

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.19/2009

Coram:

**Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M. Deena Dayalan, Member**

Date of Hearing: 7.12.2010

Date of Order : 7.9.2012

In the matter of

Petition under Section 79 (i) (f) of the Electricity Act, 2003 against Damodar Valley Corporation for non supply of power allocated to the National Capital Territory of Delhi in accordance with the Power Purchase Agreement dated 24.8.2006 entered into between Damodar Valley Corporation and Delhi Transco Limited, and thereafter re-assigned to the three Discoms of Delhi vide Delhi Electricity Regulatory Commission's Order dated 31.3.2007.

And in the matter of

1. BSES Rajdhani Power Limited, (BRPL) New Delhi
2. BSES Yamuna Power Limited, (BYPL) New Delhi
3. North Delhi Power Limited, (NDPL) Delhi

....Petitioners

Vs

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

.... Respondents

The following were present:

1. Shri Amit Kapur, Advocate, BRPL, BYPL and NDPL
2. Shri Bharat Sharma, NDPL
3. Shri J.R.Das, Advocate, DVC
4. Shri Seetaketu Mishra, Advocate, DVC

ORDER

The petition has been filed under clause (f) of sub-section (1) of Section 79 of the Electricity Act, 2003 (the Act) to seek enforcement of the Power Purchase Agreement dated 24.8.2006 (the PPA) entered into between Damodar Valley Corporation (DVC), the first respondent, and Delhi Transco Limited (DTL), the second respondent, for supply of power to the National Capital Territory of Delhi. The prayers made by the petitioners are:

- “(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. Under the PPA, DVC had agreed to supply different quantum of power on ‘round the clock’ basis to DTL for meeting the requirements of National Capital Territory of Delhi. The relevant clause of the aforesaid PPA are extracted as follows:

“A) DTL is desirous to purchase different quantum power round the clock (RTC) basis from DVC and DVC is desirous of selling the same power round the clock basis on mutually agreed terms and conditions under the provisions of CERC regulations as detailed in Tables under Clause-4. The delivery point for sale of this power by DVC to DTL shall mean the Commercial Metering Point at DVC Bus at DVC Periphery.”

“4. TARIFF AT DELIVERY POINT

- 4.1 Subject to the provisions of this Agreement, DVC shall supply the energy at the delivery point on scheduled basis and DTL shall pay to DVC for the scheduled energy as per REA prepared by ERLDC/ERPC at the following terms and rate:

TABLE-A

<i>Period of sale of scheduled energy</i>	<i>Quantum of Power (MW)</i>	<i>Rate (at DVC Bus) at DVC Periphery (Paise/Kwh)</i>
<i>From Dec' 2006 to Sep' 2007</i>	100	Negotiable

TABLE-B

<i>Period of sale of scheduled energy</i>	<i>Quantum of Power (Gross MW from capacity addition)</i>	<i>Rate (at DVC Bus) at DVC Periphery (Paise/Kwh)</i>	<i>Duration of Power supply</i>	<i>Remarks (Capacity addition of DVC units)</i>
<i>From Oct' 2007 to Nov' 2007</i>	230	<i>As determined by CERC</i>	25 years from COD	CTPS # 7
<i>From Dec' 2007 to March 2010</i>	400	<i>As determined by CERC</i>	25 years from COD	CTPS # 8
<i>From April 2010 to August 2010</i>	800	<i>As determined by CERC</i>	25 years from COD	MTPS#B- 8
<i>From Sep' 2010 to Oct' 2010</i>	1000	<i>As determined by CERC</i>	25 years from COD	MTPS#B- 7
<i>From Nov' 2010 to March 2011</i>	1975	<i>As determined by CERC</i>	25 years from COD	Koderma-U#1 & Durgapur-U#1
<i>From April 2011 onwards</i>	2500	<i>As determined by CERC</i>	25 years from COD	Koderma-U#2 & Durgapur-U#2

NOTE:

- i) COD: Date of Commercial Operation
- ii) Tariff for sale of power from Oct' 07 to April 2011 (Ref Table-B) will be determined by CERC from time to time in accordance with CERC regulations on terms and conditions of tariff.
- iii) However in absence of final/provisional tariff notification by CERC in respect of DVC at the time of commencement of power supply to DTL

based on CERC Regulations on terms and conditions of tariff, a provisional tariff will be applicable as may be mutually agreed upon between DTL and DVC, which would be subject to adjustment in accordance with the tariff fixed by CERC.

