

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 14/MP/2017

Coram:

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

Date of Order: 9th April, 2018

In the matter of

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

In the matter of

NTPC Limited,
NTPC Bhawan
Core-7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi- 110003

.....Petitioner

Vs

1. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi- 110019

2. BSES Yamuna Power Limited
Shakti Kiran Building,
Karkardooma, Delhi- 110092

3. Tata Power Delhi Distribution Limited
Grid Sub-Station Building,
Hudson Lines, Kingsway Camp
New Delhi- 110009

4. New Delhi Municipal Council
Palika Kendra Building,
Opposite Jantar Mantar, Parliament Street
New Delhi- 110001

5. Military Engineering Services
Delhi Cantonment
New Delhi- 110002



6. Delhi State Load Dispatch Centre
Minto Road, New Delhi- 110002

7. Department of Environment
Government of NCT of Delhi
4th Floor, ISBT Building,
Kashmere Gate
New Delhi- 110006

....Respondents

Parties present:

Shri Sitesh Mukherjee, Advocate, NTPC
Shri Deep Rao, Advocate, NTPC
Shri Manoj Kr. Sharma, NTPC
Shri Nishant Gupta, NTPC
Shri Kousik Mandal, NTPC
Shri Buddy Rangnadhan, Advocate, BRPL & BYPL
Ms. Malvika Prasad, Advocate, BRPL & BYPL
Shri Sameer Singh, BYPL
Ms. Shrishti Rai, Advocate, TPDDL
Shri Aniket Prasoon, Advocate, TPDDL
Shri Rahul Bajaj, Advocate

INTERIM ORDER

This Petition has been filed by the Petitioner, NTPC seeking for the following reliefs:

(a) *Declare that the directions issued by the DPCC to the Petitioner not to operate Stage-II (2 x 210 MW) units of Badarpur Thermal Power Station (hereinafter referred to as 'the generating station') in light of the severe ambient air conditions in Delhi is a change in law event which entitles the Petitioner to recover capacity charges from respondent Nos. 1 to 5 for the period during which Stage-II is not operated;*

(b) *Direct Respondent Nos. 1 to 5 to pay the bills raised by the Petitioner for capacity charges from 7.11.2016 until Stage-II of BTPS is permitted to operationalize; and*

(c) *Pass such other and further order(s) and/ or directions as this Commission deem just, fit and proper in the facts and circumstances of the case and in the interest of justice.*

2. The Petitioner has submitted that Badarpur Thermal Power Station (hereinafter 'the generating station') with a capacity of 705 MW (3 x 195 MW + 2 x 210 MW) was originally set up by the Govt. of India in 1973 and was later transferred to the



Petitioner with effect from 1.6.2006. Subsequent to this transfer, Delhi Transco Ltd. entered into PPA with the Petitioner on 21.3.2007 for purchase of power. Pursuant to the DERC's order dated 1.4.2007, the Petitioner entered into PPAs with Respondents Nos. 1 to 5 for sale of the entire quantum of power. The Petitioner has been operating and selling the power to the Respondents and the scheduling of power is carried out by Respondent No. 6 i.e. is the State Load Despatch Centre, Delhi. The Petitioner was directed by the Delhi Pollution Control Committee, Department of Environment, Govt. of NCT of Delhi (referred to as 'DPCC') vide its letter dated 6.11.2016 not to operate the Stage-II (2 x 210 MW) of the generating station on account of ambient air conditions in Delhi and NCR Region. Consequently, the Petitioner shut down the Stage II units from 7.11.2016 till 16.11.2016 which was further extended till 31.1.2017 vide DPCC letter dated 16.11.2016. The Petitioner in the present petition has submitted that such directions by a statutory body like DPCC in consultation with the Central and State government amounts to Change in law event over which the Petitioner has no control and accordingly, the Petitioner has claimed capacity charges for the said period in terms of the 2014 Tariff Regulations. The Petitioner vide affidavit dated 21.2.2017 has submitted that DPCC vide letter no. DPCC/WMC-II/BTPS/2015/515-529 dated 31.1.2017 issued an addendum in continuation of its earlier directions in letters dated 6.11.2016 and 16.11.2016 and extended the closure of all units of the generating station till further orders. The Petitioner through IA No. 5 of 2017 has submitted that though Delhi SLDC agreed in the Delhi OCC Meeting dated 28.11.2016 to accept the DC of Stage II of the generating station and accepted the DC for November and December 2016, Delhi SLDC vide its mail dated 6.1.2017/7.1.2017 intimated the Petitioner that DC of the Stage-II of the generating station would be considered as zero from 7.11.2016 onwards as the



Stage II was not in a position to demonstrate its capability of generation. In the IA, the Petitioner sought interim directions to Delhi SLDC to accept the DC from 6.11.2016 onwards and Respondent Nos. 1 to 5 to pay the bill for the period of the closure of units of Stage-II pending disposal of the petition.

