

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 150/MP/2021

Coram:

Shri P.K. Pujari, Chairperson

Shri I.S Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 31st December, 2021

In the matter of:

Petition under Sections 79(1)(c) of the Electricity Act, 2003 for implementation of Ministry of Power's Order No. 3/7/2017-Trans-Pt (6) dated 25.3.2021 read with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 2009 read with the application provisions of Transmission Service Agreement dated 26.1.2016.

And

In the matter of:

Warora Kurnool Transmission Limited,

C 105, Anand Niketan,

New Delhi-110021

...Petitioner

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited,

144, Anna Salai,

Chennai-600 002.

2. Southern Distribution Company of Andhra Pradesh Limited,

D.No. 19-13-65/A, Srinivasapuram,

Tiruchhanur Road, Kesavayana Gunta,

Tirupati - 517 503, Andhra Pradesh

3. Eastern Distribution Company of Andhra Pradesh Limited,

P&T Colony, Seethmmadhara,

Vishakhapatnam - 530013, Andhra Pradesh

4. Southern Distribution Company of Telangana Limited,

2nd Floor, H. No. 6-1-50, Mint Compound,

Hyderabad – 500063

5. Northern Power Distribution Company of Telangana Limited,

H. No. 2-5-31/2, Corporate Office Vidyut Bhavan,

Hanamkonda,

Warangal – 506001



6. Bangalore Electricity Supply Company Limited,
Krishna Rajendra Circle,
Bangalore – 560001

7. Gulbarga Electricity Supply Company Limited,
Station Road, Kalaburagi,
Karnataka – 585102

8. Hubli Electricity Supply Company Limited,
Corporate Office, P.B. Road, Navanagar,
Hubli – 580025

9. Mangalore Electricity Supply Company Limited,
Paradigm Plaza, A. B Shetty Circle,
Pandeshwar,
Mangalore – 575001

10. Chamundeshwari Electricity Supply Company Limited,
No. 29, CESC Corporate Office, Hinkal, Vijaynagar 2nd Stage,
Mysuru – 570017

11. Kerala State Electricity Supply Company Limited,
Vydyuthi Bhawanam, Pettom,
Tiruvananthapuram, Kerala - 695 004

12. Electricity Department,
Govt. of Puducherry 137, NSC Bose Salai,
Puducherry-605001

13. Electricity Department, Government of Goa,
Vidyut Bhavan, Near Mandvi Hotel,
Panaji, Goa-403001

...Respondents

Parties Present:

Shri Amit Kapur, Advocate, WKTL
Ms. Poonam Verma, Advocate, WKTL
Ms. Sakshi Kapoor, Advocate, WKTL
Ms. Gyatri Aryan, Advocate, WKTL
Shri Anank K. Ganesan, Advocate, Karnataka Discoms
Ms. Ritu Apurva, Advocate, Karnataka Discoms
Shri Jai Dhanani, Advocate, Karnataka Discoms
Shri Bhavesh Kundalia, WKTL,
Shri Afak Pothiawal, WKTL
Ms. Padmalatha, PCKL

ORDER

The Petitioner, Warora Kurnool Transmission Limited ('WKTL') has filed the present Petition under Section 79(1)(c) of the Electricity Act, 2003 (hereinafter

referred to as 'the Act') and Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 2009 read with applicable provisions of Transmission Service Agreement ('TSA') dated 26.1.2016 seeking implementation of the order of Ministry of Power dated 25.3.2021 (hereinafter referred to as 'MoP Order').

Background of the case

2. WKTL was incorporated as a special purpose vehicle by PFC Consulting Limited (PFCCL) as part of Tariff Based Competitive Bidding ('TBCB') process for implementing the transmission system of the "Additional inter-Regional AC link for import into Southern Region i.e. Warora- Warangal and Chilakaluripeta-Hyderabad-Kurnool 765 kV Link" (hereinafter referred to as "the Project") on Build, Own, Operate and Maintain (BOOM) basis. Essel Infra participated in the competitive bidding process conducted by PFCCL and upon emerging as the successful bidder, Letter of Intent (LOI) was issued by PFCCL to Essel Infra on 29.2.2016. In accordance with the bidding documents, Essel Infra acquired 100% of the shareholding in WKTL by executing a Share Purchase Agreement with PFCCL on 6.7.2016. WKTL entered into Transmission Service Agreement (TSA) with LTTCs on 6.1.2016. The Commission in its order dated 29.9.2016 in Petition No. 111/TL/2016 granted transmission licence to WKTL for inter-State transmission of electricity. As per TSA dated 6.1.2016, the transmission system comprised of seven elements and Scheduled Commercial Operation Date (SCOD) for element 1 to element 6 of the transmission system was 40 months from the effective date whereas, element 7 was required to be commissioned matching with Warora Pool-Ranganandgaon 765 kV D/C line by November 2018.

3. Ministry of Power (MoP) vide its letter No. 3/7/2017-Trans-Pt(6) dated 25.3.2021 (in short, 'the MoP order') reduced the Contract Performance Guarantee ('CPG') for certain TBCB transmission projects in light of stipulation in the Ministry of Finance Office Memorandum dated 12.11.2020 regarding reduction in Performance Security in all kinds of Government procurements from existing 5-10% to 3% of the value of the contract for all existing tenders/ contracts to be issued/ concluded till 31.12.2021.

4. Vide aforesaid order, MoP decided that CPG for TBCB transmission projects for (a) projects under construction where CPG is valid, (b) projects where Letter of Award has been issued but CPG is yet to be submitted, (c) projects where Request for Proposal (RfP) has been issued but bids are yet to be submitted, and (d) for projects where RfP is not yet issued, but to be issued till 31.12.2021, may be revised as under:

- (a) From existing Rs.13.5 lakh per km to Rs.5.25 lakh per km for total transmission line length; and
- (b) From existing Rs.1.125 lakh per MVA to Rs.0.45 lakh per MVA for sub-stations.

5. On 5.5.2021, WKTL informed all LTTCs regarding amendment/ reduction of CPG. WKTL further intimated LTTCs that it is coordinating with the bank for revising CPG value from Rs.104.94 crore to Rs.41.19 crore in favour of LTTCs in accordance with MoP order.

6. Vide letter dated 10.6.2021, WKTL informed PFCCL about the MoP Order requesting PFCCL to issue revised CPG for LTTCs to WKTL for further actions. PFCCL vide its letter dated 10.6.2021 confirmed the revised CPG amount (from Rs.104.94 crore to Rs.61.59 crore) in line with the MoP Order.

7. On 11.6.2021, WKTL informed LTTCs about letter of PFCCL confirming the revised amount of CPG for LTTCs in line with the MoP Order. WKTL requested LTTCs to give consent for the revised amount to enable WKTL to comply with TSA provisions.

8. On 18.6.2021, WKTL requested LTTCs to return the existing CPG in original within three days of receipt of revised CPG.

9. On 22.6.2021, WKTL wrote to lead LTTC i.e., Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) by referring to WKTL's previous communications dated 5.5.2021, 11.6.2021 and 18.6.2021 and reminding it regarding the MoP Order. Accordingly, WKTL requested for acceptance of revised CPG and return of the original CPG along with its amendments and guarantee discharge letter.

10. Since LTTCs did not respond to the request of WKTL, the Petitioner has filed the present Petition seeking relief in terms of implementation of the MoP Order by submitting CPG as per the amount computed by PFCCL in terms of the MoP Order.

Against the above backdrop, the Petitioner has prayed as under:

“(a) Allow the present Petition;

(b) Hold that MoP Order is applicable to WKTL and WKTL is required to submit only the reduced CPG (by 30.06.2021) of Rs.61,59,00,000/- instead of Rs.104,94,00,000/- as specified in WKTL's letter dated 21.06.2021.

(c) Direct, in the interim, LTTCs not to precipitate any action including invocation and/or encashment of CPG.

(d) Pass such other and further orders as may be deemed fit under the facts and circumstance of the present case.”

11. The Petitioner has submitted that the Project is still under construction and the MoP Order having force of law is to be implemented by all the parties to the TSA.

12. The Petitioner vide its additional affidavit dated 23.07.2021 has, *inter-alia*, submitted as under:

(a) In response to WKTL's letter dated 5.5.2021, lead LTTC, TANGEDCO vide its letter dated 29.6.2021 informed WKTL regarding meeting convened on 28.6.2021 among the LTTCs wherein it was decided that WKTL's request for revision of CPG amount in view of the MoP Order is not acceptable. Accordingly, it was decided in the meeting that CPG validity has to be extended for the same amount (i.e., Rs. 104.94 crore) till the completion of the project.

(b) LTTCs have been intimated that, in terms of the MoP Order, WKTL has obtained CPGs dated 29.6.2021 for Rs.61.59 crore, which have been submitted to all LTTCs. In the meantime, WKTL has also requested State Bank of India, by its letter dated 29.6.2021, to increase CPG value to Rs.104.94 crore (original value) by way of an amendment. WKTL further informed LTTCs that amended CPG shall be submitted and requested LTTCs not to take any coercive action including encashment of CPG which is valid till 30.6.2021, in line with the direction of the Commission vide order dated 7.2.2021 in Petition No. 334/MP/2020.

Hearing dated 20.11.2021

13. The matter was heard on admission on 20.11.2021 through video conferencing. During the course of hearing, the learned counsel for TANGEDCO submitted that TANGEDCO has already filed its reply dated 20.11.2021. The learned counsel by relying on the reply, mainly submitted as under:

(a) The reduction in CPG is subject to certain conditions mentioned in paragraph 4 of the MoP order. One of the conditions is that the revision shall not be made for the contracts under dispute wherein arbitration/court proceedings have already been started or are contemplated.

(b) In case of the Petitioner, there is an ongoing dispute with regard to payment of Liquidated Damages (LD) on account of delay in completion of the transmission project. The Petitioner has also filed a Petition which is yet to be registered. Therefore, the MoP's order is not applicable in the present case.

14. The learned counsel for Karnataka Discoms adopted the submissions made by the learned counsel for TANGEDCO and submitted that SCOD of the Project was in 2019. However, there is no visibility on the completion of the Project as on date. On account of delay in commissioning of the Project, liquidated damage of Rs.300 crore is liable to be paid to the LTTCs for delay of 180 days in terms of provisions of TSA.

15. The Petitioner, vide its rejoinder dated 3.12.2021, has submitted as under:

(a) At present, no dispute under the TSA is pending before this Commission or any other court for adjudication. Accordingly, WKTL does not fall within the ambit of paragraph 4(i) of the MoP Order and since conditions as envisaged in the MoP Order for reduction of CPG are fulfilled, WKTL is entitled for reduction of CPG in terms of the MoP Order.

(b) The present Petition is limited to seeking implementation of the MoP Order. However, all the contentions of TANGEDCO are relating to delay in execution of the Project and consequences thereof are outside the purview of the present Petition. Delay in commissioning of the Project due to force majeure and other reasons and the consequences of the delay will be decided by this Commission at the appropriate stage and need not be mixed with the present issue. Delay in the commissioning of the Project and the implementation of the MoP order are two independent issues.

Analysis and Decision

16. We have considered the submissions made by the Petitioner and the Respondents. The issue for our consideration at this stage is whether this

Commission has jurisdiction to deal with the instant Petition under sub-section (1)(c) of Section 79 of the Act.

17. Sub-section (1) of Section 79 of the Act provides as under:

“79.(1) The Central Commission shall discharge the following functions, namely;

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

.....

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clause (a) to (d) above and to refer any dispute for arbitration.”

18. Under clause (a) and clause (b) of sub-section 1 of Section 79 of the Act, the Commission is required to regulate the tariff of a category of generating stations. Under clauses (c) and (d), the Commission is required to regulate inter-State transmission of electricity and determine tariff for inter-State transmission of electricity. Under Section 79(1)(f) of the Act, the Commission has power to adjudicate the dispute involving generating company or transmission licensee in respect of the matters connected with Clauses (a) to (d) of sub-Section 1 of Section 79 of the Act. In other words, the jurisdiction of the Commission for adjudication of the dispute gets activated if the dispute involves either a generating company or a transmission licensee and if the dispute pertains to either regulation/determination of tariff or regulation of inter-State transmission of electricity. The Petitioner has filed the present Petition under Section 79(1)(c) of the Act seeking implementation of order of the Ministry of Power dated 25.3.2021 by which the Ministry of Power

reduced the Contract Performance Guarantee (in short 'CPG') for certain TBCB transmission projects in light of stipulation in the Ministry of Finance Office Memorandum dated 12.11.2020 regarding reduction in performance security in all kinds of Government procurements from existing 5-10% to 3% of the value of the contract for all existing tenders/ contracts to be issued/ concluded till 31.12.2021.

19. The MoP order dated 25.3.2021 is extracted as under:

“No. 3/7/2017-Trans-Pt (6)
Government of India
Ministry of Power
Shram Shakti Bhawan, Rafi Marg, New Delhi-110001

Dated, 25th March, 2021

To,
Chairperson,
Central Electricity Authority,
Sewa Bhawan, RK Puram,
New Delhi.

Subject: Reduction in Contract Performance Guarantee for Tariff Based Competitive Bidding (TBCB) transmission projects in line with Department of Expenditure's OM dated 12.11.2020 reg.

Sir,

In order to address the acute financial crunch among many commercial entities and contractors due COVUD-19 pandemic, Department of Expenditure (DoE), Ministry of Finance has issued an Office Memorandum dated 12.11.2020 inter-alia stipulating reduction in Performance Security in all kinds of government procurements from existing 5-10% to 3% of the value of the contract for all existing tender/contracts as well as tenders/contracts to be issued/concluded till 31.12.2021 (copy enclosed).

2. Representation has been received from Transmission Developers Association to reduce the Contract Performance Guarantee (CPG) for TBCB transmission projects in line with above DoE's OM dated 12.11.2020.

3. In view of above, it has been decided that CPG for the TBCB transmission Projects for (a) Projects under construction where CPG is valid, (b) Projects where Letter of Award has been issued but CPG is yet to be submitted, (c) projects where Request for Proposal (RfP) has been issued but bids are yet to be submitted, and (d) For projects where RfP is not yet issued, but to be issued till 31.12.2021, may be revised as under: -

	Existing	Proposed
CPG Value	@ Rs. 13.5 lakh per km for the total Transmission Line length and @ Rs. 1.125 lakh per MVA for substations	@ Rs.5.25 lakh per km for the total Transmission Line length and @ Rs. 0.45 lakh per MVA for substations

4. *The above reduction in CPG is subject to following conditions:*
- (i) *It should not be given in the contracts under dispute wherein arbitration/ court proceeding have already been started or are contemplated.*
- (ii) *The reduced Performance Security shall continue for the entire duration of the contract and there would not be subsequent increase of Performance Security even beyond 31.12.2021.*
- (iii) *Whenever, there is compelling circumstances to ask for CPG in excess of reduced value, as stipulated in para 3 above, the same should be done only with the approval of the next higher authority to the authority competent to finalise the particular tender, or the Secretary of the Ministry / Department, whichever is lower. Specific reasons justifying the exception shall be recorded.*
5. *The Standard Bidding Documents for procurement of Transmission Services on Tariff Based Competitive Bidding stand amended to the above extent.*
6. *The issues with the approval of Secretary (Power).*

Encl.: As above

Yours faithfully,

*(Bihari Lal)
Under Secretary to the Govt. of India*

20. In terms of the above-quoted MoP order, the Petitioner has sought directions of the Commission holding that the MoP Order is applicable to WKTL and it is required to submit only reduced CPG (by 30.6.2021) of Rs.61,59,00,000/- instead of Rs.104,94,00,000/- as specified in WKTL's letter dated 21.6.2021.

21. The Petitioner has invoked the provisions of Section 79(1)(c) of the Act which provides that the Commission shall have the functions "to regulate inter-State transmission of electricity." The Petitioner has been granted inter-State transmission licence for implementation of the Project pursuant to TBCB process conducted by PFCCCL and the Petitioner has executed the TSA with the Respondents/ LTTCs.

22. We observe that CPG has been defined in the TSA as under.

“Contract Performance Guarantee” shall mean the irrevocable unconditional bank guarantee, submitted and to be submitted by the TSP or by the Selected Bidder on behalf of the TSP to the Long Term Transmission Customers from a bank mentioned in Annexure 12 of the RFP, in the form attached here to as Schedule 11, in accordance with Article 3 of this Agreement and which shall include the additional bank guarantee furnished by the TSP under this Agreement;”

23. Further, Article 3.1.1 of the TSA, *inter-alia*, provides as under:

“The Selected Bidder on behalf of the TSP will provide to the Long Term Transmission Customers the Contract Performance Guarantee for an aggregate amount of Rs 104,94,00,000/- (Rupees One Hundred Four Crore and Ninety Four lakhs only), which shall be provided separately to each of the Long Term Transmission Customers for the amount calculated pro-rata in the ratio of their Allocated Project Capacity, as on the date seven (7) days prior to the Bid Deadline (rounded off to the nearest Rupees one Lakh (Rs 100,000) with the principle that amounts below Rupees Fifty Thousand (Rs 50,000) shall be rounded down and amounts of Rupees Fifty Thousand (Rs 50,000) and above shall be rounded up).”

24. It is noted that the Petitioner and the Respondents, LTTCs have entered into the TSA dated 26.1.2016 based on the TBCB guidelines notified by the Ministry of Power under Section 63 of the Act. As per Article 3.1.1 of the TSA, Transmission Service Provider is required to provide CPG to the Long-Term Transmission Customers. Further, the amount of CPG which is required to be given by the Transmission Service Provider, has also been specified in Article 3.1.1 of the TSA.

25. In the present Petition, the Petitioner has sought reduction of Contract Performance Guarantee in terms of the MoP order. However, the Petitioner has not indicated the provision of the guidelines or TSA based on which such direction is sought from the Commission.

26. The Hon`ble Supreme Court in Energy Watchdog case, *inter alia*, has held that the regulatory power under Section 79(1)(b) of the Act can be resorted to only in the absence of Guidelines. Paragraph 19 of the judgment of Hon`ble Supreme Court in the case of Energy Watchdog is extracted as under:

“19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission

adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

27. The Hon'ble Supreme Court, after analysing the scope of Section 63 and Section 79(1)(b) of the Act, came to the conclusion that even in cases where tariff has been adopted under Section 63 of the Act, this Commission is not divested of its powers under Section 79(1)(b) of the Act to regulate the said tariff. However, the Commission can exercise its powers to regulate tariff under Section 79(1)(b) of the Act only in a scenario where it is not covered by any of the provisions of the Guidelines or where no Guidelines are framed at all or Guidelines do not deal with a given situation. Where Guidelines covers a situation, as in the present case, power under Section 79(1)(b) of the Act can be exercised by the Commission only in accordance with the Guidelines.

28. Even though the Petitioner has filed the present petition under Section 79(1)(c) of the Act, in our view, the judgement of the Hon'ble Supreme Court in the

Energy Watchdog Case is squarely applicable. Since the TSA has been entered into consequent upon Guidelines notified under Section 63 of the Act and there are laid down provision in Article 18.17 of the TSA for amendment of the TSA, the Commission's general regulatory powers under Section 79(1)(b) cannot be used.

29. Implementation of the MoP order as prayed for by the Petitioner and consequently, reduction in the amount of CPG as specified in the TSA would undeniably require amendment to the provisions of TSA. Article 18.17 of the TSA provides as under:

“18.17 Amendments:

18.17.1 This Agreement may only be amended or supplemented by a written agreement between the Parties and after obtaining approval of the Appropriate Commission, where necessary.”

30. Thus, TSA can only be amended or supplemented by written agreement between the parties and after obtaining approval of the Appropriate Commission, where necessary. Evidently, in the present case, the parties, namely the Petitioner and the LTTCS, are not in the agreement with regard to the reduction in CPG amount as specified in the TSA as per the MoP order. In absence thereof, in our view, the Petitioner cannot by invoking the jurisdiction of this Commission under Section 79(1)(c) of the Act pray for the unilateral amendment/ changes to the TSA.

31. In light of the above discussion and findings, the Petition is dismissed at the admission stage.

32. Accordingly, the Petition No. 150/MP/2021 is disposed of.

**Sd/-
(P.K. Singh)
Member**

**sd/-
(Arun Goyal)
Member**

**sd/-
(I.S. Jha)
Member**

**sd/-
(P.K. Pujari)
Chairperson**