

CENTRAL ELECTRICITY REGULATORY COMMISSION

Coram:

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

Petition No. 90/2008

In the matter of

Non-compliance of the provisions of the agreement for purchase of power.

And in the matter of

Madhya Pradesh Power Trading Company Ltd, Bhopal ...Petitioner

Vs

Adani Enterprises Ltd, Ahmedabad ...Respondent

Following were present

1. Shri G. Umapathy, Advocate, MPPTCL

**ORDER
(Date of Hearing: 9.6.2009)**

Through this application filed under Section 29 of the Electricity Act, 2003 (hereinafter "the Act"), the petitioner claimed compensation amounting to Rs.3,52,20,800/- and refund of open access charges amounting to Rs. 26,39,531/- along with surcharge from the respondent, M/S Adani Enterprises Ltd (hereafter "Adani") for latter's alleged default to meet its the contractual obligations for purchase of power under the agreement dated 19.9.2007.

2. Briefly, the facts of the case as stated in the petition are that the petitioner floated tender for sale of 300 MW from July 2007 to September 2007. The Letter of Intent (hereafter "LOI") was placed on Adani vide the petitioner's letter dated 19.4.2007, as it was found to be the highest bidder for purchase of 300 MW of electricity. LOI though laid down the terms and conditions for sale of electricity, also provided for execution of an agreement for confirmation of the terms and conditions. It was clarified by the petitioner in its letter dated 25.7.2007 that Adani was to execute the agreement before commencement of sale of power.

3. Adani by its letter dated 20.4.2007, confirmed purchase of 100 MW of power round-the-clock for re-sale to Union Territory of Chandigarh. The petitioner has claimed that the draft agreement for sale and purchase of 100 MW of power was forwarded to Adani on 10.7.2007. However, the agreement was finally signed by Adani on 15.9.2007 and sent to the petitioner for signature, after continuous persuasion and follow up by the petitioner, and was reportedly received by the petitioner on 19.9.2007. For proper appreciation of the matter, it is considered appropriate to refer to some salient features of the agreement. The different clauses of the agreement are taken note of as under, namely -

- (a) As per clause 1.1 (b), the delivery point for the power sold was to be the periphery of the State of Madhya Pradesh, that is, the point of inter-connection between the Madhya Pradesh Transmission System and the Central Sector Transmission.

- (b) According to clause 1.2 (a) the petitioner was to raise provisional bills on weekly basis duly supported by implemented schedule of WRLDC and final bill on the basis of monthly Regional Energy Accounts issued by WRPC.
- (c) Under clause 1.2 (b), the payment was to be deposited by Adani in the designated current account of the petitioner within 7 days from the date of receipt of the bill through fax and in case the seventh day happened to be the bank holiday, the next working day was considered as the due date for making payment.
- (d) Clause 1.2 (c) provided for payment security mechanism, according to which Adani was to open weekly revolving Letter of Credit (hereafter "LC"), which was to be established before the commencement of power supply, equivalent to 18 days of energy billing as per the open access approved by nodal RLDC in favour of the petitioner.
- (e) In terms of clause 1.2 (d), there was a provision for levy of late payment surcharge @1.25% per month on all payments delayed beyond a period of 30 days from the receipt of the bills, the surcharge was to be calculated on day-to-day basis for each day of delay.
- (f) Clause 1.2 (e) of the agreement provided for rebate of 2% on the energy bills on payments made by Adani within 7 days of receipt of the bills.

(g) Clause 1.2 (f) of the agreement laid down that if Adani failed to schedule capacity approved for open access for the concerned period at least to the extent of 80% in energy terms, it was to pay the petitioner @ 50 paise per kWh for the short purchase. Similarly, if the petitioner could not schedule at least 80% of the capacity for which open access was approved, it was liable to pay compensation to Adani on the same basis.

4. Adani obtained open access from NRLDC for transmission of power from 15.7.2007 to 30.7.2007 and raised bills on the petitioner towards short-term open access charges. The amount of Rs. 26, 39,351 on this account were refunded by the petitioner to Adani on 27.12.2007. It is of interest to note that the petitioner refunded the open access charges in December 2007 when it was known that the contract for sale of power, valid up to 30.9.2007 was not executed by Adani.

5. The petitioner has alleged that no power was scheduled by Adani despite availability of open access. Therefore, the petitioner raised invoices for compensation claim amounting to Rs. 4.896 crore with Adani, presumably in terms of clause 1.2 (f) of the agreement. The claim of the petitioner has not been accepted by Adani who in its reply to the petitioner claimed that the concerned officer of the petitioner had not conveyed the daily schedule for sale of power.

6. When the petition was heard on 26.3.2009, learned counsel for the petitioner could not satisfy the Commission on the maintainability of the petition under section

29 of the Act. Section 29 provides for issue of directions by the Regional Load Despatch Centre, their compliance and the penal consequences that may follow for non-compliance of the directions of the Regional Load Despatch Centre. The Commission under clause (f) of sub-section (1) of section 79 of the Act is entrusted with the function of adjudication of disputes involving the generating company or the transmission licensee. In the present case, neither of the parties is the generating company or the transmission licensee, both of them being trading companies. Therefore, maintainability of the petition to adjudicate upon the claim of the petitioner for compensation under the said clause (f) was also ruled out. At that stage, learned counsel for the petitioner alleged that Adani had violated the provisions of regulation 7(h) of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Trading Licence and other related matters) Regulations, 2004 (the trading regulations). Based on the allegation, the Commission issued notice to Adani under Section 142 of the Act limited to the question of non-compliance of regulation 7(h) of the trading regulations.

