

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 183/MP/2015

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A. S. Bakshi, Member
Dr. M.K. Iyer, Member**

**Date of Hearing: 07.1.2016
Date of Order : 15.6.2016**

In the matter of

A Petition under section 79(1)(f) read with section 79(1)(b) of the Electricity Act, 2003, for the adjudication of disputes over an increase in tariff sought by the Petitioner for its power plant selling power to Andhra Pradesh and Telangana licensees, to compensate for the increase in Clean Energy Cess on coal, being a 'Change in Law' under the contracts between the Petitioner and the Respondents

**And
In the matter of**

Meenakshi Energy Pvt Ltd
NSL ICON, H No 8-2-684/2/A
Plot No 1 to 4, 2nd Floor,
Road No 12, Banjara Hill,
Hyderabad – 500 034 Telengana

...Petitioner

Vs

1. Telengana State Power Coordination Committee
Vidyut Soudha, Khairatabad
Hyderabad – 500 082
2. Andhra Pradesh Power Coordination Committee
Vidyut Soudha, Khairatabad
Hyderabad – 500 082
3. Southern Power Distribution Company of Telengana Ltd
6-1-50, Corporate Office, Mint Compound,

- Hyderabad – 500 063
4. Northern Power Distribution Company of Telengana Ltd
H. No. 2-5-31/2, Corporate Office, Vidyut Bhawan,
Nakkalgutta, Hanamkonda,
Warangal – 506 001
 5. Southern Power Distribution Company of Andhra Pradesh Ltd
D. No. 19-13-65/A, Srinivasapuram,
Tiruchanoor Road,
Tirupat, Chittoor – 517 503
 6. Eastern Power Distribution Company of Andhra Pradesh Ltd
P&T Colony, Seethamadhara,
Visakhapatnam – 530 013
 7. PTC India Ltd
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi – 110 066

Respondents

Parties Present:

Shri Sitesh Mukherjee, Advocate, MEPL
Shri Deep Rao, Advocate, MEPL
Ms. Anuja Tiwari, MEPL
Shri Himansu Nishra, MEPL
Shri Ashish Bernard, Advocate, PTC
Shri S. Vallinayagam, Advocate, APPCC

ORDER

The petitioner has raised a claim of ₹61,906,964/- (Rupees six crore nineteen lakh six thousand nine hundred and sixty four only) against the respondents towards compensation for increase in the Clean Energy Cess, along with a surcharge for late payment at the rate of 1.25% per month on the outstanding amount.

2. The petitioner has set up a coal-based thermal power generating station consisting of two units with a total capacity of 300 MW (**the generating station**) in the State of Andhra Pradesh. The petitioner uses imported coal for generation of power.

3. On 19.11.2013, Andhra Pradesh Power Coordination Committee (**APPCC**), invited bids on behalf of the distribution companies in the erstwhile State of Andhra Pradesh for procurement of 2000 MW of power on a short-term basis for the period 30.5.2014 and 28.5.2015. On a reference from PTC India Ltd (**PTC**), Respondent No. 7, the petitioner authorized PTC, the petitioner authorized PTC to participate in the bidding process on its behalf for supply of 240 MW of power - 120 MW from each unit. Based on the authorization, PTC submitted the bid. Thereafter, the petitioner and PTC are said to have participated in the pre-bid meetings together.

4. Andhra Pradesh Central Power Distribution Company Limited (**APCPDCL**) (now named as the Southern Power Distribution Company of Telangana Limited, Respondent No. 3), issued purchase orders dated 29.4.2014 (**the Purchase Orders**) to PTC for procurement of 240 MW of firm power on round-the-clock basis for the periods 30.5.2014 to 31.5.2014 and 1.8.2014 to 28.5.2015. PTC in turn sent the Purchase Orders to the petitioner who communicated its acceptance to PTC.

