

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 36/RP/2018
in
Petition No. 122/MP/2018**

Coram:

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

Date of order: 10.05.2019

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 (1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking review of order dated 23.7.2018 in Petition No. 122/MP/2018.

And

In the matter of

Lanco Anpara Power Limited
411/9, Riverside Apartments
New Hyderabad, Lucknow
Uttar Pradesh-226007

....Review Petitioner

Vs

1. Northern Regional Load Despatch Centre
18-A, Shaheed Jeet Singh Sansalwal Marg
Katwaria Sarai, New Delhi-110016
2. U.P. State Load Despatch Centre
UPSLDC Complex, Vibhuti Khand-II
Gomti Nagar, Lucknow-226010

....Respondents

For Review Petitioner : Shri S.B. Upadhyay, Senior Advocate, LAPL
Shri Gaurav Dudeja, Advocate, LAPL
Ms. Namita Singh, Advocate, LAPL
Shri Arun Tholia, LAPL

For Respondents : None



ORDER

The instant review petition is filed by Lanco Anpara Power Limited (“Review Petitioner”) under Section 94 (1) (f) of the Electricity Act, 2003 (“the Act”) read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of the order dated 23.7.2018 in Petition No. 122/MP/2018 alongwith (hereinafter referred to as “impugned order”). The Review Petitioner has made the following prayers:

- “(a) Declaration that LAPL’s Anpara Power Plant is allowed to declare and schedule net-capacity at ex-bus on actual basis i.e. considering actual auxiliary consumption;
- (b) Alternatively, for declaration that LAPL’s Anpara Power Plant is allowed to declare and schedule net-capacity at ex-bus on basis of normative auxiliary consumption @5.75%, as prescribed by this Hon’ble Commission in its Tariff Regulations;
- (c) Direction to UP State Load Dispatch Centre (‘UP SLDC’) to allow LAPL to declare and schedule 100% of net-capacity at ex-bus without referring to commercial agreement between LAPL and the procurers.”

Background

2. The Petition No. 122/MP/2018 was filed by the Review Petitioner seeking a declaration that its generating station should be allowed to declare and schedule net-capacity at ex-bus considering actual auxiliary consumption of the 1200 MW (2 x 600 MW) coal fired power plant near Anpara in the State of Uttar Pradesh. The Review Petitioner entered into two Power Purchase Agreements (PPAs) for sale of power from the said generating station, one with UP Discoms through PPA dated 12.11.2006 read with Supplementary PPA dated 31.12.2009 for gross supply of 1100 MW with normative auxiliary consumption of 7.5% and the other one with Tamil Nadu Generation and

Distribution Corporation Limited (TANGEDCO) for supply of 100 MW net power through back-to back arrangements with National Energy Trading and Services Limited (NETS). In the impugned order, the Commission observed that the installed capacity of the Review Petitioner's generating station is 1200 MW and out of which, the contracted capacity is 1100 MW with UP Discoms at normative Auxiliary Energy Consumption (AEC) of 7.5% and 100 MW with TANGEDCO at normative AEC of 6.5% and the scheduling of the generating station needs to be carried out as a whole on ex-bus basis as per the following procedure:-

Procurer	Contracted capacity (MW)	AEC	Ceiling ex-bus schedule (MW)
UP Discoms	1100	7.50%	1017.50
TANGEDCO	100	6.5%	93.50
Station as a whole	1200	7.416%	1111.00

3. Aggrieved by the above decision in the impugned order, the Review Petitioner has submitted that there are errors apparent on record and there are otherwise sufficient cause for review of the impugned order on the following grounds:

(a) For consideration of auxiliary consumption on normative basis for implementation of Regulation 5.2(h), the norms are supposed to be specified by the Commission/Authority. Further, the auxiliary consumption mentioned in a PPA executed between two private parties for commercial purposes should not be considered sacrosanct for grid safety purposes. In PPA, parties may mention auxiliary consumption suited to them instead of the generating station's actual auxiliary consumption which defeats the desired purpose of introduction of Regulation 5.2(h) in the Grid Code as the power plant will not have margin to

increase the generation in case frequency falls. Further, the context of normative auxiliary consumption has to be derived from a 'norm' having force of law and the same cannot be gathered from a contract.

