

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 182/MP/2015

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A. S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order : 31st of March, 2017

In the matter of

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.

And in the matter of

Tata Power Delhi Distribution Ltd
Grid-Station Building
Hudson Lines
Kingsway Camp
Delhi – 110009

.....Petitioner

Vs

1. NTPC Ltd. New Delhi
NTPC Bhawan, Scope Building
7, Institutional Area, Lodhi Road,
New Delhi - 110003
2. Govt. of NCT of Delhi
Through
Department of Power, 8th Level,
B Wing, Delhi Secretariat,
New Delhi -100002
3. Union of India
Through
Ministry of Power, Shram Shakti Bhawan,
Rafi Marg, New Delhi - 110001

.....Respondents

Parties Present

Shri Alok Shankar Advocate, TPDDL
Shri Sumit Sachdev, TPDDL
Ms. Shimpy Mishra, TPDDL
Shri. M.G.Ramachandran, Advocate, NTPC
Ms. Poorva Saigal, Advocate, NTPC
Ms. Anushree Bardhan, Advocate, NTPC
Shri Nishant Gupta, NTPC
Shri Prashant Chaturvedi, NTPC
Shri Shankar Saran, NTPC

ORDER

In the present petition, the Petitioner, Tata Power Delhi Distribution Ltd, has made the following prayers, namely:

- “A) To hold that the PPA’s entered into between the Petitioner and the Respondent for the power plants as given in Table A stands discharged by operation of law as they have been frustrated;
- B) To issue necessary direction/advice in exercise of powers under the Electricity Act, 2003 to the Central Government to allocate the Petitioner’s entire firm share of power from the Respondent NTPC power station mentioned in Table B to other power deficit states / utilities; and
- C) Pass such other of further orders as the Ld. Commission may deem fit and proper in the facts and circumstances of the case.”

2. The Petitioner is a Joint Venture of the Tata Power Company Limited and the Government of National Capital Territory of Delhi (**GNCTD**). Consequent to reorganization of power sector in the National Capital Territory of Delhi (**NCTD**) by GNCTD in July 2002, the Petitioner succeeded the erstwhile Delhi Vidyut Board (**DVB**) as a distribution licensee. On reorganization in July 2002, Delhi Transco Ltd (**DTL**) succeeded the erstwhile DVB in transmission of electricity in the NCTD. In addition, DTL was made responsible for bulk procurement and bulk supply of power to the distribution licensees in the NCTD. The Petitioner and other distribution licensees in NCTD used to

purchase power from DTL for retail supply to the consumers. This arrangement continued till 31.3.2007.

3. GNCTD issued a set of policy directives under which with effect from 1.4.2007 the distribution licensees were required to make their own arrangements for procurement of power for supply to the consumers. Consequently, Delhi Electricity Regulatory Commission (**the State Commission**) vide its order dated 31.3.2007 reassigned all the PPAs to the distribution licensees including the Petitioner as per their load profile. The Petitioner was initially allocated 29.18% of the contracted capacity available with DTL, but its share was later on increased to 30.68%. Thus, since 1.4.2007, the responsibility for arranging power for their respective areas of distribution has been vested in the respective distribution company.

4. The erstwhile DVB had entered into PPAs with NTPC Ltd (**NTPC**), Respondent No 1, for supply of power from the following upcoming generating stations:

- (a) Anta Gas Power Station II
- (b) Auraiya Gas Power Station II
- (c) Koldam Power Station

5. On reorganization of power sector, the PPAs executed by the erstwhile DVB were assigned to DTL, who itself executed the PPA with NTPC for supply of power from North Karanpura Power Station which was being set up by NTPC. Subsequent to the State Commission's order dated 31.3.2007, the Petitioner entered into fresh PPAs with NTPC, which included the PPAs for supply from under-construction generating stations

of NTPC. The Petitioner has averred that none of the generating stations being established by NTPC for which PPAs were entered into, whether by the erstwhile DVB or DTL or the Petitioner, has achieved the commercial operation. NTPC is stated to have informed the Petitioner that due to non-availability of gas, implementation of the gas-based generating stations has been put on hold and implementation of other generating stations also has been delayed. The Petitioner has furnished the following details of the PPAs executed with NTPC from time to time in respect of the upcoming generating stations; it appears that Table A in prayer A) refers to these generating stations:

Sl.No	Name of Plant	Date of PPA	Remarks/ Status
1.	Anta Gas Power Station II	12.2.1999	CoD achieved. not
2.	Auriya Gas Power Station II	12.2.1999	CoD achieved. not
3.	Koldam Power Station	24.02.2002	CoD achieved. not
4.	North Karanpura Power Station	19.04.2006	CoD achieved. not
5.	Tanda II Power Station	05.11.2010	CoD achieved. not
6.	Gidderbaha Power Station	28.12.2010	CoD achieved. not
7.	Meja Urja Vidyut Power Station	05.11.2010	CoD achieved. not
8.	Unchahar-4 Power Station	03.03.2011	CoD achieved. not
9.	Bilhaur Power Station	28.12.2010	CoD achieved. not
10.	Tapovan Visnhugad Power Station	05.11.2010	CoD achieved. not
11.	Lata Tapovan Power Station	09.09.2009	CoD achieved. not

6. The Petitioner has submitted that due to the inordinate and unexplained delay in commissioning of the above projects, the Petitioner has made alternative arrangements to meet its power requirements. The Petitioner has urged that because of inordinate delay in commercial operation of the above generating stations, the PPAs have been frustrated. The Petitioner has averred that neither party assumed that commercial operation of the generating stations would get delayed by more than 15 years. According to the Petitioner, sale and purchase of power from the generating stations for which PPAs were entered into in 1999 would result in performance of obligations which are significantly different from the obligations undertaken at the time of signing because since the execution of the PPAs cost of construction of the generating stations has substantially increased. Therefore, according to the Petitioner, if the obligations under the PPAs are enforced on commercial operation of the generating stations, these obligations would be substantially different from those assumed under the PPAs. The Petitioner claims to have terminated the PPAs vide its letter dated 26.5.2015 (**Annexure D to the Petition**) which was addressed to Additional General Manager, NTPC. The letter dated 26.5,2015 was followed by another letter dated 26.6.2015 (**Annexure E to the Petition**) wherein the request to complete necessary formalities in relation to termination of the PPAs was reiterated. In continuation of its two earlier letters dated 25.6.2015 and 26.6.2015, the Petitioner wrote another letter dated 10.7.2015 to Ministry of Power (**Annexure F to the Petition**) wherein it was concluded as under:

“TPDDL has been under pressure from all quarters including the Government of NCT of Delhi, Delhi Electricity Regulatory Commission & Consumer rights activists to not incur any imprudent expense and thus bring down the retail supply tariff payable by the consumers. Therefore, in the interest of consumers of TPDDL and all other stakeholders, we would request you to take up the concerns expressed herein on priority and proceed

to reallocate the power from these generating stations mentioned in the above referred letter to other power deficient states.”

7. Based on the above facts, the Petitioner has sought a declaration that the PPAs entered into by the Petitioner with NTPC for the power plants which are still under construction stand discharged by operation of law on ground of frustration.

8. The Petitioner has further submitted that the following generating stations from which the Petitioner is presently supplied power have outlived their useful life:

- (a) Badarpur Thermal Power Station
- (b) Anta Gas Power Station
- (c) Auraiya Gas Power Station
- (d) Unchahar -I Thermal Power Station

9. It has been stated that these generating stations have incurred additional expenses on Renovation and Modernisation **(R&M)**. However, despite the huge expenditure, the generating stations are not able to achieve the performance standards set by this Commission and have been allowed to operate on relaxed norms. The Petitioner has averred that investments on R&M of these generating stations are leading to higher capacity charges and their operation on relaxed operating norms results in higher Energy Charge Rate. Thereby, it has been urged, the tariff for supply of power from these generating stations is considerably higher. Because of the higher capacity charge and energy charges, the abovementioned generating stations are very low on the merit order. For these reasons, the Petitioner has stated that it is rarely able to off-take the entire contracted capacity from these generating stations. As a result, the

landed per-unit cost from these generating stations is prohibitively expensive. The average per-unit cost for supply from these generating stations over past 12 months, as furnished by the Petitioner, is as under:

Sl. No.	Name of Generating Station	Year of COD	Useful Life	Cost (₹/Unit)
1.	Badarpur TPS	1981	25 years	7.10
2.	Unchahar-ITPS	1989	25 years	4.27
3.	Anta GPS	1990	25 years	5.09
4.	Auraiya GPS	1990	25 years	8.06

10. The Petitioner has stated that it had requested NTPC to get power from the above generating stations reallocated to others as it has been under intense pressure from the stakeholders to reduce the power purchase cost. The Petitioner has alleged that NTPC has not taken any steps towards reallocation.

