement of the rights and obligations can only be between the parties *inter se*, that is, between DTL and itself. It has been further submitted that an application under clause (f) of sub-section (1) of Section 79 of the Act lies for adjudication of disputes covered by clauses (a) to (d) of sub-section (1) of Section 79 of the Act read with clause (a) of sub-section (1) of Section 62 of Act and when so read the regulatory powers of the Commission under the said provisions are confined to sale of electricity by a generating company to a distribution licensee. Therefore, it has been urged, function of adjudication under clause (f) of sub-section (1) of Section 79 of the Act can be discharged only in relation to the disputes involving a generating company and the distribution licensee. It has been argued that power of adjudication under clause (f) of sub-section (1) of Section 79 of the Act cannot be extended to any transaction between a generating company

and a trading licensee. According to DVC, it is not bound by assignment of the agreement by the Delhi Electricity Regulatory Commission to the applicants since it was not party before that Commission in the proceedings leading to assignment of the agreement.

5. The applicants in their rejoinder have sought to meet the preliminary objections taken by DVC. They have pointed out that consequent to assignment of the agreement signed between DVC and DTL to them based on directions by the Delhi Electricity Regulatory Commission they have succeeded DTL. Therefore, they have inherited the rights and obligations of DTL under the agreement and thus can seek enforcement of these rights *qua* DVC. The applicants have pointed out that DVC in its fax dated 4.4.2007 recognised assignment of the agreement by the Delhi Electricity Regulatory Commission to them, when it sought to reassure that there would not be any legal complication in supplying power to them.

6. We heard learned counsel for the parties on the question of maintainability. Learned counsel for DVC relied upon the judgment of the Appellate Tribunal in Lanco Amarkantak Power Pvt Ltd Vs Madhya Pradesh Electricity Regulatory Commission [2008 ELR (APTEL) 0878] to support its contention that sale of electricity by a generating company to a trading licensee is outside the jurisdiction of the Commission since clause (a) of sub-section (1) of Section 79 of the Act is not attracted in such case. Learned counsel for the applicants rebutted the argument made by the learned counsel

for DVC and vehemently argued that adjudication of the dispute was within the exclusive jurisdiction of the Commission.

7. The relevant statutory provisions of the Act are extracted hereunder for ease of reference:

*“79. (1) The Central Commission shall discharge the following functions, namely:-*

*(a) to regulate the tariff of generating companies owned or controlled by the Central Government;*

*(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*

*(c) to regulate the inter-State transmission of electricity ;*

*(d) to determine tariff for inter-State transmission of electricity;*

*(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.*

*(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;”*

8. Clause (f) of sub-section (1) of Section 79 of the Act confers jurisdiction on the Commission to adjudicate disputes connected with clauses (a) to (d) of sub-section (1) of Section 79 of the Act. In the instant case, the dispute involves adjudication of claim for enforcement of contractual obligations. The question thus is whether the dispute raised in the petition might be construed to be within the ambit of any of the clauses (a) to (d) of sub-section (1) of Section 79

9. The function assigned under clause (f) of sub-section (1) of Section 79 of the Act to the Commission is to adjudicate upon disputes involving the generating companies or transmission licensee in regard to matters connected with clauses (a) to (d). A plain reading of clause (f) show that the adjudication of disputes falls within the jurisdiction of the Commission on satisfying the following conditions , namely-

(a) The dispute involves the generating company or the transmission licensee.

(b) The dispute is in regard to matters connected with clauses (a) to (d), that is, the dispute should be either connected with regulation of tariff of the generating company, or regulation of inter-State transmission of electricity, or with the determination of tariff for inter-State transmission of electricity.

