

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.170/MP/2013

Sub: Dispute pertaining to the composite scheme of supply for power to the respondents.

Petitioner : Jhajjar Power Limited

Respondents : Uttar Haryana Bijli Vitran Nigam Limited
Dakshin Haryana Bijli Vitran Nigam Limited

Petition No.319/MP/2013

Sub: Petition seeking a declaration that COD by the generating company was illegal and not in accordance with the terms of the PPA and prudent utility practices.

Petitioner : Tata Power Delhi Distribution Limited

Respondents : Jhajjar Power Limited and others

Date of hearing : 18.9.2014

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri M. Deena Dayalan, Member
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member

Parties present : Shri Sanjey Sen, Senior Advocate, JPL
Shri Aditya Jalan, Advocate, JPL
Shri Ashish Gupta, Advocate, JPL
Shri Ashim Gupta, Advocate, JPL
Shri Alok Shanker, Advocate, TPDDCL
Shri Veniktesh Advocate, TPTCL
Ms. Anushree Bardhan, Advocate, HPGCL

Record of Proceedings

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Learned senior counsel for Jhajjar Power Limited referred to Clause 18.2 of the PPA and submitted that Tata Power Delhi Distribution Limited is not a party to the PPA and has no privity of contract with the generator.

2. Learned counsel for Tata Power Delhi Distribution Company Limited (TPDDCL) referred to Clause 4.2 of the PPA dated 20.1.2009 and Clause 4.1 of PPA executed between TPTCL and NDPL and approval of DERC for procurement of power from the petitioner company and submitted that the issue of privity of contract has been settled by Hon'ble High Court of Delhi in PTC's case where it has been

decided that if a trader is merely a facilitator between a generating company and distribution company, the supply would be considered as supply of power by a generating company to a distribution company and in terms of Section 62 (1) of the Act, the Commission has jurisdiction to determine the tariff. Learned Counsel further submitted that in the present case, TPTCL is merely a facilitator as the PPA has been entered between JPL and TPTCL with back to back TSA between TPTCL and TPDDCL. Learned counsel for TPDDCL submitted that the present petition has been filed on the ground that in the absence of firm fuel arrangement, declaration of commercial operation by the petitioner is illegal and is not in accordance with the prudent utility practices. Learned Counsel submitted that when JPL declared COD of Unit I, there was no arrangement for reliable supply of fuel. Referring to the provisions of the PPA and TSA, learned counsel submitted that for declaration of COD, the readiness/ability of the machine to generate power is not enough, but the ability of the generating station to operate in a manner which is capable of scheduling and comply with the dispatch instructions of the procurers is also important. Learned counsel further submitted that as per the provisions of the PPA, it is the obligation of the generating company, and not of the respondents to procure fuel for supply of power. Learned Counsel submitted that on account of non-generation of power due to shortage of fuel, the transmission line is hardly utilized but the transmission charges are being borne by TPDDCL. Learned Counsel submitted that TPDDCL vide its letter dated 19.7.2012 and 25.7.2012 requested for withdrawal of the COD or for reimbursement of the transmission charges. Learned Counsel submitted that signing of the fuel supply agreement was a condition subsequent which had to be complied with by the generator at the time of declaration of COD.

3. Learned counsel for JPL referred to the final test certificate and submitted that the commissioning tests have been carried out in accordance with schedule 5 of the PPA and the tested capacity of Unit-1 was more than 95% of its contractual capacity. The certificate has not been challenged by TPDDCL as a wrong certificate. As per the Fuel Supply Agreement, JPL is allowed to procure domestic/imported coal in a manner prescribed in the PPA. Therefore, approval of the distribution company under the PPA and approval of HERC under the Competitive Bidding Guidelines are required. The respondents have met with the requirement of the contract and supplying power through alternative fuel arrangement a continuing obligation which is contingent upon the approval of the Discom. He further submitted that the petitioner entered into various MOUs to procure coal, until such time a Fuel Supply Agreement could be executed by it. Despite fuel shortage, Haryana Discoms requested the petitioner to declare COD to meet the power demand in Haryana. Learned Counsel submitted that JPL was not able to execute the FSA with CIL as CIL would sign FSA only for those projects which had been commissioned till 31.12.2011. JPL also requested the Ministry of Coal to intervene and impress upon CIL to supply 5.21 million tones of coal per annum to the petitioner at the earliest through MOU route till the FSA between CIL and JPL is executed. As regards the transmission charges, learned counsel submitted that the charges are costs of engaging in the business of purchase and sale of electricity which has been contractually agreed to be paid by TPTCL. Learned counsel for the petitioner submitted that as per Clause 18.2 of both the PPAs, there are no third party beneficiaries. Therefore, the act of adding a party by implication through correspondence is not permissible under the contract.

4. Learned counsel for the Tata Power Trading Company Limited (TPTCL) submitted that the contention of learned counsel for JPL regarding absence of privity of contract between JPL and TPDDCL is not correct as Clause 3.2 (iii) of the PPA between TPTCL and JPL clearly provides that copy of the signed escrow agreement between TPTCL and NDPL should be provided to JPL. Learned counsel further submitted that both the parties were aware that power is generated by JPL and supplied to TPDDCL (NDPL).

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5. Learned Senior Counsel for the petitioner referring to the reply of HPPC dated 15.9.2014 submitted as under:-

- (a) There is no discussions/explanation of the PPA terms on commercial operation/synchronization/commissioning. There is no discussion that after 29.3.2012, firm schedule will happen. Failure to address PPA terms has to be read with series of letters to CEA to take coal under MOU for commissioning of the plant.
- (b) The time for signing FSA was extended subject to not revising the scheduled operation date.
- (c) The declaration of COD has not been questioned. Therefore, 29.3.2012 is the only date on which commercial operation was declared.
- (d) The submission of HPPC that liability would not lie with Haryana Utility for delay in signing of the FSA with CIL, is not correct as in the minutes of the meeting dated 2.2.2010, the Chief Engineer of Haryana Utilities agreed to take up the matter with CEA to expedite the process of procuring coal.

6. After hearing the learned senior counsel for JPL and learned counsels for TPDDL and TPTCL at length, the Commission directed the petitioner and respondents to file their written submissions by 25.10.2014 with copy to each other.

7. The Commission directed that due date of filing the written submissions should be strictly complied with. Any submission filed after the due date would not be taken into consideration.

8. Subject to the above, the Commission reserved order in the petitions.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Law)**