DTL shall be liable to pay capacity (fixed) charges in proportion to their contracted power out of capacity additions during Xth and XIth plan in terms of target availability as per CERC norms.

- 4.2 *Any levy such as sales tax, Electricity duty, Octroi or otherwise by whatever name or names called or either described by the Govt. of West Bengal or Govt. of Jharkhand or any other State Govt. or Govt. of India or any other competent authority in respect of energy generated by the Corporation and/or purchased by DTL from the Corporation shall be paid by DTL.*
- 4.3 *The transmission charges and transmission losses for sale of above power up to the delivery point shall be borne by DVC. No other charges beyond the delivery point (DVC Periphery) shall be borne by DVC.*
- 4.4 *All applications for availing intra-regional and inter-regional transmission system of CTU to transfer power from DVC periphery to DTL shall be made by DTL to respective RLDCs/RPCs and all other charges as per CERC norms is to be paid by DTL.*
- 4.5 *DTL shall be responsible to coordinate with CTU or any transmission licensee or other agencies for implantation of transmission system for evacuation of power from the DVC power stations with the commissioning schedules."*

3. From the above extracts it can be seen that during the months from December 2006 to September 2007, 100 MW of power was agreed to be supplied and the quantum of supply (Gross MW from capacity addition) agreed from October 2007 and onwards was as under:

- | | |
|------------------------------|--|
| (i) Oct 2007 to Nov 2007 : | 230 MW (CTPS Unit-7) |
| (ii) Dec 2007 to Mar 2010 : | 400 MW (CTPS Unit-8) |
| (iii) Apr 2007 to Aug 2010 : | 800 MW (Mejia TPS B Unit-I) |
| (iv) Sep 2010 to Oct 2010 : | 1000 MW (Mejia TPS B Unit-II) |
| (v) Nov 2010 to Mar 2011 : | 1975 MW (Koderma Unit-I & Durgapur Unit-I) |

(vi) Apr 2011 onwards : 2500 MW (Koderma Unit-II & Durgapur Unit-II)

4. From the extracts from the PPA given at para 2 above it is further clear than supply of 100 MW of power was from the existing generation and the incremental enhancement in supply was to keep pace with commissioning of the additional generating units. Thus, DVC had an obligation under the PPA to supply power far exceeding the quantum of 100 MW committed initially during the months from December 2006 to September 2007.

5. In accordance with the PPA, the tariff for supply of 100 MW of power up to September 2007 was to be at the rate negotiated between the parties. The tariff for the incremental enhanced supply was to be at the tariff determined by this Commission. This is expressly borne out of clause 4.1 and note (ii) below that clause of the PPA extracted above.

6. Under the PPA, all applications for availing intra-regional and inter-regional transmission system of the CTU to transfer power from DVC periphery to DTL was to be made by DTL to respective RLDCs/RPCs and all the charges on that account were also to be paid by DTL. This is borne out of the following clauses of the PPA:

“4.3 The transmission charges and transmission losses for sale of above power up to the delivery point shall be borne by DVC. No other charges beyond the delivery point (DVC Periphery) shall be borne by DVC.

4.4 All applications for availing intra-regional and inter-regional transmission system of CTU to transfer power from DVC periphery to DTL shall be made by DTL to respective RLDCs/RPCs and all other charges as per CERC norms is to be paid by DTL.

4.5 DTL shall be responsible to coordinate with CTU or any transmission licensee or other agencies for implantation of transmission system for

evacuation of power from the DVC power stations with the commissioning schedules.”

