

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 231/MP/2015

Subject : Petition under Section 79(1) (c) of the Electricity Act, 2003 read with Section 28 of the Electricity Act, 2003.

Date of hearing : 26.4.2016

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

Petitioner : Coastal Gujarat Power Limited

Respondents : Western Regional Load Despatch Centre and others

Parties present : Shri Amit Kapur, Advocate, CGPL
Shri Apoorva Misra, Advocate, CGPL
Shri Vishrov Mukerjee, Advocate, CGPL
Shri Sitesh Mukherjee, Advocate, WRLDC
Ms. Akansha Tyagi, Advocate, WRLDC
Shri Raveena Dhamija, Advocate, WRLDC
Shri M.G.Ramachandran, Advocate, Rajasthan and Gujarat
Ms. Ranjitha Ramachandran, Advocate, Rajasthan and Gujarat
Shri Anand K. Ganesan, Advocate, PSPCL

Record of Proceedings

Learned counsel for the petitioner submitted as under:

(a) In terms of Article 14.4.5 of the PPA, the generating company has the right to sell electricity to third parties upon occurrence of Procurer`s event of default. The said right can be exercised on satisfaction of the following conditions:

- (i) Issuance of seller`s preliminary default notice to the Procurers.
- (ii) Completion of consultation period of 90 (ninety) days.
- (iii) The event of default has not been remedied and the parties have not agreed otherwise.

(b) Unlike Article 17, Article 14.4.5 does not contemplate dispute resolution, since there is no reference to the matter being referred to the Commission or Arbitral Tribunal.

(c) The 7 (seven) day period provided under Article 14.4.5 for parties to arrange their affairs and for CGPL to approach the relevant authorities for permission to sell power. This is fact that under Regulation 8 of the Open Access Regulations, RLDC has to take a decision within a period of 7 days for every new standing NOC and same 7 days period has been provided under Article 11.5. of the PPA for sale of capacity of inter se procurers as well.

(d) The Appellate Tribunal for Electricity in its judgment in Appeal No. 100 of 2013 and batch matters has held that PPA is guiding document. Parties and even the Commission cannot go beyond the PPA terms. Insistence on prior consent of procurers/adjudication of Procurer`s event of default before allowing the generating company to exercise its rights under Article 14.4.5 of the PPA results in introducing new conditions which is not permissible.

(e) Refusal by the Despatch Centres to schedule power in accordance with Article 14.4.5 of the PPA and insistence of prior consent of the Procurers/prior adjudication of the dispute by the Appropriate Commission is contrary to Section 28 of the Electricity Act, which requires the RLDCs to schedule power in accordance with the PPA. Such refusal is also against the objectives of the Electricity Act and has the effect of jeopardizing the investments made by the project sponsors and lenders in the power plants.

(f) The actions of the Despatch Centres infringes upon the freedom given to the generating companies to contract and sell power to third parties under Article 14.4.5.

(g) The Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010 (Power Supply Regulations) only cover limited number of events envisaging sale of power to third parties, namely, non-payment of outstanding dues and non-maintenance of Letter of Credit or any other agreed payment security mechanism. In contrast to the aforesaid, the PPAs cover additional circumstances providing for third party sale.

2. Learned counsel for NLDC, WRLDC and NERLDC submitted as under:

(a) The dispute between the Rajasthan Procurers and CGPL giving rise to the question of third party sale has already been settled by an order dated 17.10.2013 passed by Hon`ble Rajasthan High Court. Therefore, the question raised in the present petition is only of academic nature.

(b) The termination notice sent by CGPL was challenged by Rajasthan Procurers. In light of the same WRLDC being only a system operator could not adjudicate the dispute regarding occurrence of a procurer event of default and validity of the termination notice.

(c) If the generating company is allowed to sell power to third parties without either Procurer's consent or adjudication regarding the validity of the termination notice, then the same could adversely impact third party rights.

