



Petition No 971 of 2014

BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW

Date of Order : 15.01.2016

PRESENT:

1. Hon'ble Sri Desh Deepak Verma, Chairman
2. Hon'ble Sri Indu Bhushan Pandey, Member

IN THE MATTER OF: Approval of Power Purchase Agreement of NPCL entered with M/s Dhariwal Infra structures Ltd. for procurement of 187 MW power for a period of 25 years

AND

IN THE MATTER OF

Noida Power Company Limited (NPCL)
Commercial Complex,
H-Block, Alpha -II Sector
Greater Noida - 201308

The following were present:

1. Sri Shanti Bhushan, Sr. Advocate, NPCL
2. Sri R. C. Agarwala, M.D. & CEO, NPCL
3. Sri Rajiv Goyal, GM -Project & Power Trading, NPCL
4. Sri A.K. Arora, Resident Manager, NPCL
5. Ms. Divya Chaturvedi, Advocate, NPCL
6. Sri Kartik Seth, Adv. NPCL
7. Sri Alok Sharma, Sr. Manager (Legal), NPCL
8. Sri. R. Chowdhery, MD, DIL
9. Sri Subir Saha, GM (Finance), DIL

Order
(Date of Hearing 04.11.2015)

1. NPCL filed long term PPA dated 26.9.2014 for approval of the Commission for purchase of 187 MW power from M/s Dhariwal Infrastructure Ltd. in petition no 971 of 2014 U/s 62 read with 86(1)(b) of the Electricity Act, 2003. During the hearing on



27.11.2014, learned advocate of NPCL Sri M.G. Ramchandran cited the orders of DERC dated 30.04.2009 in petition no. 60 of 2008 and of Hon'ble APTEL dated 31.3.2010 in Appeal No. 106 &107 of 2009 in support of their PPA entered through MoU route. Vid e order dated 27.01.2015, the Commission observed that both the citations mentioned by the learned counsel were from the period before 5.1.2011 after which no MoU route long term agreement was allowed by this Commission in line with MoP guidelines. The Co mmission did not approve PPA considering that for long term power purchase only competitive route was available. NPCL was directed to initiate the bid process under new case -1 bidding guidelines immediately and submit monthly progress report to the Commiss ion. For fulfilling the requirement of power d uring the intervening period, NPCL was allowed to procure requisite quantum of power through short term.

2. Against this order of the Commission, NPCL preferred an appeal before Hon'ble APTEL. In its order dated 28.5.2015, Hon'ble APTEL has taken following view:

“20. *We must first refer to BSES Rajdhani*

21. The points which arose for consideration before this Tribunal inter alia were whether the compliance with Competitive Bidding Process as en visaged in Clause 5.1 of the National Tariff Policy is mandatory for procurement of power by a distribution company and whether Section 63 of the Electricity Act is the exception to Section 62 and the guidelines issued by the Central Government will operate only when the tariff is being determined by the Competitive Bidding Process. This Tribunal observed that there are two routes and options provided under the Electricity Act: (a) tariff determination under Section 62(1)(a) by the Appropriate Commission in terms of Section 79 and Section 86 of the Electricity Act and (b) tariff discovery in terms of the Competitive Bidding Process in accordance with the Guidelines issued by the Government of India which shall be binding on the Appropriate Commission under Section 63 of the Electricity Act. This Tribunal considered Section 63 of the Electricity Act and Clause 5.1 of the National Tariff Policy which provides that the power procurement for future should be through a transparent Competitive Bidding Process using Guidelines issued by MoP on 19.1.2005 and also considered clarificatory circular dated 28.8.2006 issued by MoP and held that Section 63 is optional route for procurement of power by a distribution licensee through Competitive Bidding Process and in case t he same is followed, the Appropriate Commission is required to adopt the said tariff. However, after referring to relevant judgments of the Supreme Court, this Tribunal held that the power under Section 62(1)(a) and Section 62(1)(b) conferred on the State Commission for determination of tariff through negotiated route cannot in any manner be restricted or whittled down by way

of a policy document or a subordinate legislation or notification issued by the Government/Executive and any rules or executive instructions or notifications which are contrary to any provisions of the tariff statute shall be read down as ultra vires of the parent statute. This Tribunal rejected the contention that tariff determination under Section 62(1)(a) without adopting Competitive Bidding Process will render Clause 5.1 of the National Tariff Policy redundant as the distribution licensees in future will procure power from the generating companies through the negotiated route. This Tribunal observed that the said submission cannot be accepted as it is always open to the State Commission to direct the distribution licensee to carry out power procurement through Competitive Bidding Process only in case where the rates under the negotiated agreement are high. This Tribunal clarified that the State Commissions have been given discretionary powers either to choose Section 62, 62(1)(a) to give approval to the PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per Clause 5.1 of the National Tariff Policy read with Section 63 of the Electricity Act.

22. We find that the State Commission was mindful of this judgment. It has made a reference to it, but it has not discussed it at length or applied it to the facts of the instant case. The State Commission has taken a view that the said judgment relates to period prior to 5.1.2011. The State Commission has observed that after 5.1.2011 no MoU route long term agreement has been allowed by it in line with MoP Guidelines. It has then given a categorical finding that after 5.1.2011 for long term power purchase only competitive route is available. It is pointed out to us that on 5.1.2011, MoP had only brought in the procurement of power from the Government Generating Companies also under the Guidelines for Competitive Bidding Procurement which was notified in 2006. There was no other change in the Guidelines to conclude that the procurement of power from non-Governmental Generating Companies was modified on 5.1.2011 and, therefore, BSES Rajdhani will continue to apply to the present case. We do not want to express any opinion on this aspect but we find that the State Commission has not considered this submission. We say so because there is no discussion in the impugned order in regard to this submission. The State Commission's observation that for long term power purchase, only competitive route is available appears to be in teeth of the clear finding of this Tribunal in BSES Rajdhani that the procurement of power through the negotiated route and not through the competitive route is permissible under Section 62 of the Electricity Act notwithstanding Section 63 thereof and MoP Guidelines mandating such Competitive Bidding Process for procuring power on long term basis. Undoubtedly, this Tribunal has also laid down that the State Commissions have been given discretionary powers either to choose Section 62, 62(1)(a) to give approval to PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per Clause 5.1 of the National tariff Policy. The State Commission, therefore, can in its discretion choose either course. But, exercise of discretion has to be based on rules of reason and justice. Arbitrary exercise of jurisdiction is opposed to principles of fair play. While passing discretionary orders, regard

must be had to relevant as well as irrelevant considerations (Delhi Science Forum). In this case, we find that the impugned order is sans reasons. It has *not taken into consideration the Appellant's case regarding amended Guidelines*. There is also no discussion on the factual aspect particularly the data submitted by the Appellant. The State Commission must state, after taking into considerations all relevant facts as to why it has exercised its discretion in favour of Competitive Bidding Process

23. *The State Commission will have to address the Appellant's contention that it had made five attempts to procure power through Competitive Bidding Process, but that did not result in an effective arrangement for getting the necessary quantum of power required on long term basis; that the last attempt made by the Appellant which resulted in the signing of the PPA did not result in the commencement of supply of power from 30.4.2014 as envisaged by PPA; that need of the Appellant is to have long term arrangement forthwith instead of speculating purchase for the supply at a later date through Competitive Bidding Process and that the State Commission itself had repeatedly impressed upon the procurement of power on the long term basis forthwith instead of procurement of power on short term basis. The State Commission has also not taken into account the Appellant's contention that Respondent No.2 is willing to supply the required capacity at an indicative fixed charges/capacity charges working out to Rs.1.99 per kWh exclusive of reimbursement of income tax, CTU, SLDC charges for transmission of power from the generating station which will be on an actual basis and the project cost and other tariff elements leading to the above capacity charges which shall be further subject to prudence check by the State Commission under Section 62 of the Electricity Act. While leaning in favour of Competitive Bidding route under Section 63 of the Electricity Act and rejecting the negotiated route under Section 62 thereof, the State Commission should have examined the PPA entered into between the Appellant and Respondent No.2. The State Commission has not done so. Its reasoning is solely based on interpretation of MoP Guidelines. It has held that after 5.1.2011 for long term power purchase *only competitive route is available. We have already noted the Appellant's contention that the State Commission's interpretation of MoP Guidelines is totally incorrect and illegal. Submissions of the Appellant in this regard have not been taken into consideration by the State Commission.**
24. Reasons introduce clarity and also give assurance to the litigants that their case is considered. In the circumstances, we are of the opinion that this matter needs to be remitted to the State Commission so that submissions of the parties can be considered afresh. While remitting the case, we would like to make it clear that we have not expressed any opinion on the merits of the case of the parties. Nothing said by us in this judgment should be treated as expression of our opinion on the merits of the case of the parties. The State Commission will apply its mind to all contentions raised by the parties independently and in accordance with law and arrive at its conclusions.

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25. In the result, the impugned order is set aside. The matter is remanded to the State Commission for fresh consideration of all the submissions of the parties, independently and in accordance with law. All contentions raised by the parties are kept open. The appeal is disposed of in the aforesaid terms.
3. In compliance to Hon'ble APTEL's above order, the Commission fixed the hearing on 11.8.2015 which continued on 23.9.2015. Vide order dated 29.9.2015, the Commission desired to know that whether the cost of electricity from this project is competitive vis-a-vis the cost of power available from other sources and vis-a-vis the power available from exchange. NPCL was also asked that how would NPCL ensure that the commitments made by the concerned generator would be adhered to and whether they have made any such condition in their agreement to the effect that if the commitments are not fulfilled, the impact thereof will not be passed on to the consumers. The Commission further enquired about the FSA and 100 percent coal linkage of the generator. NPCL was directed to submit detailed reply on above along with supporting documents.
4. NPCL's initially submitted draft PPA with Dhariwal Infrastructure Ltd. has been made for procurement of 170 MW (net capacity after excluding auxiliary consumption from the gross capacity of 187 MW) of power for a period of 15 years from 300 MW coal based generating unit commissioned on 4.6.2014. The salient features of PPA are as follows:
- Capital cost = 1941 Crore (Rs. 6.47 Cr / MW)
 - Indicative Fixed charge for first year = Rs. 1.99 / kwh (exclusive of reimbursement of income tax, CTU, SLDC charges etc.)
 - Project location = Chandrapur, Maharashtra
- The PPA has a provision for determination of provisional tariff and/ or final tariff and revision thereof from time to time, in accordance with the UPERC's Regulations.
5. In reference to this Commission's order dated 29.9.2015, NPCL submitted detailed reply on 26.10.2015. NPCL has stated that they made five attempts to procure power under competitive route since 2007 but all have failed. NPCL has added that
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competitive bidding route for power procurement prescribed under the section 63 of the Electricity Act, 2003 has met with negligible success as considering the higher contingent risks, the generating companies are demanding higher risks premium. NPCL has proposed to tie up 170 MW from unit 2 of 2 X 300 MW Chandrapur thermal power station of DIL. For the project coal linkage of 2.73 MTPA (100%) has been granted by Ministry of Coal and LoA has been issued by South Eastern Coal Field Limited. The PPA has been signed on 26.9.2014. PPA has been drawn on the lines of the Power Purchase Agreement executed between Bajaj Energy Pvt. Ltd. and U.P. Discoms, the draft of which was approved by the Hon'ble UPERC on 23rd December, 2010. Vide its order in Petition No. 711 of 2010 of the same date. There is no change in the obligations of DIL as a generating company to generate and supply electricity to the Petitioner as compared to the above PPA approved by the Hon'ble Commission in case of Bajaj Energy Limited.

6. In this reply NPCL submitted the first year fixed charge of Rs. 2.14/ kwh and the term of PPA as 25 years. The levelized tariff has been calculated as Rs. 4.79/kwh. NPCL has mentioned that this levelized tariff is lower than the discovered levelized tariff of Rs. 5.73/kwh - Rs. 4.886/kwh under Case -1 bidding as adopted by the Commission vide order dated 24.6.2014 in petition no. 911 of 2013. NPCL has further stated that the capital cost of Rs. 6.47 Cr./MW for DIL is lower than quite number of contemporary power plants like Anupur TPS (2 x 600 MW) - Rs.6.67 Cr/MW, Bongaingaon TPS (3 x 250 MW) - Rs. 6.85 Cr./MW, Chandrapur TPS (2 x 500 MW) MSPGCL -Rs. 6.50/MW) etc.

NPCL has also mentioned that its capital cost also compares favourable with CERC's benchmark capital cost (for Greenfield thermal projects of 2 units of 500 MW uti size) or Rs. 4.71 Cr./ MW for thermal power plants, as per CERC is order of 4 June 2012. When compared to CERC's benchmark of Rs. 4.71 Cr./MW (which does not include the cost of land, MGR Railway siding unloading equipment at jetty, and rolling stock, Locomotive and transmission line till the tie point), DIL's project cost at Rs. 4.57 Cr/MW is more competitive. In addition, the capital cost benchmark as per the CERC, having been computed using December 2011 indices as the base, is more than 3 years old.

7. NPCL has further submitted the reply on comparison with short term power market which has been traded at Rs. 4.28 to Rs. 4.33 per kwh through traders and Rs. 3.50 to Rs 3.67 per kwh through power exchange during the last three years . NPCL has submitted that availability of power on exchanges is not reliable and depends on various factors like sudden changes in weather, availability of fuel, availability of transmission corridor etc. Therefore, procurement of base load power from short term contracts and power exchanges is not reliable. Reliability of supply is the most important factor for procurement of base load power and therefore it must be procured through long term PPAs. For meeting the seasonal variations of demand, procurement of power can be done through power exchanges where it can make the best use of price variations.
8. The Commission observed that in its detailed reply NPCL has answered the issues raised by the Commission in order dated 29.9.2015 except that how would NPCL ensure that the commitments made by the concerned generator would be adhered to and whether they have made any such condition in their agreement to the effect that if the commitments are not fulfilled, the impact thereof will not be passed on to the consumers.
9. In the hearing on 4.11.2015, learned Counsel Sri Shanti Bhushan, Sr. Advocate pleaded on behalf of NPCL and stressed upon the failure of five attempts for procurement of power through bidding route . He propounded that the power offered by DIL is cheaper than the other case -1 power approved by the Hon'ble Commission vide order dated 24.6.2014. He requested that the Commission may approve their PPA considering the efforts already put in by NPCL and also in view of the fact that the cost of power is cheaper in comparison to many sources.
10. The Commission reiterated its concern about the increasing costs of power from MoU route projects to the consumers and wanted to know from NPCL as to how would they ensure that the commitments made by the concerned generator regarding cost of power would be adhered to. The representative of NPCL, Sri R. C. Agarwala, M.D. & CEO, stated that they would submit a firm commitment for cost of power and any variation over and above would be absorbed by the generator. The representative of the generator who was present in the hearing, assented the same.



