

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

I.A.No.3/2020

in

Petition No. 392/MP/2019

Coram:

**Shri P.K.Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S.Jha, Member**

Date of Order: 27th January, 2020

In the matter of

Interlocutory Application for directions pursuant to the Commission's order dated 23.12.2019 in Petition No. 392/MP/2019

And

In the matter of

Petition under Section 79(1)(a), 79(1)(f) read with Section 79(1)(k) of the Electricity Act, 2003 seeking directions of this Commission for pre-commissioning activities, synchronization and commissioning of Dhukwan Small Hydro Electric Project (24 MW) and also for the necessary directions in relation to the tariff as provided under Article 5 of the PPA dated 5.12.2016 executed between the Petitioner and the Respondent No. 1 and payment of tariff to the Petitioner in terms of Article 5 of the said PPA.

And

In the matter of

THDC India Limited
Bhagirathi Bhawan (Top Terrace),
Bhagirathipuram, Tehri, Garhwal,
Rishikesh, Uttarakhand - 249201

...Applicant/Petitioner

Vs

1. Uttar Pradesh Power Corporation Limited
Shakti Bhawan, 14, Ashok Marg, Lucknow,
Uttar Pradesh - 226 001

2. Uttar Pradesh State Load Dispatch Centre
Phase II, Vibhuti Khand, Gomti Nagar, Lucknow,
Uttar Pradesh- 226001



ORDER

Background

The Petitioner has set up the Dhukwan Small Hydro Electric Project of 24 MW (3 x 8 MW) (hereinafter referred to as 'Project') on river Betwa located near village Sukhwan-Dukhwan in Tehsil Babina in the District of Jhansi in the State of Uttar Pradesh. It has entered into an Implementation Agreement on 2.9.2009 with the State Government of Uttar Pradesh for setting up of the said Project. As per the Implementation Agreement, the ownership of the plant is vested with it for the initial 35 years with the condition that the period may further be renewed, on specific request for another 10 years on the same terms and conditions contained in the Implementation Agreement and subsequent amendment thereof. On the expiry of the said period, the project shall revert to the State Government of Uttar Pradesh upon payment of take-over value ascertained on the depreciated book value or the realizable value of the structures whichever is less. The Petitioner has signed PPA with the Respondent No.1 (UPPCL) on 5.12.2016.

2. As per Clause 4.1 of the PPA, the Petitioner shall supply 100% power from the Project to the Govt. of UP reckoned at generating station switchyard/ Bus bar, after excluding auxiliary consumption and transformation losses (net energy). Clause 5.1 of the PPA provides that the Respondent No.1 shall pay a fixed tariff of Rs 4.87 per kWh or at the levelised tariff declared by the Commission for the year

of commissioning of the Project, whichever is lower, for the entire power to be supplied from the Project, for the project life of 35 years.

3. In the above background, Petition No. 329/MP/2019 was filed by the Petitioner seeking directions on the Respondent No.1 to make payment of tariff @ 4.87 per kWh to the Petitioner, in terms of Article 5 of the PPA, post commissioning and synchronization of the Project. The Petitioner had also prayed for a direction on the Respondents to allow the synchronization and commission of the Project. This Petition was disposed of by the Commission vide its order dated 23.12.2019.

Interlocutory Application (IA)

4. The applicant (*Petitioner in original petition*) has filed this IA seeking the following reliefs:

(a) list the mater for urgent hearing and directions:

(b) pass directions to the effect that the PPA dated 5.12.2016 executed between the Petitioner/applicant and UPPCL stands approved vide order dated 23.12.2019 passed in petition No. 392/MP/2019;

(c) pass directions to Respondent No.1 Respondent No.2 and Respondent No.3 to allow commencement of commercial operation and commercial scheduling of power from the Dhukwan Small Hydroelectric Project of 24 MW of the Petitioner;

(d) pass such other necessary regulatory orders required for tariff adoption, approval of the PPA dated 5.12.2016 and power procurement from the Dhukwan Small Hydroelectric Project of 24 MW of the Petitioner;

5. In support of the said IA, the applicant has submitted that despite the directions of the Commission in order dated 23.12.2019, the Respondents are delaying the commencement of commercial schedule of the Project by adopting delaying tactics and advancing unreasonable logic to achieve the same. The applicant has also submitted that pursuant to the Commission's order dated



23.12.2019, it had issued notice on 24.12.2019 inviting the representatives of the Respondents, for commencing commercial operation after trial runs of all three units of the project. The applicant has pointed out that the Respondent, UPPCL vide its letter dated 27.12.2019 has informed that it shall be able to procure power from the project only after approval of the PPA by the Central Electricity Regulatory Commission (CERC)/ Uttar Pradesh Electricity Regulatory Commission (UPERC). According to the applicant, there is no requirement for specific approval of the PPA, since the Commission by its order dated 23.12.2019 had approved the PPA by directing payment of tariff by Respondents, as per Article 5 of the PPA. The applicant has submitted that the insistence of the Respondent No.1 for approval of PPA by this Commission, despite the directions in order dated 23.12.2019, has led to the filing of the IA by the applicant with the aforesaid prayers.

