

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.77/MP/2018

Coram:

Shri P.K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S. Jha, Member

Date of Order: 14th May, 2019

In the matter of

Petition under Section 79 (1) (b) read with Section 79(1)(f) of the Electricity Act, 2003 seeking directions for applicability of the provisions of PTC-PPA signed between Petitioner & PTC and Procurer PPA signed between PTC & discoms of UP, both on 25.7.2013 for the purpose of calculation of Penalties due to less than 80% availability for a Contract year.

And

In the matter of

TRN Energy Private Limited
7th Floor, Office Tower, Ambience Mall
NH-8, Gurgaon-122002

.....Petitioner

Vs

1. Paschimanchal Vidyut Vitran Nigam Ltd.
Urja Bhawan, Victoria Park,
Meerut-226001
2. Purvanchal Vidyut Vitran Nigam Limited
DLW Bhikharipur, Varanasi-221004
3. Madhyanchal Vidyut Vitran Nigam Ltd.
4A, Gokhale Marg, Lucknow-226001
4. Dakshinanchal Vidyut Vitran Nigam Ltd.
Urja Bhawan, NH-2, Agra Delhi Bypass Road,
Sikandra, Agra-282002
5. Uttar Pradesh Power Corporation Limited
3rd Floor, Shakti Bhawan Extn.,
14, Ashok Marg, Lucknow-226001
6. PTC India Limited,
2nd Floor, NBCC Tower, 15 Bhikaji Cama Place,
New Delhi-110066



7. Chhattisgarh State Power Trading Company Ltd.
2nd Floor, Vidyut Sewa Bhawan, Daganiya,
Raipur- 492013

8. Chhattisgarh State Power Distribution Company Ltd.
Vidyut Sewa Bhawan, Daganiya,
Raipur- 492013

.....Respondents

Parties present:

Shri Ratan K. Singh, Advocate, TRN Energy
Shri Suraj Prakash, Advocate, TRN Energy
Shri Rajiv Srivastava, Advocate, UPPCL
Ms. Garima Srivastava, Advocate, UPPCL
Ms. Rajshree Chaudhary, Advocate, PTC
Shri Ayush Singh, UPPCL

ORDER

The Petitioner, TRN Energy Private Limited (TRNEPL) has filed this Petition seeking the following reliefs:

“(a) Declare that the computation of penalty applicable for shortfall in availability be done on cumulative basis as per schedule 4 of Procurer’s PPA and not on standalone basis as per the decision of the Respondents;

(b) Declare that the Petitioner is entitled for the refund of penalty charged on monthly basis during contract year, if at the end of contract year, the actual cumulative availability during such contract year is more than 80%; and

(e) Pass such other and further orders as this Commission may deem fit in the facts and circumstances of the present case.”

2. The Petitioner, a company incorporated under the Companies Act, 1956, is a generating company within the provisions of the Electricity Act, 2003. The Petitioner has an installed capacity of 600 (2 x 300 MW) coal based thermal power project located at Nawapara village, District Raigarh in the State of Chhattisgarh.

3. The Respondent No. 5, UPPCL had initiated competitive bidding process by issuing Request for Proposal (RFP) for procurement of 6000 MW power on long-term basis under Case-I bidding for a period of 25 years. Accordingly, the Respondent No. 6, PTC was selected as a successful bidder to supply 390 MW power from the Project and Power Purchase Agreement (Procurers-PPA) was executed with the



Respondents 1 to 4 (discoms of UP) on 25.7.2013 through the power plant of the Petitioner. The Petitioner and PTC entered into a Power Purchase Agreement (PTC-PPA) on 25.7.2013 for sale of 390 MW round the clock power for onward supply to discoms of UP for a period of 25 years from the scheduled delivery date of the Project. The Petitioner has also entered into PPA with Respondent No.7, CSPTCL who has executed back to back sale agreement with Respondent No.8, CSPDCL.

Submissions of Petitioner

4. In the above background, the Petitioner in this Petition has submitted the following:

(a) Under Section 79 (1) (b) of the Electricity Act, 2003 (the 2003 Act) this Commission has the powers to regulate tariff of generating companies if such companies have a composite scheme for generation and sale of electricity. The Petitioner has a composite scheme by virtue of the PPAs executed with PTC/UP Discoms and CSPTCL. Hence this Commission has the powers to entertain and adjudicate the present petition.

(b) In terms of Clause 4.2.1 (iv) under Schedule-4 of the Procurer-PPA, the penalty due to less than 80% availability for a contract year is applicable on cumulative basis at the end of contract year, whereas PTC/UPPCL has taken a decision to impose the penalty on a standalone basis each month and thereby not given effect to the provision of reconciliation of penalty deducted each month at the end of the contract year on a cumulative basis. This decision of PTC/UPPCL violates the provisions of Clause 4.2.1 and Clause 4.2.5 of the Procurer PPA and PTC PPA.

(c) PTC has communicated a letter dated 11.1.2018 of UPPCL stating that UPPCL has taken the decision for “deduction of penalty under Case 1 PPA”. The levy of penalty on a monthly basis and not on cumulative basis as per PTC PPA and Procurer PPA will lead to unrecoverable damages, which is not acceptable to the Petitioner.

(d) The Petitioner by letter dated 5.2.2018 took objections against the unilateral decision of PTC/UPPCL with respect to the erroneous method of commutation of penalty to be levied due to less than 80% availability for the contract year. The failure of the Respondents to accept the relevant PPA



provisions gives rise to a cause of action for enforcement of the contractual rights in favour of the Petitioner.

(e) In terms of Clause 4.7, the settlement of penalty deducted for actual availability shortfall during the contract year is to be done in accordance with Clauses 4.2 and 4.5. The yardstick defined for applicability of penalty under Clause 4.2.5 is 'shortfall in availability in a contract year' whereas Clause 4.2.1 stipulates that the penalty is to be included in monthly bills. Therefore, settlement in terms of Clause 4.7 is only possible where at the end of the contract year, reconciliation of accounts is done and refund is made for excess penalty deducted in a given contract year.

(f) If no refund is made for penalty deducted in the months preceding the last month in a contract year, where the availability in the contract year cumulatively has been 80% or more than the Respondent Discoms would be unjustly enriched at the cost and expense of the Petitioner.

(g) On a joint reading of Clause 4.2.1, Clause 4.2.5 and Clause 4.7 after monthly deduction of penalty in a contract year, if the cumulative availability at the end of the year is found to be 80% or more, the Petitioner will be entitled to adjustment and refund of penalty deducted in each month.

(h) During the month of October 2017, November, 2017 and December, 2017 the Petitioner has maintained availability of 97.93%, 90.43% and 99.51% respectively. Although PTC/UPPCL has not deducted penalty for the above months, it has not considered the effect of energy supplied over and above minimum threshold of 80% during the said months, to off-set the shortfall in the previous months while computing cumulative availability till December, 2017.

(i) Due to the erroneous methodology in computation of penalty, an amount of ₹5.03 crore for the period from April, 2017 to December, 2017 would be charged to the Petitioner in violation of the provisions of PTC PPA/Procurer PPA. Thus, the decision to levy penalty for each month on standalone basis as against cumulative basis at the end of the contract year is in clear violation of the provisions of the PTC PPA/Procurer PPA.

Accordingly, the Petitioner has filed this Petition with the prayers as in Para 1 above.

5. The Petition was admitted on 5.7.2018 and the Commission issued notice to the Respondents. During the hearing of the Petition on 6.9.2018, the learned



counsel for the Respondent, UPPCL pointed out that the Petitioner had filed petition before Uttar Pradesh Electricity Regulatory Commission (UPERC) on certain issues arising out of the PPA dated 25.7.2013 and submitted that the same PPA cannot be adjudicated simultaneously before different forums. In response, the Petitioner, however, clarified that the issues raised before UPERC was different. However, the Commission directed the Petitioner to clarify on affidavit whether the Petitioner intended to pursue the matter before this Commission or UPERC.

Reply of Respondent Nos. 1 to 5

6. The Respondent No.1 UPPCL, for and on behalf of the Respondent Nos. 2 to 5 (UP discoms), filed its reply affidavit dated 20.9.2018 and has mainly submitted the following:

(a) As per settled principles of law pertaining to privity of contract, the Petitioner can have no claim against the Respondents. There is no contractual relationship between the Petitioner and the Respondents 1 to 5 (discoms of UP). The Petitioner is seeking directions against the Respondents based on the PTC-PPA and Procurers-PPA dated 25.7.2013 as if they form a tripartite agreement between the parties. The Petitioner, in garb of this Petition, is trying to achieve what is legally impermissible by seeking enforcement of the Procurers-PPA dated 25.7.2013.

(b) The fact that UPPCL and the Petitioner do not have any contractual relationship whatsoever and that the Petitioner is completely aware of the same, is evident from the Petitioner's act of taking up the issue of penalty computation vide letter dated 5.2.2018 with Respondent PTC. The fact that the Petitioner did not raise the issue with UP Discoms but only with PTC is an admission on its part that the Petitioner does not have any legally sustainable claims against the Respondents Discoms.

(c) Since the Procurer PPA has been approved by UPERC, it is squarely covered by the Provisions contained in the Section 64 (5) of the 2003 Act and therefore, the State Commission is the Appropriate Commission to adjudicate upon issues arising out of the said PPA. This position has been



approved by the Hon'ble Supreme Court in Energy Watchdog Case. The present Petition is therefore not maintainable for want of jurisdiction.

(d) The Respondent Discoms have taken a decision on the issue of computation of penalty and have intimated the same to PTC with whom it has contractual relationship arising out of the PTC PPA dated 25.7.2013.

According, the Respondent Discoms have submitted that the Petition is not maintainable, is devoid of merits and the same is liable to be rejected.

7. During the hearing on 18.12.2018, the learned counsel for Respondent, UPPCL submitted that the Petitioner had filed affidavit dated 21.9.2018 seeking permission to withdraw the present petition. However, during the hearing of the Commission on 20.12.2018, the learned counsel for the Petitioner mentioned that the Petitioner has decided to pursue the matter before this Commission and would withdraw the Petition (Petition No. 1341/2018) filed before UPERC. Thereafter, the Petitioner vide affidavit dated 19.1.2019 sought withdrawal of the above said affidavit dated 21.9.2018, so as to continue to pursue its claims in the present Petition before this Commission. It is noticed that UPERC by its Order dated 6.2.2019 had permitted the Petitioner to withdraw the Petition No. 1341/2018 filed before UPERC. Thereafter, this Petition was heard on 14.2.2019 and the Commission after directing the parties to file their written submissions, reserved its order in the Petition. In compliance with the above directions, only the Petitioner has filed its written submissions vide affidavit dated 4.3.2019.

8. The Petitioner in its written submissions dated 4.3.2019 has referred to the judgment of the Tribunal in Appeal No. 15/2011 (Lanco Power Ltd V HERC & ors) and the judgment of Hon'ble High Court of Delhi in OMP 677/2011 (PTC V Jaiprakash Ventures Ltd) and has submitted that generating companies supplying power to the distribution licenses through trader are amenable to the jurisdiction



of the Central Commission. On merits, the Petitioner has reiterated its submissions made in the Petition.

9. After consideration of the submissions of the Petitioner and the Respondents, UPPCL/UP discoms, the following issues arise for our consideration:

Issue No.(A): Whether the Commission has the jurisdiction to decide the dispute?

Issue No.(B): Whether penalty in any contract year is to be calculated on a 'cumulative basis' or on 'standalone basis' in terms of the PPA?

Issue No. (A): Whether the Commission has the jurisdiction to decide the dispute?

(a) Composite Scheme

10. The Petitioner has submitted that it has a composite scheme for generation and sale of power in more than one State as contemplated in Section 79(1)(b) of the 2003 Act. It has stated that the project located in the State of Chhattisgarh is generating electricity and supplying power to the Respondent UPPCL /UP discoms through PTC, by virtue of the PPA dated 25.7.2013 and to the State of Chhattisgarh. Accordingly, it has submitted that in line with the judgment of the Hon'ble Supreme Court in Energy Watchdog case [(2017) 14 SCC 80], any dispute relating to tariff shall be under the jurisdiction of the Central Commission. *Per contra*, the Respondent, UPPCL has submitted that the PPA dated 25.7.2013 executed between the discoms of UP and PTC was approved by UPERC and hence it has the jurisdiction to decide the dispute. The Respondent has further stated that since the Procurers-PPA has been approved by UPERC, it is squarely covered by the provision as contained in section 64(5) of the Electricity act, 2003 (hereinafter referred to as 'the 2003 Act'). Hence, UPERC is the appropriate Commission to adjudicate upon issues arising out of the Procurers-PPA.



Analysis and decision

11. The matter has been considered. As stated, the Petitioner, TRNEL is supplying power to the host State of Chhattisgarh and to the discoms of the State of UP/UPPCL from its power project situated in State of Chhattisgarh. It has entered into PPA for supplying power from its power plant to the Respondent No.8 (CSPDCL) in the State of Chhattisgarh, through Respondent No. 7 (CSPTCL) an electricity trader. It has also entered into Procurer-PPA dated 25.7.2013 for supplying 390 MW power to the discoms in the State of UP (Respondent Nos 1 to 5) through Respondent No.6 PTC, an electricity trader. It is, therefore, evident that the Petitioner is supplying electricity to multiple States from the same generating station and such supply is governed by binding arrangements, namely the PPAs /PSAs. Sub-section (b) of Section 79(1) of the 2003 Act provides that the Central Commission shall regulate the tariff of a generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v CERC & ors, while upholding the jurisdiction of this Commission for regulating the tariff of projects which meet the composite scheme, has explained the term "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 subsections (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.”

12. The Hon’ble Supreme Court while interpreting the term “composite scheme” under Section 79(1)(b) of the 2003 Act has held that the Central Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State, whose tariff has been adopted under Section 63 of the 2003 Act. Since the Petitioner, TRN Energy is supplying power to multiple States through PPA/PSA, the generating station has a composite scheme for generation and sale of power to more than one State. Hence, in the light of the decision of the Hon’ble Supreme Court, we are of the considered view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner and thereby adjudicate the disputes raised in the present Petition in terms of Section 79 (1) (b) read with 79(1)(f) of the 2003 Act. Accordingly, the Petition is maintainable.

13. The Respondent, UPPCL has referred to the findings of the Hon’ble Supreme Court in Energy Watchdog case judgment with regard to Section 64(5) of the 2003 Act and has argued that the State Commission (UPERC) only has jurisdiction in the matter. Section 64(5) of the 2003 Act provides as under:

“64(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”.



14. With regard to Section 64(5), the Hon'ble Supreme Court in its judgment dated 11.4.2017 had observed as under:

“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.”

15. 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 Central Commission will not have jurisdiction in such matters relating to inter-State supply of power. In the above quoted 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. “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 the two States. In the present case, the Petitioner has entered into PPA for generation and supply of power to two States i.e. State of Chhattisgarh and the State of UP on long term basis. In respect of Procurer-PPA dated 25.7.2013, the Respondent UP discoms/UPPCL have invoked the jurisdiction of the State Commission (UPERC) for adoption of tariff. By no stretch of imagination can the said Petition be construed as a joint application by the parties under Section 64(5)



for invoking the jurisdiction of the State Commission. In our considered view, even though tariff discovered under competitive bidding process was adopted by the State Commission under Section 63 of the 2003 Act, Section 64(5) of the 2003 Act has no application in the present case since the generating station is supplying power to more than one State and in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case, the jurisdiction for regulating the tariff of the generating station of the Petitioner vests with this Commission.

(b) Privity of Contract

16. The Respondent, UPPCL has also submitted that there is no contractual relationship between the Petitioner and the Respondents 1 to 5 (discoms of UP). It has also submitted that the Petitioner is seeking directions against the Respondents based on the PTC-PPA and Procurers-PPA dated 25.7.2013, as if they form a tripartite agreement between the parties. The Respondent, UPPCL has argued that the Petitioner, in garb of this Petition, is trying to achieve what is legally impermissible by seeking enforcement of the Procurers-PPA dated 25.7.2013.

Analysis and decision

17. We have considered the submissions of the parties and examined the legal position on the issues raised. As stated earlier, Respondent No.1, UPPCL had initiated competitive bidding process by issuance of RFP dated 27.7.2012 for procurement of 6000 MW base load power on long term basis under Case-I bidding. Clause 2.1.2.2 (g) of the said RFP provides that in case the bidder was a trading licensee, it should have executed an exclusive PPA for the quantity of power offered in its bid and copy of the same was to be furnished with the bid. The Petitioner desirous of supplying power to the Respondent discoms, entered into an



exclusive PPA with PTC on 21.9.2012 for a contracted capacity of 390 MW capacity and the said PPA formed part of the bid submitted by PTC before UPPCL. Thereafter, PTC was selected as a successful bidder premised on the PPA dated 21.9.2012. Thus, even at the time of bidding and after PTC was selected as a successful bidder and had signed the Procurer-PPA dated 25.7.2013, the Respondent, discoms were aware that PTC would be supplying power from the Petitioner's Project.

18. It is observed that PTC had submitted its offer for 390 MW clearly indicating the source of supply of power from the generating station of the Petitioner. The offer of PTC was accepted by Respondent, UPPCL and accordingly, Lol dated 22.5.2013 in favour of PTC was issued for supply of 390 MW of power to Respondent UPPCL/UP discoms on a back to back arrangement. PTC after accepting the LOI had acted upon the same by entering into Procurer-PPA dated 25.7.2013 with the Respondent, UP discoms and PTC-PPA dated 25.7.2013 with the Petitioner, TRNEL.

19. The Respondent, UPPCL has submitted that the Petitioner is seeking directions against the Respondents based on the PTC-PPA and Procurers-PPA dated 25.7.2013 as if they form a tripartite agreement between the parties. In this regard, some of the relevant provisions of the Procurer-PPA and the PTC-PPA are as under:

Procurer-PPA dated 25.7.2013

"1.1 Definitions

Declared Capacity: shall mean the power station's net capacity at the relevant time at the interconnection point (expressed in MW) as declared by the seller in accordance with the Grid Code and dispatching procedures as per the Availability Based Tariff.

Developer: shall mean the owner of the power station from which the seller shall supply the Aggregate Contracted Capacity to the Procurers.

Interconnection Point: shall mean the point where the power from the power station switchyard bus of the seller is injected into the interstate/intrastate transmission



system (including the dedicated transmission line connecting the power station with the interstate/ intrastate transmission system).

Power Station: shall mean TRN Energy Limited power generation facility of installed capacity of 2 x 300 MW, located at village Nawapara in Distt Raigarh, Chhattisgarh.

Trading licensee: shall mean the seller which is an Electricity Trader and has submitted an exclusive power purchase agreement executed with the Developer.

PTC-PPA dated 25.7.2013

Recitals

F:It is clearly understood between the parties that the objective of the PTC-PPA is to enable PTC fulfil its duties and obligations under the Procurer(s)-PPA. The Procurer-PPA are annexed as Annexure-1 to this PTC-PPA and are the basis for execution of the PTC-PPA

G:The provisions of the Procurer-PPA dated 25.7.2013 signed between PTC and the Procurers shall be applicable mutatis mutandis to this Agreement except to the extent of the deviations as expressly stated in this agreement.

J: In the above context, the parties agree that they shall perform their respective obligations and functions in strict compliance with the letter and spirit of this agreement and also in strict compliance with the Procurer-PPA.

Articles

Article 2.1.1: This agreement shall become effective upon the date of execution of this Agreement. The validity shall be same as mentioned in the Procurer-PPA.

Article 2.1.2: The term of this agreement shall be co-terminus with the Procurer-PPA when it shall automatically terminate, unless terminated earlier, Pursuant to article 2.2.

Article 6.1: The tariff payable by PTC to Company under this agreement shall be the amount payable to PTC by Procurer(s) as per the provision of Schedule 4 of the Procurer-PPA minus PTC trading margin as specified herein below.....

Article 14.11: Purpose of the Agreement: The Parties herein understand that this PTC-PPA is being entered into to enable PTC fulfil its obligations under the Procurer-PPA for continuous and uninterrupted supply of power to the Procurer(s) under the Procurer-PPA.”

20. It is evident from the above that both Procurer-PPA and PTC PPA dated 25.7.2013 are inextricably linked to each other and the rights and obligations' arising out of any one PPA are reflected in the other PPA. Further, the LOI issued by UPPCL on 22.5.2013 had recognised the generating station of the Petitioner as the source for supply of power to it through PTC. It is also undisputed that PTC had supplied power to Respondent, UPPCL/UP discoms from the generating station of



the Petitioner in terms of the said LOI. Thus, the LOI dated 22.5.2013 read with the provisions of the said PPAs unambiguously establish the nexus between the generating company of the Petitioner and the Respondent discoms, even though power was supplied through PTC, which is an inter-State trading licensee. Hence, the contention of Respondent, UPPCL that it has no privity of contract or arrangement with the Petitioner lacks merit. We, therefore, hold that the present Petition filed by the Petitioner for adjudication of disputes against Respondent, UPPCL/UP discoms is maintainable under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act.

(c) Supply of Power through a Trader

21. The Petitioner in its written submissions has referred to the judgment of the Tribunal in Appeal No. 15/2011 (Lanco Power Ltd V HERC & ors) and the judgment of Hon'ble High Court of Delhi in OMP 677/2011 (PTC V Jaiprakash Ventures Ltd) and has submitted that transactions involving supply of power by a generating company to the distribution licensees through trader are amenable to the jurisdiction of the Central Commission.

Analysis and Decision

22. The issue whether the supply of power by a generating company to a trading licensee and supply of the said power by the trading licensee to the distribution companies through back to back arrangement would be subject to the regulatory jurisdiction of the Regulatory Commission arose for consideration in Appeal No.15/2011 (Lanco Power Limited v HERC & ors) before Appellate Tribunal for Electricity and in OMP 677 of 2011 {PTC India Limited Vs. Jaiprakash Power Ventures Ltd.] before Hon'ble High Court of Delhi. In Appeal No.15/2011, Lanco Power Limited had a PPA with PTC and PTC had a back to back PSA with Haryana



Utilities. Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The Tribunal after considering the provisions of Sections 79, 86 and 66 of the Act has in its judgment dated 4.11.2011 has observed as under:

“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company

.....
61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.

23. In OMP No. 677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited), PTC India Limited had challenged the Arbitral Award dated 28.4.2011 in the dispute between PTC India Limited and Jaiprakash Power Ventures Limited under Section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble High Court of Delhi was whether the decision of the majority of the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The Hon'ble High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:



“52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under: “(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary. (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated.

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the consumer then the tariff would not be subject to regulation. However, where a trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.

55. The words “supply of electricity by a generating company to a distribution licensee” occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR.

56. It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amendable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework of EA.”

64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco-I in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licensee was outside the purview of regulation by the CERC under Section 79 (1) (f) read with Section 62 of the Act.”



24. The above judgement was challenged before the Division Bench of the Hon'ble High Court of Delhi in FAO (OS) No. 244/2012 (Jaiprakash Power Venture Pvt Limited v PTC India Limited). Subsequently, the said FAO was withdrawn and there was no further challenge to the judgement dated 15.5.2012 in OMP No. 677/2011. The decision in the said OMP has attained finality which clearly provides 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. Since in the present case, electricity is supplied from the generating station of the Petitioner to the discoms of UP through PTC based on back to back arrangements, such supply of power shall be subject to regulatory jurisdiction of this Commission, including adjudication of any disputes with reference to supply of such power and the tariff thereof.

25. The Appellate Tribunal in Lanco Power Ltd v HERC & ors has taken the view that when power is supplied to a trading licensee who has back to back arrangements for supply of the same power to the distribution licensees, the Appropriate Commission has the power to determine the tariff. The Hon'ble High Court of Delhi in PTC India Ltd v Jaiprakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under Section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution licensees for eventual supply to the consumers. It is pertinent to mention that this Commission relying on



the judgement of Hon'ble High Court had decided the jurisdiction of this Commission in case of supply of power by GMR Kamalanga Ltd to Haryana Utilities through PTC India Limited. The jurisdiction of the Commission was upheld by the Appellate Tribunal in its judgement dated 7.4.2016 against which GRIDCO filed Civil Appeal No. 5415/2016. The Hon'ble Supreme Court in its judgement dated 11.4.2017 in Energy Watchdog case upheld the jurisdiction of the Commission. In the light of the settled legal position and the factual matrix of the present case, the contentions of the Respondent, UPPCL with regard to the absence of jurisdiction of this Commission to adjudicate the disputes between Petitioner, TRNEL/PTC and the Respondent, UPPCL/UP discoms are rejected. We hold that the Petition filed by the Petitioner to adjudicate the disputes is maintainable under Section 79(1)(b) read with section 79(1)(f) of the 2003 Act.

26. It is pertinent to mention that the Respondents i.e UPPCL/UP discoms had raised the same issues before this Commission in Petition No. 224/MP/2018 (MBP (MP)L V UPPCL & ors) and Petition No. 289/MP/2018 (MBP (MP)L V UPPCL & ors) and the Commission by its Orders dated 18.1.2019 and 30.4.2019 respectively had rejected the above submissions of the Respondents UPPCL/UP discoms and had granted relief to the Petitioner therein. In the above background, we find no merit in the submissions of the Respondent, UPPCL/UP discoms and accordingly the same are rejected. The Petition is therefore maintainable.

27. Having dealt with the objections of the Respondents UPPCL/UP discoms as above and held that the Petition is maintainable, we proceed to examine the issues raised by the Petitioner, on merits.



Issue No. (B): Whether penalty in any contract year is to be calculated on a 'cumulative basis' or on 'standalone' basis in terms of the PPAs?

28. The Petitioner in this Petition has sought for directions on the Respondents, UPPCL/UP discoms for computation of penalty amount considering the cumulative availability till the last month and not on standalone basis, as per terms of the PPAs executed by the parties. It has submitted that in terms of sub-clause (iv) of Clause 4.2.1 under Schedule 4 of the Procurer-PPA, the penalty for shortfall in supply is applicable on 'cumulative basis', whereas, the Respondent, UPPCL has decided to impose the penalty amount on a 'stand-alone' basis and thereby not to give reconciliation of monthly penalty at the end of the contract year. The Petitioner has pointed out that PTC vide its e-mail dated 23.1.2018 has forwarded the UPPCL's letter dated 11.1.2018 (regarding the decision to deduct penalty under Case-I PPA) and has submitted that the said decision of the Respondent violates Clauses 4.2.1 and 4.25 of the Procurer-PPA. The Petitioner has further submitted that during the months of October 2017, November 2017 and December 2017, the generating station of the Petitioner has maintained availability of 97.93%, 90.43% and 99.51% respectively. It has stated that though the Respondent, UPPCL has not deducted penalty for the above months, it has not given effect to the same while computing cumulative availability till December 2017. According to the Petitioner, an amount of ₹5.03 crore would remain unrecoverable till December 2017 and accordingly, it has prayed that the Respondent UPPCL/UP discoms may be directed to compute the penalty for shortfall in supply on yearly 'cumulative basis' as per PPA and refund the amount of penalty wrongly deducted along with carrying cost.



Analysis and Decision

29. The matter has been considered. Clause 4.2 of Schedule 4 of the Procurer-PPA dated 25.7.2013 provides as under:

“4.2 Monthly Tariff Payment

4.2.1 Components or monthly tariff payment

The monthly bill for any month in a contract year shall consist of the following:

- (i) Monthly capacity charge payment in accordance with clause 4.2.2 of schedule 4;*
- (ii) Monthly energy charge for scheduled energy in accordance with clause 4.2.3 of schedule 4;*
- (iii) Incentive determined in accordance with clause 4.2.4 of schedule 4 (applicable on a cumulative basis and included in each monthly bill);*
- (iv) Penalty determined in accordance with clause 4.2.5 of schedule 4 (applicable on a cumulative basis and included in each monthly bill)*

xxxx

4.2.5 Contract year penalty for Availability below Eighty percent (80%) during the contract year

4.2.5.1 In case the availability for a Contract Year is less than eighty percent (80%), the seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity Charge (in Rs/Kwh) for all months in the Contract Year applied on the energy (in kWh) corresponding to the difference between eighty percent (80%) and Availability during such Contract Year”

30. The term ‘Contract Year’ has been defined in the Procurer-PPA as under:

“Contract Year shall mean the period commencing on the effective date and ending on the immediately succeeding March 31 and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31;

Provided that:

- (i) In the financial year in which the scheduled delivery date would occur, the contract year shall end on the date immediately before the scheduled delivery date and a new contract year shall commence once again from the scheduled delivery date and end on the immediately succeeding March 31, and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31, and*

(ii) Provided further that the last contract year of this agreement shall end on the last day of the term of this agreement;

And further provided that for the purpose of payment, the tariff shall be the quoted tariff for the applicable contract year as per schedule 8 of this agreement.”



31. As per clause 4.2.1 (iv) of Schedule 4 of the Procurer-PPA, monthly bill shall include penalty determined in accordance with clause 4.2.5 of Schedule 4 and shall be applicable on cumulative basis and included in the monthly bill. Clause 4.2.5.1 of Schedule 4 of the Procurer-PPA dated 18.1.2014 provides that in case the availability for a contract year is less than 80%, a penalty of 20% of the simple average Capacity Charge for all months in the Contract year applied on the energy corresponding to the difference between 80% and actual availability during contract year will be imposed. It is, therefore, clear from clause 4.2.5.1 of Schedule 4 that penalty shall be calculated on the basis of availability for the entire contract year and not on the basis of availability during any particular month or on 'standalone basis'.

32. It is observed that the Chief Engineer (Planning), UPPCL has issued certain guidelines for computation of penalty under Case-1 PPA. The letter dated 11.1.2018, issued by the Chief Engineer (Planning), UPPCL, addressed to the Superintending Engineer (Import/Export Unit) contains the following guidelines for calculation of penalty:

“(a) Penalty be enforced for each month keeping in view the Contracted Capacity for the month and the actual scheduled availability in the month on standalone basis i.e non-cumulative yearly treatment to availability.

(b) As a corollary of the above, there shall be no reconciliation of the monthly penalty deducted at the end of the Contract Year.

(c) For the previous contract year(s) same principle be applied and in case any penalty is deemed payable for the contract year(s) against the Seller the same be adjusted from the monthly bills of the Seller.”

33. In response to the above letter dated 11.1.2018, the Petitioner vide its letter dated 5.2.2018 has pointed out that the calculation of penalty on monthly 'standalone basis' by UPPCL for the period from December 2016 to March 2017 and from April 2017 to December 2017 and the decision to dispense the reconciliation



of the monthly penalty deducted at the end of the contract year, is not in line with the provisions of the PPA dated 25.7.2013 and the same would lead to unrecoverable damages.

34. It is observed that the Respondent, UPPCL has decided to calculate penalty for each month, keeping in view the contracted capacity for the month and the actual scheduled availability in the month on a 'standalone basis'. In other words, Respondent, UPPCL has decided to adopt a non-cumulative yearly treatment of availability. As a corollary to the above decision, Respondent, UPPCL has dispensed with the reconciliation of the monthly penalty deducted at the end of the contract year. Clause 4.2.5.1 of Schedule 4 of the Procurer-PPA dated 25.7.2013 provides for computation of Availability of the Contracted Capacity on an 'annual basis' and penalty, if any, was required to be imposed only if the annual availability falls below 80%. In other words, the Procurer-PPA dated 25.7.2013 does not provide for the computation of Availability and/or deduction of penalty on 'standalone monthly' basis. The terms of the Procurer-PPA dated 25.7.2013 are unambiguous and clear and the Respondent, UPPCL is bound by the express provisions of the said PPA. Hence, in terms of the provisions of the PPA no penalty can be imposed by Respondent, UPPCL by calculation of availability on standalone monthly basis in terms of its letter dated 11.1.2018. In our considered view, the methodology adopted by the Respondent, UPPCL for deduction of penalty upto December 2017 by computation of availability of Contracted Capacity on standalone monthly basis, in terms of the said letter, amounts to unilateral amendment of the provisions of the PPA and is contrary to Clause 4.2.5 of Schedule 4 of the Procurer-PPA. We, therefore, hold that the Petitioner is entitled to refund of the said amount deducted by Respondent, UPPCL by considering Availability on monthly basis. We



also hold that the penalty applicable for shortfall in Availability of Contracted Capacity shall be computed by UPPCL, on 'annual basis' in terms of Clause 4.2.5 of Schedule 4 of the Procurer-PPA dated 25.7.2013.

