

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 224/MP/2020
along with IA No.15/2020**

**Coram:
Shri P. K. Pujari, Chairperson
Shri I.S.Jha, Member**

Date of Order: 8th April, 2020

In the matter of

Petition under Section 79(1)(c) and (k) of the Electricity Act, 2003 read with Regulation 34(1) and Regulation 37 of the Central Electricity Regulatory Commission (Cross-Border Trade of Electricity) Regulations, 2019 for declaration that revocation of the Letter of Intent dated 3.1.2020 issued to the Petitioner is illegal and arbitrary and further to direct the Respondent No.1 and Respondent No.2 to honour their obligations under the Letter of Intent dated 3.1.2020.

**And
In the matter of**

Coastal Energen Private Limited
5th Floor, Buhari Towers,
4, Moores Road,
Chennai - 600 006

.....**Petitioner**

Vs.

1. Meenakshi Energy Private Limited
Through its Resolution Professional
Mr. Ravi Shankar Deverkonda,
Meenakshi House, 8-2-418,
Road No.7, Banjara Hills,
Hyderabad - 500 034.

2. PTC India Limited
2nd Floor, NBCC Tower 15,
Bhikaji Cama Place,
New Delhi - 110 066.

3. Central Electricity Authority
Sewa Bhawan, R.K. Puram,
Sector-I, New Delhi-110 066.

4. National Load Despatch Centre
B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi - 110 016.

5. Manikaran Power Limited
2nd Floor, D 21, Corporate Park,
Sector - 21, Dwarka,
New Delhi - 110 075 .

.....Respondents

The following were present:

Shri Matrugupta Mishra, Advocate, CEPL
Shri Pratiksha Chaturvedi, Advocate, CEPL
Shri MD Aman Sheikh, Advocate, CEPL
Shri Basava Prabhu Patil, Sr. Advocate, PTC India Limited
Shri Ravi Kishore, Advocate, PTC India Limited
Ms. Prerna Singh, Advocate, PTC India Limited
Shri Geet Ahuja, Advocate, PTC India Limited
Shri Rajshree Chaudhary, Advocate, PTC India Limited

ORDER

The Petitioner, Coastal Energen Private Limited, has filed the present Petition under Section 79(1)(c) and (k) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Regulation 34(1) and Regulation 37 of the Central Electricity Regulatory Commission (Cross Border Trade of Electricity) Regulations, 2019 (hereinafter referred to as 'the Cross Border Regulations') with the following prayers:

"a. To hold and declare that the emails dated 04.02.2020 issued by the Respondent No.1 to the Petitioner, communicating revocation of Lol dated 03.01.2020, is ex-facie bad in law being arbitrary and illegal;

b. To hold and declare that the withdrawal of application dated 03.01.2020 made by the Respondent No.02 before the Respondent No.3 in respect of supply of power from the Petitioner to Bangladesh Power Development Board, is illegal;

c. To direct Respondent No.1 and Respondent No.2 to honour their respective obligations under the Lol dated 03.01.2020;"

Background

2. Brief background leading to filing of the present Petition is as under:

(a) In order to facilitate and promote cross border trade of electricity with greater transparency, consistency and predictability in regulatory approaches across jurisdictions and to minimise perception of regulatory risks, Ministry of Power, Government of India, issued the 'Guidelines on Cross-Border Trade of Electricity' dated 5.12.2016 (hereinafter referred to as 'Cross Border Guidelines, 2016'). Subsequently, the said Guidelines were repealed and superseded by the 'Guidelines for Import/Export (Cross Border) of Electricity-2018' dated 18.12.2018 (hereinafter referred to as the 'Cross Border Guidelines').

(b) In furtherance to the above Guidelines, the Commission has formulated the Cross Border Regulations. The Cross Border Guidelines and the Cross Border Regulations, *inter-alia*, provide for appointment of Designated Authority by the Ministry of Power, to be responsible for facilitating the process of approval and laying down the procedure for cross border transaction and trade in electricity. Accordingly, Central Electricity Authority (CEA) has been appointed as the Designated Authority.

(c) On 11.11.2015, Bangladesh Power Development Board (hereinafter referred to as 'BPDB'), a public utility engaged in generation, distribution and sale of electric capacity and energy in Bangladesh initiated a bidding process for procurement of 500 MW power, which was subsequently amended on 12.12.2017 and the procurement of power was proposed in two phases i.e. on short-term basis from 1.6.2018 to 31.12.2019 and on long-term basis from 1.1.2020 to 31.5.2033.

