

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 170/MP/2013

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri M. Deena Dayalan, Member

Shri A.K. Singhal, Member

Date of Hearing: 7.1.2014

Date of Order : 22.4.2014

In the matter of

Petition under Section 79 (1) (f) of the Electricity Act, 2003 read with Section 62 & 63 of the Electricity Act, 2003

And in the matter of

Jhajjar Power Limited
Village Khanpur, Tahsil Matenhail,
District Jhajjar,
Haryana- 124142

Petitioner

Vs

Uttar & Dakshin Haryana Bijli Vitaran Nigam Limited
Shakti Bhawan, Sector-6,
Panchkula-134109

Respondents

Parties Present

- 1) Shri Sanjay Sen, Senior Advocate for the petitioner
- 2) Shri Aditya Jalan, Advocate for the petitioner
- 3) Shri M.G. Ramachandra, Advocate for the respondents
- 4)
- 5) Shri Kirish Gandhi, Advocate for the respondents
- 6) Ms. Apporve Karol, Advocate for the respondents
- 7) Shri Nabeel Saleem, Jhajjar Power Limited
- 8) Shri Naveen Mundal, Jhajjar Power Limited

ORDER

The present petition has been filed by Jhajjar Power Limited for adjudication of disputes between the petitioner and the respondents, namely, Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Limited regarding (i) non-payment of petitioner's bills claiming capacity charges which the petitioner would have achieved had the respondents granted timely approval for procurement of alternate coal in terms of the PPA, (ii) penalty claimed by the respondents from the petitioner for not achieving the availability threshold of 75% under the PPA, (iii) non-acceptance by the respondents the date of commercial operation of the Unit 1 of the plant as 29.3.2012, (iv) non-payment of capacity charges for the availability declared by the petitioner and the power scheduled by SLDC Haryana, (v) non-payment of transit losses suffered by the petitioner in coal supplies from the coal mines to the petitioner's plant, (vi) payment of cost incurred by the petitioner towards charges payable to railway, and (vii) refusal of the respondents to apply the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 with respect to the application of UI charges.

2. The petitioner has set up the Mahatma Gandhi Thermal Power Plant in the State of Haryana after being selected as a successful bidder through an international competitive bidding conducted by Haryana Power Generation Corporation Limited for setting up a power plant at Jhajjar District in the State of Haryana and to supply of 90% of net power generated from the power plant to the Haryana Discoms. The bid documents envisaged the project to be set up as Mega Power Project in order to avail the benefits prescribed under the Mega Power Policy of Ministry of Power, Government

of India which required that 10% of the capacity should be sold outside the State of Haryana on long term basis. Accordingly, the petitioner has entered into an agreement that Tata Power Delhi Distribution Company Limited through Tata Power Trading Company Limited for supply of 10% of the power generated at the generation station.

3. The petitioner has submitted that in accordance with the obligations under the bid document and the PPA, the respondents arranged the coal linkage granted by the Standing Linkage Committee pursuant to which the letter of assurance dated 14.10.2008 was issued by Central Coal Limited for supply of 5.21 million tonne of e-grade domestic coal per annum of the project. The petitioner could sign the FSA with CCL on 7.6.2012 for supply of the 5.21 million tonne of coal after obtaining prior approval of the respondents in terms of the provisions of the PPA. The petitioner has further submitted that on account of the shortage of domestic coal in the country, CCL failed to supply coal as per the contracted capacity of the petitioner during the financial year 2012-13. The petitioner in anticipation of the problem of shortage of coal requested the respondents to procure the alternate coal including import of coal in the range of 20% to 30% of plant's annual coal requirements. The grievance of the petitioner is that the respondents delayed granting permission to the petitioner by 14 months to import 1 million tonnes of coal for FY 2012-13 and denied in principle approval for procuring coal on "as is where is" basis from CIL/CCL, e-auction coal and 'open market' coal to meet the shortage of coal, the petitioner's plant was able to achieve commercial availability of 31.05% in the FY 2012-13 as against the technical availability of 76.56%. The petitioner has submitted that the Haryana Utilities have

deducted an amount of ₹55 crore from the bill of March 2013 in terms of Article 1.2.5 of the PPA in an arbitrary and unreasonable manner. The petitioner has further submitted that the petitioner would have achieved 76.56% technical availability in FY 2012-13 had the respondents granted timely consents for procurement of alternate coal in line with Article 7.2.1 of the PPA as against 31.05% which it actually achieved during the same period. The other grievance of the petitioner is that even though it declared the commercial operation of the Unit 1 of the generating station on 29.3.2012 in terms of the PPA and the Power Despatch Centre scheduled power from 29.3.2012, subsequently the Power Despatch Centre did not issue the scheduled generation instructions regularly between 21.4.2012 to 11.5.2012 on the contention that HPPC had not confirmed the COD of Unit 1, which was in complete violation of the terms of the PPA. The petitioner has submitted that the respondents are not paying the monthly bills in accordance with Schedule 11 of the PPA and are paying the first contract year tariff in the second contract year and second contract year tariff in the third contract year. Against the above background, the petitioner has approached the Commission for adjudication of dispute on the issues mentioned in para 1 of this order.