10. There is no dispute that DVC is a generating company as defined under sub-section (28) of Section 2 of the Act. Further, it is also an acknowledged fact that DVC is owned or controlled by the Central Government by virtue of provisions of the Damodar Valley Corporation Act, 1948. On these premises, regulation of tariff of DVC as a generating company falls within the jurisdiction of the Commission under clause (a) of sub-section (1) of Section 79 of the Act, so also the adjudication of disputes connected with clause (a)

11. DVC signed the agreement dated 24.8.2006 for sale of power to DTL. This was followed by a Memorandum of Understanding dated 16.3.2007. It is a matter of common knowledge that in 2002, after restructuring of the erstwhile Delhi Vidyut Board, through the statutory transfer scheme of the Delhi Government, generation, transmission and distribution functions were unbundled. The applicants were granted licences for distribution of electricity within the National Capital Territory of Delhi. DTL was primarily responsible for transmission of electricity. It appears that a Power Procurement Group was constituted under DTL. The Power Procurement Group was responsible for purchase of power for further sale to the distribution companies, the applicants. Thus, the functions of DTL, in addition to transmission of electricity, included purchase of electricity on behalf of the applicants and re-sale to them in accordance with their allocated shares. The term 'trading' as defined under sub-section (71) of Section 2 of the Act, means purchase of electricity for re-sale thereof. In that sense of the matter, DTL was stated to be an electricity trader, in addition to discharging its functions as a transmission licensee, the State Transmission Utility, also responsible for operating the State Load Despatch Centre.

12. Under second proviso to sub-section (2) of Section 31 of the Act, the State Load Despatch Centre cannot undertake trading in electricity. Similarly, by virtue of first proviso to sub-section (1) of Section 39 of the Act, the State transmission Utility is also barred from trading in electricity. Also, the third proviso to Section 41 of the Act prohibits the transmission licensee from entering into any contract or otherwise engaging in the business of trading in electricity.

13. It appears that after taking note of the above statutory provisions, the Government of National Capital Territory of Delhi issued a policy directive dated 28.6.2006 to the Delhi Electricity Regulatory Commission in exercise of power under Section 108 of the Act to re-allocate the power purchase agreements then existing with DTL to the distribution licensees, including the applicants. The directions issued to the Delhi Electricity Regulatory Commission are extracted as under:

“(a) With effect from the 1<sup>st</sup> April 2007, the responsibility for arranging supply of power in the National Capital Territory of Delhi shall rest with the distribution companies as per the provisions of the Electricity Act, 2003 (86 of 2003) and the National Electricity Policy. The Delhi Electricity Regulatory Commission may initiate all measures well in advance so that necessary arrangements are put in place.

(b) With effect from the 1<sup>st</sup> April 2007, the Delhi Transco Limited will be a company engaged in only wheeling of power and also operate as State Load Dispatch Centre as per mandate of Government of National Capital Territory of Delhi. This is in line with the current thinking in the Government to let private sector distribution companies engage in trading activities.

(c) A large number of power purchase agreements have been signed by erstwhile Delhi Vidyut Board and Delhi Transco Limited with various generating stations of National Thermal Power Corporation, National Hydroelectric Power Corporation Limited, Nuclear Power Corporation of India Limited, Rajasthan Atomic Power and other companies and, therefore, arrangements would have to be worked out by Delhi Electricity Regulatory Commission with the distribution companies so that the transition to trade in power would be effected. Such assignment can be done in a manner to take care of different load profile of the distribution companies, New Delhi Municipal Council and Military Engineering Services.

(d) While addressing the issue of transiting to new arrangement in which the DISCOMs would trade in power, specified orders need to be issued by Delhi Electricity Regulatory Commission for ensuring that there is no disruption in the transmission network.

(e) The requirements of New Delhi Municipal Council and Delhi Cantonment Board areas would also have to be addressed separately. The transition arrangements would have to be such that there is no disruption in the transmission network and the arrangement of supply



of electricity is so made as to take care of the future needs of Delhi particularly in view of the fact that there are three private Discoms as well as New Delhi Municipal Council and Military Engineering Services which are involved in distribution business.”

14. Thereafter, the Delhi Electricity Regulatory Commission by its order dated 31.3.2007 re-allocated all PPAs signed by DTL, including the agreement signed with DVC, to the applicants in certain proportion with which we are not concerned in the present dispute at this stage. With re-allocation of the PPAs, including the agreement signed with DVC, all rights and obligations of DTL stood transferred to the applicants. The relevant part of the order of the Delhi Electricity Regulatory Commission is extracted hereunder –

ii) All existing PPAs (with the exception of Badarpur TPS, NCR Dadri TPS, IPGCL and the PPCL both existing and future capacities) shall be allocated amongst the three Distribution Companies, namely, the NDPL, BRPL and BYPL in a ratio which would be in proportion to the energy drawn by them from the date of unbundling to February 2007. For the NCR Dadri TPS, IPGCL and the PPCL, only 85% of the capacities shall be allocated amongst the three Discoms on the same principle. Insofar as Badarpur is concerned, only 85% of the capacity left after allocating to the NDMC and the MES would be allocated between the three Discoms, again on similar lines. The capacity allotted to each of the Distribution Companies arrived at on the basis of this principle is annexed along with this order.