(b) The Review Petitioner entered into PPA dated 12.11.2006 read with Supplementary PPA dated 31.12.2009 with UP Discoms for sale of net capacity of 1017.5 (gross 1100 MW with normative auxiliary consumption of 7.5%) based on Case-2 bidding and another PPA with TANGEDCO (through back to back arrangement dated 25.1.2012 between NETS and the Review Petitioner with amendment dated 27.9.2017) for 100 MW based on Case-1 bidding on 19.1.2012 read with addendum dated 27.9.2017. TNERC vide its orders dated 21.6.2012 and 31.7.2017 approved the TANGEDCO PPA for supply of power till 31.1.2017 and 31.1.2019 respectively. The impugned order is contrary to TANGEDCO PPA and TNERC orders dated 21.6.2012 and 31.7.2017 which provide for supply of 100 MW net capacity to TANGEDCO. TNERC orders can only be modified in an Appeal or in review and not otherwise.

(c) In the impugned order, the Commission placed reliance on Statement of Reason (SOR) for Auxiliary Energy Consumption (AEC). SOR provides that actual AEC would be known only after actual operation of machines. As such, UP SLDC in the present case should have taken actual auxiliary rate instead of normative AEC rate as the Review Petitioner's generating station has been in operation for more than 7 years with AEC of 5.75%. Using normative AEC instead of actual AEC of the Review Petitioner has put restriction on it, as a result of which the

useful capacity available with it is bound to go waste which is against the principles of Grid Code as well as electricity laws.

(d) Normative auxiliary consumption with reference to TANGEDCO PPA is the auxiliary consumption prescribed by this Commission from time to time. At the time of execution of TANGEDCO PPA, auxiliary consumption rate as per 2009 Tariff Regulations was at 6.5% and as such the parties applied the said rate while arriving at the net capacity of 1122 MW, being the installed capacity of the power station measured at the bus-bar, reduced by the normative auxiliary power consumption as prescribed by this Commission from time to time.

4. During the hearing on admission of the review petition, learned senior counsel for the Review Petitioner while reiterating the submissions made in the Review Petition submitted that in Petition No. 122/MP/2018, the issue of interpretation and enforcement of 5th amendment of the Grid Code was raised and the Review Petitioner requested to consider the actual Auxiliary Electricity Consumption (AEC) as per the norms specified by the Commission and not to consider the AEC mentioned in the PPAs. Learned senior counsel submitted that the Review Petitioner did not seek change in terms of selling capacity of the generating station which was in accordance with the PPAs executed between LAPL with UP Discoms and TANGEDCO. Two different norms of AEC were considered in the impugned order for the same plant which defeats the intent of the 5th Amendment of the Grid Code. A generating station may have two different normative auxiliary consumptions for commercial purposes like for determining availability or net capacity to be supplied to a particular procurer. However, there cannot be two norms for implementation of grid safety provisions. He submitted that reliance on Statement of

Reasons (SOR) is an error apparent on face of record since the provisions of 5th Amendment of the Grid Code are clear and unambiguous, allowing a generating station to generate and declare up to 100% of its capacity. The amended Regulation 5.2(h) does not provide for using normative AEC instead of actual AEC. Moreover, in case of any inconsistency between the SOR and the Regulations or the Act, the provisions of the Regulations or the Act would prevail. Learned counsel submitted that the Review Petitioner was constrained to schedule power to UP Discoms and TANGEDCO at very high and dissimilar AEC of 7.5% and 6.5% respectively, due to which Review Petitioner is suffering adversely since it is being able to Declare Capacity of only 1111 MW against available capacity of 1131 MW leading to wasting useful capacity of 20 MW.

Analysis and Decision

5. We have given our thoughtful consideration to the submissions of the Review Petitioner and perused the impugned order including the documents on record. The Review Petitioner entered into PPA dated 12.11.2006 read with Supplementary PPA dated 31.12.2009 with UP Discoms for sale of net capacity of 1017.5 (gross 1100 MW with normative read with addendum dated 27.9.2017 of 7.5%) under Case-2 bidding and another PPA dated 19.1.2012 read with addendum dated 27.9.2017 with Tamil Nadu for sale of 100 MW under Case-1 bidding with normative auxiliary consumption as per the regulations of the Commission. After 5th Amendment to the Grid Code, the following provisions were introduced in Regulation 5.2(h):

“....For the purpose of ensuring primary response, RLDCs/SLDCs shall not schedule the generating station or unit(s) thereof beyond ex-bus generation corresponding to 100% of the Installed capacity of the generating station or unit(s) thereof.....”