35. The Petitioner in this Petition has stated that the Respondent, UPPCL has deducted penalty during the months from April 2017 till December 2017. It has, however, not furnished any break-up as to whether the availability declared is more than 80% during the said period, except that for the months of October 2017, November 2017 and December 2017, when it had maintained availability of 97.93%, 90.43% and 99.51% respectively. The Petitioner has also not submitted any break-up of the amount of ₹5.03 crore (upto December 2017) stated to have been deducted by the Respondent, UPPCL. In the absence of these details, the exact amount to be refunded by Respondent UPPCL could not be determined in this order. We, therefore, direct that the refund of the penalty amount by Respondent UPPCL to the Petitioner, in terms of our decision above, shall be based on documentary proof that the Petitioner's generating station has maintained availability of more than 80% (calculated on a cumulative basis) for contract year ending on 31st March 2018.

36. The Petitioner has also submitted that the decision of the Respondent, UPPCL not to reconcile the monthly penalty at the end of the Contract Year is contrary to the Procurer-PPA dated 25.7.2013. In terms of Clause 8.7.1, all reconciliations including computation of Availability /deduction of penalty, if any, shall be done on quarterly basis at the beginning of the following quarter of each contract year and on annual basis at the end of each contract year. We have in this order held that the penalty applicable for shortfall in availability of the contracted capacity



shall be computed and refunded by the Respondent UPPCL on 'annual basis' in terms of the PPA dated 25.7.2013. Accordingly, the annual reconciliation shall be undertaken by the Respondent, UPPCL taking into account REA, tariff adjustment payments, tariff rebate, late payment surcharge etc. in terms of the provisions of the said PPA dated 25.7.2013.

Carrying Cost

37. The Petitioner in the Petition has prayed that the penalty amounts deducted by Respondent, UPPCL ought to be refunded to the Petitioner along with carrying cost.

Analysis and decision

38. The matter has been considered. The amounts deducted by Respondent, UPPCL is contrary to the provisions of the PPA dated 25.7.2013 which was otherwise payable on the due date at the end of the relevant month. Article 8.3.5 of the Procurer-PPA provides as under:

"8.3.5 In the event of delay in payment of monthly bills by any procures beyond its due date, a late payment surcharge shall be payable by such procures to the seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded and Monthly rest, for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary bill."

xxxxx

8.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable in the same terms applicable to the Monthly Bill in Article 8.3.5."

39. Due date has been defined in the PPA as under:

"Due Date" means the thirtieth (30th) day after a Monthly Bill or a Supplementary Bill is received and duly acknowledged by the Procurer (or, if such day is not a Business Day, the immediately succeeding Business Day) by which date such monthly bill or supplementary bill is payable by such Procurer(s)."

40. Due date has been defined as the thirtieth day after a monthly bill or



supplementary bill is received and duly acknowledged by the Procurers. Article 8.3.5 deals with late payment surcharge in case of delay in payment of monthly bills by the Procurer beyond the due date. In terms of Article 8.8, tariff payments for change in parameters, pursuant to provisions in Schedule 4 shall be raised as supplementary bills. Article 8.8.3 deals with late payment surcharge in case of delay in payment of supplementary bills. In the present case, the Respondent, UPPCL has unilaterally, based on its letter dated 11.1.2018, deducted penalty of against bills raised by Petitioner, considering the Availability on standalone monthly basis, instead of on annual basis, which is contrary to the provisions of the PPA. In our view, the Respondent UPPCL is therefore liable to pay the late payment surcharge on the deducted amount from the date of deduction till the date of payment at the rate envisaged in Articles 8.3.5 and 8.8.3 of the PPA.

41. Based on the above, the decision of the Commission is summarized as under:

- (a) The penalty for shortfall in Availability of the Contracted Capacity shall be computed by Respondent, UPPCL on “annual basis” in terms of clause 4.2.5 of Schedule 4 of the Procurer-PPA dated 25.7.2013.
- (b) Annual reconciliation to take into account REA, tariff adjustment payments, tariff rebate, late payment surcharge etc. shall be undertaken by the Respondent in terms of the provisions of the said PPA dated 25.7.2013.
- (c) Any penalty amount deducted by the Respondent, UPPCL in violation of clause 4.2.5 of Schedule 4 of the Procurer- PPA shall be refunded to Petitioner, along with late payment surcharge from the date of deduction till the date of payment at the rate as envisaged in Articles 8.3.5 and 8.8.3 of the Procurer- PPA.

42. Petition No. 77/MP/2018 is disposed of in terms of the above.

Sd/-
(I.S. Jha)
Member

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

Sd/-
(P.K. Pujari)
Chairperson

