



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 17.

No. F.11(1769)/DERC/2019-20

Petition No. 10/2020

**In the matter of : Petition for foreclosure of PPA dated 29.10.2009 entered between
BYPL and EDWPCL.**

East Delhi Waste Processing Co. Ltd. (EDWPCL)Petitioner

Vs.

BSES Yamuna Power Ltd.Respondent

Coram:

Hon'ble Sh. Justice S S Chauhan, Chairperson

Hon'ble Sh. A.K. Singhal, Member

Hon'ble Dr. A. K.Ambasht, Member

ORDER

(Date of Order: 21.02.2020)

1. The instant petition has been filed by EDWPCL for foreclosure of PPA dated 29.10.2009 with BYPL, on the ground that it has been agreed by both the parties in a meeting held under the Chairmanship of the Chief Secretary, GoNCTD.
2. Pursuant to the competitive bidding M/s BYPL has entered the aforesaid agreement (PPA) with EDWPCL for purchase of 49% of net available electricity from Municipal Solid Waste Plant of Petitioner of Ghazipur, Delhi. The draft PPA was approved by this Commission vide order dated 11.07.2008 in Petition No. 26/2008. Now through the instant Petition the Petitioner has sought foreclosure of PPA on the ground that it has been mutually agreed by the Parties to foreclose the PPA.
3. In the Petition following prayers have been made by the Petitioner:
 - a. To approve foreclosure of the PPA;
 - b. Allow the Petitioner to sell the 49% power under Open Access post of the PPA and the exemption of various charges and relaxation of DSM

- for Intra State scheduling purpose post PPA foreclosure as the Petitioner's Plant is also a Waste to Energy plant located in the Nation Capital Territory of Delhi that the Hon'ble DERC vide Order dated 21.01.2019 on ref No. F9(164)/DERC/DS/2015-16/C.F5110, has recognized that "the purpose of Waste to Energy is to dispose off the waste and divert the dump with the objective of protecting environment. Such plants would also aid the objective of protecting environment. Such plants would also aid the objectives of Swachh Bharat Mission as well as Namami Gange Mission through conversion of waste to energy. Moreover, the quantum of waste to energy generated minimal and has extremely limited operational precedence".
- c. Allow a period of 30 days from the date of the order to enable implementation of the same by all stakeholders including the parties/Discoms/SLDC etc., and for that duration the electricity generated by the Petitioner's Plant will be accounted for as being sold under the PPA.

4. The Petitioner has submitted that:

- a. The draft Power Purchase Agreement ("PPA") was approved by the Commission vide Order dated 11.07.2008 in Petition No. 26/2008 for Tariff Based Bidding and the PPA was signed between BYPL and EDWPCL on 29.10.2009. The PPA envisaged to supply and sell 49% net available electricity in bulk from the project (after offsetting the auxiliary consumption) and the generator was free to sell/trade remaining 51% energy from the project to the third parties for which open access shall however be provided as per the guidelines of the appropriate commission for sale/trade of the balance 51% energy from the project. The Project capacity has since been revised to 12MW. The revised capacity was also approved by the Commission vide their order dated 02.11.2018 in the Petition No. 27/2018.
- b. When the Project was conceived in 2007, the Country had virtually no experience in the Waste to Energy Sector. The Project was initially awarded to M/s Delhi International Airport Ltd. In consortium with M/s Selco International Ltd. In October, 2008, who bid at a low rate presuming a growing carbon market. Except for some initial development activities, the Project could not take off and remained a non-starter till October, 2010. The Project being first of its kind RDF

based Waste to Energy project faced considerable technological/development challenge(s).

- c. The IL&FS Environmental Infrastructure and Services Limited (IEISL), a Company promoted by IL&FS stepped in to the Project in 2010-11 at the request of DIAL-SELCO consortium. By that time, the Project had already lost two years of development. Since 2008 (almost a decade ago), the project required multiple restructuring to address the changing requirements of regulatory as well as environmental norms.
- d. The Waste to Energy (WtE) project is located within hundred (100) meters from urban residential areas making it sensitive to additional risks associated with emissions, odour & noise pollution. Thus, WtE project has a complex design and additional pollution control measures. The Project further suffered inordinate delays in order to obtain permissions and clearances. Also, there has been considerable increase in operating costs due to low calorific value waste and regular increase in wages. Being the only euro Norms compliant Waste to energy Plant in the country, the Plant requires regular supply of consumables such as lime, urea and activated carbon, which adds to operating costs considerably. The project received no tipping fee and only source of revenue is sale of power, making a viable tariff critical for its sustainable operations. Total power generated from the Project contributes 0.2% of total Delhi Load and 5MW allocated to BYPL as per the PPA constitutes only 0.1% of total load allocated to BYPL in Delhi. The power released from this PPA will be sold under open access/captive scheme to industrial and commercial consumers and will not impact the domestic consumers in any way.
- e. The WtE plant has significantly higher importance in terms of socio economic benefit for the citizens of Delhi. However, the low tariff PPA with BYPL is unviable for the project and could lead to closure of the Plant. The closure of this plant will have a far greater adverse impact on residents of Delhi as compared to negligible impact from foreclosure of the PPA. Thus there will be an overall positive impact for the BYPL consumer if plant continues to operate as explained above.
- f. The financial viability of the Project was adversely affected by the collapse of the Carbon Credit Market in 2012. The Carbon credit

revenue was one of the reasons for the low tariff bid by DIAL-SELCO in 2008.

- g. Thus it is pivotal for this pioneering project to sell 100% of the generated green power at suggested CERC tariff of at least Rs. 7.90/Kwh to ensure long term sustainability of the project. This may be achieved through open access which require foreclosing of the existing PPA with BYPL.
 - h. EDWPCL is willing to submit an undertaking to the BYPL that it will not go back to BYPL for sale of this released power at a higher rate in future.
 - i. To take the stock of the issues related to improving the operations of Ghazipur Waste to Energy Project, a Meeting was held at the office of Hon'ble Chief Secretary of Delhi on July 4, 2019.
 - j. As per the minutes of the meeting the Chief Secretary, inter-alia, highlighted "the importance of sustaining the Ghazipur WtE project of managing Municipal Waste in East Delhi" and directed BYPL to examine the request of foreclosure of PPA in timely manner and find a way forward on priority basis. The Hon'ble DERC was represented at this meeting and was also pleased to record in the Meeting, that DERC will have no objection if the PPA is foreclosed on mutual consent.
5. BYPL has submitted the following:
- a. The petition in its present form needs examination considering the fact that the Power of Attorney ("POA") so filed by the Petitioner is dated 30.11.2016, which was signed on 12.12.2016 in view of the Resolution passed by the then Board of Directors dated 21.11.2016. However, it is pertinent to note that the Board of the IL&FS (100% holding company of the Petitioner) and of its subsidiaries has undergone major changes. It is noteworthy that;
 - i. In October, 2018, as per the information available, the Board of IL&FS was dissolved by the Orders of the Appropriate Tribunal on an Application on under Section 241 and 242 of the Companies Act, 2013 preferred by the Union of India and Orders similar to moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 were passed on the assets of IL&FS.

- ii. Thereafter, on the application of the Union of India, a new Board of Directors was appointed for the IL&FS and the same was made applicable to its subsidiaries also.
 - iii. As such, it is evident that the Board that gave the Power of Attorney to Mr. Salhotra is no more existing, by Orders passed by appropriate Tribunal.
 - iv. There is no authority whatsoever shown on behalf of Mr. Salhotra to state that the POA has not been revoked by the new management or that he has been authorised by the new Board to file proceedings before the competent authorities.
 - v. The Petitioner has not brought out the facts as state above.
 - vi. In view of the above, there is no clarity on the aspect that Mr. Salhotra is acting on the advice of the new Board of Directors of the Company.
- b. The same is also imperative since when the issue arose as to how the claims between the parties were to be settled including clam of BYPL against the Petitioner. The Counsel on behalf of the Petitioner submitted that since the Holding Company IL&FS is before NCLT/NCLAT, BYPL would have to file a claim before NCLT. However, as regards the POA, they had annexed with the Petition is of December, 2016, i.e. much prior to being sent to NCLT/NCLAT. The Petitioner has to therefore cure the present Defect regarding POA for filing the Petition. In that case, if it were agreed that BYPL has to go before NCLT/NCLAT, then Petitioner would have to take approval from MCLT and NCLAT/NCLT as the case may be.
- c. The DERC (Comprehensive Conduct of Business) Regulations, 2001 infact under Regulation 14(i) and (ii) provide the form under Annexure III, in terms of which the Supporting Affidavit would be filed. The said form categorically provides that the person signing the Supporting Affidavit is duly authorised by Petitioner.
- d. The Petitioner took a business opportunity risk of financial viability of the project as it was a bid out Project. The foreclosure hampers the interest of BYPL which was also highlighted by BYPL. The relevant extract of the MoM dated 31.12.2019 is provided herein below.
- e. BYPL mentioned that this is a case of surrendering cheaper source of WTE plant with RPO complain vis-s-vis available costly thermal plant in

the BYPL portfolio such as Dadri-II, IPGCL, PPCL, etc. this may not be prudent commercially as well as for consumer interest. However, larger public interest on environmental issues, Government or Regulator can take a decision and direct for action, with necessary relaxation on the RPO norms, compensation etc.