7. Adani has filed its reply to the notice claiming that the petitioner has failed to make a case for proceedings under Section 142 of the Act. It has stated that the petitioner has not alleged breach of any provisions of the Act, or the rules or regulations or conditions of licence, but has alleged default of the contractual clause. Adani has asserted that the requirement of regulation 7(h) of the trading regulations was duly complied with. In the reply, on the contrary it has been alleged that the petitioner did not intimate availability as per agreed mode of communication and raised compensation bills even before signing of the agreement. Adani has stated

that as actual trading did not take place, the stage for further trading arrangement through LC had not reached.

8. Shri Umapathy, learned counsel filed his rejoinder to the reply filed by Adani during the course of hearing. In the rejoinder, the petitioner has sought to invoke clause (c) of sub-section (1) of section 79 of the Act to support its claim for compensation.

9. We heard learned counsel for the petitioner. None was present for Adani and as such no assistance was available from its side. However, because of our zeal and anxiety to do justice to the parties, we have ourselves gone through the complete record.

10. Learned counsel for the petitioner argued that the adjudication of the dispute was within the jurisdiction of the Commission under clause (c) of sub-section (1) of section 79 of the Act, according to which regulation of inter-State transmission of electricity is one the functions of the Commission. To buttress his claim, learned counsel placed reliance on the Commission's earlier order dated 12.11.2007 in Petition No. 107/2007. Learned counsel, however, did not make any effort to support violation of regulation 7 (h) of the trading regulations. Neither is anything said in this regard in the rejoinder.

11. The Commission's order on which reliance was placed by learned counsel involved dispute under clause (f) of sub-section (1) of section 79 of the Act. In the present case, as we have noted above, clause (f) of sub-section (1) of section 79 of

the Act has no application since the parties involved in the dispute are the trading companies. The basic condition for invoking clause (f) of sub-section (1) of section 79 of the Act is not satisfied. The notice to Adani was issued under Section 142 of the Act, limited to the question of non-compliance with the provisions of regulation 7(h) of the trading regulations. No relief on the claim for compensation can be considered as it is deemed to have been rejected already while examining the maintainability of the petition.

12. We now proceed to examine the alleged contravention of regulation 7 (h) of the trading regulations. Regulation 7 of the trading regulations provides for the obligations of the trading licensee and clause (h) thereof provides as under:

“(h) Trading shall be carried out bilaterally between the parties by entering into appropriate contracts. Necessary safeguards with regard to supply of electricity through trading, or payment for the electricity traded shall be included in the agreements between the parties. All trading arrangements shall be done through the letters of credit or with any other superior instrument.”

13. Regulation 7(h) of the trading regulations when analysed, imposes the following three obligations on the trading licensee, namely –

(a) Trading shall be carried out by entering into appropriate contracts.

(b) Necessary safeguards with regard to supply of electricity through trading, or payment for the electricity traded shall be included in the agreements.

(c) All trading arrangements shall be done through the letters of credit or with any other superior instrument.

14. In the case on hand, as per LOI, commencement of power supply was to be preceded by execution of agreement. Accordingly, the parties entered into contract in writing for sale and purchase of electricity. Till the time of signing of the agreement on 19.9.2007, power supply had not commenced. This meets the first requirement of regulation 7(h). Similarly, in compliance with the second requirement of regulation 7 (h), the necessary safeguards were provided in the written contract or agreement signed between the parties and taken note of at para 3 above. This leaves for examination the question of opening of LC. The third requirement of Regulation 7 (h) is that the trading arrangements should be through LC or any other superior arrangement. Clause 1.2(c) of the agreement obligated Adani to open weekly revolving LC in favour of the petitioner, to be established before the commencement of power supply. It is the undisputed fact that the power supply did not commence at all and therefore, the stage for opening of LC had not arrived. In totality of the circumstances, it cannot be said that there was any infringement of regulation 7 (h) of the trading regulations. In fact, in the petition there is no allegation of contravention by Adani of clause 7(h) of the trading regulations. On the contrary, the petitioner in the petition itself has averred that "bilateral contract was entered into in accordance with 'Clause 7(h)' of 'Chapter IV – Terms & Conditions of the License'". Notice for violation of Clause 7(h) was issued based on oral statement of learned counsel for the petitioner at the hearing on 26.3.2009.

15. The proceedings under section 142 of the Act are *quasi* criminal in nature, which may result in imposition of penalty. The established principles of law are that the penal provisions are to be construed strictly and in case there is a reasonable interpretation which will avoid penalty in any particular case, the court is required to adopt such interpretation. The penalty can be imposed when deliberate and willful defiance of law is established. In *Hindustan Steel Ltd. Vs. State of Orissa* [(1969) 2 SCC 627], the Hon'ble Supreme Court held that:

“8...An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....”

16. By applying the above principles, it is not possible to hold Adani guilty of non-compliance with clause 7(h) of the trading regulations in the background of facts established.

17. The notice issued to Adani is discharged and the petition is accordingly dismissed, with no order as to costs.

Sd/-
[V. S. VERMA]
MEMBER

Sd/-
[S. JAYARAMAN]
MEMBER

Sd/-
[R. KRISHNAMOORTHY]
MEMBER

Sd/-
[DR. PRAMOD DEO]
CHAIRPERSON

New Delhi, dated 30th June 2009