3. The Petition was admitted and notice was issued to the Respondents on the petition as well as the IA with directions to complete pleadings in the matter. The Commission also directed the Petitioner to submit, on affidavit, the documentary evidence of the DC of Stage-II units furnished to SLDC during the period of shut down starting from 7.11.2016. In compliance with the above directions, the Petitioner vide affidavit dated 18.5.2017 has submitted the relevant documents. Replies to the Petition & IA have been filed by the Respondent, TPDDL (vide affidavit dated 17.7.2017) and Respondents, BRPL & BYPL (vide separate affidavits dated 8.8.2017). Rejoinder to the above replies have been filed by the Petitioner vide affidavits dated 4.9.2017 and 29.8.2017 respectively.

4. During the hearing of the matter on 7.9.2017, the learned counsel for the Respondents, BRPL & BYPL submitted that the Petitioner has also filed Petition No. 33/MP/2016 seeking recovery of the capacity charges in respect of four units of the generating station (three units of Stage-I and one Unit of Stage-II) till operationalization of the said units and therefore, the present Petition may be clubbed and heard along with Petition No. 33/MP/2016. The learned counsel for the Petitioner objected to the above prayer and submitted that the cause of action, factual matrix and the relevant period for which the reliefs have been claimed in Petition No. 33/MP/2016 are completely distinct and different from the present Petition. The Commission directed the Petitioner to file its submissions with regard to tagging of the present Petition with Petition No. 33/MP/2016. In



compliance with the above directions, the Petitioner vide affidavit dated 6.10.2017 has filed its written submissions on the issue of clubbing of the said petitions. The Respondents, BRPL & BYPL vide affidavit dated 14.2.2018 have also filed their submissions on the said issue. Thereafter, the matter was heard on 15.2.2018 and the Commission after hearing the parties decided to issue order on clubbing of the Petitions.

5. We now proceed to examine the question of clubbing of the present Petition with Petition No. 33/MP/2016 as stated in subsequent paragraphs.

Submissions of Petitioner

6. The Petitioner vide affidavit dated 6.10.2017 has submitted the following:

(a) The Petitioner has approached the Commission seeking relief on account of change in law event, which precipitated the shutdown of two of its 210 MW units of Stage-II of the generating station. The said units have been forced to shut down due to direction dated 6.11.2016 by DPCC, Department of Environment, Govt. of NCT of Delhi which amounts to 'change in law' under the PPA executed by the Petitioner with Respondents 1 to 5 and under the CERC (Terms and Conditions of Tariff) Regulations, 2014.

(b) The Hon'ble Supreme Court in Ramji Gupta & anr v/s Gopi Krishan Agrawal & ors (AIR 2013 SC 3099) has outlined the parameters governing the consolidation of two or more matters. It has been made amply clear that the consolidation of proceedings can be ordered principally in fact, situations in which a common question of law or fact arises. This power can also be exercised to prevent multiplicity of proceedings on the same issue or to prevent conflicting verdicts. This power can be exercised to prevent the causation of prejudice to any party or in the interest of justice.

(c) None of these tests are satisfied in this case, in as much as the two petitions i.e. Petition Nos. 14/MP/2017 & 33/MP/2016 are founded upon wholly separate and distinct cause of action, relate to completely different fact situation and different time periods. Hence, there is no material commonality in the two Petitions to justify tagging.