(d) The present case does not warrant promulgation of any regulations by the Hon'ble Commission since the Power Supply Regulations deal with situations of non-payment of outstanding dues or non-maintenance of Letter of Credit or any other payment security mechanism.

(e) As per Section 28 (3) of the Act, RLDCs can only schedule and despatch electricity in terms of existing contracts, and do not have the statutory function/role of entering into contracts to schedule and despatch electricity. Therefore, RLDCs cannot take any action based on unilateral suggestion of one of the parties to the contract. The Hon'ble Appellate Tribunal for Electricity in its judgment in Appeal No. 171 of 2013 (Ravikiran Power Project Pvt. Ltd. v. State Load Despatch Centre & Ors) has held that in case of application of NOC for such power for which there exists a valid PPA, the NoC cannot be granted while ignoring the claims of the procurers.

(f) In the present matter, the PPA provides two different scenarios i.e. (i) clause 11.4.2 of the PPA provides for a temporary arrangement, namely collateral arrangement where power can be scheduled back to the original procurer, once the default is cured, whereas (ii) clause 14.4 of the PPA provides for a permanent arrangement i.e termination of the PPA for procurer's event of default.

(g) Clause 11.5 of the PPA provides for third party sale in the case of procurers event default in making the payment by the due date of an invoice. Clause 11.6.3 (a) enables the seller to sell the default electricity to any consumer subject to applicable. Therefore, in terms of the Power Supply Regulations, power can be regulated.

3. Learned counsel for Rajasthan and Gujarat submitted as under:

(a) The issue regarding the alleged default has been resolved and there is no outstanding issue in this regard.

(b) The petitioner's prayer, if allowed, would be against the principle of natural justice that no man can be a judge in his own cause.

(c) As per Section 28 of the Act, Regional Load Despatch Centres are responsible for supervision and control over transmission system and optimum scheduling and despatch of electricity in accordance with the contracts entered into with the licensees or the generating companies. In terms of the above provisions, the Regional Load Despatch Centres are mandated to schedule power in terms of the contract between the parties. Therefore, the Despatch Centres cannot schedule/grant open access for the same power sought by the

generator for third party sale unless the procurer agrees to such sale. If the contract provides for sale of power to third parties on a default of the procurer and the generator claims the occurrence of such default but the procurer does not concur, the RLDC cannot schedule power ignoring the claim of the procurer.

(d) The petitioner was obligated under Article 11.5 of the PPA to offer 25% of the contracted capacity of the defaulting procurer to other non-defaulting procurers and only in case such non-defaulting procurers waive their right to receive power, would the seller have the right to sell power to a third party.

(e) Under the Power Supply Regulations, in case of dispute on whether there is a default or not, the generator cannot unilaterally stop scheduling power to the procurer. It is well settled that such dispute is to be adjudicated by the appropriate authority.

(f) The RLDCs do not have the authority to adjudicate whether there has been material breach of PPA or not.

(d) The petitioner only has a limited right to sell power and cannot be allowed to unilaterally direct sale of power to third parties.

4. In rebuttal, learned counsel for the petitioner submitted as under:

(a) In case of a dispute, the defaulting procurers could have approached the Hon'ble Commission for resolution of the same.

(b) By insisting on prior procurers consent/prior adjudication of the dispute, the freedom granted to the generating companies to sell power to third parties upon procurer's event of default would be subjugated to conditions extraneous to the PPA.

(c) In the present case, the Rajasthan Procurers challenged the validity of the termination notice by writing to WRLDC. However, no letter was sent to the petitioner disputing the default notice. Moreover, such a challenge could only be raised before the Appropriate Commission.

(d) The Ravikiran Judgment does not apply in the present case since the PPA in that case did not contain a clause akin to Article 14.4.5 of the PPA.

(e) The petitioner is basing its claims entirely upon the PPA and is not seeking amendment of any regulations. However, in case the Commission is of the view that appropriate guidelines need to be issued in this regard, the Commission may proceed with the same.

5. After hearing the learned counsel for the parties, the Commission reserved order in the petition.

By order of the Commission

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