

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 120/MP/2022

Subject : Petition under Section 79 of the Electricity Act, 2003 read with Article 11 and 22 of the Agreement for Procurement of Power dated 25.10.2021 seeking directions to Southern Regional Load Despatch Centre seeking revision of schedule in accordance with notified declared Availability by Jindal Thermal Power Limited.

Date of Hearing : 05.5.2022

Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Petitioner : Jindal India Thermal Power Limited (JITPL)

Respondents : Southern Regional Load Despatch Centre (SRLDC) and 3 Ors.

Parties Present : Shri Amit Kapur, Advocate, JITPL
Shri Akshat Jain, Advocate, JITPL
Shri Pratyush Singh, Advocate, JITPL
Shri Sitiesh Mukherjee, Advocate, SRLDC
Ms. Abiha Zaidi, Advocate, SRLDC
Shri Prabhas Bajaj, Advocate, KSEBL
Shri Ajay Sabharwal, Advocate, KSLDC
Shri Pulak Srivastava, JITPL
Shri Gajendra Sinh Vasava, SRLDC

Record of Proceedings

Case was called out for virtual hearing.

2. Learned counsel for the Petitioner submitted that the present Petition has been filed challenging the arbitrary, illegal and unreasonable actions of the Respondent, SRPC viz. (i) refusal to perform its statutory function to downward revise the approved Short-Term Open Access ('STOA') schedule in accordance with notified declared availability by the Petitioner, and (ii) forcing the Petitioner to declare availability and supply 270 MW power to the Respondent, Kerala State Electricity Board Limited ('KSEBL'). Learned counsel further referred to the Record of Proceedings for the hearing dated 21.4.2022 and reiterated his submissions. Learned counsel submitted that despite direction to the Respondent, SRLDC to clarify the provisions under which it had sought consent of buyer for downward revision of STOA, no reply has been filed. Learned counsel also added that on account of the aforesaid arbitrary and unreasonable actions of the Respondent, SRLDC, the Petitioner is suffering a loss of approximately Rs.1.5 crore per day and thus, the Commission may consider grant of interim relief as prayed for by the Petitioner.

3. Learned counsel for the Respondent No.1, SRLDC submitted that the Respondent has received the notice only on yesterday and it may be permitted two days' time to file the reply.

4. In response to the query of the Commission to SRLDC to clarify the provision under which it had sought consent of the buyer for downward revision of STOA, the learned counsel for the Respondent, SRLDC mainly submitted the following:

(a) Initially, the Petitioner had stated to SRLDC that its transaction of supply of power to KSEBL through PTC is guided by the Medium-term contract and therefore, the requirements under the Guidelines for Short-term procurement of power would not apply. In this regard, the reliance was placed on the Petitioner's e-mail dated 2.4.2022 to SRLDC.

(b) Section 28(3)(a) of the Electricity Act, 2003 ('the Act') mandates that RLDC shall be responsible for optimum scheduling and despatch of electricity within the region in accordance with the contracts entered into with the licensees or the generating companies operating in the region.

(c) As per clause 3 of the Supplementary Agreement dated 25.10.2021 entered into between PTC and JITPL, the aggregator/supplier is required to apply for STOA on behalf of KSEBL for mutually agreed period and utilise the advance STOA, FCFS STOA upto day ahead STOA available for applying for STOA within stipulated timeline as per the prevailing regulation until the same is granted for the entire contracted quantum. Further, the said clause also provided that for any subsequent application for change in approved open access quantum shall be only with prior consent of KSEBL.

(d) Thus, the provisions of the contract entered into between JITPL and PTC/PTC and KSEBL provide for prior consent of KSEBL.

(e) As to the interplay between the aforesaid provision of the contract and Regulation 14 of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 ('Open Access Regulations'), the parties have entered into the contract only in 2021 despite being aware of the provisions of the Open Access Regulations, which were in force since 2008.

(f) Regulation 14 of the Open Access Regulations permits the applicant for downward revision of schedule by giving 5 days' notice. However, the contract entered into between parties provides for consent of KSEBL for downward revision as the application is being made on behalf of KSEBL, SRLDC is required to obtain the consent of KSEBL in accordance with Section 28(3)(a) of the Act.

(g) A party can waive its statutory right/provision for its benefit by an agreement as long as the public interest is not affected. In this regard, reliance was placed on the judgment of Hon'ble Supreme Court in the case of Krishna Bahadur v. Purna Theatre. The waiver of right to downward revision the schedule without the consent of the buyer/beneficiary as such does not affect the public interest. In this regard, reliance was placed on the direction issued by the Ministry of Power, Government of India to RLDCs under Section 37 of the Act dated 22.12.2021 and amendment to the Guidelines for Short-term Procurement of Power dated 23.2.2022

5. Learned counsel for the Respondent No.4, KSEBL also sought time to file reply in the matter. Learned counsel submitted that the Respondent has not even

received a notice as it has not been mapped by the Petitioner in the e-filing portal. Learned counsel further submitted that no interim relief ought to be granted to the Petitioner permitting downward revision of STOA schedule at this stage as it will severely prejudice the Respondent. He added that under agreement between the parties, the off-take/supply period is only for 6 months during January to June in order to meet the Respondent's demand and any interim relief to the Petitioner allowing the revise the schedule to zero will lead to irreparable loss to the Respondent, KSEBL. Learned counsel submitted that as per the agreements between the parties, the consent of the Respondent, KSEBL is pre-requisite for downward revision and the Respondent, SRLDC has rightly taken the note of the said agreement as per Section 28(3)(a) of the Act.

6. Learned counsel for the Respondent No. 2, Kerala State Load Despatch Centre sought time to file reply in the matter.

7. In rebuttal, learned counsel for the Petitioner mainly submitted the following:

(a) Copy of the Petition had been served on the Respondents vide e-mail dated 21.4.2022 and by courier on 28.4.2022. The Petitioner has also filed the proof of service.

(b) Clause 3 of the Supplementary Agreement as relied upon by SRLDC relates to the revision in the STOA quantum, whereas in the present case, the Petitioner had applied for revision of its schedule and not the quantum of STOA.

(c) As per Regulation 14 of the Open Access Regulations, as amended in 2009, STOA schedule can be cancelled and revised downwards on an application to that effect by the STOA customer by giving only 2 days' prior notice.

(d) The Statement of Reason issued along with the said amendment also recognizes that (i) flexibility of revising or cancelling previously approved STOA schedule is being granted to the STOA customer/ generating company to take care of any contingencies, and (ii) the power of nodal agency to allow revision/cancellation of STOA schedule only in extraordinary circumstances has been omitted. This implies that the nodal agency is mandated to revise the STOA schedule upon the request of STOA customer/generating company.

(e) In any case, the provisions of the Open Access Regulations, 2008 overrides the provisions of the contracts. It is settled position of law that Regulation under Section 178 of the Act overrides the existing contracts. In this regard, the reliance was placed on the Judgment of Hon'ble Supreme Court in PTC v. CERC, [(2010) 4 SCC 603].

(f) Accordingly, the Commission may issue an interim direction to SRLDC to downward revise the approved STOA schedule in accordance with notified declared availability by the Petitioner as per the Open Access Regulations, 2008. The Petitioner had applied for downward revision of its STOA schedule for the months of April and May, 2022 and the month of April, 2022 has already passed. Any further delays would render its reliefs infructuous.

8. After hearing the learned counsel for Petitioner and the Respondents, the Commission ordered as under:

- (a) Admit. Issue notice to the Respondents.
- (b) The Petitioner is directed to map the Respondents 2 to 4 on e-filing portal immediately, if not mapped.
- (c) The Respondents to file their reply 12.5.2022 with copy to the Petitioner after serving copy of the same to the Petitioner, who may file its rejoinder on or before 19.5.2022;
- (d) Parties to comply with the above directions within the specified timeline and no extension of time shall be granted; and
- (e) The prayer of the Petitioner for grant of interim relief will be taken up on the next date of hearing after taking into the account the reply and rejoinder filed by the parties.
9. The Petition shall be listed for hearing in due course for which separate notice will be issued.

By order of the Commission
Sd/-
(T.D. Pant)
Joint Chief (Law)