UPSLDC in the light of the above provision allowed scheduling of power to the Discoms of UP after adjusting the AEC of 7.5% from the contracted capacity of 1100 MW. The Review Petitioner filed the Petition No.122/MP/2018 seeking a declaration that the generating station of Review Petitioner be allowed to declare the net capacity after accounting for actual AEC of 5.75% and not on the normative AEC of 7.5% as per the PPA with UP Discoms. The Commission in the impugned order held that based on the definition of “ex-power plant” as “net MW/MWh output of a generating station, after deducting auxiliary consumption and transformation losses”, the auxiliary consumption of the generating station or unit needs to be deducted along with transformation losses to get the Ex-Power Plant capacity. Further, based on the Statement of Reasons, the Commission held that auxiliary consumption means consumption “on normative basis”, and not “on actual basis” since actual auxiliary consumption would be known only after actual operation of machines. The Review Petitioner is aggrieved by the decision of the Commission to consider the normative AEC as per the PPA of the Review Petitioner with UP Discoms.

6. Basically, the Review Petitioner has sought review on two grounds. Firstly, AECs mentioned in the PPAs should not be considered as they do not have force of law and the actual AEC should be considered. Secondly, the decision in the impugned order is contrary to Review Petitioner’s PPA with TANGEDCO and approval of the said PPA by TNERC. We are considering these two grounds to see whether there is any prima facie case for admission of the review petition.

7. The first ground for review is that the AEC mentioned in the PPAs should not be considered as the parties may agree to any number as suited to them instead of the generating station's actual auxiliary consumption. Further, the context of normative auxiliary consumption has to be derived from a 'norm' having force of law and the same cannot be gathered from a contract. We have considered the submissions. The PPA with UP Discoms is as a result of Case 2 bidding and the PPA with TANGEDCO is as per the Case 1 bidding carried out under Section 63 of the Electricity Act, 2003 (hereinafter referred to as the 'Act'). In such scenario, we of the view that AECs quoted by the Petitioner and included in the respective PPAs shall govern the commercial relationship between the parties. Further, as per Section 28(3)(a) of the Act, the RLDC shall be responsible for optimum scheduling or dispatch of electricity within the State in accordance with the contract entered into with the licensees or the generating companies operating in the region. Similarly, under Section 32(2)(a) of the Act, the SLDC shall be responsible for optimum scheduling or dispatch of electricity within the State in accordance with the contract entered into with the licensees or the generating companies operating in the State. Therefore, scheduling has to be done in accordance with the Grid Code and the contracts between the generating company and distribution licensees including the AECs mentioned therein. Therefore, we do not find any error in the impugned order on this ground so as to admit the review petition.

8. The second ground for review is that the impugned order is said to be contrary to TANGEDCO PPA and TNERC orders dated 21.6.2012 and 31.7.2017 which can be modified through an order in appeal. In TANGEDCO's PPA, the Aggregate Contracted Capacity has been defined as under:



“Aggregate Contracted Capacity: With respect to the Seller, shall mean the aggregate capacity of 100 MW contracted with the Procurer for supply at the Interconnection Point from the Power Station's Net Capacity.”

Further, Power Station's net capacity has been defined as under:

Power Station's Net Capacity shall mean 1122 MW, being Installed Capacity of the Power Station measured at the bus-bar, reduced by the normative auxiliary power consumption as prescribed by CERC from time to time;”

9. The Power Station's installed capacity is 1200 MW. An AEC of 6.5% has been applied as per the 2009 Tariff Regulations of this Commission to arrive at the net capacity of 1122 MW. Out of this, 100 MW is covered under PPA with TANGEDCO. There is a balance capacity of 1022 MW available for supply to UP. On the other hand, in the UP PPA, contracted capacity has been defined as “11/12 (eleven divided by twelve) times the Installed Capacity”. Further, Normative Auxiliary Consumption Rate has been defined as “the auxiliary power consumption factor used to calculate Availability and PLF, which shall be 7.5%.” For UP PPA, the installed capacity is 1100 MW and balance capacity of 100 MW is available for sale to third party(s). Article 4.3.4 of UP PPA provides as under:

“4.3.4 The Seller shall be entitled to sell the Scheduled Generation and Electrical Output attributable to 1/12 (one divided by twelve) times the Available Capacity to third party(s);”

10. Therefore, only 100 MW was available with the Review Petitioner for sale to third party(s). However, the Review Petitioner has entered into a PPA with TANGEDCO to sell 100 MW out of Power Station's net capacity. The Commission in para 34 of the impugned order had observed as under:

“34.....Perusal of the above provisions reveals that after increase in installed capacity of the generating station, the contracted capacity under UP Discoms PPA stands revised to 11/12 times the installed capacity i.e. 1100 MW gross from the total installed capacity of

1200 MW and the rest electrical output attributable to 1/12 times the available capacity can be sold to third party. It is therefore inferred that the third party sales specified in the UP Supplementary PPA dated 31.12.2009 is either equal to or less than 100 MW gross capacity out of total installed capacity of 1200 MW. Thus, the petitioner could have entered into PPA with other party (ies) to the extent of 100 MW gross capacity only.”

11. Instead of entering into PPA with TANGEDCO for 100 MW capacity (inclusive of AEC), the Review Petitioner has entered into a PPA for an aggregate contracted capacity of 100 MW out of the Power Station’s net capacity of 1122 MW. The Review Petitioner has applied the AEC of 6.5% on the installed capacity of 1200 MW (including the contracted capacity of 1100 MW in case of UP PPA) for the purpose of arriving at the net capacity of 1122 MW in case of TANGEDCO PPA, whereas the Review Petitioner should have considered only 100 MW (inclusive of AEC) while entering into PPA with TANGEDCO. In other words, the Review Petitioner has entered into PPA with TANGEDCO for the capacity more than what is available with it after entering into UP PPA. The Commission after considering the facts in its entirety has decided the following declared capacity as per the respective PPAs in para 41 of the impugned order:

“41. In the light of above discussions, the normative AEC to be considered by UP SLDC for 11/12 times the installed capacity for UP Discoms share shall be 7.5% and for 1/12 times the installed capacity for TANGEDCO share, the normative AEC shall be 6.5%. Accordingly, we direct UP SLDC to consider normative AEC of 7.5% in case of ex-bus declaration for UP Discoms corresponding to 1100 MW of contracted capacity and 6.5% for TANGEDCO share corresponding to 100 MW of contracted capacity.”

12. In our view, merely because provision has been made in the PPA with TANGEDCO to supply 100 MW from the Power Plant’s net capacity and the said PPA was approved by TNERC does not mean that the scheduling from the generating station can be in violation of the provisions of the Grid Code. As per the provisions of Regulation 5.2(h) of the Grid Code, a generator can declare ex-bus generation

corresponding to 100% of the installed capacity of the generating station or its unit. The provision also provides for a direction to the RLDCs/SLDCs not to schedule beyond ex-bus generation of 100% of the installed capacity of the generating station or its units. In our view, if, the calculation of the installed capacity and AEC as per the Grid Code results in variations from the provisions of the PPAs, the provisions of the Grid Code shall prevail. The Hon'ble Supreme Court in its judgment dated 15.3.2010 in the matter of PTC India Limited Vs. Central Electricity Regulatory Commission (2010 4 SCC 603) has held that the existing contracts including Power Purchase Agreements have got to be aligned with the regulations. The Apex Court in para 40 of the said judgment observed as under:-

“.....
Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).”

13. In the light of aforesaid judgment of Hon'ble Supreme Court, in case of any variation or mismatch between the provisions of the Grid Code and PPA in the matter of calculation of contracted capacity after considering AEC, the provisions of Regulation 5.2 (h) of the Grid Code shall prevail. Since the impugned order has decided the issue of declared capacity in the light of the provisions of the Grid Code, we do not find any error in the impugned order on this ground so as to warrant admission of the review petition.

14. The Review Petitioner is seeking to reargue the case on merits, which is not permissible at the stage of review.

15. In view of the aforementioned discussions, the Review Petition No. 36/RP/2018 is rejected at the stage of admission.

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

sd/-
(P.K. Pujari)
Chairperson