5. With the bifurcation of the erstwhile State of Andhra Pradesh into Telangana and Andhra Pradesh, 53.89% of the power supplied by the petitioner under the Purchase Orders was delivered to the State of Telangana and the remainder 46.11% to the State of Andhra Pradesh. At this stage it is pointed out that Telangana State Power

Coordination Committee (**TSPCC**), Respondent No. 1, has been created by Government of Telengana to, *inter alia*, coordinate the trading of electricity on behalf of the distribution companies of in the State, Southern Power Distribution Company of Telangana Limited (Respondent No. 3) and Northern Power Distribution Company of Telangana Limited (Respondent No. 4). Similarly, APPCC in its present avatar coordinates trading in electricity on behalf of the distribution companies in the State of Andhra Pradesh, namely the Southern Power Distribution Company of Andhra Pradesh Limited (Respondent No 5) and Eastern Power Distribution Company of Andhra Pradesh Limited (Respondent No. 6)

6. Consequent to acceptance of the Purchase Orders, the petitioner commenced supply of power. It appears that the petitioner received payments for the power supplied as no dispute in that regard is raised in the petition.

7. With effect from 11.7.2014, the Central Government increased the Clean Energy Cess levied on imported coal from ₹50/MT to ₹100/MT, which was further increased to ₹200/MT with effect from 1.3.2015. The dispute raised in the present petition is regarding reimbursement by the respondents of increased cost of generation/supply on account of the increase in Clean energy Cess. The petitioner claims that it deserves to be compensated by increase in tariff under “Change in Law” clause in the Purchase Orders as also the Power Purchase Agreement the petitioner executed with PTC.

8. The petitioner has stated that it notified the increase in Clean Energy Cess to PTC who accepted its claim and approached TSPCC and APPCC for revision of tariff in the light of upward revision of Clean Energy Cess. The petitioner has claimed upward

revision of tariff at the rate of ₹0.0333/ kWh for the period 11.7.2014 to 28.2.2015 and at the rate of ₹0.0666/kWh with effect from 1.3.2015. The petitioner's grievance, as projected in the present petition, is that it has not been compensated in tariff for increase in the Clean Energy Cess.

9. The petition was heard on 15.9.2015 on admission, when the learned counsel for the petitioner submitted that since the petitioner was supplying power to more than one State under a composite scheme, the dispute could be adjudicated by the Central Commission in terms of clause (f) read with clause (b) of subsection (1) of Section 79 of the Electricity Act. After hearing the learned counsel for petitioner, this Commission directed to issue notice to the respondents on the maintainability of the petition. The Commission directed the respondents to file their replies and the petitioner to file its rejoinder. The petition was directed to be notified for hearing on 29.11.2015.

10. An affidavit dated 26.10.2015 has been filed on behalf of the distribution companies in the State of Andhra Pradesh, Respondent Nos. 5&6, opposing maintainability of the petition. It has been stated that the purchase orders were placed on PTC, the electricity trader. As such, according to the affidavit, there is no privity of contract between the petitioner and the respondents. According the distribution companies of Andhra Pradesh, the respective State Commission has jurisdiction to entertain and adjudicate the dispute raised in the petition under clause (f) of subsection (1) of Section 86 of the Electricity Act.

11. We have carefully considered the question of maintainability of the petition after hearing the parties.

12. There is no dispute regarding sale of power generated by the petitioner to PTC who in turn supplied the power to the distribution companies in the States of Andhra Pradesh and Telengana. The question of jurisdiction to regulate tariff in case of sale of power by a generating company to the trader for further sale to the distribution companies in more than one State arose before the High Court of Delhi in OMP No 677/2011 (PTC India Ltd Vs Jaiprakash Power Ventures Ltd). In that case the generating company had signed PPA with PTC for sale of power and PTC further supplied the contracted power to the distribution companies in four States. In that context the question that arose before the High Court was whether the Central Commission had the jurisdiction to determine tariff for sale of power by the generating company to PTC. The High Court in its judgment dated 16.5.2012 unequivocally held that in such cases, jurisdiction to determine tariff is invested in the Central Commission. The High Court directed the generating company to approach the Central Commission for approval of tariff for sale of power to PTC. The judgment of the High Court is extracted hereunder:

“62. CERC has the power to regulate tariff of generating companies under Section 79 (1) (b) of the EA. A generating company could sell in bulk to a consumer in one state, to a trading licensee in another and to one or more distribution licensees in other states. Sections 79 (1) (a) and (b) enable the CERC to fix or approve the tariff for the sale of electricity by the generating company in any of the above situations by taking into account the capital expenditure incurred for setting up the generating plant and a fixed margin of profit. If there is an intra- State trading licensee supplying to many States, then it is possible that each SERC may want to fix appropriate tariffs keeping in view the burden on the ultimate consumer. There is no absurdity in four SERCs fixing these tariffs to benefit ultimate consumers in their respective states. Even as of

today a consumer of electricity in Maharashtra for instance is not paying the same tariff as a consumer in Delhi or elsewhere. This is one of the purposes of establishing different SERCs with one CERC. Where it is inter-State supply, the various factors will be accounted for by the CERC. Where it is an intra-State supply, the SERC would have the jurisdiction and where it is an inter-State supply, the CERC would have jurisdiction.

“Conclusion

67. As a consequence, the majority Award dated 28th April 2011 is hereby set aside. The view of the dissenting member of the Tribunal on the above aspect is, therefore, held to be correct and is approved. The parties are now to work out the respective rights and obligations under the PPA in accordance with law. JPVL will approach the CERC for fixation of the tariff for supply of electricity to the Petitioner within a period of four weeks from today.

13. The judgment of the High Court firmly establishes that sale of electricity by the generating company to an electricity trader for further sale to the distribution companies in more than one State amounts to sale by the generating company itself to these States. Accordingly, as held by the High court, regulation of tariff for supply of electricity by the generating company attracts jurisdiction of the Central Commission under clause (b) of subsection (1) of Section 79 of the Electricity Act.

14. The Full Bench of the Appellate Tribunal for Electricity in its recent judgment dated 7.4.2016 in Appeal No 100/2013 (Uttar Haryana Bijli Vitran Nigam Ltd and another Vs Central Electricity Regulatory Commission and others) and connected appeals examined the scope of clause (b) of subsection (1) of Section 79 of the Electricity Act. In these cases the generating companies (Adani Power Ltd and GMR Kamalanga Energy Ltd) are supplying power two more than one State. Adani Power supplies power to the States of Gujarat and Haryana, the tariff for which was discovered through the competitive bidding routes adopted by the concerned States independent of

each other. GMR supplies power to three States, the State of Odisha through MoU route, the State of Haryana through PTC after competitive bidding and directly to the State of Bihar through the competitive bidding. In these cases, the question arose whether adjudication of disputes involving the generating companies, Adani Power Ltd and GMR, was within the purview of the Central Commission or the respective State Commission. The Full Bench of the Appellate Tribunal held that in both cases, the generating companies are having the composite scheme for generation and sale of electricity in more than one State and hence amenable to the jurisdiction of the Central Commission. The extracts from the judgment are placed below:

*“118. In view of the above discussion, we hold that the supply of power to more than one State from the same generating station of a generating company, ipso facto, qualifies as ‘Composite Scheme’ to attract the jurisdiction of the Central Commission under Section 79 of the said Act. **Accordingly, Issue No.3 is answered in the affirmative.**”*

*“120. We have already answered Issue No.3 in the affirmative and held that supply of power to more than one State from the same generating station of a generating company ipso facto, qualifies as a ‘Composite Scheme’ to attract the jurisdiction of the Central Commission under Section 79 of the said Act. It is an admitted position that both GMR Energy and Adani Power are selling electricity in more than one State from their respective generating stations. Hence, we hold that so far as Adani Power and GMR Energy are concerned, there exists a ‘Composite Scheme’ for generation and sale of electricity in more than one State by a generating station of a generating company within the meaning of Section 79(1)(b) of the said Act for the Central Commission to exercise jurisdiction. **Issue No.4 is accordingly answered in the affirmative.**”*

15. From the above judgment of the High Court of Delhi and the Full Bench of the Appellate Tribunal it follows that sale of electricity by the petitioner to the States of Andhra Pradesh and Telengana through PTC is sale to more than one State as contemplated under clause (b) of sub-section (1) of Section 79 of the Electricity Act and

thereby the petitioner has the composite scheme for generation and sale of electricity in more than one State. As a corollary, the jurisdiction to adjudicate the disputes involving the petitioner as a generating company is vested in the Central Commission under clause (f) of sub-section (1) of Section 79 of the Electricity Act.

16. In the light of above discussion, we hold that the present petition is maintainable.

17. The respondents are directed to file their reply on merits of the petitioner's claim latest by 15.7.2016 with advance copy to the petitioner who may file its rejoinder, if any, by 29.7.2016.

18. The petition shall be listed for hearing on 9.8.2016.

Sd/-
(Dr. M. K. Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson