

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 15/RP/2019
in Petition No. 327/MP/2018**

Coram:
Shri P.K. Pujari, Chairperson
Dr. M. K. Iyer, Member
Shri I.S.Jha, Member

Date of order: 23rd December, 2019

In the matter of

Review Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of order dated 1.7.2019 in Petition No. 327/MP/2018.

**And
In the matter of**

Dhariwal Infrastructure Limited (DIL)
CESC House,
Chowringhee Square,
Kolkata – 700 001.

... Review Petitioner

Vs.

Tamil Nadu Generation and Distribution Corporation Limited
6th Floor, Eastern Wing
144, Anna Salai,
Chennai – 600 002

...Respondent

Parties Present:

Shri Sanjay Sen, Senior Advocate, DIL
Ms. Diviya Chaturvedi, Advo
Ms. Sishti Rai, Advocate, DIL
Shri Aveek Chaterjee, DIL
Shri Ashwin Ramanathan, Advocate for Objector, Sh. Awasthi



ORDER

The Review Petitioner, Dhariwal Infrastructure Limited has filed the present Review Petition under Section 94(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 seeking review of the order dated 1.7.2019 in Petition No. 327/MP/2018 (hereinafter referred to as 'impugned order') on limited and specific observations of this Commission with respect to Section 64(5) of the Act made at paragraph 28 of the impugned order along with the following prayers:

“(i) Admit the present Review Petition; and

(ii) Review paragraph 28 of the Impugned Order dated 01.07.2019 passed in Petition No. 327/MP/2018 in light of the submissions made by the Review Petitioner hereinabove.”

Background of the case

2. The Review Petitioner has set up a 600 MW (2×300 MW) Thermal Power Project (Project) at Tadali, District Chandrapura in the State of Maharashtra. Unit-I and Unit-II have been declared under commercial operation on 11.2.2014 and 2.8.2014 respectively. The Review Petitioner has entered into the following long-term Power Purchase Agreements (PPAs) for supply of power from the Project:

(i) Supply of 100 MW gross power in terms of PPA dated 27.11.2013 (as amended on 20.12.2013) entered into with Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO). The said PPA has been entered into pursuant to the competitive bidding process conducted under Section 63 of the Act.

(ii) Supply of 170 MW gross power in terms of PPA dated 26.9.2014 entered into with Noida Power Company Limited (NPCL), Uttar Pradesh. The said PPA has been



executed based on the tariff determined under Section 62 of the Act by Uttar Pradesh Electricity Regulatory Commission (UPERC), at the instance of both the parties, under Section 64(5) of the Act.

3. The Review Petitioner has filed Petition No. 327/MP/2018 under Section 79(1)(f) of the Act seeking compensation on account of expenditure incurred due to 'Change in Law' events in terms of Article 10.1.1 of the PPA with TANGEDCO dated 27.11.2013. The Commission vide order dated 1.7.2019 has only decided that the Petition No. 327/MP/2018 is maintainable and is yet to be heard on merits.

4. In the said Petition, the Review Petitioner had submitted that since it is supplying power to the States of Tamil Nadu and Uttar Pradesh, it has a composite scheme for generation and sale of power to more than one State. Therefore, the Commission has the jurisdiction to adjudicate the matter under Section 79(1)(b) read with Section 79(1)(f) of the Act. The Commission after consideration of the submissions of the Review Petitioner, TANGEDCO and Shri Awasthi (intervenor/ objector) decided that the Commission has jurisdiction and had observed that in the instant case, the generation and supply of power by the Petitioner involves three States i.e. Maharashtra where the plant is situated and Tamil Nadu and Uttar Pradesh where the power is supplied. Therefore, provisions of Section 64(5) of the Act requiring "involving the territories of two States" are not attracted in this case and thus, the case falls squarely under Section 79(1)(b) of the Act. Relevant portion of the impugned order is extracted as under:

"21. During the course of hearing, the learned counsel appearing for TANGEDCO submitted that in case the Petitioner is supplying power to two States, namely, Tamil Nadu and Uttar Pradesh, then this Commission should have the exclusive jurisdiction. On this basis, TANGEDCO objected to the continuation of Petitions filed by Petitioner before UPERC seeking change in law on similar grounds as have been raised in the present Petition. Sri Awasthi also raised similar contention and submitted that when the power is being supplied



from the same generating unit to both NPCL and TANGEDCO, then there is no basis for the Petitioner to approach the UPERC as well as this Commission claiming compensation under change in law. He further argued that when there is supply to two different States from the very same unit and all the supply being on inter-State basis, all issues would come up before this Commission. In this regard, learned counsel for TANGEDCO relied upon the Commission's order dated 6.6.2018 in Petition No. 305/MP/2015.

22. *Per contra*, the learned senior counsel for the Petitioner submitted that the Petitions before the UPERC have been filed pursuant to Section 64(5) of the Act. Learned senior counsel argued that Section 64(5) is an exception to Section 79(1)(b) since the language used in Section 64(5) is "notwithstanding anything contained in Part X" and Section 79(1)(b) falls in Part X of the Act. Therefore, the jurisdiction of the State Commission can be invoked under Section 64(5) of the Act in case where both the Distribution company and the generator agree to the same, notwithstanding that the jurisdiction is with the Central Commission.

23. In order to resolve this controversy, we have to examine the provisions of Section 64(5) of the Act which is extracted as under:

"(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor."

24. As per the above provision, the tariff for any inter-State supply, transmission or wheeling of electricity involving the territories of two States may upon application made by the parties intending to undertake such supply, transmission or wheeling may be determined by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor. It is pertinent to mention that in cases of inter-State supply, the jurisdiction of this Commission gets attracted.

25. The Petitioner has relied upon the observations of the Hon'ble Supreme Court in Energy Watchdog case with regard to the applicability of Section 64(5) in support of its action to approach UPERC for determination of tariff qua the PPA with NPCL. The Hon'ble Supreme Court in Energy Watchdog Case has observed as under:

"27. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter- State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases."

26. In the above para, the Hon'ble Supreme Court has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with



Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.

.....
28. *The Commission observes that in the instant case, the generation and supply of power by the Petitioner involves three States i.e. Maharashtra where the plant is situated and Tamil Nadu and Uttar Pradesh where the power is supplied. Therefore, provisions of Section 64(5) of the Act requiring “involving the territories of two States” are not attracted in this case and thus, the case falls squarely under Section 79 (1) (b) of the Act”*

5. Being aggrieved by the aforesaid decision of the Commission in respect of Section 64(5) of the Act (in particular para 28), the Review Petitioner has filed the present Review Petition on the following grounds:

(a) Present case of supply of 100 MW Contracted Capacity under TANGEDCO PPA relates to tariff discovered and adopted under Section 63 of the Act and accordingly, there was no occasion of invoking Section 64(5) of the Act which relates to determination of tariff under the cost-plus method under Section 62 read with Section 64 of the Act.

(b) The Commission in its order dated 22.6.2018 in Petition No. 171/MP/2016 in the case of KSK Mahanadi Power Company Limited vs. Madhyanchal Vidyut Vitran Nigam Ltd. & Ors., had observed that Section 64(5) of the Act has no application in cases of tariff discovered under competitive bidding process and adopted by the Commission under Section 63 of the Act.

6. The Review Petition was heard on admissibility. During the course of hearing, learned senior counsel for the Review Petitioner submitted that the issue before this Commission was not with respect to the jurisdiction of UPERC under Section 64(5) to adjudicate upon the disputes qua the supply of 170 MW power to NPCL but with respect to the jurisdiction of this Commission in respect of 100 MW supply made by Review Petitioner to TANGEDCO. Leaned senior counsel further submitted that the precise issue of



jurisdiction of UPERC under Section 64(5) of the Act is pending adjudication before the Appellate Tribunal in Appeal No. 185 of 2019. Learned senior counsel requested to clarify that the observation of the Commission at para 28 of the order dated 1.7.2019 is in respect to TANGEDCO PPA and not in respect of NPCL PPA.