7. The petitioners have claimed that the PPA was assigned to them by the Delhi Electricity Regulatory Commission, effective from 1.4.2007 and hence they have *locus standi* to seek enforcement of the PPA as they have substituted DTL which was earlier responsible for procurement of power for the National Capital Territory. The *locus standi* of the petitioners to seek enforcement of the PPA has been upheld by the Hon'ble Appellate Tribunal in its judgment dated 10.12.2009 in Appeal No 161/2009.

8. The long and short of the allegations made by the petitioners in the petition is that despite exchange of number of communications, meetings and conferences with DVC officials and assurances, DVC defaulted in making supply of electricity in accordance with the PPA, as DVC supplied just 25-50 MW of power during off-peak hours and not on 'round the clock' basis as was agreed. The petitioners have stated that DVC in its letter dated 1.8.2007 assured 100 MW of power supply on immediate basis, to be increased to 230 MW and 400 MW on commissioning of CTPS Units 7 and 8 and advised them to obtain open access. The petitioners have claimed that pursuant reinforcement of the commitment by DVC in the letter dated 1.8.2007; they obtained long-term open access from the CTU for 230 MW effective from 1.10.2007 and are continuously making payment of the open access charges since then. It has been alleged that DVC exploited the shortage situation in the country by resorting to the short-term supply of power to other utilities, including the utilities in the States of Rajasthan and Punjab in Northern Region at exorbitantly high rates but evaded its liability under the PPA to supply power to the petitioners. The petitioners, as successors of DTL in the matter of procurement of power, accordingly seek

enforcement of the contractual obligations of DVC. It is evident from the prayers in the petition that the substantive relief that has been sought is the directions to DVC to ensure supply of power in terms of the PPA.

9. DVC in its reply-affidavit dated 11.6.2009 raised a preliminary objection as to the jurisdiction of this Commission to adjudicate upon the dispute under clause (f) of sub-section (1) of Section 79 of the Act. This Commission vide its order dated 19.8.2009 dismissed DVC's preliminary objection. This Commission's order dated 19.8.2009 has been upheld by the Appellate Tribunal by its judgment dated 10.12.2009 in Appeal No. 161/2009. The Appellate Tribunal advised this Commission to proceed with the main petition to consider the petitioners' claim on merits and dispose of the same in accordance with law as per para 20 of the judgment extracted below:-

"20. In view of the above discussions, the impugned Order has to be held valid and accordingly the same is confirmed. Consequently, the Central Commission is permitted to proceed with the main petition to consider the case on merits and dispose of the same in accordance with law. Hence, the Appeal is dismissed as devoid of merits. No costs."

10. DVC has not denied the execution of the PPA or other averments made in the petition, including the averment of non-supply of electricity in terms of the PPA. A great deal of effort has been made by DVC to explain the reasons for non-supply of adequate quantum of power to the National Capital Territory of Delhi. It is not necessary to narrate those reasons in detail but briefly stated, the following are required to be extracted:

- (i) DTL did not take delivery of power in March 2007 at the price quoted by DVC for the alleged reason that the price was very high,
- (ii) Non-availability of surplus power due to heavy demand in West Bengal,

- (iii) Non-signing of BPTA by the petitioners with the CTU till the first week of November 2007,
- (iv) In the month of November 2007, there was shut down at Durgapur Power Station resulting in reduced generation,
- (v) There occurred delay in commissioning of CTPS units.

11. In short, DVC has stated that its primary obligation to supply power was towards its own consumers and the utilities in the States of West Bengal and Jharkhand and that only the surplus power was to be supplied to National Capital Territory of Delhi, though the contention that only the surplus power was to be supplied to National Capital Territory is not supported by any of the clauses of the PPA or the documents placed on record either by the petitioners or DVC itself. DVC has stated that DTL took delivery of surplus power during December 2006 to February 2007, but in March 2007, DTL did not take delivery of power for the reason that the price offered was very high. DVC has alleged that it suffered losses on account of DTL's refusal to take delivery of power as it had to back down its generation.

