

**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. 85/2009

In the matter of

Compensation for Unlawful termination of agreement

And in the matter of

Tata Power Trading Company Ltd, Mumbai

Petitioner

Vs

1. Damodar Valley Corporation Ltd, Kolkata
2. Rajasthan Power Procurement Centre, Jaipur
3. Eastern Region Load Despatch Centre, Kolkata
4. Power Grid Corporation of India Ltd, New Delhi

Respondents

Following were present:

1. Shri Amit Kapoor, Advocate, TPTCL
2. Ms. Shobana, Advocate, TPTCL
3. Shri G.J. Bhatia, TPTCL
4. Shri M.G. Ramachandran, Advocate, DVC
5. Shri Anand Ganeshan, Advocate, DVC

ORDER

(Date of Hearing: 28.7.2009)

The application has been made by Tata Power Trading Company Ltd (hereinafter "the applicant"), category 'F' trading licensee, under clause (f) of sub-section (1) of Section 79 of the Electricity Act, 2003 (hereinafter 'the Act') to claim compensation, surcharge, reimbursement of open access charges and

loss/damages from the first respondent, DVC for alleged unlawful termination of the agreement between the parties. the applicant has claimed that DVC had entered into a contract for sale of electricity during January 2008 for further sale by the applicant to Rajasthan. It has been alleged that the contract was rescinded by DVC later on. The specific prayers made by the applicant are extracted below:

- “(a) Direct Respondent No. 1 to pay to the Petitioner an amount of Rs. 92,50,500/-
 - (b) Direct Respondent No. 1 to pay to the Petitioner an amount of Rs. 13,72,369 as surcharges, (being cumulative interest from 60th day of billing i.e. 05.03.2008 up to 28.02.2009 @ 15% p.a.). Further direct the Respondent No. 1 to pay the petitioner the surcharge from 01.03.2009 upto the date of payment @15% p.a.;
 - (c) Direct Respondent No. 1 to reimburse to the Petitioner the amount of Rs. 11,96,050 being amount forfeited to NRLDC equivalent to 7 days open access charges;
 - (d) Direct Respondent No. 1 to pay to the Petitioner an amount of Rs. 5,14,500 as loss/damage suffered by Petitioner on account of compensation charges claimed by RPPC against TPTPCL for non-supply of contract DVC power; and
 - (e) Pass such other or further orders as the Hon’ble Commission may deem fit and proper in the facts and circumstances of the case.”
2. DVC in its reply has raised the question of jurisdiction of the Commission under clause (f) of sub-section (1) of Section 79 of the Act, apart from denying the applicant’s claim on merits. Meanwhile, ERLDC has also sent its reply. It has stated that open access was granted by NRLDC as the nodal agency. ERLDC has however added that there was no sudden change in DVC’s generation

pattern and in support of this contention, ERLDC has filed a plot of DVC's generation data for the month of January 2008.

3. DVC issued a short tender notice on 11.10.2007 to invite bids for sale of 50 MW of its off-peak surplus power round-the-clock during January 2008 to March 2008. The applicant submitted the power purchase bid on 8.11.2007. The applicant is said to have emerged as the highest bidder for purchase of power for the month of January 2008. The applicant tied up sale of power to the distribution utilities in the State of Rajasthan through Rajasthan Power Procurement Centre, the second respondent (hereinafter referred to as 'Rajasthan'). Vide its Letter of Acceptance (LOA) dated 19.11.2007, DVC offered the applicant to trade surplus 50 MW of off-peak power during January 2008 @Rs. 6.95/kWh. NRLDC vide letter dated 26.11.2007 granted approval for short-term open access for the period 1.1.2008 to 31.1.2008 from DVC to the State of Rajasthan for which short-term open access charges amounting to Rs. 52,79,650/- were reportedly paid by the authorities in the State of Rajasthan. It has been reported that DVC vide its letter dated 12.12.2007 canceled the offer dated 19.11.2007 on ground of certain unforeseen situation. The applicant vide letter dated 18.12.2007 informed Rajasthan that supply of power from DVC was not possible and requested for surrender of short-term open access. The applicant vide its letter dated 19.12.2007 demanded compensation from DVC for non-supply. Rajasthan also demanded the open access charges and compensation from the applicant. DVC vide letter dated 28.12.2007 informed the applicant that the compensation clause related only with short fall of 70% of contracted power to be scheduled by DVC

as per NIT specification and there was no clause in tender specification for reimbursement of charges towards transaction of off-peak power. DVC vide letter dated 10.1.2008 addressed to the applicant also stated that the applicant was required to execute an agreement within 10 days from date of receipt of LOA but same had not been done. As such, DVC denied its liability to pay any compensation. It has been submitted that DVC acted in breach of the terms and conditions of the contractual arrangement with the applicant while refusing supply of 50 MW off-peak surplus power without any plausible reason. According to the applicant, for reason of DVC's failure to supply the agreed power, Rajasthan is reported to have raised a bill for compensation charges of Rs. 96,20,940/- and a further bill for additional compensation amount of Rs. 1,44,060/-. It has been alleged that DVC has also refused to pay surcharge of Rs. 13, 72,369/ in terms of clause 4 of the LOA for default in payment of compensation charges.

5. Against the above background, the applicant has prayed for directions to DVC to pay an amount of Rs. 11,96,050/ forfeited to NRLDC, equivalent to 7 days open access charges and Rs. 5,14,500 towards loss/damage suffered by it on account of compensation charges claimed by Rajasthan against the applicant for non-supply of contracted DVC power.

