

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.23/GT/2017

with I.A No. 31 of 2017 and I.A No. 58 of 2018

Coram:

**Shri P.K.Pujari, Chairperson
Dr. M.K.Iyer, Member**

Date of Order: 18th September, 2018

In the matter of

Approval of tariff of Nabinagar Thermal Power Project (4 x 250 MW) for the period from date of commercial operation of Unit-I to 31.3.2019

And

In the matter of

Bhartiya Rail Bijlee Company Limited
Nabinagar Thermal Power Project,
Post- Kahira, Distt- Aurangabad
Bihar- 824303

.....Petitioner

Vs

1. East Central Railway
Hazipur, Bihar

2. North Bihar Power Distribution Company Limited
Vidyut Bhawan, Bailey Road, Patna- 800001

3. South Bihar Power Distribution Company Limited
Vidyut Bhawan, Bailey Road, Patna- 800001

.....Respondents

Parties present:

Ms. Swapna Seshadri, Advocate, BRBCL
Ms. Parichita Chowdhury, Advocate, BRBCL
Shri Sitesh Mukherjee, Advocate, ECR
Shri Deep Rao, Advocate, ECR
Shri R.B.Sharma, Advocate, BSPHCL
Shri Prashant Chaturvedi, BRBCL
Shri Vijay Gulati, BRBCL
Shri Vipul Srivastava, BRBCL
Shri R.K.Goyal, ECR



ORDER

Bharatiya Rail Bijli Company Limited (BRBCL) is a Joint Venture Company of NTPC limited and Indian Railways with shareholding of NTPC (74%) and Indian Railways (26%). The Petitioner has submitted that BRBCL is a generating company as defined under the Electricity Act, 2003 and is a company controlled by the Central Government. The Petitioner has submitted that Government of India vide letter dated 30.6.2007 allocated 90% power generated from the project to the Indian Railways and the remaining 10% power to other States and by letter dated 2.7.2010 was allocated to the State of Bihar. BRBCL entered into Power Purchase Agreement dated 16.12.2010 with East Central Railway (ECR) for share of Indian Railways and Power Purchase Agreement dated 22.1.2010 with Bihar State Electricity Board for share of Bihar for supply of electricity from NTTP. After unbundling of Bihar State Electricity Board, two distribution companies have been created, namely, North Bihar Power Distribution Company Limited and South Bihar Distribution Company Limited and both these distribution companies have been arrayed as respondents. The petition was heard on various dates and the Commission had directed the Petitioner to file additional information and the parties to complete their pleadings in the matter.

2. Petition No. 23/GT/2017 has been filed by the petitioner, BRBCL for determination of tariff of Nabinagar Thermal Power Plant (4 x 250 MW) (hereinafter 'the generating station') for the period from COD of unit-I i.e. from 15.1.2017 to 31.3.2019 in terms of the CERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 (the 2014 Tariff Regulations).



I.A No. 31 of 2017

3. Interlocutory Application No. 31 of 2017 has been filed by ECR, the Respondent No.1 in the main petition (hereinafter referred to as “Applicant”) seeking disposal of the petition qua the Applicant/ECR. The Applicant has submitted that ECR entered into a Joint Venture Agreement dated 6.11.2007 with NTPC Ltd for setting up a Captive Generating Station with four units of 250 MW each at Nabinagar in the State of Bihar. Subsequent to the execution of the said agreement, BRBCL was established as a Joint Venture Company of NTPC Limited and Indian Railways. The Applicant has submitted that BRBCL and Railways entered into a Bulk Power Purchase Agreement (BPPA) on 16.12.2010 for bulk power purchase of electricity generated from the captive generating station located at Nabinagar to the captive user, ECR. As per the said Agreement, 90% of the capacity of the generating station will be for captive use of Railways and balance 10% were allotted to the Bihar Utilities by Ministry of Power vide letter dated 2.7.2010. The Applicant has submitted that the BPPA is void *ab initio* in its present form on account of the fact that Eastern Central Railway has been referred to as a captive user in the BPPA and therefore, the generating station is not amenable to the jurisdiction of the Central Commission in terms of Section 79(1)(a) read with Section 62(1)(a) of the Electricity Act, 2003. The Applicant has further submitted that Articles 5.1 and 5.2 of the BPPA which provide for determination of tariff by this Commission for payment by Indian Railways is hit by Section 23 of the Indian Contract Act, 1872. The Applicant has submitted that in the present case, consideration clause is not implementable as Eastern Central Railways is the captive user and in the absence of valid consideration, the contract is not enforceable in terms of Section 10 read with Section 25 of the Indian Contract Act,



1872. The Applicant has also submitted that the present petition filed by BRBCL is misconceived and no tariff can be determined under this petition. The Applicant has stated that the Commission could be approached for determination of tariff and related matters after the parties agree on fresh terms and conditions between ECR and BRBCL and as on date the BPPA is not enforceable. Accordingly, the Applicant has submitted that the petition is liable to be dismissed.

4. The matter has been considered. The main contention of the Applicant/ECR is that BRBCL and Railways entered into a BPPA dated 16.12.2010 for bulk power purchase of electricity generated from the captive generating station located at Nabinagar to the captive user ECR. The Applicant has submitted that the BPPA is void ab initio on account of the following reasons

(a) The Applicant/Respondent No. 1/ECR has been referred to as a captive user of BRBCL in the BPPA.

(b) Articles 5.1 and 5.2 of the BPPA refer to the consideration of the said contract and determination of tariff by the Commission. Since there is no provision for determination of tariff by the Commission for a captive power plant supplying power to its captive user, these articles of the BPPA are hit by the Section 23 of the Contract Act, 1872.

