

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 223/MP/2015

Subject : Adjudication of dispute between the parties involving the termination of PPAs due to high average power purchase cost of NPTC, NHPC and THDC plants, seeking surrender of power allocation from the stations and requesting issuance of statutory advise to Ministry of Power recommending surrender, reallocation of the petitioner's share from these PPAs in the interest of consumers of petitioner's licensed area of supply in NCT of Delhi

Petition No. 182/MP/2015

Subject : Dispute between TPPDL and NTPC Ltd in relation to failure of NTPC to get power reallocated from generating stations which have been delayed for several years and generating stations which have outlived their useful life and are operating at high cost

Petitioner : Tata Power Delhi Distribution Limited

Respondents : NTPC Limited & others

Petition No. 301/MP/2015

Subject : Adjudication of disputes and seeking analogous reliefs under Section 79 (1) (a), Section 79 (1)(f) of the Electricity Act, 2003 and the CERC (Regulation of Power Supply) Regulations, 2010.

Petitioner : BSES Yamuna Power Limited

Respondents : NTPC Limited & 2 others

Petition No. 302/MP/2015

Petitioner : BSES Rajdhani Power Limited

Respondents : NTPC Limited & 2 others

Date of Hearing : **8.2.2016**

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

Parties present : Shri Alok Shankar Advocate, TPDDL
Shri Sumit Sachdev, TPDDL
Shri Buddy Ranganathan, Advocate, BRPL & BYPL
Shri Arijit Mitra, Advocate, BRPL & BYPL
Ms. Malavika Prasad, Advocate, BRPL & BYPL
Shri Sameer Singh, BYPL
Shri Nishant Grover, BYPL



Shri Mayank Ahlawat, BYPL
Shri Suma Kant
Shri. M.G.Ramachandran, Advocate, NTPC & THDC
Ms. Poorva Saigal, Advocate, NTPC & THDC
Ms. Anushree Bardhan, Advocate, NTPC & THDC
Shri Nishant Gupta, NTPC
Shri Prashant Chaturvedi, NTPC
Shri Shankar Saran, NTPC
Shri Piyush Kumar, NHPC
Shri Sarosh Majid Siddiqi, THDC
Shri Gaurav Nand, Consumer Representative

Record of Proceedings

At the outset, the learned counsel for the respondent, NTPC clarified that the issue of maintainability of these petitions as raised by the respondents is only with regard to the prayer / subject matter involved in these petitions and that the jurisdiction of the Central Commission over the central government generating companies in terms of Section 79(1)(a) of the 2003 Act has not been disputed. Accordingly, the learned Counsel made submissions on the maintainability of these petitions mainly as under:

- (i) The prayers of the petitioners in these petitions seeking advice to the Central Government or to issue necessary directions under the 2003 Act, are all general in nature and do not fall within the scope and ambit of adjudication of dispute under Section 79(1)(f) of the 2003 Act. Accordingly, these petitions are not maintainable.
- (ii) The advisory jurisdiction of the Central Commission under Section 79(2) of the 2003 Act cannot be invoked by way of quasi-judicial proceedings.
- (iii) The PPAs executed by the petitioners do not provide the option of termination by the petitioners and hence the petitioners cannot seek to opt out of the terms of the PPA (*judgment of the Hon'ble Supreme Court dated 2.2.2016 in GUVNL v EMCO Ltd was referred to*).
- (iv) The agreement to procure power is a contractual document, subject to regulation of tariff by the Commission. Only matters involving the interpretation, scope and application of the terms and conditions of the PPA executed by the parties is required to be adjudicated under Section 79(1)(f). The petitioners in these petitions have sought the intervention of this Commission to rewrite the PPAs under the 2003 Act which is not permissible.
- (v) The PPAs executed by the parties are to be in conformity with the Regulations notified by the Commission in exercise of the powers under Section 79 read with Section 178 of the 2003 Act. The terms and conditions in the long term PPAs executed by the parties are not in conflict with the Regulations notified by the Central Commission and hence the PPAs cannot be interfered with under Section 79 (1) and (2) of the 2003 Act.
- (vi) The word 'shall' indicated in Section 79(2) is not with reference to issuance of directions, but the duty to aid and advice the Central Government, on policy issues in electricity sector. Hence, the prayer of the petitioners is not maintainable.
- (vii) The prayers of the petitioners are contrary to the terms of the PPA as the rights and obligations of the parties has been crystallised under the PPA. The petitioners cannot be permitted to seek unilateral termination of the contract on the ground that the contract has become onerous.
- (viii) The scheme with regard to surrender of part of allocated firm share, reallocation, has been laid down in Note-2 under Regulation 42 of the 2014 Tariff Regulations notified by the Central Commission.



(ix) Permission may be granted to file written submissions with copies of relevant judgments in the matter.

2. In rejoinder to the above, the learned counsel for the petitioner (BRPL & BYPL) mainly submitted as under:

(i) It is not the case of the petitioner that the contract has become onerous or that it has become difficult to perform. The obligation under the PPA cannot be continued by the petitioners on account of the order of the State Commission (DERC) disallowing the cost for procurement of power from Anta, Auraiya and Dadri stations of NTPC for the previous year.

(ii) Section 86(1)(b) of the 2003 Act provides for approval of agreements by the State Commission for procurement of power by the distribution licensees. However, in terms of Rule 8 of the Electricity Rules, 2005, the State Commission has the power to determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission (*Judgment of APTEL in BSES v NTPC & ors in Appeal No.94/2012 was referred to*).

(iii) The APTEL in its judgment dated 26.5.2006 in Siel Ltd v PSERC & ors has held that the Commission is not powerless to issue orders and directions relating to matters having a bearing on and nexus with the determination and fixation of tariff and its directions shall be binding on all persons and authorities including the State Government. Accordingly, the petitioners have prayed for issuance of directions to the Central Government in this matter.

(iv) In terms of Section 46 of the Indian Contract Act, 1872, the non-commissioning of the projects within a reasonable time of the execution of the PPAs, amounts to breach of obligations by the respondent, NTPC.

(v) The prayer of the petitioner seeking directions on Central Government for re-allocation is not be construed as a pre-condition for termination of the PPAs by the petitioners.

(vi) In respect of Badarpur TPS of NTPC, the Delhi Pollution Control Committee have issued orders directing the closure of some of the units. Thus, there cannot be a legally enforceable contract in case of orders/directions if any, of a super veining legal authority.

(vii) Permission may be granted to the petitioners to file its written submissions along with relevant documents/judgments.

3. The learned counsel for the petitioner, TPDDL also prayed for grant of time to file its written submissions.

4. Shri Gaurav Nand, Consultant for some of the HT consumers of Delhi submitted that the petitioners may be directed to serve copy of the petition and also prayed for grant of time to file its comments/response in the matter. The Commission accepted the prayer and directed the learned counsel for the petitioners to handover copies of the petition to the consultant, if not already done.

5. The Commission further directed the parties to file its written submissions with relevant documents, on or before 29.2.2016. Subject to this, order on maintainability of the petitions is reserved.

By Order of the Commission

Sd/-
(T. Rout)
Chief (Legal)