6. DVC in its reply dated 1.6.2009 has submitted that the application made under clause (f) of sub-section (1) of Section 79 of the Act is not maintainable. It has been averred that the above provision relates to adjudication or arbitration of disputes arising out of exercise of power by the Commission for determination of

tariff and is not invocable for settlement of the kind of dispute raised by the applicant. It has been further submitted that power to regulate tariff of a generating company under clauses (a) and (b) of sub-section (1) of Section 79 have to read with clause (a) of sub-section (1) of Section 62 of the Act and regulatory powers of the Commission are confined to sale of electricity by a generating company to a distribution licensee. According to DVC, the said provisions have no application to sale of electricity by a generating company to a trading licensee. On merits, DVC has stated that there was no concluded and binding contract between the parties for supply of power. According to DVC, as per terms and conditions of tender, LOI had been issued and accepted by the applicant but the detailed terms and conditions were to be decided by mutual consent and only upon such agreement being finalized and concluded, DVC could be held bound to supply power. Therefore, DVC has denied right of the applicant to claim any compensation for the alleged breach.

7. The applicant has relied upon clause (f) of sub-section (1) of Section 79 of the Act in support of its contention that the Commission has jurisdiction to entertain the petition. According to the applicant, clauses (b) to (f) of section 79(1) of the Act read with the power and functions of DVC as provided under the DVC Act confer jurisdiction on the Commission.

8. We heard learned counsel for the parties on maintainability of the application.

9. According to learned counsel for the applicant,, DVC is a generating company falling under clauses (a) and (b) of sub-section (1) of Section 79 of the Act and therefore, adjudication of any dispute arising with DVC is covered under clause (f) and thereby falls within the jurisdiction of the Commission. Learned counsel for DVC reiterated the preliminary objection taken in the reply affidavit.

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

Electricity Act

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;

11. Clause (f) of sub-section (1) of Section 79 of the Act confers jurisdiction on the Commission to adjudicate upon 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 compensation arising out of the trading transactions between the parties. 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

12. The function assigned under clause (f) of sub-section (1) of Section 79 of the Act is to adjudicate upon disputes involving 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.

13. It is not the case of the applicant that the dispute relates to regulation of tariff of DVC, undisputedly a generating company owned or controlled by the Central Government and having a scheme for generation and sale of electricity in

more than one State. In the present case, there is nothing to show that electricity was proposed to be sold by DVC to the applicant at the tariff regulated by the Commission. In fact, as the record indicates, the applicant had offered to purchase power at the rate of Rs. 6.95/kWh. The rate offered and accepted by DVC in LOA is much above the tariff decided by the Commission in respect of DVC's generating stations. Therefore, the ground on which jurisdiction of the Commission has been invoked does not exist. The dispute does not relate to determination of tariff for inter-State transmission of electricity. Therefore, applicability of clause (d) of sub-section (1) of Section 79 is also ruled out.

14. The next question is whether the dispute involves regulation of inter-State transmission of electricity under clause (c) of sub-section (1) of Section 79 of the Act. The Commission in its order dated 27.2.2008 in Petition No. 107/2007 dealt with the scope of clause (c) of sub-section (1) of Section 79 of the Act and adjudication of dispute arising thereunder. In that case, the Commission had interpreted the term 'regulation of inter-State transmission' to include cases involving conveyance of electricity from one State to another. The relevant paragraph of the order is extracted hereunder:

"13. The next question to be considered for adjudication of dispute is whether the supply of power to the State of Madhya Pradesh involves inter-State transmission. The expression "inter-State transmission" though extensively used in the Act has not been defined. In order to examine the issue, we may first have a look at the expression "inter-State transmission system" defined under sub-section (36) of Section 2 of the Act, extracted hereunder:

"(36) "Inter-State transmission system" includes –

- (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;
- (ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;
- (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by Central Transmission Utility.”

15. Based on the above analysis the Commission found that supply of electricity from the generating stations located in the State of UP to State of Madhya Pradesh involved inter-State transmission of electricity and therefore, adjudication of dispute was within the jurisdiction of the Commission. The order of the Commission has been upheld by the Appellate Tribunal and the appeal filed by Uttar Pradesh Power Corporation Ltd against the judgment of the Appellate Tribunal has not been admitted by the Supreme Court. In this manner, the Commission’s order and views recorded therein have become final.

16. However, in the present case, there is no averment that the applicant was denied open access or use of inter-State transmission system by DVC. The allegation against DVC is that it has arbitrarily revoked the agreement for sale of power to the applicant. Therefore, the dispute is not in regard to regulation of inter-State transmission of electricity, so as to fall within the ambit of clause (c) of sub-section (1) of Section 79 of the Act. The dispute is breach of contractual obligations and has no nexus with the statutory duties performed by the Commission.

17. The first and fundamental principle of interpretation is that interpretation of statutes in the first instance is to be limited to the express language of the statute. In the instant case, the language of clause (f) of sub-section (1) of Section 79 of the Act does not seem to include adjudication of contractual disputes, and exercise of power of adjudication under clause (f) needs to be limited to disputes arising out of statutory functions and powers of the Commission.

18. In view of the above discussion, the petition is not maintainable and accordingly stands dismissed.

Sd/-
[V.S.Verma]
Member

Sd/-
[S.Jayaraman]
Member

Sd/-
[R.Krishnamoorthy]
Member

Sd/-
[Dr. Pramod Deo]
Chairperson

New Delhi, dated the 18th August, 2009