

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

No. F.11(761)/DERC/2011-12/

Petition No. 01/2012

In the matter of: Petition under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 in connection with the disputes and differences arising under the PPA dated 12.05.2008 between the Maithon Power Limited and TPDDL

Maithon Power Limited
Jeevan Bharti, 10th Floor,
Tower I, 124,
Connaught Circus,
New Delhi-110 001

.....Petitioner

Vs.

Tata Power Delhi Distribution Ltd.
Through its Managing Director
Grid Sub Station Building
Hudson Lines, Kingsway Camp
Delhi – 110 009

....Respondent No. 1

Tata Power Trading Company Limited
Mahalaxmi Receiving Station,
Senapati Bapat Marg,
Lower Parel,
Mumbai-400013, Maharashtra

.....Respondent No. 2

Coram:

**Sh. P.D. Sudhakar, Chairman, Sh. Shyam Wadhera, Member &
Sh. J.P. Singh, Member.**

Appearance:

1. Mr. Sitesh Mukherjee, Adv. MPL
2. Mr. Sakya Singha Choudhuri, Adv. MPL
3. Mr. Ashwani Chawala, MPL
4. Ms. Mandakini, Adv. MPL
5. Mr. Anurag Bansal, HOD Regulatory, TPDDL
6. Mr. K. Datta Adv. for TPDDL
7. Mr. Puneet Munjal, TPDDL

ORDER

(Date of Hearing: 09.07.2013)
(Date of Order 17.09.2013)

1. The issue before the Commission is regarding the maintainability of the petition filed by M/s Maithon Power Limited seeking adjudication by this Commission under PPA dated 12.05.2008 entered into between the company and Tata Power Delhi Distribution Ltd.

2. The brief facts of the case as per the Petitioner are as below:

- i. M/s Tata Power Delhi Distribution Limited (TPDDL), earlier known as North Delhi Power Ltd.(NDPL), a distribution licensee operating in the National Capital Territory of Delhi, issued a tender for procurement of power on short/medium term basis for itself and also for BSES Rajdhani Power Limited (BRPL), and BSES Yamuna Power Limited (BYPL) through competitive bidding process. The power was to be procured in terms of the tender documents and the terms and conditions set out in the draft power purchase agreement attached to the tender documents.
- ii. M/s Maithon Power Limited, the petitioner herein submitted its bid for supply of 309 MW power on medium term basis from its generating unit of the Maithon Right Bank Thermal Power Plant (Generating Unit), which was to be commissioned on 01.10.2010. The petitioner was declared the lowest bidder.
- iii. The Petitioner executed a Power Purchase Agreement with TPDDL (herein after collectively referred to as the "PPA"). As per the PPA, the Petitioner was required to supply 154.5 MW power to TPDDL on round the clock basis for the period 01.10.2010 to 31.03.2012.
- iv. This Commission by an order indicated their satisfaction that the Tariff for the PPA had been determined through a transparent process of bidding in terms of Section 63 of the Act. This Commission therefore adopted the tariff of Rs. 3.48/Kwh as quoted by the Petitioner for supply of power by the Petitioner to the BRPL under the PPA.
- v. The Petitioner agreed to supply power to the TPDDL under the PPA for the period from October 2010 to March 2012. However, the Petitioner submits that due to the reasons beyond its control, the COD of its Generating Unit was delayed and accordingly power could not be made available by Maithon to TPDDL from such Generating Unit from October 2010. The position persisted till 31.03.2011. However, with effect from 01.04.2011, Maithon arranged for supply of power to TPDDL from alternate source in terms of Clause 4.4. of the PPA. In this connection, the Petitioner had engaged TPTCL to arrange for power to the extent of 154.5 MW from alternate sources to be supplied to TPDDL.

- vi. While effecting supply of power from alternate sources, in some cases, the rate of power made available to TPDDL by TPTCL from various sources, including trading margin (TPTCL Rate) was higher than the PPA Tariff. In such cases, TPTCL had billed TPDDL at the PPA Tariff of Rs. 3.58 per unit and recovered the excess charges over and above the PPA Tariff ("Excess charges") from Maithon Power.
- vii. There were also certain instances when the TPTCL Rate was lower than the PPA Tariff. In such cases, TPTCL billed TPDDL at the TPTCL Rate which is lower than the PPA Tariff. As a result, the effective tariff paid by TPDDL in such occasions was lower than the PPA Tariff.
- viii. The Petitioner (M/s Maithon Power Limited) filed a petition against the Respondents (M/s Tata Power Delhi Distribution Ltd. & Anr.) and prayed that this Hon'ble Commission may be pleased to:
 - (a) Admit the present petition;
 - (b) Issue appropriate directions to Respondent no. 1 to pay to the Petitioner an amount of Rs. 1.25 Crores as Differential Price on account of the differ Respondent no. 2 has charged Respondent no. 1 from time to time.
 - (c) Issue appropriate directions to Respondent no. 1 to pay to the Petitioner STOA Charges amounting to Rs. 1.27 Crores which Respondent no. 2 had erroneously charged to the Petitioner .
 - (d) Declare that the Petitioner is entitled to recover 100% Capacity Charges under the PPA on achieving normative availability of 80%.
 - (e) Direct Respondent no. 1 to accept the scheduling of power by the Petitioner in excess of 154.5 MW for the period January 2012 to March 2012 as per clause 1.6 of Schedule G of the PPA.
 - (f) In the alternative to prayer (e) above, in the event the Respondent no. 1 is unable to accept the incremental power in excess of 154.5 MW, or any part thereof, to treat the same as Availability Factor (AV_n) under clause 1.6 of Schedule G of PPA for determining the Monthly Availability Adjustment.
 - (g) Pass appropriate ad-interim orders in terms of prayer (e) and (f) above pending disposal of the present petition.
 - (h) Determine the appropriate court fees to be paid by Petitioner in accordance with the DERC (Conduct of Business) Regulations, 2001; and

- (i) Pass such other and further orders/directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case.
- ix. A similar petition no. 10/2012 has also been filed by M/s. Maithon Power seeking similar relief against M/s BSES Rajdhani Power Ltd (BRPL), who had also entered a similar PPA under the same arrangement.
- x. M/s BSES Rajdhani Power Ltd. (BRPL), the Respondent no. 1 in that petition had filed objections regarding maintainability of the present petition before the Commission. BRPL argued that CERC is the appropriate forum for adjudication on the matter.
- xi. Whereas, M/s Tata Power Delhi Distribution Ltd. (TPDDL) has not raised the issue of maintainability of petition before this Commission.
- xii. However, as the issues in the petitions are same, ANY decision in one petition would have bearing on the other also.
- xiii. The Commission heard the counsels and considered the arguments made by the Ld. Counsel for Maithon Power Ltd. and BRPL and was of the view that the Commission would first hear the parties in both petitions on maintainability of the petitions.

3 The issue of maintainability has to be decided on interpretation of following sections of the Electricity Act, 2003:

"79. Function of Central Commission.-(1) *The Central Commission shall discharge the following functions, namely:-*

- (a) *to regulate the tariff of generating companies owned or controlled by the Central Government;*
- (b) *to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*
- (c) *To regulate the inter-State transmission of electricity;*
- (d) *To determine tariff for inter-State transmission of electricity;*
- (e) *.....*
- (f) *to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*

86. **Function of State Commission.**-(1) *The State Commission shall discharge the following functions, namely:-*

- (a) *determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:*
Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;
- (b) *regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*
- (c)
- (d)
- (e)
- (f) *adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;*

4. The petitioner, M/s Maithon Power Limited has submitted that law is well settled that the provisions of a statute have to be read harmoniously to avoid any conflict between different provisions of the law. The Hon'ble Supreme Court in the case of P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672, has held as follows:

"....it is a well-established rule of interpretation that if one interpretation leads to a conflict whereas another interpretation leads to a harmonious reading of the section, then an interpretation which leads to a harmonious reading must be adopted. In the guise of giving a purposive interpretation one cannot interpret a section in a manner which would lead to a conflict between two sub-sections of the same section".

5. The Petitioner has submitted that the facts of the present case call for a harmonious interpretation of sections 79(1) and 86(1) of the Act. Having regard to the nature of the Long-term and Medium-term agreements, the Hon'ble CERC and this Hon'ble Commission are exercising jurisdiction over distinct activities and transactions entered into by the generating station with its Beneficiaries. There is no conflict in such exercise of power by both the Commissions.

6. It is further submitted by the Petitioner that the function of regulation of electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from generating companies or licensees or from other sources for distribution and supply within the State has been vested on the concerned State Electricity Regulatory Commission under Section 86(1)(b) of the Act. In the present case where the power is being procured by the distribution companies in the state of Delhi, it is this Hon'ble Commission which has the power to regulate the

electricity purchase and procurement process of BRPL including the price at which electricity is procured by BRPL from MPL. It is in this light that BRPL has got the Medium-term PPA and the tariff approved by this Hon'ble Commission. This principle has also been established in the judgment of the Hon'ble Appellate Tribunal for Electricity ("Hon'ble Tribunal") in the case of Pune Power Development Authority, Appeal No. 200 of 2009. The relevant extracts are set out below:

The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute".

7. The Petitioner has put forward the point that the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755 has upheld the wide power of the state commissions to adjudicate upon any disputes u/s 86(1)(f) of the Act in the following words:

"We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute".

