



Delhi Electricity Regulatory Commission

Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi –110 017.

No. F.11(1979)/DERC/2022-23/7387

Petition No. 25/2022

In the matter of: **Petition under Section 142 read with Section 146, Section 86(1)(f) and Section 86(1)(k) of the Electricity Act, 2003 seeking urgent directions and action against Respondent No. 1 BSES Rajdhani Power Limited for being in non-compliance of the specific and express direction(s)/order of this Commission dated 13.04.2021 in petition No. 25 of 2015 and the provisions of Electricity Act, 2003, and seeking issuance of directions against the Respondent No. 1 to comply with the unequivocal directions of the Commission by virtue of the said Order**

Timarpur Okhla Waste Management Co. Ltd.

....Petitioner

Vs.

BSES Rajdhani Power Ltd.

....Respondent No. 1

State Load Despatch Centre

....Respondent No. 2

Coram:

Hon'ble Justice (Retd.) Jayant Nath, Chairperson

Appearance:

- 1. Mr. Molshree Bhatnagar, Advocate, TOWMCL**
- 2. Mr. Buddy A. Ranganadhan, Advocate, BRPL**
- 3. Mr. Rahul Kinra, Advocate, BRPL**
- 4. Ms. Shailja Kulshreshtha, Advocate, SLDC**

Order

(Date of Order: 14.03.2024)

1. Petition seeking urgent directions and action against Respondent No. 1 BSES Rajdhani Power Ltd. (BRPL) for being in non-compliance of the specific and express direction(s)/order of this Commission dated 13.04.2021 in petition No. 25 of 2015 and the provisions of Electricity Act, 2003, and seeking issuance of directions against the Respondent No. 1 to comply with the unequivocal directions of the Commission by virtue of the said Order. The Petitioner has made the following prayers:
 - a. Declare that actions/inactions of Respondent No. 1 (BRPL) not providing the NoC for allowing the Petitioner to enter into other commercial arrangements for power supply beyond the Contracted Capacity tied up with the

WEAR FACE MASK WASH HANDS REGULARLY MAINTAIN SOCIAL DISTANCING

Respondent No. 1 under the Energy Purchase Agreement dated 20.01.2010 along with Amended EPA is in violation of Order dated 13.04.2021 passed by the Commission in Petitioner No. 25 of 2015.

- b. Issued appropriate order(s)/directions(s) to Respondent No. 1 to immediately take steps to be in conformity and compliance of the Order dated 13.04.2021, including granting the NOC as has been prayed and requested by the Petitioner.
- c. Issue appropriated Order(s) directions(s) to respondent No. 2, Delhi State Load Despatch Centre (SLDC) to immediately take steps to be in conformity and compliance of the Order dated 13.04.2021, including allowing the Petitioner to supply to third party/open access, beyond the Contracted Capacity committed to the Respondent No. 1 under The Energy Purchase Agreement dated 20.01.2010 and Amended (EPA);
- d. Issue appropriate order(s)/directions(s) to the Respondents to compensate the Petitioner for the period, where it could not enter into commercial arrangements for supply of power either to third party/open market, on account of delay in granting the NOC for such supply

Brief Facts

- 2. The Petitioner has setup a 1950 MT per day Municipal Solid Waste to Energy (WtE) Power Project (16MW) by installing plant and equipment having installed capacity capable of exporting minimum 13MW of power, situated at Okhla, New Delhi. It is a joint venture effort of the petitioner with Municipal Corporation of Delhi (MCD) and New Delhi Municipal Corporation of Delhi (NDMC, Government of NCT of Delhi). The Pettitioner's Okhla Wte plant is being connected at 33 kV voltage level at BSES Jasola S/sand supplying power generated to the local distribution company BSES as a power at the tariff determined through competitive bidding by this Commission.
- 3. Subsequently, on 20.01.2010 the Petitioner (TOWMCL) and the Respondent No. 1 (BRPL) entered into Energy Purchase Agreement (EPA). In terms of EPA the Respondent No. 1 agrees to purchase 50% ex-bus energy (after the Plant's auxiliary consumption of upto 22%) from the Original Project Capacity on monthly

basis for a period of 25 years onwards supply the consumers of Respondent No. 1. The aforesaid EPA interalia agrees the following;

“AND WHEREAS, The Generating Company agrees to supply, 100% of ex-bus energy (after its own auxiliary consumption of upto 22%) from 16MW capacity plant i.e., minimum 6.5 MW out of 13 MW at ex-bus from Waste to Energy generating plant facility to the procurer, under the terms and conditions set forth herein.

AND WHEREAS, the procurer agrees to purchase 50% of ex-bus energy (after plant's auxiliary consumption of upto 22%) from 16MW capacity plant on monthly basis, for the entire period of contract for its consumption from such plant at tariff adopted by the Delhi Electricity Regulatory Commission pursuant to the Competitive Bidding as per the Regulations.

AND Whereas, Procurer agrees to facilitate Generating Company to bank rest 50% ex-bus energy (after its own auxiliary consumption of upto 22%) with them, from 16MW capacity plant. The procurer shall return this energy on monthly and RTC basis to the generating company within 60 days from the bill date as per the schedule of returnable 50% energy, provided by generating company and agreed by procurer. The schedule of returnable 50% energy provided by generating company shall clearly specify the quantity in each of captive use/sale to third party/to be banked at procurer's end (as mentioned in clause 2.5) for exigencies. Scheduling of power shall be done as per IEGC/DEGC.

AND WHEREAS, in case the generating company decides to use the entire power for its captive use, it shall serve a notice to Procurer. Procurer reserves the right to disconnect the plant serving a reply to the notice and providing a reasonable timeframe i.e, maximum 6 months for alternate connectivity arrangements of the plant. “

4. Thereafter the Petitioner filed a Petition bearing No. 18/2010 before the Commission for adoption of the tariff and for approval EPA executed on 20.01.2010 between the Petitioner and Respondent. The Commission vide its order dated 20.01.2011 accorded its approval to EPA on following terms:

- i. EPA shall be modified to the extent that maximum 50% of Generation on daily basis subject to 60 MUs per year shall be supplied to BRPL by TOWMCL.

- ii. *The Tariff of first year of Rs. 2.49/kWh and levelised tariff of Rs. 2.833 shall continue to prevail.*
- iii. *Both the parties shall abide by the terms and conditions of LOI and EPA.*
- iv. *The evacuation of power shall take place as per the provisions of IEGC, Delhi Grid Code and satisfaction of State Load Despatch Center (SLDC Delhi).*
- v. *After supplying the allocation energy to BRPL, if there is any surplus energy generated from the plant, the TOWMCL shall be entitled to use remaining energy for captive purpose/to be sold to the Third Party, after obtaining open access from SLDC, Delhi and other Agencies as applicable.*
- vi. *This order shall be integral part of earlier interim orders issued in petition No. 37/2007.*

5. The aforesaid EPA dated 20.01.2010 was accordingly amended vide an amendment dated 27.07.2011 whereby one of the recital clause of EPA was amended regarding the quantum of power to be supplied by the Petitioner to the Respondent No. 1. The said amended recital read as follows: -

"AND WHEREAS, Minimum 50% of Generation on daily basis subject to 60 MUs per year shall be supplied to Procurer i.e., BRPL Generating Company i.e., TOWMCL."

6. However, a dispute had arisen between the parties after the Petitioner served termination notices on Respondent No.1, for using the entire contracted power for captive use in respect to Okhla WtE plant in terms of the EPA dated 20.01.2010 and amended EPA dated 27.07.2011. Thereafter, the Petitioner filed a Petition bearing No. 25/2015 before this Commission U/s 86 (f) of the Electricity Act, 2003 seeking declaration and correct interpretation of the provisions of EPA dated 20th January, 2010 and amended EPA dated 27th July 2011. The said Petition contended following prayers:

- a. Direct, declare and hold that Petitioner is entitled to use the share of power of the respondent, i.e. 50% of generation of power being subject matter of EPA dated 20.01.2010 and amended EPA dated 27.07.2011 for captive purpose.

- b. Direct, declare and hold that “Entire Power” means 50% of 16MW ex-bus energy, after auxiliary consumption of upto 22%, this will not apply on the generation over and above 16MW and:
 - c. Direct, declare and hold that the total supply of energy is limited to 60Mus per annum and petitioner cannot be compelled to supply more than 60MU to respondent in case the target of 60Mus is achieved early in the year, the Petitioner is free to sale the balance power in market.
7. The Commission disposed the above Petition on 13.04.2021 with following directions;

“34. In the light of the above discussion and reasons therein, it is ordered that the petitioner will be entitled for captive generation as provided in the EPA dated 20.01.2010 and emended EPA dated 27.07.2011, while making alternate arrangements for connectivity and if the petitioner fails to arrange alternate connectivity, then he will not be entitled for the benefit of this clause. It is further ordered that 50% of the maximum annual generation of ex-bus which is equivalent to 56.94 Mus with a cap of 60 Mus in a year would be for BRPL. The Petition is disposed of accordingly. “

8. Thereafter, a meeting was held in the office of State Load Despatch Centre, Delhi (SLDC) on 08.07.2021 regarding implementation of order dated 13.04.2021 passed by this Commission in Petition No. 25 of 2015. The Minutes meeting dated 08.07.2021 was forwarded by SLDC vide its letter dated 24.09.2021. In the said minutes meeting a dispute arose regarding correct interpretation of Energy Purchase Agreement (EPA) dated 20.01.2010 and amended EPA dated 27.07.2011 executed between Petitioner No.1 and Respondent 1, and orders of this Commission dated 20.01.2011 and 13.04.2021.

Petitioner's Submissions

9. In the wake of execution of Nationwide Swachh Bharat Abhiyan and with aim to provide solid waste processing/management, the Petitioner setup a 1,950 tonnes per day MSW power project (16MW) by installing plant and equipment having installed capacity capable of exporting minimum 13MW of power, situated at Okhla, New Delhi.

10. On 20.01.2010, the Petitioner and Respondent No. 1 (BRPL) entered into an Energy Purchase Agreement and in terms thereof Respondent No. 1 agreed to purchase 50% ex-bus energy (after the Plant's auxiliary consumption of upto 22%) from the Original Project capacity on monthly basis, for a period of 25 years for onward supply to consumers of Respondent No. 1 (hereinafter referred to as "Energy Purchase Agreement dated 20.01.2010").
11. The Petitioner filed a petition before the Commission, being Petition No. 18/2010 for approval of Energy Purchase Agreement 20.01.2010. In furtherance to the same the Commission vide its Order dated 20.01.2011, accorded its approval to the Energy Purchase Agreement. Accordingly, the Energy Purchase Agreement dated 20.01.2010 was amended 50% of generation on daily basis subject to 60Mus per year will be supplied by the Petitioner to Respondent No. 1) (hereinafter referred to as "Amended EPA"). The said amended Recital reads as follows:
- "AND WHEREAS, minimum 50% of generation on daily basis subject to 60Mus per year shall be supplied to Procurer i.e., BRPL by generating i.e. TOWMCL"*
12. The Energy Purchase Agreement dated 20.01.2010 and Amended EPA are collectively referred to as "EPA"
13. The Petitioner's project is power plant, wherein, MSW is being used as a raw material for generating electricity. In this reference, it may be noted that in India waste to energy projects were originally governed under Municipal Solid Waste (Management and Handling) Rules, 2000 (hereinafter referred to as "MSW Rules 2000") framed by Central Government in accordance with Sections 3, 6 and 25 of the Environment (Protection) Act, 1986. However, at present, the management and handling of MSW is governed under Solid Waste Management Rules 2016 (hereinafter referred to as "SWM Rules 2016"). Under Rule 6 of the SWM Rules 2016, duty has been casted over the Ministry of Urban Development to coordinate with State Governments and Union territory Administrations to:
- (a) Take periodic review of the measures taken by the States and local bodies for improving solid waste management practices;
 - (b) Formulate national policy and strategy on solid waste management;
 - (c) Facilitate States and Union Territories in formulation of state policy and strategy on solid management;
 - (d) Promote research and development in solid waste management sector;
 - (e) Undertake training and capacity building of local bodies;

- (f) Provide technical guidelines and project finance to States, Union territories and local bodies on solid waste management.
14. The Petitioner filed a Petition bearing No. 25/2015 under Section 86(1)(f) of the Electricity Act, 2003 for resolution of which had arisen between the Petitioner and respondent No. 1. The dispute was in relation to interpretation, meaning and applicability of some of the provisions of the Energy Purchase Agreement executed between the parties on 20.01.2010 and Amended EPA on 27.07.2011. By virtue of the said Petitioner, the petitioner sought indulgence of the Commission to:
- a. *direct, declare and hold that petitioner is entitled to use the share of power of the respondent, i.e. 50% of generation of power being subject matter of EPA dated 20.01.2010 and amended EPA dated 27.07.2011 for captive purpose.*
 - b. *Direct, declare and hold that "Entire Power" means 50% of 16MW, ex-bus energy, after auxiliary consumption of upto 22%, this will not apply on the generation over and above 16MW and;*
 - c. *Direct, declare and hold that the total supply of energy is limited to 60MUs per annum and petitioner cannot be compelled to supply more than 60MU to respondent in case the target of 60MUs is achieved early in the year, the Petitioner is free to sale the balance power in market.*
15. The Commission vide its Order dated 13.04.2021, while adjudicating the issue that had arisen between the Petitioner and Respondent No. 1 with respect to true interpretation of the EPA clearly held as under:

"CONCLUSION

34. In the light of the above discussions and reasons therein, it is ordered that the Petitioner will be entitled for captive generation as provided in the EPA dated 20.01.2010 and amended EPA dated 27.07.2011, while making alternate arrangements for connectivity and if the Petitioner fails to arrange alternate connectivity, then he will not be entitled for the benefit of this clause. It is further ordered that 50% of the maximum annual generation at ex-bus which is equivalent to 56.94 MUs with a cap of 60 MUs in a year would be for BRPL. The Petition is disposed off accordingly. "

16. A consequences of passing of the order dated 13.04.2021, the Commission clearly directed the parties that;
 - a. The Petitioner will be entitled for captive generation as provided in the EPA, while making alternate arrangements for connectivity and if the Petitioner fails to arrange alternate connectivity, then the Petitioner will not be entitled for the benefit of this clause.
 - b. 50% of the maximum annual generation at ex-bus which is equivalent to 56.94 Mus with a cap of 60 Mus in a year will be allocated to Respondent No. 1.
17. The Petitioner issued a letter dated 23.06.2021 to Respondent No. 1 for approval of sale of additional generation of power from its Project to consumers under open access route. Further its letters dated 17.09.2021 and 30.09.2021, the Petitioner issued a notice of trial run and other supporting documents to demonstrate that the capacity of Project has enhanced from 16MW to 23MW (hereinafter referred to as "Project").
18. The Respondent No. 1 during the meeting dated 08.07.2021, submitted that the Petitioner must supply the 60 MUs of power to Respondent No. 1 and thereafter the petitioner shall be allowed to sale power through open access route. However, as to give true effect to the intent and purpose under the EPA and to the directions passed by the Commission, 5 Mus on a monthly basis with a cap of 60 Mus per year shall be supplied/allocated to Respondent No. 1. The said arrangement is necessary for execution of contracts between the Petitioner and the open access consumers on long-term basis.
19. It naturally flows from the Order dated 13.04.2021 that the parties are under obligation to consider and act in accordance with compliance with the said direction (i.e. the maximum annual generation/supply of power for Respondent No. 1 will be 56.94 MUs with a cap of 60 MUs). However, due to imposition of the additional conditionality by Respondent No. 1 that the petitioner is required to supply the 60 MUs of power to Respondent No. 1 and only then the Petitioner will be allowed to sale power through open access route, has resulted in significant low demands for purchase of renewable power through the Petitioner's Project under open access route.
20. In accordance with the express/specific directions issued by the Commission vide its Order dated 13.04.2021, the contractual obligation of the Petitioner to supply power to Respondent No. 1 is limited to 56.94 MUs (which is further capped to 60

MUs). Thus, the Petitioner is desirous of supplying 49 MUs under open access route for which it is in negotiation with multiple open access consumers, to secure an arrangement of supply of power beyond the Contracted be supplied first and thereafter the Petitioner shall be allowed to sale power through open access route is resulting in considerable decrease in supply of power under open access regime.

21. Considering the same, the Petitioner *vide its* letter dated 01.03.2022, requested Respondent No. 1 for issuance of consent/NOC for the period commencing from 01.04.2022 to 31.03.2023 in relation to supply of power by the Petitioner through open access beyond the Contracted Capacity tied up with Respondent No. 1 under the EPA. After passing of the Order dated 13.04.2021, Petitioner has been approaching Respondent No. 1 consistently and continuously, seeking for its immediate compliance of the said Order. However, not only Respondent No. 1 has refused to provide any concrete response to the letters issued by the Petitioner, but it has also maintained its studious silence qua issuance of aforesaid consent/NOC.
22. The Petitioner that the project has a current installed capacity of 201.48 MUs. Out of the said capacity, the Petitioner is contractually mandated to provide ex-bus generation equivalent to 56.94 MUs which will be reconciled annually. The EPA empowers and contractually entitles the Petitioner to supply power beyond the Contracted Capacity to any open access consumer/third party and/ or bank the same. However, non-issuance of consent/NOC by Respondent No. 1 for the period commencing from 01.04.2022 to 31.03.2023 in relation to supply of power by the Petitioner through open access beyond the Contracted Capacity tied up with Respondent No. 1 under the EPA is causing financial prejudice to the Petitioner.

Submissions of Respondent No. 1, BRPL

23. By present Petition, TOWMCL has erroneously alleged that BRPL is in non-compliance of Order dated 13.04.2021 since:
 - a. During the meeting dated 08.07.2021 held under the aegis of State Load Despatch Centre ("SLDC" / "Respondent No. 2"), BRPL had submitted that TOWMCL must supply 60 MUs of power to BRPL and only then can TOWMCL sell power through open access route. However, in terms of directions of the Commission and the provisions of the Amended EPA, TOWMCL shall only supply 5 MUs on a monthly basis with a cap of 60 MUs per year to BRPL. Above

arrangement is necessary for TOWMCL to execute contracts with open access consumers on long-term basis.

- b. As evident from Order dated 13.04.2021 that TOWMCL is only liable to supply maximum of 60 MUs of power to BRPL annually. Additional condition imposed by BRPL, that TOWMCL must first supply 60 MUs to BRPL and only then TOWMCL can sell power through open access route, has significantly reduced the demand for power from the Project under open access.
 - c. TOWMCL by communication dated 01.03.2022 had requested BRPL to provide its consent / No Objection Certificate ("NOC") with respect to supply of power by TOWMCL through open access route beyond the contracted capacity under the Amended EPA for the period from 01.04.2022 to 31.03.2023.
 - d. TOWMCL has approached BRPL continuously to comply with directions of the Commission in Order dated 13.04.2021, however, BRPL has not provided any concrete response to letters issued by TOWMCL and has also maintained silence on the issuance of consent / NOC.
 - e. The Commission has powers under Section 142 and 146 of the Electricity Act to adjudicate the present dispute since BRPL has disregarded the specific directions of the Commission in Order dated 13.04.2021. Further, it is evident from the submissions of BRPL in the meeting dated 08.07.2021 that it has deliberately, wilfully, and consciously defied the Order dated 13.04.2021.
 - f. TOWMCL's Project has a capacity of 201.48 MUs out of which, the Amended EPA mandates TOWMCL to supply a maximum of 60 MUs of power to BRPL annually. EPA allows TOWMCL to supply power beyond the contracted capacity to any open access / third party consumer. However, non-issuance of consent / NOC by BRPL for the period from 01.04.2022 to 31.03.2023 is causing financial prejudice to TOWMCL.
24. At the outset, it is settled law that contempt jurisdiction should be confined to the question as to whether there has been any deliberate disobedience of the order of the Court and if the conduct of the party who is alleged to have committed such disobedience is contumacious. In the present case, there is no disobedience by BRPL of any direction issued by the Commission. Reliance is placed on:
- (a) *Jhareswar Prasad Paul v. Tarak Nath Ganguly*, (2002) 5 SCC 352 [Para. 11].
 - (b) *Bihar Finance Service House Construction Coop. Society Ltd. v. Gautam Goswami*, (2008) 5 SCC 339 [Para. 30-32].

- (c) *Union of India v. Subedar Devassy PV*, (2006) 1 SCC 613 [Para. 2].
- (d) *Sudhir Vasudeva v. M. George Ravishekar*, (2014) 3 SCC 373 [Para. 19].
- (e) *Judgment dated 05.08.2009 in Appeal No. 156 of 2007 titled B.M. Verma v. Uttarakhand Electricity Regulatory Commission* [Para. 14] passed by the Hon'ble Appellate Tribunal for Electricity ("Hon'ble APTEL").
25. Contentions raised by TOWMCL in the present Petition are ex-facie fallacious, arbitrary, and self-serving, and hence, denied in toto. BRPL has been acting in compliance with the Commission's directions in Order dated 13.04.2021. Notably there is no direction in the Commission's Order dated 13.04.2021 to the effect that BRPL is required to give consent to TOWMCL for sale of power beyond the contracted capacity through open access, prior to supply of 56.94 MUs with a cap of 60 MUs to BRPL.
26. In the absence of any such directions by the Commission as sought to be read into Order dated 13.04.2021 by TOWMCL, it is completely erroneous and arbitrary on part of TOWMCL to allege that BRPL has "*wilfully, knowingly and deliberately failed to comply with the directions issued by this Hon'ble Commission vide its order dated 13.04.2021...*".
27. Contrary to TOWMCL's allegation, it is relevant to note that from 01.04.2021 to 31.08.2022, BRPL has received thirty-three (33) applications for open access from various open access consumers and from TOWMCL as well. BRPL has duly issued Form 5A for the said applications as well as its NOC in favour of the open access consumers.
28. In fact, in reference to TOWMCL's letter dated 01.03.2022, BRPL issued a letter dated 03.03.2022 to Delhi SLDC and requested Delhi SLDC to apprise the Commission about the difficulties being faced by it in implementation of Order dated 13.04.2021 and seek necessary modification / amendment of the said Order, if any. The aforesaid letter was also marked to this Hon'ble Commission as well as TOWMCL.

29. Further, TOWMCL has sought to misinterpret the directions passed by the Commission in its Order dated 13.04.2021. This is evident from the Minutes of Meeting dated 08.07.2021 wherein TOWMCL had itself agreed to the decision that:

(a) TOWMCL can apply for sale of power through the open access route only after the completion of supply of at least 50 MUs to BRPL from the Project, as under:

*“Decision: After detailed discussion it was decided in this matter that **after completion of 50 MUs actual energy supplied to BRPL (which can be verified by the actual meter reading available with TOWMCL), TOWMCL shall apply for sale of power in open access.** After issuance of 5A by concerned Discern, 5B would be issued by SLDC on the condition that power transaction will take place only after supply of 60 MUs to BRPL.”*

(b) On receipt of such application, BRPL would issue Format-ST 5A in terms of the Guidelines / Procedure for Implementation of Short-Term Open Access (STOA) issued by the Commission under the Delhi Electricity Regulatory Commission (Terms and Conditions for Intra State Open Access) Regulations, 2005 (“DERC Open Access Regulations”).

30. The above agreement was arrived at amongst the stakeholders present in the meeting dated 08.07.2021 and was beyond the scope of the Order dated 13.04.2021. Therefore, TOWMCL cannot at this stage renege from the mutually agreed terms as decided in the meeting held on 08.07.2021 and allege Contempt of the Order dated 13.04.2021. In fact, in the present Contempt Petition, TOWMCL has relied upon the said Minutes of Meeting. However, TOWMCL has conveniently failed to even mention in its Petition the aforesaid decision arrived at in the meeting on this issue.

31. Even otherwise, if TOWMCL was not in agreement with the decision arrived in Minutes of Meeting dated 08.07.2021, it ought to have taken appropriate steps against the decision in accordance with law.

32. Therefore, the present Petition has been filed by TOWMCL with the sole intention to coerce BRPL into accepting TOWMCL's erroneous interpretation of the Commission's Order dated 13.04.2021, which ought not to be countenanced. It is settled law that contempt jurisdiction of this Hon'ble Commission cannot be used as a weapon in abundance / misused, in present case to coerce BRPL into giving

- an NOC / consent for sale of power by TOWMCL under open access, especially when there is no wilful or deliberate disobedience of the Commission's directions by BRPL. Reliance is placed on R.N. Dey v. Bhagyabati Pramanik, (2000) 4 SCC 400 [Para. 7].
33. Without prejudice to the above, in case of any ambiguity or difficulty in interpretation and implementation of the Commission's Order dated 13.04.2021, TOWMCL ought to have filed an application seeking clarification before the Commission instead of initiating frivolous proceedings against BRPL on flimsy grounds.
34. Only two (2) directions were issued by the Commission in its Order dated 13.04.2021 in Petition No. 25 of 2015.
- a. *TOWMCL will be entitled for "captive generation as provided in the EPA dated 20.01.2010 and amended EPA dated 27.07.2011, while making alternate arrangements for connectivity and if the Petitioner fails to arrange alternate connectivity, then he will not be entitled for the benefit of this clause."*
- b. *BRPL is entitled to "...50% of the maximum annual generation at ex-bus which is equivalent to 56.94 MUs with a cap of 60 MUs in a year"*
35. There is no direction in the Commission's Order dated 13.04.2021 to the effect that BRPL is required to give consent to TOWMCL for sale of power beyond the contracted capacity through open access prior to supply of such contracted capacity (56.94 MUs with a cap of 60 MUs) to BRPL.
36. In the absence of any such directions by the Hon'ble Commission as sought to be read into Order dated 13.04.2021 by TOWMCL, it is completely erroneous and arbitrary on part of TOWMCL to allege that BRPL has *"wilfully, knowingly and deliberately failed to comply with the directions issued by this Hon'ble Commission vide its order dated 13.04.2021..."*. Clearly, no case of non-compliance of any directions of the Hon'ble Commission under Section 142 or 146 of the Electricity Act is made out against BRPL.
37. In fact, in reference to TOWMCL's letter dated 01.03.2022, BRPL issued a letter to Delhi SLDC and requested that Delhi SLDC to apprise Commission about the difficulties being faced by Delhi SLDC in implementation of Order dated

13.04.2021 and seek necessary modification. The aforesaid letter was also copied to the Commission as well as TOWMCL. However, no such steps were taken either by TOWMCL or Delhi SLDC.

Submissions by the Respondent No. 2, SLDC

38. That the allegation of not disposing of the cases for issuing NOCs is denied. Respondent No. 2 has processed all the NOCs in timely manner.
39. That without prejudice to the above stated submission, it is humbly submitted that if the Commission allows this Petition against Respondent No. 1 then the following observations may also kindly be considered: -
 - a. That as per the Inter-state ABT system, which was implemented in Delhi wef 01.04.2007 as per the Commission's order dated 31.03.2007, the scheduling of Discoms and Generators is carried out in 15 Min time-blocks on MW basis. The allocation of Discoms from corresponding generators is carried out in MW.
 - b. if the Commission fixes 5 MUs per month the same would result in plethora of complexities during scheduling of power between Petitioner and Respondent No. 1, which are elaborated as follows: -
 - i. For Scheduling of 5 MUs in a month, Respondent No. 2 would have to translate the same in terms of MW on 15 min time-block wise basis. For example, for months with 31 days $5\text{MUs} \times 1000/24 \times 31 = 6.72\text{MW}$ per block and for months with 30 days $5\text{MUs} \times 1000/24 \times 31 = 6.94\text{MW}$ per block.
 - ii. As per DERC Order dated 21.01.2019, relaxation has been provided to WTE from the applicability of DSM Regulations by replacing the Schedule with the actual generation. Accordingly, even-after finalizing the MW per time block wise from the Petitioner, the Schedule is ought to change in post facto basis.
 - iii. Further, during the month there may be cases of excess and/or under generation or drawl from grid due to shut down, and in such cases, the capping of 5 MUs may be breached due to settlement of excess generation and/or drawl by Petitioner with that of Respondent No. 1, as per DERC Order dated 06.03.2020.

iv. Accordingly, SLDC is of the view that to resolve the above issue, instead of fixing the MUs, a fixed percentage may be allocated to Respondent No1 from the Petitioner BRPL by the Commission as it will result in availability of spare capacity with the Petitioner throughout the year which can be sold by the Petitioner in Open Access. However, quantum of percentage may be fixed by the Commission as deemed fit.

Rejoinder by the Petitioner

40. That the underlying intent of the contractual arrangement between the Petitioner and the Respondent No. 1 qua sale of power over and above the contracted quantum (50% of the maximum annual generation equivalent to 56.94MUs) was to entitle the Petitioner to effectuate sale of the balance power to any consumer or third party or bank the same with the Respondent No. 1.
41. Respondent No. 1 has laid emphasis upon the Minutes of Meeting dated 08.07.2021 relying upon an alleged consensus at idem between the Petitioner and Respondent No. 1 qua supply of 56.94 MUs subject to capping of 60 MUs in a year. It would be pertinent to highlight that the contracted quantum of 56.94 MUs subject to a capping of 60 MUs has been contractually agreed to be supplied 'in a year', which, by no stretch of imagination, can be construed to be a condition precedent for supply of surplus power under open access regime without first fulfilling the obligation of supply of entire quantum of 56.94 MUs by the Petitioner to the Respondent No. 1 in a year.

Commission Analysis

42. The main issue of the dispute in the instant Petition is whether the Petitioner would be allowed to sell power through open access after 50% of power allocated to BRPL after supply of 60 Mus in terms of Energy Supply Agreement (EPA) and amended EPA dated 20.01.2010 and 27.07.2011 respectively executed between Petitioner No.1 and Respondent 1.
43. It is noted that the Commission while granting approval of EPA dated 20.01.2010 directed parties vide order dated 20.01.2011 to modify the aforesaid EPA. The relevant part of the order is reproduced below:

“11 (i) EPA shall be modified to the extent that maximum 50% of Generation on daily basis subject to 60 MUs per year shall be supplied to BRPL by TOWMCL.”

44. Pursuant to order of the Commission dated 20.01.2011, EPA dated 20.01.2010 was modified one of the recital clause of the EPA vide an amendment dated 27.07.2011, The said amended recital clause is read as follows: -

"AND WHEREAS, Minimum 50% of Generation on daily basis subject to 60 MUs per year shall be supplied to Procurer i.e., BRPL by Generating Company i.e., TOWMCL."

45. However, a dispute had arisen between the party after the Petitioner served termination notices on Respondent No.1, for using the entire contracted power for captive use in respect to Okhla WtE plant in terms of the EPA dated 20.01.2010 and amended EPA dated 27.07.2011. Thereafter, the Petitioner filed a Petition bearing No. 25/2015 before the Commission U/s 86 (1)(f) of the Electricity Act, 2003 seeking declaration and correct interpretation of the provisions of EPA dated 20th January, 2010 and amended EPA dated 27.07.2011
46. The Commission decided the aforementioned petition vide order dated 13.04.2021. In the aforesaid order, the Commission had quantified the maximum generation capacity of the plant after auxiliary consumption and the quantum of energy to be supplied to the Respondent No.1 under EPA. The relevant part of the of the order dated 13.04.2021 in Petition No. 25 of 2015 is extracted below;

"33. That from a 13 MW Plant after adjusting for plant's auxiliary consumption of 22% from 16 MW capacity, the Commission observed that the maximum annual generation at ex-bus would be as follows:

At 13 MW ex-bus capacity

13MW x 24hrsx365days/1000= 113.88 MUs

50% of above generation is equivalent to 56.94 Mus which was capped to 60 MUs in year for BRPL.

47. Accordingly, the Commission in the aforesaid order concluded as follows;

34. In the light of the above discussions and reasons therein, it is ordered that the Petitioner will be entitled for captive generation as provided in the EPA dated 20.01.2010 and amended EPA dated 27.07.2011, while making alternate arrangements for connectivity and if the Petitioner fails to arrange alternate connectivity, then he will not be entitled for the benefit of this clause. It is further ordered that 50% of the maximum annual generation at ex-bus which is equivalent to 56.94 MUs with a cap of 60 MUs in a year would be for BRPL. The Petition is disposed off accordingly. "

48. It is clear from the order dated 13.04.2021 that, the Commission did not alter the direction given in the earlier order dated 20.01.2011 with regard to quantum of supply of energy on daily basis. Even Both the parties agreed to the order dated 20.01.2011 of the Commission and accordingly amended the EPA dated 20.01.2010 on 27.07.2011, where it is agreed that minimum 50% generation on daily basis has to be supplied to BRPL. In the subsequent order dated 13.04.2021 the Commission had also capped the maximum supply of energy in year to 60 Mus for BRPL. Therefore, under the contract the Petitioner is obligated to supply power 50% of generation of 13 MW ex-bus capacity plant on daily basis under the EPA to supply energy 56.94 MU in a year which is capped to maximum 60 Mus in a year. The Petitioner should have scheduled energy accordingly, on daily basis, to fulfil its annual obligation of supply of energy 56.94MUs which is capped maximum of 60 MUs in a year.

49. Manager (Energy Accounting) SLDC, Delhi vide letter dated 24.09.2021 Delhi, circulated a Minutes of Meeting (MOM) held in SLDC dated 08.07.2021. As per aforesaid MOM the implementation of the DERC order dated 13.04.2021 with respect to sale of 50% power to Respondent No.1/BRPL by Petitioner/TOWMCL was discussed. In the said meeting, the Petitioner submitted that from April to July 2021, Petitioner has supplied 27 MUs and remaining 33 MUs will be supplied till march 2022 at approximately 4.12 MUs Per month. The Respondent No.1 submitted that the Petitioner should supply 60 MUs to BRPL **first and after** supply of 60 MUs to BRPL, the sale in Intra State Open Access shall be allowed as per DERC order. In the aforesaid issue that the decision was taken after submission of the both parties was also recorded in the MOM, though the minutes were unsigned. The relevant part is given hereunder:

"After detailed discussion it was decided in this matter that after completion of 60 MUs actual energy supplied to BRPL (which can be verified by the actual meter reading available with TOWMCL), TOWMCL shall apply for sale of power in open access. After issuance of 5A by concerned DISCOMs, 5B would be issued by SLDC on the condition that power transaction will take place only after supply of 60 MUs to BRPL."

50. The Petitioner disputed the decision taken on the above issue. The Petitioner during argument emphatically objected the above decision of the MOM and submitted that they had not agreed in the meeting that after completion of 60 MUs actual energy supplied to respondent No.1/BRPL the Petitioner will apply for

sale of power in open access. It is also observed that the said MOM does not bear the signature of Petitioner.

51. The EPA executed between both parties does not specify that the Petitioner has to supply 60 MUs to BRPL and after supply of 60 MUs the sale in Intra State Open Access will be allowed. It is indisputably established that the agreement relied upon by the Petitioner is a valid subsisting agreement. It is in force. It is neither repudiated nor terminated. It is binding upon both the parties. It is trite that regard is required to be had to the sanctity of the terms and provisions of the Energy Sale Agreement executed between the parties. The Hon'ble Supreme Court of India in plethora of cases has held that even the Commission or Court has no power to alter valid contract. The views of Hon'ble Supreme Court in the above issue is placed below.

52. In the matter of Gujarat Urja Vikas Nigam Limited v. Solar Semi-Conductor Power Co. (India) P. Ltd, (2017) 16 SCC 498 the Hon'ble Supreme Court of held that:

“A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs.15/- per unit for twelve years, the first respondent should commission the Solar PV Power project before 31.12.2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.”

53. In the matter of Gujarat Urja Vikas Nigam Limited v. ACME Solar Technologies (Gujarat Pvt) Ltd and Ors, (2017) 11 SCC 801;

“When the parties were bound by the terms and conditions of the PPA dated 31st May, 2010 and Supplemental PPA dated 24th March, 2011 we do not think that it was proper on the part of either the State Commission or the Appellate Tribunal to travel beyond the said terms and conditions to determine the liability of the first respondent to pay liquidated damages or the period thereof.”

54. In Shree Ambica Medical Stores v. Surat People's Cooperative Bank Limited 2020 SCC OnLine SCC 92;

“ In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves...” The court through its interpretative process cannot rewrite or create a new contract between the parties. The court has to simply apply the terms and conditions of the agreement as agreed between the parties.”

55. We also perused suggestion of Respondent No. 2/SLDC in its reply in the instant Petition. The Respondent No. 2 at para 3 & 4 has submitted that;

“3. Further, during the month there may be cases of excess and/or under generation or drawl from grid due to shut down, and in such cases, the capping of 5MUs may be breached due to settlement of excess generation and/or drawl by Petitioner with that of Respondent No. 1, as per DERC Order dated 06.03.2020.

4. Accordingly, SLDC is of the view that to resolve the above issue, instead of fixing the MUs, a fixed percentage may be allocated to BRPL from TOWMCL by the Commission it will result in availability of spare capacity with petitioner throughout the year which can be sold by petitioner in Open Access. However, quantum of percentage may be fixed by the Commission as deemed fit.”