- f. BYPL further submitted that DISCOMs are regulated by Delhi Electricity Regulatory Commission (DERC) and all the PPAs have been approved by DERC. Hence any decision regarding foreclosure shall be accepted only after the written approval from DERC.
- g. BYPL submitted that as per the National Tariff Policy 2016, the DISCOMs shall compulsorily procure 100% power WtE plants in the State. If executed PPA is foreclosed, and in future any successor entity of EDWPCL approaches the Regulator, then this power shall again be allocated to BYPL at the much higher rate in accordance to NTP, 2016 EDWPCL stated that upon foreclosure of PPA with BYPL, it will be ensured that the power from EDWPCL shall not be sourced back to BYPL again.
- h. Further, there are certain pending commercial issues like claim of EDWPCL of Rs. 2.78 crores excess bill raised by BYPL and BYPL's claim of Rs. 5.74 crores for liquidation damages due to delay in CoD of the plant which needs to be addressed prior to foreclosure of PPA.
- i. BYPL requested EDWPCL to undertake to indemnify BYPL for any past current and future claims/losses/liabilities (if any) which may arise out of this termination from any party, which includes EDWPCL, lenders, MCT etc.
- j. Considering request of EDWPCL and with directions of GoNCTD, it was agreed that EDWPCL shall proceed for approval on the foreclosure of PPA before DERC and necessary directions from Govt. of NCT of Delhi with copy to BYPL."
- k. As evident from the above, BYPL has never consented to EDWPCL that it will foreclose the PPA, however the contention of BYPL, was that any foreclosure would be after approval of the Commission and GoNCTD, hence necessary decision of GoNCTD may please be considered. In this regard the relevant extract of letter dated 18.11.2019 submitted to

GoNCTD and forwarding letter to the Commission dated 23.12.2019 is reproduced herein below:

"6. It is pertinent to mention here that this is a case of surrendering cheaper source of WtE plant with RPO complaint vis-s-vis available costly thermal plant in the BYPL portfolio this may not be prudent commercially as well as on consumer interest. However for larger public interest of environment issues, Government or Regulator can take a decision and direct for action, with necessary relaxation on the RPO norms, compensation etc.

7. On this backdrop if directed by GoNCTD BYPL shall approach Hon'ble DERC for necessary approval or direction"

- I. The Commission under its regulatory powers under Section 86(1)(b) and 86(1)(e) and (f) has to consider the present petition. Further, the claims of BYPL regarding liquidated damages due to delay in CoD are to be examined by the Commission and not by NCLT and/or NCLAT as it is only this Commission which has jurisdiction over the issues and disputes so arising between the licensee and the generator operating within the regulatory jurisdiction of the Commission as held in catena of judgements.

Commission Analysis

6. The rival contentions of the party have been considered and it is observed that it is related to termination of contract namely Power Purchase Agreement entered into between the parties, which is a bilateral arrangement and if both the parties agree, the role of DERC as a Regulator is limited to the extent that it should not be violative of provisions of the Electricity Act, 2003 or the Regulations made thereunder.
7. in the instant case what is important is to know is whether BYPL is agreeable to foreclosure of PPA or not; and not the question that who has filed the petition. If both the parties agree and consent for foreclosure of PPA as per the terms and conditions of PPA, in a bilateral contract, it is immaterial who has instituted the petition because, it will not change the contention. Therefore, the contention of the Respondent that the present petition has not been instituted under proper Power of Attorney (PoA) has no efficacy. Had it been a case of filing claim against BYPL, then certainly

a proper PoA is a necessity. Rather it is for BYPL to show that the foreclosure of PPA has not been agreed by the competent authority.

8. M/s EDWPCL has submitted that clause 2.2 of PPA provides for termination of agreement with consent of both the parties. It has been further argued that M/s BYPL has agreed to foreclose the instant PPA in a meeting held under the Chairmanship of Chief Secretary GoNCTD, a copy of the minutes of which has been filed which has not been disputed by BYPL.
9. In the Petition M/s EDPWCL has made the following prayers;
 - a. To approve the foreclosure of PPA;
 - b. Allow the Petitioner to sell the 49% power under Open Access post foreclosure of the PPA and the exemption of various charges and relaxation of DSM for Intra State scheduling purpose post PPA foreclosure as the Petitioner's Plant is also a Waste to Energy plant located in the Nation Capital Territory of Delhi.
 - c. Allow a period of 30 days from the date of the order to enable implementation of the same by all stakeholders including the parties/Discoms/SLDC etc., and for that duration the electricity generated by the petitioner's Plant will be accounted for as being sold under the PPA.
10. As much it is related to the prayer of foreclosure of PPA, since both the parties have agreed, and there is provision in the extant PPA for foreclosure of PPA with mutual consent, there may be no objection for allowing foreclosure PPA. The Petitioner, EDWPCL may have options to sell power made available after foreclosure of PPA, through any mode including open access, however, the quantum of power released due to foreclosure of PPA will not be allocated to the Discoms of NCT of Delhi under policy of compulsory buying of WtE power.
11. Regarding the prayer for exemption from payment of wheeling charges, cross subsidy charges etc. in case of power being sold under open access regime, it is observed that the Petitioner has not provided any cogent or plausible reason in support of their demand so that the Commission may decide contrary to its own Order dated 21.01.2019. The Order dated 21.01.2019 is a considered order and unless anything extraordinary or exemplary is observed, it would not be prudent to reverse a considered order. It is also to be noted that the aforesaid Order dated 21.01.2019 has

been issued in respect of WtE projects only, keeping in view the benefits and necessity of such projects in waste disposal management, so as to encourage and promote them. Therefore, the benefits of WtE project as cited by the Petitioner may not be considered as a cogent reason for reversing the decision of the Commission. Therefore, the prayer of the Petitioner for exemption from wheeling charges etc. in case of selling power through Open Access mode cannot be granted.

12. The thirty days period as requested for making arrangement to enable implementation of the same by all stakeholders including the parties/Discoms/SLDC etc. is reasonable and therefore, is allowed; and for that duration the electricity generated by the Petitioner's Plant will be accounted for as being sold under the PPA.
13. As much it is related to the prayer of the Respondent BYPL regarding claims of liquidated damage etc., it is observed that the instant Petition is regarding allowing foreclosure of PPA as agreed by the parties and as such no claim has been made by the Petitioner so as to entertain counter claim by the Respondent. Foreclosure of a PPA does not mean an end of everything or extinguishing of rights related to the PPA. The legitimate claims of a party under the foreclosed PPA dated prior to foreclosure survive and the affected party has every right to file claim before appropriate forum. Therefore, the Respondent BYPL may file Petition regarding its claims before an appropriate forum including this Commission.
14. On the issue of EDWPCL to undertake to indemnify BYPL for any past current and future claims/losses/liabilities (if any) which may arise out of this termination from any party which includes EDWPCL, lenders, MCT etc., it is observed that such indemnity is part of every commercial arrangement and therefore, does not need any further order from this Commission.
15. The request of the Respondent BYPL to relax RPO norms as the power from WtE plant qualifies for fulfilment of RPO is also considered and it is directed that BYPL will make alternative arrangement to make good the shortfall of RPO due to foreclosure of the PPA within a period of one year and during that period the shortfall in RPO to the extent of this PPA shall not be considered against BYPL.

16. In view of the foregoing discussions, following Orders are made:

- a. Foreclosure of PPA dated 29.10.2009 between EDWPCL and BYPL for purchase of 49% of power from Petitioner's WtE plant at Ghazipur is allowed on the basis of mutual consent in terms of clause 2.2 of the PPA.
- b. The power made available due to foreclosure of PPA will not be allocated again to the Discoms of NCT of Delhi under compulsory buying policy.
- c. EDWPCL shall be free to sell available power under any mode including open access, however, exemption from wheeling charges, cross-subsidy charges etc. would not be available in terms of the Order of this Commission dated 21.01.2019.
- d. 30 days time is allowed for making arrangement to enable implementation of the same by all stakeholders including the parties/Discoms/SLDC etc.; and for that duration the electricity generated by the Petitioner's Plant will be accounted for as being sold under the PPA.
- e. BYPL will make alternative arrangement to make good the shortfall of RPO due to foreclosure of the PPA within a period of one year and during the period the shortfall in RPO to the extent of this PPA shall not be considered against BYPL.
- f. The claim of BYPL about liquidated damage etc. could not be decided through instant Petition. BYPL is at liberty to file Petition about its claim related to PPA being foreclosed.

17. The Petition is disposed of accordingly.

Sd/-
(A.K. Ambasht)
Member

Sd/-
(A.K. Singhal)
Member

Sd/-
(Justice S S Chauhan)
Chairperson