(d) The difference between the two petitions becomes amply clear on bare perusal of the table below:



Sl. No.	Ground	33/MP/2016	14/MP/2017
1.	Cause of action	Issuance of letter dated 31.12.2015 by virtue of which 4 out of 5 units of BTPS were ordered to be shut down for the period between 1.1.2016 and 15.3.2016 on account of failure to comply with the revised emission norms for particulate matter	Issuance of DPCC's directions dated 06.11.2016 imposing a temporary embargo on the operation of Stage II of the Badarpur Thermal Power Station on account of the ambient air conditions in Delhi and not because of the emission norms of 50 MG/nm ³ .
2.	Application of Section 11 of the Electricity Act, 2003	Not applicable to the facts of the case	Squarely applicable
3.	Relevant time period	01.01.2016 to 15.03.2016 during which period one unit of Stage II was ordered to be shut down and shut down of Stage I units i.e. 3X95 MW units has been continuing since 01.01.2016.	6.11.2016 to 14.3.2017 for the 2 x 210 MW units of Stage II
4.	Units involved	All 3 units of Stage I and 1 unit of Stage II	Both Stage II units of BTPS.
5.	Prayers	<p>A. Declare that the change by the DPCC in emission norms contained in the Consent to Operate dated 02.01.2014 is a "Change in Law" in accordance with the PPAs;</p> <p>B. Direct the Respondents to make the payment of the fixed charges incurred by the petitioner from 31.12.2015 for all 4 units till they are permitted to operationalize.</p>	<p>A. Declare that the directions issued by the DPCC to the Petitioner not to operate Stage II (2 x 210 MW) units of Badarpur Thermal Power Station in light of the severe ambient air conditions in Delhi is a change in law event which entitles the petitioner to recover capacity charges from Respondent Nos. 1 to 5 for the period during which stage-II is not operated;</p> <p>B. Direct Respondent Nos. 1 to 5 to pay the bills raised by the Petitioner for capacity charges from 7.11.2016 until Stage- II of BTPS is permitted to operationalize</p>

(e) As the above table shows, there are numerous pertinent and significant differences between these two petitions, so the body of evidence, factual and legal arguments and relevant considerations in these two would be vastly different.



(f) Not tagging these two matters would assist and aid this Commission in giving both matters the separate and distinct considerations that they deserve in view of the inherent differences of each case. The Petitioner's contention of section 11 of the Electricity Act, 2003 being applicable in this Petition is a pertinent question of law, which is unique.

(g) It is well settled principle that consolidation of proceedings cannot be ordered in cases in which the two proceedings are not inextricably intertwined and where there is no possibility of contradictory results. There is no possibility of any conflicting decisions whatsoever in Petition No. 33/MP/2016 and the present Petition.

(h) The tagging of two Petitions would be contrary to the well settled law as outlined above, would result in unnecessary delays and is wholly inappropriate in the facts and circumstances of this case.

Accordingly, the Petitioner has submitted that the present Petition may be adjudicated independent of Petition No. 33/MP/2016.

Submissions of BRPL & BYPL

7. The Respondents, BRPL & BYPL vide affidavit dated 14.2.2018 have prayed for clubbing of the present Petition with Petition No. 33/MP/2016 and batch and in justification of the same have submitted the following:

(a) Petition No. 33/MP/2016 has already been tagged with Petition Nos. 86 of 2016 and 91 of 2016 based on the Commissions' direction vide ROP dated 30.6.2016 . Hence, there could no conceivable reasons as to why the present Petition should not be clubbed with other three Petitions as above.

(b) All the four Petitions deal with the same generating station of the Petitioner which has a single PPA with the Respondents.

(c) The present Petition pertains to both the units of Stage-II of the generating station and the prayer of the Petitioner is for a declaration that the DPCC's direction not to operate Stage-II is a change in law under PPA and to recover the capacity charges for Stage-II from the beneficiaries even during the period it did not operate. Petition No. 33/MP/2016 pertains to three units of Stage-I and one unit of Stage-II and the Petitioner has prayed for a declaration that the 'change in norms of operation' is a change in law and sought recovery of fixed charges during the period the units were not in operation. Thus, both these Petitions (33/MP/2016 & 14/MP/2017) are premised upon DPCC's direction not to operate and / or change in ability to



operate due to norms of operation. Also, the prayer for payment of capacity charges is identical to both these Petitions.

(d) The question as to whether such unit could operate or not, what would be the norms of operation and whether capacity charges would be payable are to be necessarily considered only with / after the disposal of Petition Nos. 86/MP/2016 & 91/MP/2016.

(e) The judgment cited by the Petitioner as regards tagging in fact completely support the contentions of the respondents that the four petitions are required to be clubbed together. Even the comparative table in the submissions of the Petitioner prove the similarity between the present Petition and Petition No. 33/MP/2016. The table supports the stand of the Respondents rather than that of the Petitioner.