Thereafter, the Commission directed NPCL to file a firm reply on the cost of power including the fixed and variable charges for 25 years in tabular form.

11. NPCL has made submissions on 20.11.2015 as follows:

a. Fixed Charges for 25 years :

Financial Year	Fixed Charges (Rs./kwh)
FY 2015-16	2.14
FY 2016-17	2.11
FY 2017-18	2.06
FY 2018-19	2.02
FY 2019-20	1.98
FY 2020-21	1.95
FY 2021-22	1.92
FY 2022-23	1.88
FY 2023-24	1.85
FY 2024-25	1.82
FY 2025-26	1.80
FY 2026-27	1.77
FY 2027-28	1.40
FY 2028-29	1.45
FY 2029-30	1.50
FY 2030-31	1.55
FY 2031-32	1.61
FY 2032-33	1.67
FY 2033-34	1.74
FY 2034-35	1.81
FY 2035-36	1.88
FY 2036-37	1.96
FY 2037-38	2.04
FY 2038-39	2.13
FY 2039-40	2.22

The details of norms and parameters are tabulated as follows:

Parameters	Unit	Value
Capital Cost	Rs. in Crores	1941 (6.47/ MW)
Debt equity	Ratio	70:30
Weighted Average RoI	%	12.49
Availability Factor	%	85
O & M (2015)	Rs. in lakhs	19.95/MW
O & M Escalation	%	6.3
Depreciation Rates	%	As per UPERC's Regulation
Coal Stock	Days	30
Oil Stock	Months	02

NPCL has further confirmed that there would be no upward revision in the project cost.

b. Variable Charges

Regarding the variable charges NPCL has reiterated clause 4.1.1(h) as follows:

“Execution of the Fuel Supply Agreement and providing the copy of the same to the Procurer prior to Scheduled Delivery Date. However, till execution of such Fuel Supply Agreement, the Seller shall arrange to procure fuel from alternative sources and bear the additional cost over the prevailing “SECL” price, if any, incurred thereon.”

The basis of assumption for computation of variable charge has been given as follows:

Parameters	Unit	Value
Coal – 100% linkage - SECL	Grade	G11
Calorific value	Kcal/kg	4,150
Coal cost at railway loading point	Rs/MT	1,236.54
Annual Coal Price Escalation (CERC Escalation Rate)	%	6.62
PLF	%	85
Specific Oil Consumption	MI/kwh	0.75



12. From the above discussions, it is evident that although NPCL has submitted a commitment on fixed charges for 25 years but has not submitted firm view on variable cost for the term of the PPA as promised by them during the hearing. The undertaking submitted by the generator is only for the period till fuel supply agreement is executed. In view of the fact that whole case of NPCL is based on the levelized tariff of Rs. 4.79/kwh (for the period of 25 years), it becomes necessary to firm up the fixed as well as the variable part of the tariff. The table showing fixed charges for 25 years and confirmation that there would be no upward revision in the project cost ensures sanctity of fixed charge. Similarly the component of variable charge also require to be as per the commitment of levelized tariff of Rs. 4.79/kwh for the period of 25 years except for the variation due to CERC escalation rates, over and above the escalation rates taken in calculation of levelized tariff of Rs. 4.79/kwh, which would be additionally allowed in variable charge. Such limitation on variable charge would mean that for the whole term of PPA if there ever is any short supply from SECL and the Seller has to procure fuel from alternative sources then he would bear the additional cost, if any, over the prevailing SECL price plus CERC escalation. In this manner, the consumer may be ensured to get power at a cheaper rate through this PPA as promised by the parties.

13. It has also been observed by the Commission that many clauses in the draft PPA have been deleted and new insertions have been made. As any deviation is required to be approved by the Commission, it is desired that all such deviations/ insertions should be put up before the Commission in tabular form giving reasons for deletions/insertions.

14. The next hearing shall be fixed subsequent to submissions of commitments as above and the revised PPA.

(Indu Bhushan Pandey)
Member

(Desh Deepak Verma)
Chairman

Place : Lucknow

Dated: 15.01.2016