11. Against the above background narrated by the Petitioner, the present petition has been filed.

12. Besides submitting the reply on merits, NTPC has taken a preliminary objection to the maintainability of the petition. NTPC has stated that the Petitioner has not raised any issue related to determination of tariff or any matter connected with tariff which may fall within the scope of clause (f) of subsection (1) of Section 79 of the Electricity Act. NTPC has submitted that in the proceedings under clause (f) of subsection (1) of Section 79, the Petitioner cannot seek reallocation of power allocated to it by the Central Government, but can only seek enforcement of the rights and obligations under the PPAs and adjudication of the disputes arising out of the PPAs. NTPC has stated that reallocation of the capacity contracted by the Petitioner to others and foreclosure and surrender of the allocated capacity and other such matters are within the purview of

the Central Government and is possible only in the event and to the extent, the Central Government is able to identify an alternative procurer. Accordingly, according to NTPC, the prayers for directions to the Central Government to reallocate the share of the Petitioner in the generating stations of NTPC to others are outside the purview of the present petition. NTPC has submitted that it is not open to the Petitioner to seek directions for reallocation of power by raising a dispute under clause (f) of subsection (1) of Section 79.

13. On merits, NTPC has submitted that the Petitioner has entered into binding, concluded and enforceable PPA dated 8.5.2008 with NTPC for purchase of power of the specified contracted capacity from the various generating stations, including Badarpur Thermal Power Station, Feroze Gandhi Unchahar Thermal Power Station Stage I, Anta Gas Power Station and Auraiya Gas Power Station. The PPA is in continuation of the earlier PPAs entered into, as noted in the PPA. NTPC has placed on record the Supplementary PPA dated 22.3.2012 entered into by the Petitioner for extension of the agreement for sale and purchase of electricity beyond the initial period of 15 years in the case of gas-based generating stations including Anta GPS and Auraiya GPS i.e. beyond 31.3.2012. NTPC has stated that the Petitioner having entered into binding and concluded contract, cannot now seek a unilateral termination of the PPAs.

14. NTPC has pointed out that in view of long-term applicability of the PPAs it has made significant investments and financial commitments. NTPC has furnished the

details of the expenditure incurred by it up to October 2015 on the upcoming generating stations:

S. No	Project	Current Approved Cost (₹ in crore)	Cumulative Expenditure (₹ in crore)
1	Tapovan Vishnugad	3,846	2,606
2	Lata Tapovan	1,527	142
3	Koldam Power Station	Under commercial operation since 18.7.2015	
4	Unchahar IV	3,363	838
5	North Karanpura	14,367	2,214
6	Tanda II	9,189	873
7	Meja Urja Vidyut Power Station	10,830	4,003 (till September 2015)
8	Bilhaur Power Station	FR under approval	555

15. NTPC has clarified that in response to the communications received from the Petitioner, it had duly explained the position in regard to the obligations of the parties in its letters dated 22.9.2015 (**Annexure R 3 to NTPC's Reply**) and 12.10.2015 (**Annexure R 4 to NTPC's Reply**).

16. Ministry of Power has submitted its reply on merits in its affidavit dated 8.1.2016. The Ministry has stated that allocation of power from the Central Sector Generating Stations, which have been set up considering the long-term PPAs entered into by the procurers, is made at the instance of the State Governments/Procurers. According to the Ministry, the procurers are not entitled to unilaterally terminate the PPAs, except in accordance with the provisions thereof. The Ministry has pointed out that the purported cancellation or termination of the PPAs by the Petitioner on unilateral basis was not contemplated at the time of allocation of power by the Central Government. The cancellation or termination of the PPAs executed based on allocation of power made by the Central Government seriously affects the scheme of investment in the infrastructure such as power generation by Central Public Sector Units (**CPSUs**). The Ministry has

pointed out that investments made by the CPSUs are to be serviced and that when a procurer decides to unilaterally terminate the PPAs, the CPSUs are seriously prejudiced. According to the Ministry, the Petitioner as the procurer has a right to the allocated capacity under the PPAs at all times and correspondingly, has the obligation to pay the fixed charges for the power allocated even in case of non-scheduling of power of its own volition.

17. The Ministry has urged that the claim of the Petitioner to seek enforcement of the termination of PPAs entered into on long-term basis on the ground that the power supplied from the generating stations is costlier ought not to be entertained. However, the Ministry has added that determination of tariff and terms and conditions, including the issue of delay in the completion of the projects, consequential effect on IDC etc. to be allowed are matters entirely within the domain and jurisdiction of this Commission under the Electricity Act.

18. Explaining the process of reallocation of power, the Ministry has stated that the Central Power Sector Units can approach it for reallocation to any other procurer in case the procurer to whom power has been allocated decides to surrender it at any time during the operation of the long-term PPA. It has been explained that release of the procurer from its obligations under the PPA would be subject to the Ministry being able to reallocate the power, fully or partially, to any other person and would be limited to the period for which reallocation fructifies. The Ministry has argued that the procurer who has surrendered power continues to be bound by the obligations incurred under the

PPA till such time and to the extent other procurer undertakes to honour the obligations of the procurer surrendering power.

19. At the hearing held on 1.2.2016, learned senior counsel appearing for the Petitioner had circulated the “Note for Arguments on Maintainability” and his submissions were based on this document. The Commission has referred to the submissions of the Petitioner at appropriate places while examining the question of maintainability.

20. While responding to the submissions made by the learned senior counsel for the Petitioner on maintainability, the learned counsel for NTPC clarified that the issue of maintainability of the petition raised by NTPC is only with regard to the subject matter involved in the petition and that the jurisdiction of this Commission over the generating companies owned or controlled by the Central Government in terms of clause (a) of subsection (1) of Section 79 of the Electricity Act was not being disputed. Learned counsel for NTPC argued that the prayers in the petition were all of general nature and did not fall within the scope and ambit of adjudication of dispute under clause (f) of subsection (1) of Section 79. According to the learned counsel, the petition was not maintainable. As regards, the submission of the Petitioner seeking to render advisory opinion to the Central Government, the learned counsel for NTPC submitted that the advisory jurisdiction under subsection (2) of Section 79 could not be invoked through *quasi* judicial proceedings. Though the learned counsel for NTPC made submissions on merits also, for the present order we are not referring to those submissions as the hearing on 8.2.2016 was limited to maintainability of the petition.

21. We have carefully considered the rival submissions as regards the maintainability of the petition.

22. It was firstly argued on behalf of the Petitioner that the function of the Central Commission under clause (a) of subsection (1) of Section 79 of the Electricity Act, is not limited to the determination of tariff but the function assigned is of “regulation” of tariff of the generating companies owned or controlled by the Central Government. It was urged that the word “regulate” has a very wide connotation. In this regard reliance was placed on the judgments of the Hon’ble Supreme Court in cases reported as (i) U.P. Co-Op Cane Unions Federations Vs West U.P. Sugar Mills Association [(2004) 5 SCC 430], (ii) PTC India Ltd Vs Central Electricity Regulatory commission [(2010) 4 SCC 603] and (iii) BSNL Vs Telecom Regulatory Authority of India [(2014) 3 SCC 222]. It was submitted on behalf of the Petitioner that in the ultimate analysis the dispute relates to payment of tariff by the Petitioner to NTPC and therefore, adjudication of the dispute falls within the scope of clause (f) of sub-section (1) of Section 79.

23. The legal position is fully settled that “power to regulate “is a very wide power. Therefore, it is not necessary for us to individually refer to the ratio of the judgments of the Hon’ble Supreme Court relied upon by the learned senior counsel for the Petitioner. We have no doubt in our mind that power to regulate tariff includes any power incidental or consequential thereto so as to make the power of regulation purposeful and effective. However, in the present case, the dispute raised and consequential prayer made at (A) has no relationship with regulation of tariff. The Petitioner is seeking a declaration that the PPAs executed with NTPC for latter’s upcoming generating stations stand

discharged by operation of law as they have been frustrated on the ground of inordinate delay in commissioning and thereby seeks to repudiate its obligations under the PPAs. The dispute involves adjudication of rights and obligations of the parties under the PPAs. Therefore, the Commission is of the view, the dispute raised in the Petitioner has no nexus with the Commission's power to regulate the tariff of the NTPC under Section 79 (1) (a) of the Act.