7. On the other hand, learned counsel appearing on behalf of Shri Rama Shankar Awasthi, submitted that this Commission alone has the jurisdiction in the present matter. Learned counsel further submitted that UPERC has already exercised its jurisdiction with respect to the disputes qua the supply of 170 MW power to NPCL under Section 64(5) of the Act and has also issued orders determining the tariff for such supply, against which he has filed appeal no. 185 of 2019 before the Appellate Tribunal.

Analysis and Decision

8. We have considered the submissions of the parties and perused the impugned order and documents on record. The impugned order was passed on the issue of maintainability of Petition No. 327/MP/2018 filed by the Review Petitioner claiming the compensation on account of occurrence of 'Change in Law' events as per Article 10.1.1 of 100 MW Case-1 long-term Power Purchase Agreement dated 27.11.2013 (read with Addendum No. 1 dated 20.12.2013) entered into between the Review Petitioner and TANGEDCO.

9. This Commission in the impugned order held that the Petition filed by the Review Petitioner herein, is maintainable and that this Commission has jurisdiction to adjudicate the disputes raised in the Petition in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act.



10. Under Order 47 Rule 1 of CPC, a person aggrieved by order of a Court can file review on the following grounds:

(a) Discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.

(b) On account of some mistake or error apparent on the face of record.

(c) For any other sufficient reason.

In the light of the above provisions, we are considering the grounds raised in the Review Petition for review of the order dated 1.7.2019 in Petition No. 327/MP/2018.

11. The Review Petitioner has submitted that in the present case, supply of 100 MW Contracted Capacity under TANGEDCO PPA relates to tariff discovered and adopted under Section 63 of the Act and accordingly, there was no occasion of invoking Section 64(5) of the Act which relates to determination of tariff under cost-plus method under Section 62 read within Section 64 of the Act. The Review Petitioner has submitted that the Commission, however, in paragraph 28 of the impugned order made observation regarding inapplicability of Section 64(5) of the Act.

“28. The Commission observes that in the instant case, the generation and supply of power by the Petitioner involves three States i.e. Maharashtra where the plant is situated and Tamil Nadu and Uttar Pradesh where the power is supplied. Therefore, provisions of Section 64(5) of the Act requiring “involving the territories of two States are not attracted in this case and thus the case fails squarely under Section 79 (1) (b) of the Act.”

12. The Review Petitioner cannot read paragraph 28 of the impugned order in isolation. In fact, paragraph 28 has to be read with paragraphs 25, 26 and 27 also which are reproduced as under:

“25. The Petitioner has relied upon the observations of the Hon`ble Supreme Court in Energy Watchdog case with regard to the applicability of Section 64(5) in support of its action to



approach UPERC for determination of tariff qua the PPA with NPCL. The Hon'ble Supreme Court in Energy Watchdog Case has observed as under:

“27. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

26. In the above para, the Hon'ble Supreme Court has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.

27. Learned counsel for TANGEDCO during the hearing on 28.5.2019 submitted that the Commission in its order dated 6.6.2018 in Petition No. 305/MP/2015 (Adhunik Power and Natural Resources Ltd. vs. WBSEDCL and other) had observed that where the generating company has the PPAs/ arrangement to supply power from its project to more than one State including the Home State where the plant is located, this Commission shall have the exclusive jurisdiction to regulate the tariff in terms of Section 79 (1) (b) of the Act. Therefore, in the present case, this Commission has jurisdiction to regulate the tariff of the Petitioner's project.”

Thus, the observations of the Commission in paragraph 28 of the impugned order were in context of the submissions of the learned senior counsel for the Review Petitioner that the Petition for supply of 170 MW to NPCL in Uttar Pradesh had been filed before UPERC under Section 64(5) of the Act. After considering the provisions of Section 64(5) of the Act and the observation of the Hon'ble Supreme Court in the Energy Watchdog case, the Commission had observed that the provisions of Section 64(5) of the Act are not attracted in TANGEDCO PPA matter.

13. During the course of hearing, learned senior counsel for Review Petitioner submitted that the Commission's observation at Paragraph 28 is being misused by Shri Rama Shankar Awasthi to oust the jurisdiction of UPERC regarding the claims raised therein by



the Review Petitioner with respect to supply of 170 MW power to NPCL. Accordingly, learned senior counsel requested the Commission to clarify that its findings in the impugned order are restricted to the present case of TANGEDCO PPA and cannot be relied upon by any party to oust the jurisdiction of UPERC regarding the claims raised therein as the same will have severe ramifications on the scheme of power supply by the Review Petitioner.

14. The Petition No. 327/MP/2018 has been heard only on maintainability and is yet to be heard on merits and the Commission's observation in paragraph 28 of its Order dated 1.7.2019 was only for the purpose of deciding the maintainability of the Petition before this Commission under Section 79(1)(b) of the Act. The submission of the Review Petitioner that our observations at paragraph 28 of the impugned order is being misused by another party, cannot be a ground for review. It is up to the Review Petitioner to counter such contentions of any other party in appropriate fora.

15. This Commission has only decided that the Petition No. 327/MP/2018 is maintainable and that it has jurisdiction to adjudicate the matter of 100 MW TANGEDCO PPA before it. In this regard, our observations at paragraph 29 of the impugned order are as under:

"29. Further, TANGEDCO as well as Shri Awasthi have placed lot of emphasis on the fact that the supply to both TANGEDCO and NPCL are being made by the Petitioner from the same generating unit, namely, Unit-2 of its generating station. In our considered view, this fact has no relevance in deciding the question of maintainability with which the Commission is presently concerned. There is no embargo in the Act, particularly under Section 79(1)(b), that a generating company cannot supply power to different procurers from the same generating unit, especially when such supplies are being made under separate PPAs as in the present case."

16. We observe that UPERC has already exercised its jurisdiction with respect to the disputes qua the supply of 170 MW power to NPCL under Section 64(5) of the Act and the matter is now pending adjudication before Appellate Tribunal in Appeal No. 185 of 2019.



This matter has also been dealt with in the impugned order and the relevant paragraphs are extracted as under:

“30. Shri Awasthi has stated that the issue of jurisdiction is pending before the APTEL in Appeal No. 185 of 2019 filed by it, where the precise issue of whether the Petitioner can approach UPERC under Section 64(5) has been raised. Shri Awasthi has requested to adjourn the present proceedings till the disposal of the said appeal by APTEL.

31. Per contra, the Petitioner has submitted that above Appeal No. 185 of 2019 pending adjudication before the APTEL is in relation to the supply of 170 MW of power to NPCL under NPCL PPA wherein the tariff of such sale has been determined by UPERC under Section 62 of the Act. It has stated that Mr. Awasthi has challenged the jurisdiction of UPERC while the present Petition has been filed in terms of provisions of TANGEDCO PPA, there is no scope for stay/ adjournment of the present proceedings.

32. It is noted that the present Petition has been filed for claiming compensation towards certain change in law events in terms of Article 10.1.1 of the TANGEDCO PPA dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 for supply of 100 MW contracted capacity to TANGEDCO from Unit-2 of the generating station. Since no Appeal is pending before APTEL against the supply of 100 MW of power to TANGEDCO under the TANGEDCO PPA, the contention of Shri Awasthi to adjourn the present Petition is not sustainable.