(d) In response to the aforesaid bidding process, Respondent No.2, PTC India Limited (hereinafter referred to as 'PTC') on behalf of Respondent No.1, Meenakshi Energy Private Limited (hereinafter referred to as 'MEPL') submitted its bid for supply of power, which was accepted by BPDB and accordingly, Letter of Intent (LoI) dated 12.4.2018 was issued in favour of PTC for supply of 200 MW. In

terms of said Lol dated 12.4.2018, Power Purchase Agreement dated 9.10.2018 was executed between PTC and BPDB ('BPDB PPA') and PPA dated 29.10.2018 was executed between PTC and MEPL ('PTC PPA') on back-to-back basis.

(e) Article 7(1)(iii) of the BPDB PPA provides that if MEPL is unable to supply power to BPDB upto contracted capacity i.e. 200 MW except due to Force Majeure event or due to BPDB event of default, MEPL shall be allowed to supply power upto the contracted capacity from an alternative generation source to meet its obligations under the BPDB PPA for a maximum continuous period of six (6) months or a maximum non-continuous period of twelve (12) months during the operating period.

(f) After the execution of PTC PPA, insolvency proceedings were initiated against MEPL before National Company Law Tribunal (NCLT), Hyderabad, whereby a Resolution Professional was appointed in the said proceedings. In view of the same, the Petitioner, vide its e-mail dated 17.12.2019 offered MEPL to supply the contracted capacity of power i.e. 200 MW from its 2x600 MW imported coal-based power plant at Tuticorin, Tamil Nadu to BPDB, as an alternate supplier in terms of Article 7(1)(iii) of BPDB PPA through/with the involvement of Respondent No. 5, Manikaran Power Limited (hereinafter referred to as 'MPL').

(g) After prolonged negotiations, the Committee of Creditors (CoC) of MEPL accorded its approval for supply of power through alternative sources to BPDB after meeting all the requirements under the BPDB PPA and draft Lol was issued to the Petitioner and MPL on 26.12.2019 setting out the terms and conditions of the proposed supply of power by the Petitioner to BPDB.

(h) In suppression of draft Lol dated 26.12.2019, MEPL issued final Lol on 3.1.2020 to the Petitioner and MPL for supply of power on behalf of MEPL as an alternate supplier, for an initial period of three months which was extendable upto maximum continuous period of six months or maximum non-continuous period of

six months or maximum non-continuous period of 12 months during the operating period.

(i) Subsequent to issuance of Lol dated 26.12.2019, on 3.1.2020, PTC approached CEA for approval for supply of power to BPDB as an alternate supplier. On 10.1.2020, CEA forwarded the application of PTC to Ministry of Power, Government of India for concurrence as per Clause 4.6 of the Cross Border Guidelines.

(j) However, on 4.2.2020, MEPL vide its e-mail of the even date revoked the Lol dated 3.1.2020, *inter-alia*, citing the apprehensions of PTC with regard to financial viability of the transaction proposed by the Petitioner with the involvement of MPL, dependence of the Petitioner on an intermediary/ MPL for fulfilment of its material obligation under the PPA, and non-furnishing of Bank Guarantee.

(k) In the meantime, PTC made a fresh application to CEA on 31.1.2020 for supply of power from a third-party source (i.e. other than the Petitioner) and later withdrew the application made for supply of power by the Petitioner on 4.2.2020. In furtherance to the fresh application made by PTC on 31.1.2020, power supply from the third-party source to BPDB has commenced with effect from 7.2.2020.

Petitioner's submissions

3. In support of its prayers, the Petitioner has primarily made the following submissions:

(a) Lol dated 3.1.2020 issued in favour of the Petitioner and MPL was in terms of Article 7(1)(iii) of the BPDB PPA in order to mitigate the eventualities when MEPL is unable to supply power. Also, the proposal made by the Petitioner along with MPL for supply of power as an alternate source, was approved by CoC after analysing the eligibility as well as the fundamental viability of the Petitioner prior to issuance of Lol in favour of the Petitioner and MPL.

(b) As per the terms and conditions of Lol, it can be terminated by MEPL only after a prior notice of one month and on full discharge of Operational Security Deposit. However, relying on the false pretext and apprehensions of PTC, MEPL revoked the Lol dated 3.1.2020 vide its e-mail dated 4.2.2020 contrary to the terms and conditions specified therein.

(c) PTC was aware of the involvement and role to be played by MPL from the very beginning of the transaction. Also, various details with regard to the project, generating plants and the source of fuel, etc. were given by the Petitioner to PTC on basis of which PTC made an application before CEA for obtaining the requisite approval. Thus, having acted upon the Lol and the representation made by the Petitioner, PTC cannot subsequently retract from its position, to the prejudice of the already accrued rights and interests in favour of the Petitioner.

(d) The conduct of PTC in making fresh application before the CEA on 31.1.2020 for supply of power from a third-party source, despite the Lol dated 3.1.2020 being valid and the application made before CEA in respect of Petitioner being pending, is illegal, arbitrary and violative of BPDB PPA.