Accordingly, the Respondents have submitted that the present Petition may be clubbed and heard with Petition No. 33/MP/2016 and batch.

8. The learned counsel for the Respondents BRPL & BYPL during the hearing prayed that the present Petition may also be clubbed with Petition No. 33/MP/2016 and batch Petitions since these petitions relate to the same generating station and that the prayer of the Petitioner are based on the DPCC's directions not to operate and / or inability to operate the units of the generating station due to emission norms resulting in Change in law and associated recovery of capacity charges during the period when the same were not in operation. The prayer for clubbing of the present Petition with Petition No. 33/MP/2016 was strongly objected to by the learned counsel for the Petitioner.

Analysis & decision

9. The question which emerges for consideration is whether the present Petition is required to be clubbed with Petition No. 33/MP/2016 and batch Petitions. The generating station with a total capacity of 705 MW comprises of three units of 100 MW each in Stage-I (de-rated to 95 MW) and 2 units of 210 MW each in Stage-II.



The dates of commercial operation of the different units in Stage-I and Stage-II are as follows:

Stage-I	Stage-II
Unit-I: 1.11.1973	Unit-IV: 17.3.1980
Unit-II: 1.9.1974	Unit-V: 1.4.1982
Unit-III: 1.4.1975	

10. The capacity allocation and the details of PPAs entered into by the Petitioner in respect of the generating station are as under:

Respondent Nos.	Entity	PPA dated	Capacity allocation (MW) (as on date)
1	BRPL	5.6.2008	236
2	BYPL	5.6.2008	118
3	TPDDL	8.5.2008	176
4	NDMC	6.5.2008	125
5	MES	31.7.2008	50

11. Apart from Petition Nos.14/MP/2017 and 33/MP/2016, the Respondents, BRPL and TPDDL have filed Petition Nos. 86/MP/2016 and 91/MP/2016 respectively. The Petitioner during the hearing of Petition No. 33/MP/2016 on 30.6.2016 had requested for clubbing of Petition Nos. 86/MP/2016 and 91/MP/2016 with Petition No. 33/MP/2016 which was allowed by the Commission and all three petitions were directed for listing and hearing together.

12. The prayer of the Petitioner in the present Petition has been extracted in para 1 above. The prayer of the Petitioner in Petition No. 33/MP/2016 is extracted herein below:

“(a) Declare that the change by the DPCC in the norms for emission of particulate matter contained in the Consent to operate dated 2.1.2014 as a change in law in accordance with the PPAs;

(b) Direct the Respondents to make the payment of the fixed charges incurred by the Petitioner from 31.12.2015 for all 4 units till they are permitted to operationalize”



13. In Petition No. 86/MP/2016, BRPL has made the following prayers:

“(a) Consider the difficulties submitted in the petition and direct for phasing out the closure and / or decommissioning of specified units of Badarpur Thermal Power station (BTPS) Stage-I (3 x 95 MW) and direct to withdraw the selected units from service;

(b) Pass directions to revise the norms of operation of BTPS for 2 x 210 MW only on account of closure / decommissioning of 3 x 95 MW units of BTPS;

(c) Pass directions for determination of AFC for only 2 units of BTPS Stage-II (2 x 210 MW) thereby excluding Stage-I (3 x 95 MW);

(d) Recommend to the Central Govt that the coal linkage presently reserved for (3 x 95 MW) of BTPS be re- allocated to APCPL Jhajjar;

(e) Respondent No. 5 ensure that there will be no transmission constraints due to phasing out or decommissioning of the 3 units of 95 MW of BTPS”

14. Petition No. 91/MP/2016, TPDDL has prayed for the following:

“(a) Hold and declare that due to shut down of three units of 95 MW and one unit of 210 MW from 1st Jan, 2016 to 15th March, 2016, the SHR of the BTPS station stands revised;

(b) Re-determine the SHR of the subject generation project BTPS w.e.f the date of closure of the three/ four units of BTPS; and

(c) Direct Respondent No. 1, NTPC to recover charges towards the off take of power by beneficiaries from BTPS station as per the revised tariff determined by this Hon'ble Commission w.e.f the date of closure of the three/ four units of BTPS and refund the excess charges claimed with interest thereof @ 15% per annum”