(c) The BPPA is not enforceable in the absence of a valid consideration as there is no sale of electricity by a captive generating plant to its captive user.

5. It is noticed that in Petition No. 24/MP/2017 (BRBCL V ECR & ors) filed by the Petitioner for a direction to ERLDC/ERPC to accept the DC as given by the generating station, the Applicant/ECR filed I.A. No 20/2017 and had raised the same contentions as above. However, the Commission by its interim order dated 29.6.2017 disposed of the said IA rejecting the aforesaid submissions of ECR as under:

"21. In the light of the order of the Commission as well as the Appellate Tribunal as quoted above, Indian Railways has been vested with the authority to undertake distribution and



supply of electricity in terms of the Railways Act, 1989 and Electricity Act, 2003. In the teeth of the above legal position, the Applicant cannot take a different stand to claim that it is a bulk consumer and Nabinagar TPS is a captive power plant of East Central Railways. BRBCL has entered into BPPA dated 16.12.2010 with Indian Railways and PPA dated 22.1.2010 with Bihar Electricity Board and therefore, Nabinagar TPS has the contractual arrangement to supply power to distribution licensees in more than one State. In terms of section 79(1)(a) read with section 62(1)(a) of the Act, the tariff of BRBCL which is jointly owned by Indian Railways, a Department of Government of India and NTPC Limited, a Central Generating Company owned and controlled by Ministry of Power, Government of India, shall be determined by the Central Commission. Therefore, we do not accept the contention of the Applicant that the determination of tariff of Nabinagar TPS is not amenable to the jurisdiction of this Commission.

22. The Applicant has submitted that Articles 5.1 and 5.2 of the BPPA are hit by Section 23 of the Contract Act, 1872 and therefore, are void ab initio and not implementable in the absence of a valid consideration in accordance with Section 10 read with Section 25 of the Contract Act, 1872. We have considered the submission of the Applicant. Section 10 of the Indian Contract Act provides that all agreements are contracts if they are made by free consent of parties competent to contract, lawful consideration and with a lawful object and are not hereby expressly declared to be void. The BPPA has been entered into by BRBCL and Indian Railways and there is nothing on record to prove that the agreement was not made with free consent. The object of the agreement is to supply power from the Nabinagar TPS to Indian Railways which is a legitimate activity under the Electricity Act, 2003 and the consideration for supply of power is the tariff determined by this Commission. We have already held that the tariff determination for supply of power from Nabinagar TPS to Indian Railways is amenable to the jurisdiction of this Commission. Since the BPPA has been made with a lawful object and valid consideration, the provisions of Section 23 and Section 25 of the Indian Contract Act are not applicable.

23. In the light of the above discussion, the prayer of the Applicant in IA No. 20 of 2017 for disposal of the petition qua the Applicant/Respondent No. 1/ECR is rejected. The IA is disposed of accordingly.

6. In line with the above decision, the prayer of the Applicant in IA No. 31 of 2017 for disposal of the petition qua the Applicant/Respondent No. 1/ECR is rejected. The said IA is disposed of accordingly.

I.A No. 58 of 2018

7. The Respondent No.1/ECR has also filed I.A No. 58/2018 seeking issuance of directions to the Petitioner, BRBCL to place on record necessary documents and information as per Annexure R-I enclosed with the application. The Respondent has submitted that numerous documents essential to the adjudication of the petition has not been placed on record by the petitioner as mandated under the 2014 Tariff Regulations. It has also submitted that in the absence of these documents/details, it is not possible for the Commission to ascertain the veracity of the claims made



by the petitioner. Accordingly, the Respondent has tabulated the details of the information/documents, enclosed as Annexure R-I to the application and has prayed that the Commission may issue appropriate directions to the petitioner to furnish the said particulars expeditiously.

8. During the hearing, the learned counsel for the Respondent No.1/ECR sought directions on the petitioner to furnish the data / documents as per list enclosed by the Petitioner. In response, the learned counsel for the petitioner clarified that it has filed all particulars / documents along with the tariff petition in terms of the provisions the 2014 Tariff regulations with copies to the respondents. Learned counsel, however, agreed to share any other available document with respondent No.1. This was agreed to by the learned counsel for the Respondent No. 1/ ECR. Accordingly, the Petitioner is directed to furnish copies of the relevant documents available with it to the Respondent No. 1 / ECR. I.A No. 58/2018 is disposed of in terms of above.

Petition No. 23/GT/2017

9. The Petitioner is directed to submit, on affidavit, the following information on or before 3.10.2018, with advance copy to the Respondents:

- (i) Revised Form- 9E & 9F to include position as on COD of Unit-I, 31.3.2017, COD of Unit-II and 31.3.2018;
- (ii) Revised Form-13 D to include position as on scheduled COD of Unit-II;
- (iii) Statement showing applicable rate of interest along with changes in respect of each loan;
- (iv) Reconciliation of cumulative cash expenditure as on COD of Units-I & II with respective auditor certified financial statements;
- (v) Reconciliation of capital cost claimed as on COD of Units-I & II with respective auditor certified financial statements;



(vi) Since the anticipated COD of Unit-III has already elapsed, the status of actual COD; and

(vii) In case actual COD has occurred, all above stated forms need to provide details on Unit-III COD also.

10. The Respondents shall file their replies by 10.10.2018, on affidavit, with copy to the petitioner, who shall file its rejoinder, if any, by 17.10.2018. Petition No. 23/GT/2017 shall be listed in due course for which separate notices shall be issued to the parties. Pleadings in the matter shall be completed by the parties within the due dates mentioned.

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

Sd/-
(P.K.Pujari)
Chairperson