8. The Petitioner has further submitted that the exercise of adjudicatory power has to be preceded by or concomitant to the exercise of jurisdiction u/s 79(1)(a) to (d) of the Act. This position has been elaborated by the Hon'ble Tribunal in the case of Pune Power Development Authority, Appeal No. 200 of 2009 while dealing with the adjudicatory powers of the State Commission u/s 86(1)(f) of the Act:

"18. A plain reading of the above provision would clearly show that the State Commission has jurisdiction to entertain disputes between the licensees and also the Generating Companies. Thus, the scope of Section 86(1)(f) is very wide as it covers all disputes between the licensee which relate to the regulatory jurisdiction of the State Commission. In other words, there is no restriction in Section 86(1)(f) regarding the nature of the licensee. Thus, all disputes relating to the regulatory jurisdiction of the State Commission which involves the Distribution Licensee or a trading licensee or a transmission licensee shall have to be adjudicated upon exclusively by the State Commission".

9. The line of argument of the Petitioner is that in the present case, Hon'ble CERC has not exercised any jurisdiction in relation to the tariff for supply of power under the Medium-term PPA. The tariff has been approved by this Hon'ble Commission u/s 63 of the Act since the supply relates only to the state of Delhi. This Hon'ble Commission having so exercised regulatory jurisdiction over the Medium-term PPA, the Hon'ble CERC cannot exercise adjudicatory jurisdiction in relation to any dispute arising under the PPA. In fact as elaborated in para k below, the Hon'ble CERC has not exercised its regulatory jurisdiction under Section 79(1)(b) of the Act for the Medium-term PPA approved by this Hon'ble Commission. Accordingly, it has proceeded with the determination of tariff for the Long-term PPA's by taking into consideration the proportionate cost and expenses related to the generating station in relation to the capacity contracted under Long-term PPA's and excluded the cost relating to the supply of electricity under the present Medium-term PPA.

10. To further strengthen its argument the Petitioner has submitted that the jurisdiction of the Hon'ble CERC to adjudicate any dispute involving generating companies or transmission licensees u/s 79(1)(f) of the Act is limited to matters connected with Clauses (a) to (d) of Section 79(1). Therefore, any disputes that are beyond the scope of Section 79(1)(a) to (d) do not fall within the scope of Section 79(1)(f) of the Act. The disputes in the present case do not relate to the regulation of tariff by MPL as a generating company. It is clear from a plain reading of the petition that it relates to the recovery of dues by MPL from BRPL that are worked out on the basis of agreed tariff under the Medium-term PPA and approved by this Hon'ble Commission, which is a purely commercial issue. Further, the petition also has raised issues regarding interpretation of the Medium-term PPA regarding the meaning and applicability of certain conflicting provisions of the PPA. Therefore, none of the disputes in the present petition per-se fall within the scope of Section 79(1)(a) to (d) of the Act. This being the position, section 79(1)(f) of the Act will not be applicable to the facts of the present case. It is further submitted that while disputes under Section 79 (1) (f) of the Act relate to tariff matters regulated by the Hon'ble CERC, the disputes under Section 86 (1) (f) of the Act have a broader scope and are not restricted to such Tariff matters alone. The matter in the instant case relate to interpretation of the Medium-term PPA and recovery of the dues under the same which can be dealt under the jurisdiction of this Hon'ble Commission.

11. The above contentions of the Petitioner were held by this Commission in a similar petition no. 10/2012 between M/s Maithon Power Ltd and M/s BSES Rajdhani Power Ltd and a detailed and reasoned order has already been passed in the above said Petition. The Commission does not propose to reproduce its full order in the above

petition herein since the facts in both petitions are substantially the same and the reliefs sought by the Petitioners in both cases are also substantially the same .

12. In its order in Petition no. 10/2012 (Maithon Power Ltd. Vs BSES Rajdhani Power Ltd.) the Commission has held that:

“ In any case, even if the present Commission were to assume jurisdiction to decide the limited issue of disputes in respect of the medium term PPA approved by this Commission, since the medium term PPA period overlaps with the supply of power from MTL to other stations (where CERC is the undisputed arbiter of tariff) the financial impact of the decisions taken by the present Commission in term of the dispute would definitely impact the tariff regulation of MTL by CERC and the matter would necessarily have to be taken to CERC for a final determination of tariff as indicated above. Such a cumbersome procedure is best avoided in the interest of minimizing litigation and bringing one supervisory lens on the entire process of tariff regulation (where CERC is without doubt the final arbiter in a generating station with a composite scheme).”

13. In view of the above, this Commission is of the view that the Petitioner may approach CERC for determination of the terms and dispute of the instant petition

14. The petition is disposed off accordingly.

Sd/-
(J.P. Singh)
MEMBER

Sd/-
(Shyam Wadhera)
MEMBER

Sd/-
(P.D. Sudhakar)
CHAIRPERSON