12. DVC has further brought out that 250 MW Unit 6 of Mejia TPS was commissioned on 24.9.2008, consequent to which Ministry of Power allocated 150 MW of power to Northern Region, which included supply of 100 MW to Delhi. The balance 100 MW was allocated to Madhya Pradesh for which it had signed a bilateral agreement. DVC has stressed that allocation of 100 MW to the petitioners is 40% of the gross capacity of 250 MW of Mejia TPS Unit 6. Therefore, according to DVC, its obligation towards the petitioners is to supply 40% of the power generated because other States have also to be supplied power in proportion of the capacity allocation. DVC has stated that because its generation at Mejia TPS was seriously affected for

the reasons beyond its control from January 2008 to May 2009, it could not supply power to Delhi during that period.

13. We heard learned counsel for the parties and have very carefully perused the records.

14. The PPA stipulates supply of different quantum of power by DVC to National Capital Territory of Delhi, the maximum of which is 2500 MW after the commissioning of Koderma Unit-II and Durgapur Unit-II as seen from clause 4.1 of the PPA extracted above at para 2.

15. 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 *inter alia* to assign the power purchase agreements then existing in favour of DTL to the distribution licensees in the National Capital Territory of Delhi. In keeping with the directive of the Delhi Government, the Delhi Electricity Regulatory Commission by its order dated 31.3.2007 assigned all Power Purchase Agreements for existing and future power stations signed by DTL or its predecessor, Delhi Vidyut Board. In view of the directive of the Delhi Government, all rights and obligations of DTL for procurement of power stood transferred to the petitioners. From the documents placed on record it is discernible that some efforts were being made to sign a fresh Power Purchase Agreement involving the petitioners. No such agreement seems to have been executed as nothing in this regard has been brought on record. However, non-execution of agreement between the petitioners and DVC does not militate against the obligation of DVC to supply power to the petitioners. As has been noticed above, Ministry of Power also advised to supply 100 MW of power to National

Capital Territory of Delhi as agreed by DVC. The Ministry's advice does not in any manner absolve DVC of its commitments and obligations under the PPA. Therefore, in view of the express provisions of the PPA, the petitioners can seek enforcement of the PPA for supply of power as under:-

- (i) 230 MW (CTPS Unit – 7)
- (ii) 400 MW (CTPS Unit – 8)
- (iii) 800 MW (Mejia TPS B Unit – 1)
- (iv) 1000 MW (Mejia TPS B Unit – III)
- (v) 1975 MW (Koderma Unit – I & Durgapur Unit – I)
- (vi) 2500 MW (Koderma Unit – II & Durgapur Unit – II)

16. However, the express prayers of the petitioners are only *qua* the following quantum –

- (i) supply of at least 100 MW power as per PPA executed and the long-term open access obtained by them, and
- (ii) supply of 230 MW power when CTPS unit 7 is commissioned; and supply of 400 MW power after commissioning of CTPS unit 8.

Hence, we are required to decide the matter only in respect of the quantum sought to be enforced in terms of the aforesaid prayers.

17. DVC in its reply has stated that that only the surplus power was to be supplied to the petitioners. The basis of DVC's contention is not known as DVC has not relied upon any clause of the PPA in this regard. The PPA is completely silent since it does not state that only the surplus power was to be supplied to the petitioners. On the other hand Note (iii) below clause 4.1 states as follows:

“iii) However in absence of final/provisional tariff notification by CERC in respect of DVC at the time of commencement of power supply to DTL based on CERC Regulations on terms and conditions of tariff, a provisional tariff will be applicable as may be mutually agreed upon between DTL and DVC, which would be subject to adjustment in accordance with the tariff fixed by CERC.

DTL shall be liable to pay capacity (fixed) charges in proportion to their contracted power out of capacity additions during Xth and XIth plan in terms of target availability as per CERC norms.

18. We reject the contention of DVC that its obligation is to supply only the “surplus” power.

19. DVC has also averred that the petitioners can claim only 40% of the gross generation at Mejia TPS Unit 6. We do not find any strings or conditions in the PPA on this count. From clause 4.1 of the PPA extracted above it is clear that supply of 100 MW of power was to be from the existing generating stations. Therefore, commitment to supply 100 MW of power was absolute and it was an unconditional contractual obligation. DVC had been offering to supply 100 MW of power, as noted from the documents available on record. DVC has in its reply again expressed its willingness to continue with supply of 100 MW of power to the petitioners. The argument of DVC for supply of power corresponding to actual generation since October 2007 may be valid for supply beyond 100 MW from additional generation as it is to supply “Gross MW from capacity addition”. We direct DVC shall adhere to and honour its commitment made under clause 4 of the PPA. It can be seen that 230 MW power was agreed to be supplied as and when CTPS Unit 7 was commissioned and 400 MW power was to be supplied on commissioning of CTPS Unit 8. Unit 7 was commissioned on 2.11.2011 and Unit 8 was commissioned on 15.7.2011. We find no reason for DVC to prevaricate on the question. We direct DVC to immediately resume supply of power to discharge the obligation under the PPA, if not already done.

21. DVC has already filed before this Commission a petition for approval of tariff for CTPS Units 7 and 8. The Commission is in the process of issuing the provisional tariff order in respect of the generating station and DVC shall charge the tariff from the beneficiaries of the generating station accordingly.

22. As regards the other prayers, prayer (c) requires a direction upon DVC to comply with the open access regulations of this Commission. It goes without saying that the regulations are mandated to be complied with as they have statutory force and their non-compliance attracts penal action. No specific directions are needed for this purpose. Prayer (d) requires a direction upon DVC to comply with the PPA which has already been decided in the foregoing portion of this order.

23. During pendency of the petition, the petitioners filed their individual claims for compensation for non-supply of power and for recovery from DVC of the transmission and corridor charges paid to PGCIL for obtaining long-term open access as under:

(Rs in crore)

Particulars of claim	Petitioner No 1		Petitioner No 2		Petitioner No 3	
	Amount	Interest	Amount	Interest	Amount	Interest
Non-scheduling of power by DVC	207.71	44.80	117.98	28.67	187.54	42.10
Transmission charges	36.73	6.83	22.96	4.25	26.05	4.71

24. DVC has raised objection to entertainment of the petitioners' claim for compensation and reimbursement of the transmission charges on several grounds, including that the PPA is silent on this question. The petitioners have attempted to

rebut DVC's objections by stating that their claim for compensation is covered under Section 73 of the Contract Act.

25. The prayers made by the petitioners in the main petition have been extracted above. It is seen that the petitioners have not claimed relief of compensation in the petition. They have filed individual statements of claim at later stage, without amending the petition. It is well settled that relief (more so in nature of compensation or damages) not prayed for in the petition cannot be granted. It also settled law that when the petitioner is entitled to more than one relief, he must pray for all reliefs. Under the provisions of the Civil Procedure Code, if the plaintiff omits, except with the leave of the Court, to sue for any particular relief which he is entitled to, he will not afterwards be allowed to sue in respect of the portion so omitted or relinquished. In *Om Prakash v. Ram Kumar* (AIR 1991 SC 409), the Hon'ble Supreme Court observed, "A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute".

26. Keeping in view the above settled legal position, we are not in favour of going into the question of compensation as relief in this regard has not been sought in the main petition. The petitioners may take other steps in law, if so advised.

27. With the above, the petition stands disposed of.

Sd/-
(M.DEENA DAYALAN)
MEMBER

sd/-
(V.S.VERMA)
MEMBER

sd/-
(S.JAYARAMAN)
MEMBER

sd/-
(Dr. PRAMOD DEO)
CHAIRPERSON