56. In view of above, it is held that the Petitioner has to schedule 50% of generation of 13 MW ex-bus capacity on daily basis in order to meet out the obligation of the Petitioner to supply 56.94 MUs with a cap of 60MUs in a year to BRPL. It is also a fact that the daily generation of the plant may vary due to various factors such as break down etc. In such an event there is a possibility of breach of contract in respect to supply of power on daily basis. Therefore, it is prudent and appropriate that at the beginning of the last quarter of the Financial Year, the parties should review the supply of energy and the generator may revise the schedule, if so required to fulfil the supply of 56.94 MUs subject to maximum 60MUs in a year from the plant.

57. Further, the Commission in its order dated 20.11.2011 at para 11(v) has laid down a condition that;

*“v. **After supplying the allocation energy to BRPL**, if there is any surplus energy generated from the plant, the TOWMCL shall be entitled to use remaining energy for captive purpose/to be sold to the Third Party, after obtaining open access from SLDC, Delhi and other Agencies as applicable. “*

58. With regard to para 11 (v) of the order dated 20.01.2011, the Commission dealt this issue at para 28 to 30 of its order dated 13.04.2021. It had held that the observation made by the Commission on 20.01.2011 was neither directly raised nor was it required to be adjudicated, therefore, that observation deemed to be *obiter dicta* and the said observation made without looking the provision of EPA would be treated *per incuriam*. Para 28 to 30 of the order is extracted below;

"28. The above prayer has been made in the light of the provision made in the EPA dated 20.01.2010 and amended EPA 27.07.2011 and has drawn the attention of the Commission towards particular provision of the EPA dated 20.01.2010 wherein the following provision has been made:

"AND WHEREAS, in case the generating company decides to use the entire power for its captive use, it shall serve notice to the Procurer. Procurer reserves the right to disconnect the plant serving a reply to the notice and providing a reasonable timeframe i.e. maximum 6 months for alternate connectivity arrangement of the plant."

*29. Relying upon this arrangement in the EPA, the Petitioner has claimed that in case the Petitioner so wishes to use his entire power for captive use he shall be given liberty to that extent to use entire power for captive use. However, the Petitioner had earlier approached this Commission for adoption of tariff and for approval of Energy Purchase Agreement (EPA) executed between the parties w.r.t. 16MW of plant to be setup. In the said order in Petition No. 18/2010 dated 20.01.2011 while adopting the tariff the Commission had made some observation which shall be deemed *obiter dicta* as that issue was neither directly raised nor was required to be adjudicated in that petition. A passing observation made by the Commission at earlier point of times without the issue being raised by the parties claiming their rights on the basis of EPA, such observation which has been made and that too overlooking the provisions of the EPA dated 20.01.2010 will be out of the context and the said observation will be treated as *per incuriam*. The observation made by the Commission at earlier point of time in Petition no. 18 of 2010 on 20.01.2011 was as follows;*

"After supplying the allocated energy to BRPL, if there is any surplus energy generated from the plant, TOWMCL shall be entitled to use remaining energy for captive purpose/to be sold to Third Party, after obtaining open access from SLDC, Delhi and other Agencies as applicable".

30. While recording this finding, it is clear that the Commission ignored the relevant clause of the EPA dated 20.01.2010. If the said clause is to be understood in the right context, then interpretation which can be adopted by the Commission is only to the effect that if the Petitioner wants to use the entire generation for captive purpose then it will have to find out an alternate arrangement for connectivity, apart from connectivity which is continuing. Thus, it is for the petitioner to make alternate arrangement for connectivity when he claims under this clause, and if it fails to arrange alternate connectivity, then obviously it will not be entitled for the benefit of this clause. From the reading of the above clause, it is clear that the intention of the parties while entering into EPA has to be looked into and liberty has to be given to the Petitioner to go for captive generation, if it so desires. In the above circumstances, the Petitioner will be entitled for captive generation as provided in the EPA by making alternate arrangements, for connectivity."

59. Since, the Commission in the subsequent Order dated 13.04.2021 corrected the condition imposed at para 11, in the order dated 20.01.2011, therefore, the para 11 (v) is said to be modified to the extent as set out at para 30 of the order dated 13.04.2021. The above condition is no more existing. Therefore, the need for obtaining No Objection Certificate (NOC) by the Petitioner/TOWMCL from Respondent No.1/BRPL does not arise.

Conclusion

60. Considering the above and in order to resolve the dispute, it is directed that the Petitioner has to schedule energy to the Respondent No.1/BRPL minimum 50% of generation of 13 MW ex-bus capacity after adjusting for plant's auxiliary consumptions of 22% of 16MW capacity on daily basis in order to meet out the obligation of the Petitioner to supply 56.94 MUs with a cap of 60MUs in a year to BRPL. At the beginning of the last quarter of the Financial Year, the parties should review and reconcile the supply of energy and the generator may revise the schedule, if so required to fulfil the supply of 56.94 MUs subject to maximum 60MUs in a year from the plant. Needless to say, that the Petitioner is at liberty to use the surplus generation for its captive use or sell through open access to any third party. There will be no requirement to obtain NOC from Respondent No.1/BRPL by the Petitioner/TOWMCL for sale of excess generation under open access to third party.
61. There is no order of cost.
62. Ordered Accordingly.

Sd/-
(Justice (Retd.) Jayant Nath)
Chairperson