15. In this manner, the agreement between DTL and DVC stands assigned to the applicants and with the assignment of the agreement the rights and obligations of DTL stand vested in the applicants. According to DVC, it is not bound by the assignment of the agreement to the applicants on the ground that it was not party before the Delhi Electricity Regulatory Commission in those proceedings. We do not find any merit in this argument. The preamble of the agreement dated 24.8.2006 while referring to DTL

expressly states that the expression unless repugnant to the context or meaning thereof "include its successors in business and permitted assigns under Delhi Reforms Act". The applicants have succeeded DTL as regards purchase of power by virtue of a policy decision of the Government of National Capital Territory of Delhi in accordance with law. They have been assigned the agreement by the Delhi Electricity Regulatory Commission in exercise of its statutory function. Thus, the applicants have succeeded DTL by operation of law and are its lawful assigns. Nothing has been shown that the view taken by us could be repugnant to the context or meaning of DTL. Therefore, in our considered view, the applicants have been vested with right to seek enforcement of the agreement which their predecessor, DTL signed with DVC. Moreover, DVC having not challenged Delhi Electricity Regulatory Commission's order dated 31.3.2007, the said Order has attained finality and DVC cannot now contend that it is not bound by the said Order.

16. There is another reason for our above conclusion. DVC in its letter dated 4.4.2007, after taking cognizance of assignment of the agreement to the applicants reinforced that the applicants will be guided by the terms and conditions executed by DTL till signing of a formal tri-partite agreement amongst DVC, DTL and the applicants. DVC while so conveying confirmed that no legal complication could be foreseen in supplying power to the applicants pending execution of the tri-partite agreement. Thus, DVC itself expressly consented to substitution of the applicants in place of DTL as regards supply of electricity to them under the agreement. At this stage DVC cannot be permitted to blow hot and cold and deny rights of the applicants

flowing from the agreement. Also, we are of the view that reliance by learned counsel for DVC on the judgment of the Appellate Tribunal in Lanco case (supra) is misplaced as the issue and decision contained therein is not on the proposition as to whether under Section 79(1)(f) the Central Commission would have jurisdiction to adjudicate upon disputes involving electricity traders or have the jurisdiction to adjudicate upon disputes in regard to matters connected with clause (e) of sub-section (1) of Section 79 of the Act. In the case of Lanco Amarkantak Power Pvt. Ltd. Vs Madhya Pradesh Electricity Regulatory Commission, the issue dealt with was solely related to territorial jurisdiction of the State Commission. This case has no relevance to the present dispute which does not concern with territorial jurisdiction of State Commissions. It is important to be noted that the applicants before us are distribution companies and not electricity traders. Therefore, the bar sought to be imposed by DVC on the applicants will not be attracted.

17. Though as per clause 4.1 of the agreement, the tariff for sale of electricity from December 2006 to September 2007 was to be at mutually agreeable rates, the tariff for sale of power from October 2007 and onwards was to be at the rates fixed by the Commission, ostensibly under clause (a) of sub-section (1) of Section 79 of the Act. Therefore, by virtue of clause (f) of sub-section (1) of Section 79 the Commission has the jurisdiction to adjudicate the dispute raised in the application that involving a generating company within the meaning of Section 79 (1)(a) and distribution licensees.

18. In view of the foregoing discussion, we conclude that adjudication of the dispute raised is within the jurisdiction of the Commission. We direct the matter be listed for hearing on merits of the applicants' claim on 15<sup>th</sup> September, 2009.

Sd/-	Sd/-	Sd/-	Sd/-
<b>[V.S.Verma]</b>	<b>[S.Jayaraman]</b>	<b>[R.Krishnamoorthy]</b>	<b>[Dr. Pramod Deo]</b>
<b>Member</b>	<b>Member</b>	<b>Member</b>	<b>Chairperson</b>

New Delhi, dated the 19<sup>th</sup> August, 2009