

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.116/MP/2019

- Subject : Petition under Section 79 (1)(f) of the Electricity Act, 2003 read with CERC Tariff Regulations, 2014 for resolution of disputes regarding payment of capacity charges for the allocated capacity for Muzaffarpur Thermal Power Station (MTPS) Stage-II (2 x 195 MW).
- Petitioner : Kanti Bijlee Utpadan Nigam Limited
- Respondents : Jharkhand Bijli Vitran Nigam Limited & 4 ors.
- Date of Hearing : **17.9.2021**
- Coram : Shri P.K. Pujari, Chairperson
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member
- Parties Present : Ms. Swapna Seshadri, Advocate, KBUNL
Ms. Ritu Apurva, Advocate, KBUNL
Shri Venkatesh, Advocate, DVC
Shri Ashutosh Kumar Srivastava, Advocate, DVC
Ms. Mehak Verma, Advocate, DVC
Shri Mahoranjana Sahoo, DVC
Shri Arijit Maitra, Advocate, GRIDCO
Shri R.B. Sharma, Advocate, WBSEDCL

Record of Proceedings

The case was called out for virtual hearing.

2. During the hearing, the learned counsel for the Petitioner, KBUNL mainly submitted that the present Petition has been filed for resolution of disputes which have arisen due to short payment/ non-payment of capacity charges to the Petitioner in respect of the allocated capacity supplied to the Respondents under the respective PPAs entered into with them. Referring to the various provisions of the PPA (Articles 2.2, 3.0, 4.1 and 4.2), the learned counsel submitted that the PPA entered into with the beneficiaries is based on the allocation of power made by MOP, GOI and the right to recover the capacity charges are based on the Declared Capacity by the Petitioner. She further submitted that the Respondents cannot avoid the obligations under the PPA on the pretext of reallocation/ de-allocation of power by MOP, GOI and ARR petition pending before the State Commission. The learned counsel also submitted that the objections of the Respondents were considered in order dated 9.3.2018 in Petition No. 20/MP/2017, wherein, the Commission held that the Respondent beneficiaries cannot unilaterally abandon the PPA. She added that the total dues payable by the Respondents towards capacity charges and energy charges (partly) is Rs.539 crore, out of which, Rs 489.02 crore was outstanding for more than 45 days. The learned counsel prayed that the Petitioner may be permitted to file the status of outstanding dues payable by the Respondents.

3. The learned counsel for Respondent, WBSEDCL submitted that pursuant to the filing of the present petition, both the parties, in terms of Article 7 of the PPA, had arrived at an



amicable settlement of the dispute on 27.5.2019, subject to the approval of the competent authority of both parties. He further submitted that in terms of the amicable settlement, principal amount of Rs 32.18 crore is to be paid to the Petitioner in 24 installments and Late Payments Surcharge is to be waived by the Petitioner. The learned counsel submitted that payments will be made in accordance with the settlement, once consent is received from the Petitioner on the same.

4. The learned counsel for the Respondent, GRIDCO raised preliminary objections and mainly submitted as under:

- (a) The PPA between the Petitioner and the Respondent has not come into operation, as the same is pending approval of the State Commission (Orissa Electricity Regulatory Commission) in terms of Section 86(1)(b) of the Electricity Act, 2003. In the absence of approval of the PPA and the ARR of the Respondent by the State Commission, the bills raised by the Petitioner are not payable (Rule 8 of the Electricity Rules, 2005 and the judgment dated 31.3.2010 in Appeal Nos.106 & 107/2009 (BRPL v DERC & ors) was referred to;
- (b) Though the Respondent executed the PPA with the Petitioner on 27.12.2010, due to delay in the commissioning of the generating station within the scheduled COD, the Respondent was left with no option but to make alternate arrangements to meet the power demand of the State by signing PPAs/ Supplementary PPAs with other generating companies/ IPPs, in order to fulfill the 'Universal Supply obligation'. The doctrine of frustration/ doctrine of legitimate expectation will be applicable in the present case.
- (c) The Govt. of Odisha, at the request of the Respondent, had requested MOP, GOI to consider the de-allocation of power from the generating station, due to surplus power situation in the State. Accordingly, MOP, GOI accepted the proposal and has sought willingness from interested States for acceptance of such de-allocated quantum of 30 MW power, surrendered by the State of Odisha.
- (d) The relevance of Section 31 (contingent contract) and Section 32 (enforcement of contingent contract on an event happening) can be found in Article 2.2.2, Article 6.2 and Article 11 of the PPA. In terms of Article 2.2.2, the allocation made by MOP, GOI from the generating station to the Respondent is subject to signing of agreement, opening of LC and providing appropriate payment mechanism (as provided under Article 6.2). The Respondent has not opened LC for such transaction since it has approached MOP, GOI for de-allocation of the capacity. The Respondent vide letter dated 29.6.2017 had informed the Petitioner that Bihar SLDC was neither intimating any declared capacity of generating station of the Petitioner, on day ahead basis, nor getting consent from SLDC Odisha, for scheduling the power.
- (e) Though various letters have been addressed to ERLDC by the Respondent objecting to the scheduling of power from the generating station of the Petitioner, power has been scheduled by force, despite there being no contract between the parties. The allocation made by MOP, GOI through its notification cannot override the provisions of the statute. The letters addressed by the Respondent to ERLDC may be taken on record.

5. The learned counsel for the Respondent, DVC mainly submitted the following:



- (a) As per the Tariff Regulations notified by the Commission, the Procurer's liability to pay fixed charges emanates from fact that availability is declared by the generator. The generating station was commissioned belatedly and it was decided in the ERPC forum on 25.1.2017 that SLDC, Bihar is responsible for optimum scheduling and despatch of electricity from the generating station. However, SLDC Bihar was neither communicating any declared capacity to the Respondent on a day-ahead basis nor getting any consent from the Respondent for scheduling the same. As the Respondent was completely unaware of the declared availability of the generating station of the Petitioner, it cannot be held liable to pay capacity charges.
- (b) Pursuant to this Commission's order dated 9.3.2018 in Petition No. 20/MP/2017, ERLDC, with effect from 1.4.2018, has been communicating the declared capacity of the generating station to the Respondent, on a regular basis, which enabled the Respondent to schedule power and make regular payments to the Petitioner, within the due dates, for the energy consumed.
- (c) It is evident from the Monthly Energy Accounts Statements signed by the executives of the Petitioner that it was aware, as early as in June 2017, that no scheduling of power was given by SLDC Bihar to the Respondent. The Respondent has, therefore, contested its liability to pay capacity charges claimed by the Petitioner for the period from March 2017 to March 2018.
- (d) The Petitioner had failed to supply power even after five years after execution of the PPA. Thus, the Respondent had no other option but to consider alternative measures to mitigate the losses caused on account of the said delay. Accordingly, the Respondent requested MOP, GOI to re-allocate the quantum of power to prospective beneficiaries and pursuant to this, MOP, GOI vide OM dated 6.5.2016 has requested different States to convey their interest to avail the quantum of power (10 MW) proposed to be surrendered by the Respondent.

6. In response to the above, the learned counsel for the Petitioner mainly clarified as under:

- (a) The reliance placed by the Petitioner on the observation of the Commission in its order dated 9.3.2018 in Petition No. 20/MP/2017 that when power is allocated, the parties are bound by the provisions of the PPA, till the same is in operation, has not been answered by the Respondents. As per Regulation 30 of the 2014 Tariff Regulations, the Respondents are liable to pay capacity charges till the time power remain allocated.
- (b) The submission of the Respondent GRIDCO that since no LC was opened by it, the PPA does not exist and the allocation gets frustrated, cannot be accepted, as the party cannot, after violating the agreement, contend that no PPA exists between the parties. The reliance to Article 2.2.2 of the PPA is erroneous, as it provides that the allocation letter will form basis of the PPA. Assuming that PPA did not exist (as argued by Respondent GRIDCO), there was no need for the Respondent to seek de-allocation of power from MOP, GOI.
- (c) In various meetings held before ERPC, it was decided that since power from Unit-I was entirely allocated to the State of Bihar and power from Unit-II was allocated to other States, Bihar SLDC will schedule the power. In the said



meeting, the Petitioner was directed to approach the Commission for clarification. Pursuant to the order dated 9.3.2018 in Petition No.20/MP/2017, scheduling of power to the Respondents was done by ERLDC. No issues were raised by the Respondents regarding SLDC not giving them schedules, despite being aware of the same.

- (d) The contentions of the Respondent GRIDCO with regard to the delay in COD of the generating station were rejected by the Commission in its order dated 29.4.2019 in Petition 74/GT/2019, wherein, the delay of 948 days for Unit-1 and 961 days for Unit-II was condoned, while determining the tariff of the generating station for 2017-19.
- (e) Only a meeting was held with the Respondent, WBSEDCL and there was no amicable settlement of the disputes as alleged by the Respondent. The decision of the Commission in the present petition will bind all the parties.

7. The Commission, after hearing the parties directed the Petitioner to file the following additional information, after serving copy to the Respondents, on or before 11.10.2021:

- (i) The monthly energy accounting statements issued by SLDC, Bihar and counter-signed by the KBUNL for the month of June 2017 shows that the monthly availability of the plant as well as scheduled generation are 'zero'. Accordingly, the Petitioner shall provide details regarding the basis for raising of monthly bills against the beneficiaries, if any;
- (ii) The sum of allocation made by MOP, GOI to DVC, Jharkhand, Orissa, Sikkim and West Bengal is 88 MW, but LTA has been taken for 121.6 MW. Further, in the communication made by the Petitioner to its beneficiaries for opening of LC, the quantum mentioned is at variance with the allocation made by MOP, GOI. In addition, it is noted that State of Telangana has also been considered as one of the beneficiaries of the generating station. The Petitioner shall, therefore, provide clarification regarding the difference of 33.6 MW and the variation between the quantum for which LC has been demanded and allocation made by Ministry of Power. In addition, the Petitioner may also provide information regarding the quantum of power being supplied to the State of Telangana, the date of commencement of supply and allocation after such transfer of power;
- (iii) Details as per Annexure-I (attached below) for the period between 17.3.2017 to 31.3.2018.

8. At the request of the parties, time to file written submissions has been granted till 22.10.2021.

9. Subject to the above, order in the Petition was reserved.

By order of the Commission

Sd/
(B. Sreekumar)
Joint Chief (Law)



Annexure – I

		17.3.2017 to 31.3.2017	1.4.2017 to 30.4.2017	1.5.2017 to 31.5.2017	1.3.2018 to 31.3.2018
Average DC					
Energy generated					
Energy supplied to Bihar					
Energy traded through Short term market					
Amount received from Short term sale					
Beneficiary 1	Energy supplied				
	Amount levied on account of Annual Fixed Charges				
	Amount levied on account of energy charges				
	Date of invoicing				
	Payment received				
	Date of payment received				
Beneficiary 2	Energy supplied				
	Amount levied on account of Annual Fixed Charges				
	Amount levied on account of energy charges				
	Date of invoicing				
	Payment received				
	Date of payment received				
	Payment received				
	Date				
<i>(same as above for Other beneficiaries)</i>					