33. In light of above discussion, we hold that the present petition is maintainable before this Commission. We make it clear that this order is limited to determination of issue of the jurisdiction of this Commission and maintainability of the Petition before this Commission. We have not expressed any view on the merit of the issues raised in the Petition. Accordingly, the Respondent is directed to file its reply on merits, if not already filed, latest by 19.7.2019 with advance copy to the Petitioner who may file its rejoinder, if any, by 31.7.2019. No extension of time for completion of pleadings shall be permitted.”

17. The Review Petitioner has also relied on the order dated 22.6.2018 passed by the Commission in Petition No. 171/MP/2016 in the case of KSK Mahanadi Power Company Limited vs. Madhyanchal Vidyut Vitran Nigam Ltd. & Ors, and has submitted that the Commission in the said order has unambiguously observed that Section 64(5) of the Act has no application in cases of tariff discovered under competitive bidding process where tariff is adopted by the Commission under Section 63 of the Act. The Review Petitioner has submitted that the observation of the Commission in Paragraph 28 of the impugned order to the extent it interprets Section 64(5) of the Act is outside the scope of the Petition and ought to be deleted.



18. We have considered the submission of the Review Petitioner. In KSK Mahanadi case, Project was located in the State of Chhattisgarh and KSK Mahanadi has executed separate PPAs with the Discoms of three States (i.e. TANGEDCO, UP Discoms and the AP Discoms) for supply of power at different points in time and for different quantum. After considering the submissions in the matter and the law laid down by the Hon'ble Supreme Court in Energy Watchdog case, the Commission came to the conclusion that the Commission has jurisdiction to regulate the tariff of the generating station. In this connection, Paragraph 15 of the order dated 22.6.2018 in Petition No. 171/MP/2016 is extracted as under.

“There can be no doubt that the Petitioner has a ‘composite scheme’ for generation and sale of electricity in more than one State and in terms of the above decision, the Commission has the jurisdiction to adjudicate the dispute/claims of the Petitioner under Section 79(1)(b) read with Section 79(1) (f) of the 2003 Act. The Petition is therefore maintainable.”

19. In the KSK Mahanadi case, learned counsel for UP Discoms contended that UPERC has the jurisdiction in the matter in terms of Section 64(5) of the Act in the light of the Energy Watchdog case. The Commission after considering the submission of UPPCL came to the following conclusion:

“20. In our view the findings of the Hon'ble Supreme Court on Section 64(5) do not in any manner support the argument of the Respondent that the State Commission (UPERC) will have jurisdiction in matters relating to inter-state supply of power. In the above quoted para. The Hon'ble Supreme Court has observed that the non-obstetric clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission by application of the parties concerned. The jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. “By application of the parties concerned” would mean the parties to the inter-State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of two States. In the present case, the Petitioner has entered into PPAs for generation and supply of power to three States i.e. State of AP State of UP and State of Tamil Nadu. Accordingly, in respect of the UP Discoms PPA dated 26.2.2014, the Respondent, UP discoms has invoked the jurisdiction of the State Commission (UPERC) for adoption of tariff in terms of the said PPA. By no stretch of imagination can be the Petition be construed as a joint application by parties under Section 64(5) for invoking the jurisdiction of the State Commission. In our considered view, Section 64(5) has no application in cases of tariff discovered under competitive bidding process and



adopted by the Commission under Section 63 of the 2003 Act. In view of this, we find no merit in the submission of the Respondent. UP discoms and accordingly the same is rejected.”

20. Therefore, the Commission, in the KSK Mahanadi case, held that Section 64(5) of the Act does not have any application in cases of tariff discovered under Section 63 of the Act and that this Commission has jurisdiction to deal with the matter. Thus, the KSK Mahanadi case has no relevance in case of the present review petition.

21. Thus, none of the grounds raised by the Review Petitioner is sufficient to review our observations in paragraph 28 of the impugned order.

22. The Review Petition No. 15/RP/2019 is dismissed in terms of the above.

Sd/-
(I.S.Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson

