

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**I.A. No. 100/IA/2018**  
**in**  
**Petition No. 275/MP/2018**

**Coram:**

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

**Date of Order : 26.11.2019**

**In the matter of:**

Interlocutory Application under Section 79(1) of the Electricity Act, 2003 for seeking dismissal of the Petition under Section 79 of the electricity Act.

**AND IN THE MATTER OF:**

Tata Power Trading Company Limited  
Corporate Centre, 'A' Block,  
34, Sant Tukaram Road,  
Carnac Bunder,  
Mumbai 400 009

**...Petitioner**

Versus

SKS Power Generation (Chhattisgarh) Ltd.  
B-501, Elegant Business Park,  
Andheri Kurla Road,  
J.B. Nagar, Andheri – (E),  
Mumbai – 400 059

**...Applicant/Respondent**

**Parties Present :**

Shri Niraj Malhotra, Senior Advocate, SKPGCL  
Shri Matrugupta Mishra, Advocate, SKPGCL  
Shri Ambuj Dixit, Advocate, SKPGCL  
Shri Amit Kapoor, Advocate, TPTCL  
Ms. Aparajita Upadhyay, Advocate, TPTCL  
Ms. Sarika Jerath, Advocate, TPTCL  
Shri R. Abhijeet, Advocate, TPTCL



## **ORDER**

Tata Power Trading Company Limited (hereinafter referred to as "TPTCL") filed Petition No. 275/MP/2018 against SKS Power Generation (Chhattisgarh) Ltd. (hereinafter referred to as "SPGCL") under Section 79 of the Electricity Act, 2003 read with Article 15 of the Power Purchase Agreement dated 13.12.2011 for setting aside the alleged unlawful and illegal termination of Purchase Power Agreement (PPA) dated 24.8.2017 executed between TPTCL and SPGCL, by SPGCL. TPTCL also prayed for specific performance of the PPA in terms of Section 10 of the Specific Relief Act, 1963 and recovery of damages and losses alongwith interest due to for breach of contractual obligations.

2. SPGCL has filed the present Interlocutory Application No.100/IA/2018 for dismissal of Petition No. 275/MP/2018 filed by TPTCL on the ground that the petition is not maintainable as the present dispute is purely a commercial dispute involving private arrangement between two private bodies and the same is not covered under Section 79 of the Electricity Act, 2003 ('the Act').

### **Background**

3. The Petitioner, TPTCL, an electricity trader as per Section 2(26) of the Act, had entered into a PPA dated 13.12.2011 with SPGCL, operating a thermal power generating plant at Raigarh in the State of Chhattisgarh, for selling 137.50 MW of Power from each unit i.e. Unit-1 and Unit-2 under Phase-I and Unit-3 and Unit-4 under Phase-2 of the Project, aggregating to 550 MW, for a period of 15 years from 13.12.2011.



4. Pursuant to the terms of the PPA with SPGCL dated 13.12.2011, TPTCL entered into the following arrangements for sale of electricity: -

(a) Supply of 250 MW to Uttar Pradesh Power Corporation Ltd. (“**UPPCL**”) in terms of the Letter of Intent (“**LoI**”) dated 15.07.2017 for the period from 1.8.2017 to 30.09.2017;

(b) Supply of 90 MW to Brihan Mumbai Electric Supply & Transport Undertaking (“**BEST**”) in terms of the LoI dated 19.06.2017 for the period from 1.7.2017 to 30.9.2017;

(c) Supply of 180 MW to Maharashtra State Electricity Distribution Company Ltd. (“**MSEDCL**”) in terms of the letter of intent dated 7.8.2017 for the period 8.8.2017 to 17.8.2017.

5. TPTCL has submitted that it participated in the Tenders/RFP in respect of the above arrangements with UPPCL, MSEDCL and BEST as per authorization given by SPGCL and on being successful in the bids, LOIs were issued in its favour. TPTCL has further submitted that SPGCL cited certain force majeure events for its inability to achieve COD of first unit within scheduled period and therefore, suggested that TPTCL should arrange for alternate source of supply of power to meet the contractual obligations arising from Lols issued by UPPCL, MSEDCL and BEST. It has been submitted that accordingly, TPTCL had to procure power from alternate sources even at relatively higher costs for which SPGCL had given confirmation in the said cases involving supply of power to UPPCL, MSEDCL and BEST.



6. TPTCL has submitted that SPGCL issued a notice dated 24.8.2017 under Article 2.2 read with Article 13 and Schedule E of the PPA dated 13.12.2011 for termination of the PPA dated 13.12.2011 alleging that the TPTCL had failed to tie-up 70% of the power under the long term PPAs and that TPTCL had suppressed material fact related to Clause 13.1 of the RFP with UPPCL. It has been submitted that Clause 13.1 of the RFP with UPPCL inter-alia provided for UPPCL to cause the selected bidder to execute the PPA within the prescribed period of 15 days from the close of the e-Reverse auction. SPGCL has submitted that in the backdrop of the delayed COD of its first Unit, said clause 13.1 of the RFP with UPPCL presented an opportunity for SPGCL to exit the contractual obligations with UPPCL as the said Lol was not issued by UPPCL within the prescribed 15 days' time period specified under the said Clause. Subsequently, vide notice dated 5.4.2018, TPTCL invoked Buyer Preliminary Default Clause under Article 13.3.1 of the PPA inter-alia on the grounds of failure of SPGCL to achieve COD within the specified period which resulted in losses in terms of revenue opportunities to TPTCL, cost of arranging alternate power for supply to BEST, lost opportunities to TPTCL to sell power on power exchange from 27.11.2014 and pending dues of fees for Phase-2 and MSTC fees for participating in UPPCL and MSEDCL tenders.

7. In view of the aforesaid disputes, TPTCL filed Petition No. 275/MP/2018 for setting aside the SPGCL's notice dated 24.8.2017 for termination of PPA dated 13.12.2011 while claiming damages for ₹94,34,12,727/- (inclusive of Interest @ 15% per annum) from the generating company.



## **Interlocutory Application**

8. During the hearing in Petition No. 275/MP/2018 on 19.12.2018, learned counsel for SPGCL submitted that the instant Petition is not maintainable due to the lack of jurisdiction of the Commission to adjudicate a private dispute between an electricity trader and a generating company and therefore, Petition No. 275/MP/2018 may be dismissed on the grounds of maintainability alone. Learned counsel for TPTCL opposed the contentions of counsel for SPGCL on the grounds that the opposition to the jurisdiction of the Commission is contrary to the provisions to the Act, judgment in Energy Watchdog case as well as the understanding of TPTCL in its letter dated 4.1.2018.

9. In furtherance to the aforesaid contentions challenging jurisdiction of the Commission in the present matter, SPGCL filed the instant Interlocutory Application on the grounds of lack of jurisdiction of the Commission. Further, in support of the contention in the I.A., SPGCL filed Written Submissions vide affidavit dated 8.2.2019 raising issue of maintainability in Petition No. 275/MP/2018 as under: -

a) The dispute adjudicatory power of the Commission emanates from Section 79(1)(f) of the Act which provides for adjudication of disputes involving generating companies or transmission licensee with regard to matters connected with clauses (a) to (d). However, the referred jurisdictional provisions are not attracted in the present case as neither of the parties to the present dispute is owned by the Central Government nor is seeking any regulation of tariff. Further, there is no sale of power by the SPGCL to a distribution licensee through TPTCL and as per Section 49 of the Act, the tariff/ rate mutually agreed between TPTCL and SPGCL is beyond Section 62 and Section 79(1)(b) of the



Act. Further, in the present case, there is no dispute with regard to regulation of inter-State transmission of electricity. Moreover, the present Petition is not for determination of transmission tariff under Section 79(1)(d). In view of the above, SPGCL has contended that none of the sub-sections (a) to (d) of Section 79(1) are attracted in the present case and therefore, the Commission does not have the jurisdiction to adjudicate the instant petition under Section 79(1)(f) of the Act.

b) In the Energy Watchdog judgment of the Hon'ble Supreme Court in Civil Appeal Nos. 5399-5400 of 2016, it is clearly specified that in order to fall under Section 79(1)(b), supply of power to a "distribution" licensee is material, which is not the case in the present petition.

c) The disputes involving electricity traders are outside the ambit of the adjudicatory powers of the Commission. It is submitted that Section 79(1)(e) of the Act is related to issue of licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations. However, the same has been specifically excluded from adjudicatory powers of the Commission as specified under Section 79(1)(f) of the Act. Thus, the jurisdictional fact which is necessary is that the dispute should relate to any of the provisions under Section 79(1)(a) to (d). However, the same is not in existence in the present case. Moreover, the present dispute is a commercial dispute involving two private parties which cannot be adjudicated by the Commission.



d) The findings of the Commission in Petition No. 159/MP/2017 are not applicable in the present case on account of there being no back to back arrangement of SPGCL with any distribution licensee.

e) TPTCL has placed reliance on SPGCL's letter dated 4.1.2018 to infer that SPGCL has already acceded to the jurisdiction of the Commission. However, SPGCL has submitted that it is a settled principle of law that parties cannot confer jurisdiction upon a Court of Law by private agreement, which the said Court does not possess under the enabling Law.

10. SPGCL has made the following prayers in the instant Interlocutory Application.

"(a) Hold and declare the present Petition preferred by the Petitioner under Section 79 of the Electricity Act, 2003 as not maintainable and, accordingly dismiss Petition no. 275/MP/2018;

(b) Pass such further or other order(s) as this Hon'ble Commission may deem fit in the facts and circumstances of the case."

### **Submissions of TPTCL**

11. TPTCL vide affidavit dated 9.1.2019 has refuted the submissions of SPGCL and has contended that the Central Commission has the jurisdiction to entertain the instant Petition under Section 79 of the Act on the following grounds:-

a) The Hon'ble Supreme Court in Energy Watchdog judgment has held that whenever there is generation and supply of electricity to more than one State, the Central Commission will have jurisdiction. TPTCL has further submitted that Section 2(70) of the Act provides that "*supply*", *in relation to electricity, means the sale of electricity to a licensee or consumer*, which includes a trading licensee. Thus, supply of power *ipso facto* to two or more States is sufficient to



attract Section 79(1)(b). TPTCL has therefore argued that, SPGCL's interpretation of the Energy Watchdog judgment that the Commission shall have jurisdiction only when the power is supplied to a distribution licensee is misconceived.

b) The sale of power by a generating company to distribution licensees through a trading licensee has been held to be a supply by generating company to distribution licensee directly attracting regulatory jurisdiction of Electricity Regulatory Commissions. In this reference, TPTCL has placed reliance on Hon'ble High Court of Delhi's Judgment dated 15.5.2012 in PTC India Ltd. v. Jaiprakash Ventures Ltd. [2012(130) DRJ 351] and Hon'ble Appellate Tribunal for Electricity's Judgment dated 31.8.2016 in PTC India Ltd. Vs Uttarakhand ERC & Ors. [2016 ELR (APTEL) 1176]. Further, order of the Commission dated 5.11.2018 in Petition No. 159/MP/20117 is also relied upon by the TPTCL where it is inter-alia held that when power is supplied by a generating company to a distribution licensee through the intervention of a trading licensee for ultimate consumption of consumer, the tariff would be subject to the regulatory jurisdiction of the Regulatory Commission. TPTCL has submitted that same approach has been followed by the Commission in order dated 18.9.2018 in Petition No. 160/MP/2017 (TPTCL & JITPL Vs. WBSEDCL) and Order dated 17.9.2018 in Petition No. 158/MP/2017 (TPTCL & JITPL Vs. UPPCL). In this reference, SPGCL is a generating company having a composite scheme for supply of power to multiple States through TPTCL namely, Maharashtra, Bihar, Chhattisgarh, Uttar Pradesh (Noida Power), Telangana and Uttarakhand. Therefore, this Commission has the jurisdiction to adjudicate the present Petition.





c) The dispute raised in TPTCL's Petition pertains to non-performance of material obligations by SPGCL and specific performance in relation to the PPA dated 13.12.2011 and the back-to-back arrangement for supply of power to the States of Uttar Pradesh and Maharashtra. Therefore, the present Petition is maintainable before this Commission in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act.

d) The powers under Section 79(1)(b) are wide and plenary and includes the present dispute.

e) That Section 79(1)(f) of the Electricity Act provides for adjudicatory powers of the Central Commission to include disputes involving generating companies or transmission licensee with regard to matters connected with clauses (a) to (d) and the present case clearly pertains to a dispute involving a generating company. Since SPGCL is within the regulatory jurisdiction of the Commission on account of supply of power to more than one State, the Commission is the appropriate forum.

f) Section 79(1)(f) of the Act pertaining to the Central Commission may be invoked in any case where the dispute *involves* a generating company whereas, Section 86(1)(f) pertaining to the jurisdiction of State Commission may be invoked only in case a dispute *between* generating company or a licensee. The present case is within the larger ambit of Section 79(1)(f) and is covered within the jurisdiction of the Central Commission.

g) SPGCL vide letter dated 4.1.2018 had itself acceded to the jurisdiction of the Commission. However, subsequently, as an afterthought, SPGCL is seeking to



take a contrary stand by claiming that the Petition filed by TPTCL is not maintainable under Section 79(1)(f) of the Electricity Act.

### **Analysis and Decision**

12. We have considered the submissions of SGPCL and TPTCL. SGPCL has filed the instant Interlocutory Application on grounds that the main Petition No. 275/MP/2018 is not maintainable in law due to the lack of jurisdiction of the Commission to adjudicate a private dispute between an electricity trader and a generating company. SPGCL has submitted that the dispute adjudicatory power of the Commission emanates from Section 79(1)(f) of the Act which provides for adjudication of disputes involving generating companies or transmission licensee restricted to matters connected with clauses (a) to (d) of Section 79(1) of the Act, which is not the case in the present matter. SPGCL has further argued that in the Energy Watchdog judgment, Hon'ble Supreme Court has held that in order to fall under Section 79(1)(b), supply of power to a "distribution" licensee is material, which is not the case in the present petition.

13. TPTCL has refuted the aforesaid contentions of the SPGCL and has mainly submitted that SPGCL, whose project is located in State of Chhattisgarh, has a composite scheme for generation and sale of electricity through TPTCL in Maharashtra, Bihar, Chhattisgarh, Uttar Pradesh (Noida Power), Telangana and Uttarakhand and therefore, the Commission has jurisdiction to adjudicate the dispute in the present petition in terms of Section 79(1)(b) of the Electricity Act, 2003.



14. The issue that arise for our consideration in the present case is whether in the case of SPGCL, there exists a composite scheme for generation and supply of power to more than one State in terms of Section 79(1)(b) of the 2003 Act.

15. In so far legal provisions related to SPGCL is concerned, clause (b) of Section 79(1) of the Act provides that Central Commission shall “regulate the tariff of generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State”. Further, the Hon’ble Supreme Court in the judgment dated 11.4.2017 in Energy Watchdog v CERC & Ors. [(2017 (4) SCALE 580)] has explained the scope of composite scheme and the jurisdiction of this Commission in respect of the generating companies having composite scheme as under.

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

“24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”.



This makes it clear that the expression “composite scheme” does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”

16. Since SPGCL has entered into contractual obligations for supplying power to multiple States through PPA with TPTCL and binding arrangements by participating in the tenders and RFP floated by various distribution entities in a number of States, its generating station has a “composite scheme” for generation and sale of power to more than one State. Accordingly, this Commission has the jurisdiction to regulate the tariff of the generating station of SPGCL under Section 79(1)(b) and therefore, also to adjudicate the disputes raised in the present Petition in terms of Section 79(1)(f) of the 2003 Act. Accordingly, we hold that the Petition filed by TPTCL before the Commission to adjudicate the disputes with regard to contractual obligations under the PPA dated 13.12.2011 is maintainable under Section 79(1)(b) read with section 79(1)(f) of the 2003 Act.

17. I.A. No. 100 of 2018 in Petition No. 275/MP/2018 is disposed of in terms of above. The matter shall be listed for further hearing, for which a separate notice shall be issued.

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

sd/-  
**(P. K. Pujari)**  
**Chairperson**

