

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 158/MP/2019

- Subject : Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 seeking a declaration that the deductions made by the Respondents towards penalty imposed and capacity charges from the bills raised by the Petitioner for the months of December, 2018, January, 2019 and February, 2019 is illegal and wrongful and a consequent direction to the Respondents, to jointly and severally, pay the deducted/withheld amounts against the bills raised for the month of December, 2018, January, 2019 and February, 2019, i.e. penalty imposed and unpaid capacity charges.
- Petitioner : Adhunik Power and Natural Resources Limited (APNRL)
- Respondents : Tamil Nadu Generation and Distribution Company Limited (TANGEDCO) and Anr.
- Date of Hearing : 21.5.2020
- Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
- Parties present : Shri Deepak Khurana, Advocate APNRL
Shri Tejasv Anand, Advocate, APNRL
Shri Amit Griwan, APNRL
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri Vishrov Mukherjee, Advocate, PTC
Shri Rohit Venkat, Advocate, PTC

Record of Proceedings

The matter was listed for hearing through video conferencing.

2. Learned counsel for the Petitioner submitted that the present Petition has been filed, *inter-alia*, seeking declaration that deduction made by the Respondents towards penalty imposed and capacity charges in the bills as raised by the Petitioner for the months of December, 2018 to February, 2019 is illegal and further direction to the Respondents, jointly and severally, to forthwith pay the deducted/withheld amount along with interest. Learned counsel further submitted as under:

- (a) The Petitioner and the Respondent No. 2, PTC India Limited (PTC) has executed back-to-back Power Purchase Agreement dated 19.12.2013 (PTC-PPA) pursuant to Power Purchase Agreement dated 18.12.2013



(TANGEDCO-PPA) entered into between PTC and TANGEDCO for supply of 100 MW power on long-term basis from the Petitioner's generating station.

(b) On account of persistent delay by the Respondents in making the payments under the provisions of the PPAs as well as for non-opening of Letter of Credit (LC), the Petitioner was constrained to invoke the provisions of Article 8.5 of the PTC-PPA with effect from 20.12.2019.

(c) As per Article 8.5.2 of the PTC-PPA, in case PTC fails to make payment by the due date, the Petitioner shall have the right to sell 25% of the contracted capacity to third parties. Further, as per Article 8.5.5 of the PTC-PPA, if the Standby Letter is not fully restored by PTC/Procurer within 30 days of the non-payment by the PTC/Procurer, the provisions of Article 8.5.2 of the PTC-PPA shall apply with respect to 100% of the contracted capacity. Further, as per Article 8.5.8, in both the above situations, the Petitioner is entitled to receive the capacity charges corresponding to the contracted capacity.

(d) As per various letters of PTC and TANGEDCO, there is an admitted default on their part in making timely payment to the Petitioner in terms of the PPAs. It is also an admitted position that PTC has failed to open Letter of Credit in **the** favour of the Petitioner in terms of PTC-PPA.

(e) Contention of PTC that since the PPAs are back-to-back in nature, the opening of LC by PTC is contingent upon the opening of LC by TANGEDCO and the Petitioner cannot invoke Article 8.5 of the PTC PPA, is misconceived. The Commission in its order dated 9.8.2019 in Petition No. 393/MP/2018 (JSW Hydro Energy Limited v. PTC India Limited and Ors.) has already rejected similar contentions raised by PTC.

(f) No reply has been filed by TANGEDCO despite given number of opportunities. However, the contention raised by TANGEDCO in its letter dated 13.2.2019 that since the delay in payment is protected by Late Payment Surcharge (LPS), the Petitioner could not have invoked Article 8.5, is misconceived as remedy under Article 8.5 is in addition to the LPS and not in derogation. Therefore, such interpretation would render Article 8.5 redundant.

(g) Accordingly, the Petitioner has prayed for direction to the Respondents, jointly and severally, to refund the illegally withheld/deducted amount towards capacity charges along with interest.

3. Learned counsel for the Respondent, TANGEDCO submitted as under:

(a) TANGEDCO is not disputing the claims of the Petitioner.

(b) PTC-PPA has been entered into after TANGEDCO-PPA and there is no mention of any commitment entered into by PTC with the Petitioner in TANGEDCO-PPA. Both the PPAs are having different and distinct provisions and TANGEDCO is not liable to or accountable to the terms and conditions contained in the PTC-PPA.



(c) Hon'ble High Court of Delhi in its judgment dated 15.5.2012 in the case of PTC India Limited v. Jaiprakash Ventures Limited had observed that 'a trader is treated as an intermediary. When the trader deals with the distribution company for resale 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 all the risks to the purchaser under resale, then there is clearly a link between the ultimate distribution company and the generator with the trader acting as only an intermediary linking company'. PTC has specifically taken on itself the financial and commercial risks under the PTC-PPA.

(d) Under Schedule 1 of the PTC-PPA, the Petitioner and PTC have specifically agreed that the terms and conditions of TANGEDCO-PPA shall be applicable to the Petitioner and it shall abide, adhere and fulfil the terms and conditions and obligations arising under the TANGEDCO-PPA, albeit subject to certain deviation/changes as specified therein. However, there is no similar clause in TANGEDCO-PPA to the effect that TANGEDCO agreed to abide and adhere to fulfil the obligations of PTC towards the Petitioner under PTC-PPA

(e) Reference to the various Articles of the PTC-PPA makes it clear that the obligation of PTC, *inter-alia*, to make payment for supply of power as well as opening of LC under the PTC-PPA is not contingent upon the payment and opening of LC by TANGEDCO in favour of PTC under TANGEDCO-PPA. As per various letters and correspondence available on record, TANGEDCO had furnished LC to PTC in February, 2019.

(f) There is no direct link between the Petitioner and TANGEDCO and it is only in Article 8.5.5 of the PTC-PPA, liability to restore the Standby Letter of Credit has been tied to PTC/Procurer i.e. TANGEDCO. However, PTC-PPA is bilateral contract between the parties and TANGEDCO, being non-signatory to the said contract, terms and conditions agreed under PTC-PPA cannot bind TANGEDCO.

(g) TANGEDCO, not being party to PTC-PPA, is not obliged to fulfil PTC's obligations/duties qua payment of tariff and opening of LC therein.

(h) The Petitioner, in its various letters issued to PTC, has categorically referred to the failure of PTC in making payments and opening of LC in terms of PTC-PPA. Since PTC has failed to fulfil its obligations under the PTC-PPA, any consequent payment liability on account of invocation of Article 8.5 by the Petitioner arises on PTC.

(i) TANGEDCO is only liable to pay for scheduled power and not otherwise. TANGEDCO had accordingly informed PTC that since there is deficiency in scheduling of power, it is imposing penalty and the same **was** accepted by PTC.



(j) The Commission in its order dated 9.8.2019 in 393/MP/2019 (JSW Hydro Energy Limited v. PTC India Limited and Ors.) has held that under the terms and conditions of the PPA with the generator, payment security mechanism in the form of monthly revolving irrevocable LC is to be provided to the generator by PTC and in terms of Regulation 7 (h) of the Trading License Regulations, a statutory obligation is cast on PTC to carry out trading in accordance with the terms and conditions and to take such safeguards as considered necessary, with regard to payment security mechanism.

(k) The Commission in its order dated 26.3.2020 in Petition No. 127/MP/2019 and Ors., after examining provisions of PPA and PSA, had observed that even though PPA and PSA are back-to-back in nature, the billing and payment between the Petitioner (generating station) and SECI (Trader) are not conditional upon billing and payment between SECI (Trader) and Discoms. The said ratio squarely applies in the present case as billing and payment between the Petitioner and PTC are not conditional upon billing and payment between PTC and TANGEDCO.

(l) The genesis of the entire dispute, resulting in curtailment of power by the generator and claim of capacity charges is due to default on the part of PTC to comply with its obligations under PTC PPA.

4. Learned counsel for the Respondent, PTC mainly submitted as under:

(a) Contention of TANGEDCO that PTC is acting as merchant trader and that the supply arrangement is not back-to-back is grossly misplaced. PTC-PPA incorporates all the terms and conditions of TANGEDCO-PPA as back-to-back arrangement for supply of power by the Petitioner to TANGEDCO. The preamble of Procurer-PPA along with Schedule-5 itself recognizes that the supply of power is from the Petitioner.

(b) PTC-PPA and TANGEDCO-PPA are back-to-back in nature and PTC-PPA has been executed in order to enable PTC to fulfil its obligations under TANGEDCO-PPA. PTC is only an intermediary. Actual generation and consumption of electricity takes place by the Petitioner and TANGEDCO respectively.

(c) As per Article 6 of the PTC-PPA, PTC is only paid its trading margin. Despite this, PTC had been making payments to the Petitioner from its own resources irrespective of whether PTC has received payment from TANGEDCO. However, PTC could not continue making payment to the Petitioner from its own resources indefinitely without receiving payments from TANGEDCO.

(d) As regards LC, PTC had continuously written letters to TANGEDCO to provide LC at the earliest in terms of the PPA. However, TANGEDCO issued LC to PTC on 20.2.2019 in which there were certain technical issues. Since, TANGEDCO issued fresh LC on 1.8.2019, PTC immediately issued LC in favour of the Petitioner on 2.8.2019.

(e) In none of the oral submissions put forth by the learned counsel for TANGEDCO, the persistent delay in making the payment and opening of LC



by TANGEDCO under TANGEDCO-PPA has been pointed out. Accordingly, the Commission may direct TANGEDCO to file its reply and to explain the reason for delay/default committed by it.

5. In rebuttal, learned counsel for the Petitioner submitted that none of the Respondents have disputed the claims of the Petitioner on merits but have only attempted to shift the liability of making payment on to each other. Learned counsel further submitted that oral arguments put forth by the learned counsel for TANGEDCO is on completely different footing from what is indicated in its letter dated 13.2.2019. Further, TANGEDCO did not raise such objections earlier in the Petition No. 17/MP/2019, wherein the Commission adjudicated certain Change in Law events between the same parties in terms of the above PPAs.

6. The Commission observed that the Respondent, TANGEDCO has not filed any reply despite repeated directions. Learned counsel for TANGEDCO submitted that oral submissions made by it during the course of hearing may be considered while passing the order.

7. Based on the request of learned counsel for PTC, the Commission allowed PTC to file its reply/written submission in response to the oral arguments/submissions put forth by TANGEDCO on or before 3.6.2020 with copy to each other.

8. Subject to the above, the Commission reserved order in the matter.

By order of the Commission

**Sd/-
(T.D. Pant)
Deputy Chief (Law)**