Analysis & Decision

6. We have considered the submissions of the Applicant. Considering the fact that the main petition had been disposed of by order dated 23.12.2019 and the submissions of the applicant in the IA are in the nature of seeking clarifications to the said order, we deem it proper to dispose of the said IA by circulation.

7. As stated, the applicant, in the main petition, had sought directions on Respondent No.1 for payment of a fixed tariff of ₹4.87/kwh as per Article 5 of the PPA or the levelized tariff to be declared by this Commission at the time of commissioning of the project, whichever was less. Per contra, the Respondent No.1 had submitted that it agreed to honour the terms of the PPA, subject to regulatory certainty from the Commission, with regard to the tariff to be paid by



it, as the project falls within the jurisdiction of this Commission in terms of Sections 79(1)(a) of the Electricity Act, 2003 (hereinafter referred to as the 2003 Act). The Commission by its order dated 23.12.2019 disposed of the said Petition, by directing Respondent No.1 to pay the tariff of ₹4.87/kWh to the applicant, as agreed under Article 5 of the PPA, post commissioning and synchronization of the project. It was also noted in the said order that the Respondent No. 1 was agreeable to this tariff and had no objection to the same. The relevant portion of the order is extracted below:

“44. From the above it is observed that the Generic Tariff for RE Technologies for FY 2019-20 for Small Hydro Power Project for other States excluding HP, Uttarakhand, WB and NE States (5 MW to 25 MW) as given by the Commission is Rs. 5.21 per kWh whereas the Article 5 of the PPA stipulates a fixed tariff of Rs. 4.87 per kWh for the entire project life of 35 years. Ostensibly, the tariff of Rs. 4.87 per kWh mentioned in the Article 5 of the PPA is less than the Generic Tariff of Rs. 5.21 per kWh given by the Commission. Therefore in view of Article 8 of the PPA read with Article 5 of the PPA, the Commission directs the Respondent No.1 to pay Tariff of Rs 4.87 per kWh to the Petitioner post commissioning and synchronization of the 24 MW(3x8 MW) Dhukwan Small Hydro Electric Project. It is worth mentioning that the Respondent No. 1 is agreeable to this tariff and has no objection in this regard”.

8. It is, however, noticed that Respondent No.1 vide its letter dated 27.12.2019 has informed the applicant that it shall be able to procure power from the project only after approval of PPA by this Commission/ UPERC. According to the Respondent, though as per PPA and Section 79 of the 2003 Act, the power purchase falls under the jurisdiction of the Central Commission, there was no prayer in the main petition regarding approval of PPA by this Commission/ UPERC. Now, the Respondent No.1 by letter has informed the applicant that it shall commence the scheduling and procurement of power from the project only after approval of PPA by this Commission/ UPERC. The applicant has however clarified that the PPA



stands approved in terms of order dated 23.12.2019 and there is no further requirement for approval of the same by this Commission.

9. The matter has been examined. The objection of the Respondent No.1 to commence the scheduling and procurement of power from the project is mainly on the ground that the PPA dated 5.12.2016 has not been approved by this Commission, as no prayer to this effect was made by the applicant in the main petition. In our view, this contention of the Respondent is misconceived. In Petition No. 392/MP/2019 filed by the Petitioner under Section 79(1)(a) read with Section 79(1)(f) of the 2003 Act, for directions on the Respondent No.1 as aforesaid, no prayer was made by the applicant for approval of PPA. However, in the reply affidavit dated 3.12.2019 filed by the Respondent No.1, a prayer was made for the approval of the PPA/ tariff. The said submission of the Respondent is extracted hereunder:

“9. In view of the foregoing the Respondent No. submits that this Hon’ble Commission may be pleased to approve the requisite tariff/PPA and clarify that the tariff payable for infirm power....”

10. Thus, the Commission’s order dated 23.12.2019 directing the Respondent No.1 to pay the tariff of ₹4.87/kWh to the applicant, in terms of Article 5 of the PPA was only after considering the submissions of the parties, including the aforesaid submission of Respondent No.1. Accordingly, the objection of the Respondent has no basis and the same is in our view, an afterthought and is not sustainable.



11. Further, the contention of the Respondent No.1 that the PPA is required to be approved by this Commission is incorrect. Section 62(1)(a) of the 2003 Act provides for the determination of tariff by the Commission as under:

“62. Determination of Tariff.- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for- (a) Supply of electricity by a generating company to a distribution licensee:

12. Section 79(1)(a) of the 2003 Act confers power on the Central Commission to regulate the tariff of a central generating station. A combined reading of the provisions of Section 62(1)(a) and Section 79(1)(a) leads to the conclusion that the tariff of a generating company owned or controlled by the Central Government shall be determined by the Central Commission for supply of power to a distribution licensee. The applicant THDC is a joint venture Company of the Government of India and Government of Uttar Pradesh, with GOI holding majority and controlling shares. The Respondent No.1 is a licensee under the 2003 Act, which undertakes bulk purchase & sale of electricity, primarily on behalf of the distribution licensees in the State to maintain electricity distribution to the public at large. Accordingly, this Commission by its order dated 23.12.2019 had fixed the tariff of ₹4.87 per kWh in terms of Article 5 of the PPA, for supply of power from the project to Respondent No.1. As regards the power of the Central Commission under Section 79(1)(a) to regulate tariff of generating companies, the Appellate Tribunal for Electricity (the Tribunal) in its judgment dated 10.12.2009 in Appeal No. 161/2009 (DVC v BRPL & ors) held that the term ‘regulate’ involves the fixation of rates at which the generating company has to supply power to the discoms. The relevant portion of the judgment is extracted hereunder;

“18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term ‘regulate’ as contained in Section 79(1)(a) is a broader term as compared to the term ‘determined’ as used in Section 86(1)(a). In various authorities, the Supreme Court, while discussing the term ‘regulation’ has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms.”

13. Also, a clear demarcation of the separate and independent jurisdiction exercised by the Central Commission and the State Commission in discharging their statutory functions have been underlined in Rule 8 of the Electricity Rules, 2005.

Rule 8 provides as under:

“Tariff of generating companies under Section 79:

The tariff determination by the Central Commission for generating companies under clause (a) or (b) of sub-Section 1 of Section 79 of the Act shall not be subject to redetermination by the State Commission in exercise of the functions under clause (a) or (b) of sub-Section (1) of Section 86 of the Act , and subject to the above, the State Commission may determine whether a distribution licensee in a State should enter into a PPA or procurement process with such a generating company based on the tariff determined by the Central Commission”.

14. From the conjoint reading of the provision of Section 79(1) of the 2003 Act and Rule 8 made thereunder, it is clear that it is not open to the State Commission to re-determine the tariff of the generating companies whose tariff is determined by the Central Commission under Section 79 of the 2003 Act. What is left to the State Commission is that they may determine whether a distribution licensee in the State should enter into a procurement process with such generating companies based on the tariff determined by the Central Commission.

15. Further, the determination of tariff of a generating station by the Central Commission under Section 79 is separate from the regulation of power

procurement of a distribution licensee by the State Commission under Section 86(1)(b) of the 2003 Act. Section 86(1)(b) provides as under:

“86(1)(b): regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.”

16. In terms of Section 86(1)(b) of the 2003 Act, the regulation of electricity purchase and procurement process to distribution licensee including the price at which electricity shall be procured from generating companies through agreements for purchase of power for distribution and supply between the State is within the sole domain of the concerned State Commissions. Section 79(1) does not have a clause similar to Section 86(1)(b) of the 2003 Act, since the Central Commission does not deal with functions of a distribution licensee under the said Act. The said Act has not bestowed the Central Commission with jurisdiction to regulate power purchase and procurement process as is vested in the State Commission under Section 86(1)(b) of the 2003 Act. The contractual and commercial terms of supply under a PPA can, therefore, only be looked into by the State Commission of the procuring licensee. Thus, the approval of the PPA and the quantum of electricity required to be approved by the Applicant is within the jurisdiction of the State Commission under Section 86(1)(b). It is pertinent to mention that the Tribunal in its judgment dated 4.9.2012 in Appeal Nos 94 & 95/2012 (BRPL & BYPL v DERC & ors) has clarified the scope and jurisdiction of the Central Commission under Section 79 and that of the State Commissions under Section 86 of the 2003 Act as under:

“46. The role of the State Commission is only to decide whether the Power Purchase Agreement to be entered into between the NTPC and the Distribution

Company for purchase of Electricity from NTPC Stations at the tariff determined by the Central Commission has to be approved or not from the point of view of deciding whether the power can be procured from other sources at a cheaper or in a more economical manner to supply the same to the concerned State.

47. The said power of scrutiny by the State Commission cannot be taken to mean that the State Commission has got the powers to suggest modifications to the terms and conditions or even reserving to deal with the implications of the terms and conditions at a later stage

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78. The provisions of Section 86 (1) (b) is for regulating the role of distribution licensee in the procurement of power. It does not regulate a generating company supplying the power. This is particularly in the context of de-regulation of the generating company under the Act, 2003.....”

17. In the light of the aforesaid discussions, we conclude that the approval of the PPA dated 5.12.2006 for procurement of power by the Respondent No.1 from the project of the applicant vests with the State Commission (UPERC) and not with the Central Commission. The Respondent No.1 may, therefore, approach UPERC for approval of the said PPA in terms of Section 86(1)(b) of the 2003 Act.

18. IA No. 3/2020 in Petition No. 392/MP/2019 is disposed of as above.

Sd/-
(I.S.Jha)
Member

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

Sd/-
(P.K.Pujari)
Chairperson