4. The matter was listed for hearing on admission on 24.9.2013. Learned senior counsel for the petitioner submitted that the generating station has a composite scheme for generation and supply of power to more than one State as the petitioner is supplying 90% of its contracted capacity to Haryana Utilities and 10% to Tata Delhi Power Distribution Company Limited in terms of the Mega Power Policy of the Government of India. Learned counsel further submitted that the petitioner had earlier approached

HERC for certain reliefs under Section 86(1) (b) of the Electricity Act, 2003 and the petition was withdrawn by the petitioner after realizing that the generating station has a composite scheme for generation and supply of electricity to more than one State and would come within the jurisdiction of the Commission under Section 79 (1) (b) of the Act. The Commission after hearing the learned counsel issued notice to the respondents. The matter was listed for hearing on 19.11.2013. During the hearing, learned counsel for the respondents sought time to file reply to the petition which was granted. Haryana Power Purchase Centre (HPPC) on behalf of Haryana Utilities has filed reply vide affidavit dated 2.12.2013.

5. During the hearing of the petition, learned counsel for the respondents submitted that TPTCL should be impleaded as a party to the petition. Learned senior counsel for the petitioner opposed the submission of learned counsel for the respondent on the ground that since TPTCL has been making payments in terms of the PPA and the petitioner has no dispute with TPTCL and therefore, there is no requirement to implead TPTCL as respondent in the present petition.

6. We have considered the submissions of learned counsel for the respondents and learned senior counsel for the petitioner. In the reply dated 2.12.2013, HPPC has taken two preliminary objections. Firstly, it has been contended that in terms of provisions of section 86(1)(b) of the Act, HERC is the appropriate forum for dealing with the disputes arising between the petitioner and the respondents under the Power Purchase Agreement dated 7.8.2008. Secondly, the petition suffers from the non-joinder of

necessary party as Tata Power trading Company Limited (TPTCL) to whom 10% of power is being sold has not been impleaded as a party in the proceedings.

7. This Commission has the power to regulate the tariff of a generating company under section 79(1)(b) of the Act which has a composite scheme for generation and supply of power in more than one State. Under section 62(1)(a) of the Act, the Appropriate Commission shall determine the tariff if it is supplied from a generating company to a distribution licensee. Reading both the provisions together, it emerges that this Commission is empowered to regulate the tariff of a generating company if it has a composite scheme for generation and supply of electricity to the distribution companies in more than one State. Sometimes, power is supplied by a generating company to an inter-State electricity trader which is in turn supplied by the trader to the distribution licensee. This issue arose for consideration before the Hon'ble High Court of Delhi in OMP No.677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited) where the Hon'ble High Court held as under:

“55. The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR.”

In view of the above interpretation, it is clear that tariff is subject to regulation only when there is supply of electricity to a distribution company through a trading licensee. In other words, the trading licensee in such cases is merely an intermediary and the supply is from the generating company to the distribution licensee.

8. The petitioner claims that the generating station has a composite scheme for supply of power to more than two States, i.e. 90% of contracted capacity to Haryana Utilities and 10% power to Tata Power Delhi Distribution Limited through TPTCL. In this connection, para 10 of the petition is extracted as under:

"10. In order that the Plant meets the qualification requirement of a Mega Power Project and as the same was formed as a composite scheme, the petitioner negotiated sale of 10% of the net capacity to New Delhi Power Limited ("NDPL") (now called Tata Power Distribution Limited). The sale was executed through a trader i.e. Tata Power Trading Company Limited ("TPTCL") vide a Power Exchange Agreement dated January 20, 2009 for sale of power generated from 10% of the Plant's Net capacity, i.e. 123.72 MW, at the same tariff as under PPA 1 ("PPA 2"). The duration of PPA 2 was 25 years. The sale of power to TPTCL under PPA 2 was made conditional on it on-selling such power solely and exclusively to the distribution licensee in the National Capital Territory of Delhi by the name of NDPL at the relevant time. NDPL is now known as Tata Power Delhi Distribution Limited ("TPDDL"). TPTCL, accordingly, executed a back-to back power sale Agreement with TPDDL on the same day and on the same tariff, and agreed to sell the entire power contracted from the petitioner to TPDDL for distribution in the National Capital Territory of Delhi i.e. outside the State of Haryana. Thus, a composite scheme actually came into existence on the lines conceptualized under the Bid Documents."

It is evident from the above that the petitioner is supplying power to Tata Power Delhi Distribution (TPDDCL) Limited through TPTCL. The petitioner has a PPA with TPTCL which has a back to back Power Supply Agreement with TPDDCL. Since the petitioner is supplying power to Haryana Utilities as well as TPDDCL, it prima facie satisfies the conditions of section 79(1)(b) of the Act.

9. The petitioner has stated that similar PPA has been entered into by the petitioner with TPTCL as in the case of Haryana Utilities. It therefore follows that decision on the disputes with regard to the various provisions of the PPA with Haryana Utilities will equally affect the TPTCL and TPDDCL. In view of that matter, TPTCL and TPDDCL are considered as necessary parties and need to be heard. Accordingly, we direct the

petitioner to revise the memo of parties to implead TPTCL and TPDDCL as respondents and serve copies on them within one week. TPTCL and TPDDCL are directed to file their replies if any within two weeks and the petitioner may file its rejoinder if any within one week thereafter. The petitioner is directed to file its rejoinder to the reply of HPPC within two weeks if not already filed.

10. The petition shall be listed for hearing on 27.5.2014.

sd/-
(A.K. Singhal)
Member

sd/-
(M. Deena Dayalan)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson