

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 14/MP/2017

Subject : Petition under section 79 (1) (a) and section 79 (1) (f) of the Electricity Act, 2003 read with the CERC (Terms and Conditions of Tariff) Regulations, 2014 for relief on account of Change in Law affecting Stage-II of the Badarpur Thermal Power Station (BTPS)

Petitioner : NTPC Limited

Respondents : BRPL & ors

Date of hearing : **15.5.2018**

Coram : Shri P.K. Pujari, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Parties present : Shri Sitesh Mukherjee, Advocate, NTPC
Shri Buddy Ranganadhan, Advocate, BRPL & BYPL
Ms. Malvika Prasad, Advocate, BRPL & BYPL
Shri Hasan Murtaza, Advocate, BRPL & BYPL
Shri Aniket Prasoon, Advocate, TPDDL
Shri Abhishek Kumar, Advocate, TPDDL
Ms. Shrishti Rai, Advocate, TPDDL
Shri Deep Rao, NTPC
Shri Manoj Kr. Sharma, NTPC
Shri Sameer Singh, BYPL
Shri Haridas Maity, BYPL
Shri Nishant Grover, BYPL
Shri Abhishek Srivastava, BYPL
Shri Kartikey Tripathi, TPDDL
Shri S.K.Sinha, Delhi SLDC
Ms. Sonali Garg, Delhi SLDC

Record of Proceedings

During the hearing, the learned counsel for the Petitioner, NTPC mainly submitted the following:

- (i) DPCC issued Consent to Operate on 2.1.2014 to BTPS valid upto 31.1.2018 inter alia prescribing that the generating station shall not exceed the Particulate Matter (PM) emission norm of 150 mg/Nm³. However, DPCC by letter dated 11.2.2016 revised the SPM emission norms of BTPS from 150



mg/Nm³ to 50 mg/Nm³ thereby modifying the Consent to Operate dated 2.1.2014.

(ii) DPCC in exercise of its powers under section 31-A of Air (Prevention and Control of Pollution) Act, 1981 read with Rule 20 A(6) of the Air (Prevention and Control of Pollution) (Union Territories) Rules, 1983 issued letter dated 6.11.2016 directing NTPC to shut down all units of BTPS upto 16.11.2016 in the light of severe ambient air pollution levels in Delhi.

(iii) Subsequently, DPCC by email and letter dated 16.11.2016 extended its earlier direction dated 6.11.2016 for closure of all units of BTPS upto 31.1.2017. Consequently, all units of BTPS remained shut down from 7.11.2016 to 31.1.2017.

(iv) Stage-II of BTPS is compliant with the emission norms and all other environmental standards prescribed by DPCC in Consent to operate dated 2.1.2014. However, DPCC by issuing directions dated 6.11.2016 and 16.11.2016 has over ridden the Consent to operate dated 2.1.2014, thereby preventing Stage-II of BTPS from operating. Thus, the suspension of the statutory consent to operate issued to BTPS amounts to a change in law.

(v) Pursuant to the meeting of the EPCA on 27.2.2017, the DPCC by letter dated 14.3.2017 revoked the closure directions and BTPS was allowed to operate from 15.3.2017 to 15.10.2017.

(vi) Stage-II of BTPS is ready to generate power and BTPS has been communicating Declared Capacity (DC) and Delhi SLDC is therefore bound to accept and record the same in its periodical Energy Accounts, though the Stage-II units are under shutdown for complying with the directions of DPCC.

(vii) Delhi SLDC had accepted DC of BTPS for the months of November, 2016 and December, 2016 and accordingly published Energy Accounts. However, by email dated 6.1.2017/7.1.2017, Delhi SLDC informed that BTPS is not in a position to demonstrate capability of generation and therefore DC of BTPS shall be 'zero' from 7.11.2016 onwards. Stage-II is capable of generating power but for DPCC's unforeseeable statutory directions over which the Petitioner has no control. Therefore, Delhi SLDC may be directed to accept and record the DC from Stage-II of BTPS failing which the change in law claim of the Petitioner would be rendered infructuous.

(viii) The provisions of the 2014 Tariff Regulations [Regulation 3(9)(d) and Regulation 8(7)] read with clause 5.3.3 of the PPA provides that the distribution licensees are liable to bear the risk, once the Commission arrives at the finding that a change in law has occurred in respect of Stage-II of BTPS.

(ix) Since the change in law event has adversely affected the petitioner's ability to recover the costs incurred by it during the period from 7.11.2016 to 14.1.2017, it would be appropriate for the Respondents 1 to 5 to pay capacity charges as relief from change in law (*Judgment in case of NTPC v/s AP Power distribution Company Ltd. was referred to.*)



(x) The directions of DPCC, an instrumentality of Govt. of NCTD, not to operate Stage-II of BTPS is in the nature of directions under Section 11 of the Act. The 'Appropriate Government' as defined under Section 2(5) of the Act in the case of NTPC is the Central Government. Section 11(2) empowers the Central Commission (in this case) to offset the adverse financial impact of such direction suffered by the generating company of the petitioner. Hence, the Commission may offset the financial impact by way of tariff recovery from the respondents for the period it was shut down due to directions of DPCC (*Judgments of the Hon'ble SC in K. Balakrishna Rao & Ors vs Hazi Abdulla Sait & Ors, Printers (Mysore) Ltd vs Asstt. Commercial Tax Officer and Tata Power Company Ltd vs Reliance Energy Limited & Ors was referred to*).

2. In response, the learned counsel for the Respondents BRPL & BYPL objected to the above submissions of the Petitioner and submitted the following:

(i) The prayer of the petitioner is for a declaration that the directions of DPCC dated 6.11.2016 and 16.11.2016 are change in law event for which capacity charges is sought to be recovered during the period when Stage-II units were not in operation. However, the petitioner's reliance on Regulation 8 of the 2014 Tariff Regulations (truing-up) is not maintainable as the said regulation contemplates truing up of the capital expenditure and cannot be equated to the recovery of full capacity charges. It does not also speak of recovery/payment of capacity charges on 'deemed generation' concept.

(ii) BTPS had not complied with the PM emission norm of 150mg/Nm³ in terms of the Consent to operate granted on 2.1.2014. Thus, there can be no payment/recovery of capacity charges in case of shut down ordered by the DPCC for non-compliance of the environmental norms. Regulation 30 of the 2014 Tariff Regulations which provides for capacity charges, does not contemplate payment of full capacity charges on account of Change in law.

(iii) In case of a shut-down ordered by a lawful constitutional authority, the only option before the petitioner would be to claim 'frustration' of the contract (Sec 56 of the Contract Act) in order to avoid any claim for damages by the respondents, for failure on the part of the petitioner to perform its obligations under the contract/PPA. However, in the present case, the generating company, despite not performing due to supervening conditions, has sought the beneficiaries to perform its obligations.

(iv) Even otherwise, the claim of the petitioner for 'change in law' is not maintainable since the petitioner had knowledge as early as in 2008 that BTPS is required to comply with the PM emission norm of 50 mg/Nm³.

(v) DC can be declared only when the generating station is legally permitted to operate. The term 'capable to deliver' would mean 'lawfully permitted to deliver'. Since BTPS was not permitted to operate by direction of a legal authority, it was not capable of delivering ex-bus power. Hence, the prayer for declaration of DC by BTPS and acceptance of the same by Delhi SLDC is not acceptable.



(vi) DPCC is a State Board under the Air Act, 1981 and is not an 'Appropriate Government' under the Electricity Act, 2003. The directions issued by DPCC dated 6.11.2016 and 16.11.2016 have been issued under Section 31 A of the Air Act, 1981 and cannot be construed as directions under Section 11. Hence, the question of offset of adverse financial impact does not arise.

(vii) There is no provision in the Act or Regulations that permits the petitioner to levy capacity charges when it has been prohibited from generating power. The payment of capacity charges is on the basis of declared availability as certified by SLDC. Since the plant is shut down and DC is nil, there can be no question of recovery of capacity charges from the beneficiaries.

3. The learned counsel for the respondent, TPDDL adopted the above submissions made on behalf of the respondents BYPL & BRPL. He however referred to the Provisional Energy Accounts issued for the months of November, 2016 & December, 2016 by Delhi SLDC (in pages 56 & 72 of the petition) and pointed out that no amicable decision could be arrived at in the Delhi OCC meeting dated 28.11.2016 with regard to the DC of Stage-II units.

4. The representative of Delhi SLDC submitted that DC of BTPS is certified based on their availability and after considering the directions of DPCC.

5. On a specific query by the Commission as to why the DC of Stage-II units of BTPS was revised as 'zero' despite issue of Monthly Energy Accounts for November, 2016 and December, 2016 by SLDC, the representative of Delhi SLDC clarified that the revision of DC was based on the directions of the GoNCTD.

6. Accordingly, the Commission directed the Delhi SLDC to file an affidavit, on or before **31.5.2018**, all the correspondences/documents addressed by SLDC to GoNCTD as regards the Monthly Energy Accounts/DC of Stage-II units of BTPS along with the directions of GoNCTD for revision of Monthly Energy Accounts/DC in respect of Stage-II units of BTPS. The Commission also directed the Petitioner and the Respondents to file their written submissions with copy to the other, on or before **4.6.2018**.

By order of the Commission

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

