

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.176/MP/2019

Subject : Petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreement dated 7.2.2018 between the Petitioner and the NTPC Limited seeking relief on account of Change in Law event viz. the imposition of Safeguard Duty by Notification No. 1/2018 Custom (SG) dated 30.7.2018 issued by the Department of Revenue, Ministry of Finance, Government of India with respect to the Solar Power PV Project having Project capacity of 140 MW at Bihaur, Uttar Pradesh.

Date of Hearing : **25.5.2023**

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

Petitioner : Solairepro Urja Private Limited (SUPL)

Respondents : NTPC Ltd. and 3 Ors.

Parties Present : Shri Sanjay Sen, Sr. Advocate, SUPL
Ms. Molshree Bhatnagar, Advocate, SUPL
Ms. Parichita Chowdhury, Advocate, SUPL
Shri Rishabh Sehgal, Advocate, SUPL
Ms. Ruth Elwin, Advocate, SUPL
Shri Sidhant Kumar, Advocate, AP Discoms
Ms. Manya Chandok, Advocate, AP Discoms
Ms. Muskaan Gopal, Advocate, AP Discoms
Shri Venkatesh, Advocate, NTPC
Shri Ashutosh Srivastava, Advocate, NTPC
Shri Nihal Bhardwaj, Advocate, NTPC

Record of Proceedings

During the course of hearing, learned senior counsel for the Petitioner made detailed submissions in the matter. Learned senior counsel *inter-alia* submitted the following:

- (a) The matter has been re-listed in terms of the order of Hon'ble High Court of Andhra Pradesh dated 6.1.2023 in WP No. 5212 of 2020 wherein the Hon'ble High Court set-aside the Commission's order dated 5.2.2020 and remitted the matter back with a direction to the Commission to afford another opportunity to AP Discoms to file their response/counter and to pass the order afresh after hearing all the parties and considering their submissions and without being influenced by the earlier findings in the order dated 5.2.2020.

(b) AP Discoms, in their reply, have raised the issue of jurisdiction of the Commission on the ground that they have already surrendered the bundled thermal power (of NTPC) w.e.f. 16.10.2020 and hence, the entire supply of power is from the Petitioner's Project, which is located within the State of Andhra Pradesh. However, letter of CEA dated 15.10.2020 as enclosed along with the Respondents' reply indicates that even after the withdrawal of 125 MW w.e.f. 16.10.2020, power to the tune of 75 MW still continued to be allocated to them. Also, as per the Tariff Order for Retail Supply of Electricity for financial year 2021-22 dated 25.3.2021, they had been purchasing bundled power of 39.27 MW under the JNNSM Phase-I.

(c) Regardless, surrendering of bundled thermal power by AP Discoms does not take away the composite 'scheme' as envisaged in the RfS & PPA and as explained by the Hon'ble Supreme Court in Energy Watchdog judgement. In this regard, reliance was placed on the definition of the term 'Scheme' as provided in Black's Law dictionary and Oxford English Dictionary.

(d) AP Discoms in their affidavit in the aforesaid Writ Petition before the Hon'ble High Court had stated that APERC has the jurisdiction by virtue of Section 64(5) of the Electricity Act, 2003 ('the Act'). However, the said Section can only apply if the jurisdiction otherwise vests with this Commission alone.

(e) In the present case, however, AP Discoms are contending that jurisdiction lies with APERC under Section 86(1)(b) read with Section 63 of the Act as APERC had adopted the tariff discovered and approved the PSA between NTPC and AP Discoms. Thus, there is a clear shifting of stand on the part of AP Discoms. Also, despite AP Discoms having raised the issue of jurisdiction of this Commission in the WP, the Hon'ble High Court has remitted the matter back to this Commission for deciding on merits.

(f) Originally vide order dated 5.2.2020, the Commission did not allow the prayer of the Petitioner for carrying cost. However, the said aspect now being squarely covered by the judgment of Appellate Tribunal for Electricity dated 15.9.2022 in Appeal No. 256 of 2019 and Ors., the Commission may allow the carrying cost on the Change in Law claims of the Petitioner.

2. Learned counsel for the Respondents, AP Discoms made detailed submissions in the matter. Learned counsel *inter alia* submitted the following:

(a) The jurisdiction is a question of law and the party cannot be estopped from raising such question.

(b) In the present case, APERC, since by exercising its jurisdiction under Section 86(1)(b) read with Section 63 of the Act had adopted the tariff & also approved the PSA entered into between AP Discoms and NTPC, any dispute between the parties has to be referred to and adjudicated by APERC and as such the Appropriate Commission under the PSA is also APERC.

(c) In the order dated 6.1.2023, the Hon'ble High Court of Andhra Pradesh has nowhere stated that this Commission is the Appropriate Commission as sought to be put forth by the Petitioner. Therefore, the Commission has to also consider the jurisdiction issue as raised by the Respondents.

(d) As to the reference to the CEA's letter and the Tariff Order regarding purchase of the bundled power after 16.10.2020, liberty may be granted to take necessary instructions in this regard.

3. Learned counsel for the Respondent, NTPC submitted that NTPC had approached this Commission for adoption of tariff under Section 63 of the Act in Petition No. 549/AT/2020, whereas the Respondents, AP Discoms approached the APERC, under Section 86(1)(b) of the Act, for approval of the power procurement process and the PSA.

4. The Commission directed the parties to file their respective written submissions (not exceeding 3 pages) before next date of hearing.

5. The matter remained part-heard for submissions on behalf of the respondents. The Petition shall be listed for hearing on 30.5.2023.

By order of the Commission

**Sd/
(T.D. Pant)
Joint Chief (Law)**