15. In the present Petition, the Petitioner has pointed out that the DPCC letter dated 6.11.2016 directing the closure of all the units of Stage-II of the generating station up to 16.11.2016 and later on till 31.1.2017 in the light of severe ambient air pollution in Delhi has in effect overridden the Consent to Operate granted to the Petitioner and the same amounts to Change in law for which the Petitioner is entitled for recovery of capacity charges from the Respondents during the period of shut down. Whereas, in Petition No. 33/MP/2016, the Petitioner has pointed out that the change by DPPC in the emission norms from 150 mg/Nm³ to 50 mg/Nm³ vide its direction dated 31.12.2015 had resulted in the shutdown of four out of the five units (three units of Stage-I and one unit of Stage-II) of the generating station and the same amounts to Change in law for which the Petitioner is entitled to



recover capacity charges from the Respondents till Stage-II is permitted to be operationalized.

16. It is evident from the above that though the Petitioner, in both the Petitions (Petition No. 14/MP/2017 and Petition No. 33/MP/2016), has prayed for a declaration that the directions of DPCC had resulted in the closure of the said units of the generating station and is therefore a Change in law event enabling the Petitioner to recover the capacity charges till it was permitted to operationalize, the cause of action in both the Petitions are different. In other words, though the Petitioner in these Petitions is aggrieved by the directions of DPCC resulting in the closure of operation of the units of the generating station for which it has claimed relief under change in law with associated recovery of capacity charges, the grounds for the directions are different in both the Petitions. In our considered view, the 'cause of action' in these Petitions (Petition No. 14/MP/2017 and Petition No.33/MP/2016) has arisen on account of the directions of DPCC based on different grounds. In this backdrop, the issues raised in the present Petition are independent of the issues raised in Petition No. 33/MP/2016.

17. The Respondents BRPL & BYPL have also submitted that the present Petition ought to be clubbed not only with Petition No. 33/MP/2016 but also with Petition Nos. 86/MP/2016 and 91/MP/2016. In support of this, the Respondents have contended that the question of whether such unit could operate or not, what would be the norms of operation and whether capacity charges would be payable can be considered only with/after the disposal of Petition Nos. 86/MP/2016 and 91/MP/2016. The Petitioner has objected to the above and has submitted that the change in law claim in the present Petition relate to the period from 6.11.2016 to 14.3.2017 and only in respect of Stage-II units of the generating station and hence



the present Petition may be independently adjudicated without clubbing with Petition No. 33/MP/2016 and batch.

18. The matter has been examined. As stated, Petition No. 86/MP/2016 has been filed by the Respondents BRPL & BYPL for a direction for phasing out the closure and / or decommissioning of specified units of Stage-I of the generating station, for revision of the norms of operation of Stage-II units, on account of closure / decommissioning of Stage-I units; for determination of Annual fixed charges for only Stage-II units and for ensuring that there would be no transmission constraints due to phasing out or decommissioning of the Stage-I units. Petition No. 91/MP/2016 has been filed by the Respondent, TPDDL for declaration and determination of Station Heat Rate (SHR) with effect from the date of closure of three/four units of the generating station and for recovery/refund of the excess charges as per revised tariff to be determined by the Commission. These Petitions filed by the Respondents have been clubbed with Petition No. 33/MP/2016 on 30.6.2016 at the request of the Petitioner. Considering the fact that the issues raised by these Respondents relate to the closure/ decommissioning of Stage-I units and the re-determination of annual fixed charges and SHR of Stage-II units of the generating station consequent upon the said closure/ decommissioning, which are different from issues raised in the present Petition, we do not find sufficient justification to club the present Petition with Petition Nos. 86/MP/2016 and 91/MP/2016.

19. Accordingly, the present Petition (Petition No. 14/MP/2017) would be heard independently. However, in order to take a holistic view in respect of the generating station, we direct that Petition No.14/MP/2017 shall be listed along with Petition Nos. 33/MP/2016, 86/MP/2016 and 91/MP/2016 for hearing, on the



same day. Parties are directed to complete their pleadings in these Petitions with copy to the other, by 27.4.2018.

20. The Petitions shall be listed for hearing on **15.5.2018**.

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

Sd/-
(A.S. Bakshi)
Member

Sd/-
(A. K. Singhal)
Member

Sd/-
(P. K. Pujari)
Chairperson