(e) Since, the Petitioner was fulfilling the eligibility criteria prescribed under Clause 5 and 6 of the Cross Border Guidelines, there was no valid ground/ reason for CEA to reject the application made by PTC in respect of the Petitioner. Further, by keeping the application made by PTC in respect of Petitioner pending and approving the fresh application made by PTC in respect of third party source, CEA has failed to discharge its function as the Designated Agency / Nodal Agency qua the application made by PTC seeking approval for the transaction.

(f) The Petitioner had also obtained requisite Bank Guarantee for an amount of Rs. 27 crore on 31.12.2019 and copy of the same was shown to MEPL. Further, the balance Operation Security Deposit was to be provided within a period of 23 days after the supply of power commenced in accordance with Article 4.7 of the

PTC PPA. Therefore, there cannot be any allegation with regard to inability of the Petitioner to provide the required Bank Guarantee.

(g) It is well settled law that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. In the present case, the Letter of Intent was issued to the Petitioner after due consultation and confirmation by PTC. Accordingly, MEPL was bound to honour the terms and conditions specified in the Lol.

IA No.15/2020

4. The Petitioner has filed IA No.15/2020 seeking ex parte ad-interim order directing the Respondent No. 4, National Load Despatch Centre to restrain/ regulate supply of power to BPDB in furtherance of Article 7(1)(iii) of the BPDB PPA dated 9.10.2018 by any party other than the Petitioner. The Petitioner has submitted there is a *prima-facie* case in favour of the Petitioner and the balance of convenience is also in favour of the Petitioner. Accordingly, the Petitioner may be granted interim relief as prayed for and in absence of which the Petitioner shall be subject to irreparable loss and injury which cannot be compensated in terms of money.

5. The matter was heard on 12.3.2020. During the course of hearing, learned counsel for the Petitioner reiterated the submissions made in the pleadings. Learned counsel for PTC submitted that in terms of Lol, BPDB PPA dated 9.10.2018 was executed between PTC and BPDB and PTC PPA dated 29.10.2018 was executed between PTC and MEPL on back to back basis. After hearing the learned counsels for the Petitioner and PTC, the Commission reserved order on the admissibility of the matter.

Analysis and Decision

6. We have considered the submissions of the Petitioner. The issue that arises for our consideration is whether the present Petition is admissible before the Commission.

7. On 11.11.2015, Bangladesh Power Development Board invited bid for procurement of 500 MW power in two phases, namely, (i) on short-term basis from 1.6.2018 to 31.12.2019, and (ii) on long-term Basis from 1.1.2020 to 31.5.2033. PTC was declared as successful bidder to supply power through MEPL. Accordingly, Lol was issued in favour of PTC for supply of 200 MW power. In terms of the said Lol, BPDB PPA dated 9.10.2018 was executed between PTC and BPDB and PTC PPA dated 29.10.2018 was executed between PTC and MEPL on back to back basis. However, subsequent to execution of the PPA, insolvency proceedings were initiated against MEPL before NCLT, Hyderabad and Resolution Professional was appointed therein. Accordingly, the Petitioner vide its e-mail dated 17.12.2019 approached MEPL/ Resolution Professional and offered to supply 200 MW power from its own plant, as an alternate generator in terms of Article 7(1)(iii) of the BPDB PPA. After mutual negotiations between the Petitioner and MEPL, Committee of Creditors approved the Petitioner's proposal for supply of power from the Petitioner's Plant to BPDB as an alternative source and issued Lol dated 3.1.2020.

8. As per Clause 13 of the Lol dated 3.1.2020, PTC/MEPL was required to obtain necessary statutory clearances/approvals for scheduling of power before starting of supply by the Petitioner. According to the Petitioner, after issuance of Lol dated 3.1.2020, PTC approached CEA for approval of the Petitioner to supply of power to

BPDB as an alternate supplier. On 10.1.2020, CEA forwarded the application of PTC to Ministry of Power, Government of India for the latter's concurrence as per the requirement under Clause 4.6 of the Cross Border Guidelines. However, no approval was received from CEA/ Ministry of Power, Government of India for supply of power to BPDB.

9. Further, Clause 10 of the Lol dated 3.1.2020 provides as under:

"19. The parties acknowledge that a tripartite agreement shall be executed among PTC, MEL and CEPL/MPL to record the terms of the alternate supply arrangement."

As per the above provision, PTC, MEPL and Petitioner/ MPL were required to sign the tripartite agreement for alternate supply.

10. On 4.2.2020, Resolution Professional for MEPL informed the Petitioner that since PTC is not agreeable to enter into the tripartite alternate supply agreement with the Petitioner, the terms of the Lol cannot be given effect to. Resolution Professional for MEPL further informed the Petitioner that since no tripartite agreement was executed between PTC, MEPL and Petitioner/MPL for alternate supply arrangement and no approval was received from the CEA/ Ministry of Power, Government of India for supply of power to BPDB, MEPL has revoked the Lol dated 3.1.2020.

11. The Petitioner has approached the Commission under Section 79(1)(c) and 79(1)(k) of the Act read with Regulation 34(1) and Regulation 37 of the Cross Border Regulations, *inter-alia*, for declaration of revocation of Lol dated 3.1.2020 issued to the Petitioner, as illegal and arbitrary and to direct the Respondents, MEPL and PTC to honour their obligations under the said Lol.

12. Section 79(1)(c) and 79(1)(k) of the Act read as under:

"Section 79 (Functions of Central Commission): (1) The Central Commission shall discharge the following functions, namely:-

*...
(c) to regulate the inter-State transmission of electricity;*

*....
(k) to discharge such other functions as may be assigned under this Act."*

Section 79(1)(c) of the Act entrusts the Commission with function of regulating the inter-State transmission of electricity, whereas Section 79(1)(k) entrusts the Commission to discharge all such other functions as may be assigned under the Act. The dispute in the present case pertains to the cancellation of LOI by MEPL terminating the arrangement with the Petitioner as the alternate source of supply of power. Therefore, the dispute does not pertain to inter-State transmission of electricity and cannot be entertained under Section 79(1)(c) of the Act. Section 79(1)(k) is the source of residual power of the Commission which may be assigned under the Act. The Commission has been assigned the responsibility to regulate cross border trade of electricity. Pursuant thereto, the Commission has framed the Cross Border Regulations.

13. The Petitioner has invoked Regulations 34(1) and 37 of the Cross Border Regulations which are extracted as under:

"34. Disputes Settlement and Resolution mechanism:

(1) The disputes in relation to the cross border trade of electricity within the Indian territory shall be settled as per the provisions of the Electricity Act, 2003.

37. Power to issue directions

If any difficulty arises in giving effect to these regulations, the Commission may on its own motion or an application filed by any affected party, issue such directions as may be considered necessary in furtherance of the objective and purpose of these regulations."

Regulation 34(1) specifies that the dispute in relation to the cross border trade of electricity within Indian territory shall be settled as per the provision of the Act. Cross Border Trade has been defined in Regulation 2(1)(q) of Cross Border Regulations as under:

“(q) Cross Border Trade of Electricity’ means transactions involving import or export of electricity between India and any of the neighbouring countries and shall also include transactions across India involving neighbouring countries;”

14. In the present case, there is no dispute with regard to transactions involving import or export of electricity between India and its neighbouring country. The dispute is between two generators with regard to alternate source of supply. There is no privity of contract between the Petitioner and PTC or the Petitioner and BPDB. The tripartite agreement between PTC, MEPL and the Petitioner/MEL has not been signed and as such, the Petitioner has not been accepted by the parties to the cross border transaction as an alternate source of supply. The Petitioner cannot claim that its dispute with MEPL is a dispute in relation to cross border trade of electricity. Therefore, the case of the Petitioner is not covered under Regulation 34 of Cross Border Regulations. Regulation 37 vests power in the Commission to issue such direction as may be considered necessary, if any difficulty arises in giving effect to these regulations. Since no difficulty has arisen to give effect to any of the provisions of Cross Border Regulations on account of the dispute between the Petitioner and MEPL which is not in relation to cross border trade in electricity, the petition cannot be maintained under Regulation 37 of Cross Border Regulations.

15. We have noticed that the Petitioner and MEPL have agreed to a dispute resolution mechanism in Clause 21 of the Lol dated 3.1.2020 which provides as under:

"21. Dispute Resolution:

All differences or disputes between the parties arising out of or in connection with the offer shall be settled by both the parties amicably. In the event, such disputes are not settled amicably through mutual discussion amongst parties concerned within two months, then dispute shall be referred to, arbitration as provided herein.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and conciliation Act, 1996 and any statutory modifications thereto. Notwithstanding the existence of any disputes and difference referred to arbitration, the parties hereto shall continue to perform their respective obligations under this Agreement. The seat of Arbitration shall be Delhi. The language of Arbitration shall be English."

In case of any difference and dispute between the parties arising out of or in connection with the offer, the same has to be settled amicably failing which through arbitration. The parties to the Lol are therefore aware that the dispute *inter se* arising out of the Lol cannot be settled through the mechanism provided either in the Act or the Cross Border Regulations.

16. In the light of the above discussion, we hold that the dispute between the Petitioner and MEPL cannot be adjudicated by this Commission under any provisions of the Act or Cross Border Regulations.

17. In view of the foregoing observations, Petition No. 224/MP/2020 alongwith IA No. 15/2020 is disposed of at admission stage without going into the merits of the case.

Sd/-
(I.S.Jha)
Member

sd/-
(P.K.Pujari)
Chairperson