

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 61/MP/2021

- Subject : Petition under Section 79(1)(f) and (k) of the Electricity Act, 2003 for adjudication of disputes arising on account of termination of Power Purchase Agreement dated 31.7.2012 by the Respondent Nos. 1 and 2.
- Date of Hearing : 12.3.2021
- Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member
Shri P. S. Mhaske, Member (ex-officio)
- Petitioner : KSK Mahanadi Power Company Limited (KMPCL)
- Respondents : Southern Power Distribution Company of Andhra Pradesh Limited and 3 Ors.
- Parties Present : Shri M. G. Ramachandran, Sr. Advocate, KMPCL
Shri Anand K Ganesan, Advocate, KMPCL
Shri Ashwin Ramanathan, Advocate, KMPCL
Shri Ardhendumauli Kumar Prasad, Advocate, AP Discoms
Shri Ashish Madan, Advocate, AP Discoms
Shri Sidhant Kumar, Advocate, AP Transco

Record of Proceedings

Case was called out for virtual hearing.

2. Learned senior counsel for the Petitioner submitted that the present Petition has been filed, *inter alia*, for seeking to declare action of Respondent Nos. 1 & 2 ('AP Discoms') in issuing the termination notice dated 19.12.2020 in respect of Power Purchase Agreement ('PPA') dated 31.7.2012 as illegal and arbitrary and to set aside the said notice. Learned senior counsel mainly submitted the following:

(a) As per Article 4.3.1(b) of the PPA, AP Discoms are required to pay transmission charges from injection point onwards and are also liable to reimburse the same to the Petitioner, if paid by it. However, owing to the AP Discoms' continuous and substantial defaults in making the payment of transmission charges including in reimbursing the Petitioner, power supply to AP Discoms was, time and again, regulated by the Power Grid Corporation of India Limited ('PGCIL') due to outstanding transmission charges. Thus, the non-supply of power to AP Discoms was solely attributable to their actions.

(b) In terms of Article 11.1.1 of the PPA, interruption of power supply by the seller does not constitute seller event of default if it occurs as result of a breach by Procurer of its obligations or a Procurer event of default. Non-payment of transmission charges as provided for in Article 4.3.1(b) of the PPA

is clearly spelled out as a Procurer event of default under Article 11.2.1(i) of the PPA.

(c) As on date, total undisputed outstanding amount due and payable by AP Discoms is Rs. 443.10 crore (inclusive of Rs. 112.96 crore towards transmission charges).

(d) Since the Commission was not holding the hearing in terms of the order dated 28.8.2020 of the Hon'ble Supreme Court in Contempt Petition (C) No. 429/2020 in C.A No. 14697/2015, the Petitioner had approached the Appellate Tribunal for Electricity ('APTEL') under Section 121 of the Electricity Act, 2003 ('the Act') and APTEL vide its orders dated 24.12.2020 and 12.1.2021 granted certain interim relief to the Petitioner as prayed therein. However, the said orders of APTEL were set aside by the Hon'ble Supreme Court vide its order dated 29.1.2021 in Civil Appeal Nos. 226-227 of 2021, on the ground that Section 121 of the Act does not give APTEL any power to decide disputes.

(e) Subsequently, the Petitioner approached the Hon'ble Delhi High Court in W.P (C) No. 1380/2021. As per the judgment of Hon'ble Delhi High Court dated 9.2.2021, the parties are required to maintain status quo on invocation of bank guarantee as well as the supply of power for a period of 30 days from its order or till the time the Petition and the application for appropriate interim orders of the Petitioner is taken up for consideration by this Commission, whichever is earlier and that thereafter the interim protection would be subject to the orders of this Commission. Accordingly, it was requested that the status quo between the parties may be extended till the outcome of the present Petition.

3. Learned counsel for the Respondents, AP Discoms, submitted that in terms of the decision of the Hon'ble Supreme Court, the Commission is required to decide the issue of jurisdiction. Accordingly, the Commission may first decide the primary question of jurisdiction. It was further submitted by the learned counsel that in the instant case, the dispute involved relates to termination of the PPA and not of the determination of tariff. It was submitted by the learned counsel that the jurisdiction in the present case lies with Andhra Pradesh Electricity Regulatory Commission ('APERC') as it is the APERC, which is mandated to regulate the electricity purchase and procurement process of AP Discoms through the agreements for purchase of power under Section 86(1)(b) of the Act.

4. In rebuttal, the learned senior counsel for the Petitioner submitted that APTEL, in the specific case *inter-se* the present parties, has upheld the jurisdiction of this Commission in judgment dated 31.10.2018 in Appeal No. 230 of 2017. This decision of APTEL has also been upheld by the Hon'ble Supreme Court in its order dated 3.12.2018 in Civil Appeal No. 11142 of 2018. It was further submitted that the Petitioner's generating station is located in the State of Chhattisgarh and in addition to the AP Discoms, it is supplying power to distribution companies of the States of Chhattisgarh, Uttar Pradesh and Tamil Nadu. Since the Petitioner has a composite scheme, only this Commission has the jurisdiction to adjudicate upon the dispute involved in the present Petition under Section 79(1)(f) of the Act.

5. After hearing the learned senior counsel for the Petitioner and the learned counsel for the Respondents, AP Discoms, the Commission directed to issue notice to the Respondents. The Commission directed the Petitioner to serve copy of the

Petition on the Respondents immediately, if not already served. The Respondents were directed to file their reply by 30.3.2021 with advance copy to the Petitioner who may file its rejoinder, if any, by 9.4.2021. The due date of filing of reply and rejoinder should be strictly complied with.

6. It was observed by the Commission that in terms of the order dated 29.1.2021 of Hon'ble Supreme Court in Civil Appeal No. 226-227 of 2021, the Commission is required to examine the issue of jurisdiction. The Commission further observed that the Hon'ble High Court of Delhi vide its judgment dated 9.2.2021 in W.P (C) No. 1380/2021 and Anr., had directed the parties to maintain status quo on invocation of bank guarantee as well as the supply of power for a period of 30 days or till the time the Petition is taken up for consideration by the Commission, whichever is earlier and that the further interim protection would be subject to the order of this Commission. The Commission observed that the parties have maintained the status quo on invocation of bank guarantee as well as the supply of power as per the judgment dated 9.2.2021 of the Hon'ble High Court of Delhi as obtained on 9.2.2021. Accordingly, the Commission directed the parties to continue to maintain the status quo on invocation of bank guarantee as well as the supply of power till further orders.

7. The Commission reserved the order on the issue of jurisdiction.

By order of the Commission

**Sd/-
(T.D. Pant)
Joint Chief (Legal)**