24. On behalf of the Petitioner reliance has been placed on the judgment of the Appellate Tribunal dated 4.9.2012 in Appeal No 94/2012 (BSES Rajdhani Power Ltd Vs Delhi Electricity Regulatory Commission and another) wherein it was held that the disputes involving NTPC, which is a generating company owned or controlled by the Central Government, falls within the jurisdiction of this Commission. On the basis of this judgment, it was argued that this Commission has the jurisdiction to adjudicate the dispute. We do not find any merit in the submission. A bare reading of clause (a) of subsection (1) of Section 79 unequivocally suggests that the power to regulate tariff of the generating companies owned or controlled by the Central Government is vested in this Commission. Even NTPC does not dispute this legal position. Learned counsel for NTPC while making his submissions on maintainability accepted this position. The dispute of jurisdiction has been raised in relation to the subject matter of the petition and the relief claimed. The Commission is of the view that even though the tariff of NTPC is regulated by this Commission in exercise of power under Section 79 (1) (a) of the Act, the disputes raised in the part petition relate to termination of PPA on account of inordinate delay for execution of the project which fall outside the scope of the Section

79 (1) (a) of the Act. Therefore, the petition is not maintainable and the prayer of the Petitioner for a declaration regarding discharge of the PPA cannot be granted.

25. The Petitioner has prayed for issue of necessary directions/advice in exercise of the powers under the Electricity Act, 2003 to the Central Government to allocate Petitioner's entire share of firm power from the Respondent NTPC to power default States/utilities. It is noted that the petition has been filed under clause (f) read with clause (a) of subsection (1) of Section 79 of the Electricity Act. Section 79 which describes the functions of this Commission, to the extent relevant, is extracted below:

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

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

.....

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;”

26. From clause (f) of subsection (1) of Section 79 extracted above it is obvious that this Commission has jurisdiction to adjudicate disputes involving the generating companies or the transmission licensees. When a matter is brought before this Commission under clause (f) of subsection (1) of Section 79, the Commission may give directions at the instance of, or against, the generating company or the transmission licensee. Seeking direction to the Central Government for reallocation of power in the petition filed by the Petitioner, a distribution licensee, is clearly outside the scope of clause (f) of subsection (1) of Section 79 of the Electricity Act. Therefore, relief on

prayer (B) cannot be granted. However, the Petitioner is at liberty to approach the Ministry of Power, Government of India with its grievance for consideration and appropriate directions.

27. Learned counsel for the Petitioner submitted that under sub-section (2) of Section 79 of the Electricity Act, the Commission has been mandated to advise the Central Government on matters with respect to efficiency in the activities of electricity industry and promotion of investment in electricity industry, though this issue has not been raised in the petition. Learned counsel for the Petitioner urged that the statutory advice may be considered to be given by this Commission for reallocation of power since all efforts made by the Petitioner for in that direction had proved to be futile as the representations made to the Central Government in this regard have remained unaddressed.

28. Sub-section (2) of Section 79 provides as under:

“(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely :- (i) formulation of National Electricity Policy and tariff policy;

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.”

29. Under sub-section (2) of Section 79 of the Act, the Commission is required to advise the Central Government on formulation of National Electricity Policy and Tariff Policy and matters of common importance namely, promotion of competition, investment, efficiency and economy in activities of the electricity industry. The

Petitioner is seeking a statutory advice to the Central Government for reallocation of power allocated to the Petitioner from the Central Generating Station of NTPC to any other party. In our view, statutory advice can be rendered by the Commission to the Government in the matters concerning overall interest of the electricity industry and cannot be invoked to address the individual grievances of a particular entity. In our view, the Commission cannot render any statutory advice on the subject to the Central Government.

30. The Petition is disposed of in terms of the above directions.

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

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson