

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO.88 OF 2015**

**Dated: 28<sup>th</sup> May, 2015**

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson.  
Hon'ble Shri T. Munikrishnaiah, Technical Member.**

**IN THE MATTER OF:**

Noida Power Company Limited ) ... Appellant

**Vs.**

Uttar Pradesh Electricity Regulatory )  
Commission & Anr. ) ... Respondents

Counsel for the Appellant(s) : Mr. C.S. Vaidyanathan, Sr. Adv.  
Mr. M.G. Ramachandran  
Ms. Divya Chaturvedi

Counsel for the Respondent(s) : Mr. C.K. Rai for **R.1**

**J U D G M E N T**

**PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON**

1. The Appellant is a distribution licensee within the meaning of Section 2(17) of the Electricity Act, 2003 (**“the Electricity**

**Act**”) for the Greater Noida area and was granted a licence for distribution and supply of electricity on 30.08.1993 by the State Government under Section 3(1) of the Indian Electricity Act, 1910 (As prevalent then) which authorized it to supply electricity in the licenced area. Accordingly, the Appellant is undertaking the distribution and retail supply of electricity under the regulatory control of Respondent No.1 (“**State Commission**”).

2. Respondent No.2 - Dhariwal Infrastructure Limited is a generating company as defined under Section 2(28) of the Electricity Act and has an existing coal based thermal power station situated in District Chandrapur, Maharashtra. The Appellant intends to purchase 186.81 MW power which is 170 MW net power at the Project CTU interconnection point after deducting 9% auxiliary consumption for a period of 15 years from the CTU connected Unit 2 of Thermal Power Station of Respondent No.2.

3. It is the case of the Appellant that the Generation Project of Respondent No.2 has already been commissioned and is under commercial operation and Respondent No.2 is in a position to make available the quantum of power required by the Appellant within a short time upon the approval being granted by the State Commission.

4. On 19.1.2005, Ministry of Power (“**MoP**”) issued the Competitive Bidding Guidelines which were subsequently amended on 30.3.2006, 18.8.2006, 27.9.2007, 27.3.2009 and 21.7.2010.

5. It is the Appellant’s case that during 2008-09, it made four attempts to procure power through long term Competitive Bidding Process. However, due to various reasons such as lack of sufficient valid bids, the procurement of power through long term sources could not be finalized at all in the first four attempts. This is evident from the State Commission’s Tariff

Order dated 19.10.2012 for financial year 2012-13 and Tariff Order dated 31.5.2013 for financial year 2013-14.

6. In the fifth attempt to procure power on long term basis the Appellant published a notice on 11.10.2010 for procurement of 200 MW (+/- 20%) power of Scheduled Delivery Date of April, 2014. Six bidders submitted their technical and financial bids on 3.2.2011 and based on the levelized tariffs discovered from the financial bids received, the tariff of M/s. Essar Power (Jharkhand) Limited (“EPJL”) for 240 MW was found to be the lowest.

7. In pursuance of the above, the Appellant executed a Power Purchase Agreement (“**PPA**”) along with an Escrow Agreement and Deed of Hypothecation with EPJL on 9.5.2012. The Appellant filed a petition before the State Commission for adoption of the above tariff under Section 63 of the Electricity Act. The State Commission adopted the said tariff on 4.9.2012 on the Appellant’s petition for adoption of the tariff. According to

the aforesaid, PPA dated 9.5.2012, the EPJL was required to commence supply of 240 MW power with effect from 30.4.2014. However, EPJL failed to do so. The Appellant, therefore, terminated the said PPA on 22.8.2013.

8. The termination was challenged by EPJL before the State Commission vide Petition No.903 of 2013. On 30.5.2014, the State Commission disposed of the petition with following directions.

*“Therefore, on equitable presumption, the Commission directs NPCL to restore EPJL’s bank guarantee amounting Rs.72 crores within 15 days from the date this order with no other cost or interest to any of the parties. This would bring EPJL and NPCL to their former position. By bringing them to their earlier status, the Commission allows them an opportunity to rethink over the issues in light of the facts under the provisions of PPA.*

*The Commission further considers that in view of the shortage of power in the State, the reasonable tariff tied up through the subject PPA and the willingness of the parties for an equitable and reasonable solution, it may also be just and proper for the parties to consider entering into a fresh contract, if the present PPA is not continued, on the same terms conditions and tariff except the change in source of*

*generation. However, in such a situation, the modalities would require to be discussed afresh.”*

9. According to the Appellant, it duly complied with the directions of the State Commission. However, EPJL vide letters dated 27.6.2014 and 7.7.2014 expressed its inability to commence supply of power and requested that the PPA may be considered as terminated.

10. On 28.11.2013, the Appellant submitted its ARR Petition for financial year 2014-15. The Appellant submitted information. In the information, based on a load forecast study conducted by M/s. PWC Limited, the Appellant has estimated its long term power requirement till 2021-22 for maintaining the supply of electricity in the licenced area as under:

<b>Year</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>
<b>Energy Requirement MU</b>	1451	1654	1883	2148	2462	2813	3229	3710	4267
<b>% Increase</b>	14%	14%	14%	14%	15%	14%	15%	15%	15%
<b>Peak Demand MW</b>	294	343	400	471	559	655	770	905	1059
<b>% Increase</b>	36%	17%	17%	18%	19%	17%	18%	18%	17%

11. According to the Appellant its energy requirement is increasing and is expected to rise upto 4267 MUs in the year 2022. The Appellant would be required to arrange for power procurement upto 1059 MW to meet the power demand of its consumers and, therefore, it is essential for it to make arrangements for power procurement on a long term basis.

12. According to the Appellant since in the circumstances mentioned above, the Appellant cannot get the contracted capacity of 240 MW from EPJL, which was to commence on 30.4.2014, it has been making short term purchases from various licensees/power traders/generating companies to meet the demand of the consumers in its licensed area. According to the Appellant in the proceedings before the State Commission for approval of short term power procurement, the State Commission has been directing the Appellant to make arrangements for procurement of power on long term basis in the interest of the consumers of the Appellant's licensed area.

13. In the circumstances, on 15.7.2014, the Appellant filed an application in Petition No.903 of 2013 seeking *inter alia* directions from the State Commission to allow the Appellant to procure power from alternative sources under the negotiated route under Section 62 of the Electricity Act. In the context of Competitive Bid Procurement not fructifying into effective long term contracts despite efforts, the Appellant as per directions of the State Commission vide its order dated 30.5.2014 sought to purchase long term power from other sources in order to ensure reliable and continuous power to all consumers at economically viable tariff.

14. According to the Appellant, it has been able to negotiate an arrangement with one of the group companies i.e. Respondent No.2 which is a CTU connected generating unit in the capacity of 300 MW duly commissioned on 4.6.2014 and in a position to provide the quantum of power required by the Appellant on long term basis without any delay. Tariff for such procurement of power was sought for determination under Section 62 of the



Electricity Act by the State Commission based on applicable regulations.

15. On 26.9.2014, the Appellant and Respondent No.2 subject to the approval being given by the State Commission entered into a PPA for supply of 170 MW power as contracted capacity (net capacity after deducting auxiliary consumption from the gross capacity of 186.81 MW) to the Appellant on a long term basis. It is the case of the Appellant that Respondent No.2 is willing to supply the above 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 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.

16. On 29.9.2014, the Appellant filed petition being Petition No.971 of 2014 before the State Commission for approval of the PPA with Respondent No.2 under Section 62 of the Electricity Act. The intended delivery of such supply of power was 1.4.2015. According to the Appellant, it placed on record that the parent company of the Appellant CESC Limited holds stake in both the Appellant as well as Respondent No.2. However, it was submitted that the transaction is proposed to be conducted at an arm's length and is subject to final approval of the State Commission.

17. On 27.1.2015, the State Commission passed the common impugned order in Petition No.971 of 2014 and with respect to the application in Petition No.903 of 2013. The Appellant's challenge to the said order is limited to the extent it does not grant approval to the PPA entered into between the Appellant and Respondent No.2. The Appellant has reserved its right to challenge the direction of the State Commission as regards extension of bank guarantee.

18. We have heard Mr. C.S. Vaidyanathan, learned counsel appearing for the Appellant at some length. Counsel drew our attention to the **judgment of this Tribunal dated 31.3.2010 in BSES Rajdhani Power Ltd. v. DERC & Ors. (Appeal Nos.106 and 107 of 2009)** where this Tribunal has laid down that the powers of the State Commission to consider the approval of the procurement of power through negotiated agreements is not in any manner affected by the Guidelines issued by MoP directing the Competitive Bidding Process for long term power procurement. Counsel submitted that the State Commission erred in holding that the power exercised by the various State Commissions in pursuance to the **decision of this Tribunal in BSES Rajdhani** was no longer available to it after 5.1.2011 in view of the subsequent Guidelines issued by MoP. Counsel submitted that the principles laid down by this Tribunal in that judgment were with regard to the Guidelines issued by MoP in the year 2006. It equally applies to Guidelines issued on 5.1.2011 by MoP because the said Guidelines only extended the

scope of procurement of power through Competitive Bidding Process even to the Government Companies whereas the Guidelines issued in the year 2006 were only applicable to non-Governmental Companies. Counsel submitted that the State Commission erred in holding that the only way to procure power on long term basis is through Competitive Bidding route. If such a view is upheld then tariff determination exercise under Section 62 and Section 86(1)(b) will be rendered otiose. Counsel submitted that the State Commission has repeatedly emphasized the importance of long term power procurement agreements to ensure supply to its consumers at reasonable cost. The State Commission failed to appreciate that five attempts made by the Appellant to procure power through Competitive Bidding Process has not resulted in an effective arrangement for getting the necessary quantum of power required on long term basis. The last attempt made by the Appellant resulted in the signing of PPA but it did not result in the commencement of supply of power from 30.4.2014 as envisaged and the PPA had to be terminated. Counsel submitted that inasmuch as the State Commission has

failed to take into consideration vital aspects of the matter, the impugned order suffers from the vice of non-application of mind. Counsel submitted that it is true that the State Commission can in its discretion choose either Competitive Bidding Process as per Section 63 read with Clause 5.1 of the National Tariff Policy or procurement of power through negotiated route under Section 62 of the Electricity Act. But, it is well settled that while exercising discretionary powers, relevant as well as irrelevant factors have to be considered (**Delhi Science Forum v. Union of India**<sup>1</sup>). The State Commission has failed to do so. Counsel submitted that in the circumstances, the matter be remitted to the State Commission so that it can be heard afresh and appropriate order can be passed.

19. Learned counsel for the State Commission supported the impugned order. Counsel submitted that Respondent No.2 is an affiliate company of the Appellant and its bid was earlier rejected on that count. Counsel submitted that the State Commission

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<sup>1</sup> (1996) 2 SCC 405

has discretion to choose either Section 62(1)(a) of the Electricity Act to give approval to negotiated 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. The State Commission has chosen the competitive bidding route for which it cannot be faulted.

20. We must first refer to **BSES Rajdhani** on which reliance is placed by the Appellant. In that case, the Appellants therein were engaged in the business of distribution and retail supply of electricity. Maithon Power Limited filed a petition before the Central Commission seeking exemption from applicable requirement of Competitive Bidding Process of power under Clause 5.1 of the National Tariff Policy. The Central Commission directed Maithon Power Limited to approach the Central Government to seek clarification as to whether it falls outside the scope of Clause 5.1. Maithon Power Limited did not do so. North Delhi Power Limited entered into a PPA with Maithon Power Limited for supply of power. North Delhi Power Limited filed a

petition before the Delhi Electricity Regulatory Commission (Delhi State Commission) seeking approval of the PPA entered between it and Maithon Power Limited. The Appellant filed objection petition before the Delhi State Commission contending that the approval sought by North Delhi Power Limited is in violation of the mandatory nature of Clause 5.1 of the National Tariff Policy which prescribes bidding process for procurement of power by the distribution licensee. However, the Delhi State Commission granted approval to the PPA entered into between New Delhi Power Limited and Maithon Power Limited. The said order was challenged before this Tribunal.

21. The points which arose for consideration before this Tribunal *inter alia* were whether the compliance with Competitive Bidding Process as envisaged 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 the 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.

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.

26. Pronounced in the Open Court on this 28<sup>th</sup> day of May, 2015.

**(T. Munikrishnaiah)**  
**Technical Member**

**(Justice Ranjana P. Desai)**  
**Chairperson**

✓ **REPORTABLE / NON-REPORTABLE**