

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No. 140/MP/ 2012

and

IA No. 36/2012

Coram

Dr. Pramod Deo, Chairperson

Shri S Jayaraman, Member

Shri V.S.Verma, Member

Shri M. Deena Dayalan, Member

Date of Hearing : 16.10.2012

Date of Order : 19.11.2012

In the matter of

Petition under Section 79(1)(c) of the Electricity Act, 2003 read with Section 79(1)(f) of Electricity Act, 2003 read with Regulation 21 of Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 read with Regulation 32 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 read with Bulk Power Transmission Agreement between Powergrid Corporation of India Ltd. read with Regulation 113 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

And in the matter of

PTC India Limited

Vs

Petitioner

Power Grid Corporation of India Ltd. & Ors.

Respondents

Present

Shri Parag Tripathi, Senior Advocate, PTC

Shri Varun Pathak, Advocate, PTC

Shri Ram Babu, PTC

Shri R.P. Padhi, PGCIL

Shri Vishal Gupta, Advocate, JPVL

Shri Pawan Upadhyay, Advocate for JPVL

Shri Ankit Sibbal, Advocate for JPVL

Shri Ankit Vij, Advocate for JPVL



ORDER

This petition was heard on maintainability. The Interlocutory Application filed by Respondent No 2, Jaiprakash Power Ventures Ltd (JPVL), seeking discharge/deletion of its name from the array of respondents was earlier heard and by order dated 8.10.2012, we had directed to hear the petitioner on maintainability in the first instance and decide the IA thereafter. Accordingly, this order considers both these aspects, maintainability of the petition and deletion of JPVL from the array of respondents.

2. The petitioner has made the following prayers, namely:

“A. To exempt PTC from payment of LTOA charges under BPTA dated 20.7.2007 and exempt PTC from any penalty/compensation as PTC has acted in accordance with law; and/or

B. In view of Jaypee’s stand that PPA is void, direct Jaypee to pay LTOA charges for evacuation of power from the project; and/or

C. Pass any other order(s) and or directions(s), which the Hon’ble Commission may deem fit and proper in the facts and circumstances of the case.”

3. The undisputed facts leading to filing of the present petition are briefly noted.

4. JPVL (earlier known as Jaypee Karcham Hydro Corporation Ltd) has established Karcham Wangtoo Hydro Electric Project (4X250) in the State of Himachal Pradesh. The petitioner and JPVL entered into a Power Purchase Agreement dated 21.3.2006 (PPA) for purchase of power corresponding to gross capacity of 704 MW. The petitioner agreed to supply power contracted under the PPA to the States of Punjab, Haryana, Uttar Pradesh and Rajasthan and executed Power Sale Agreements with the utilities in these States. The petitioner also entered into the Bulk Power Transmission Agreement dated 20.7.2007 (BPTA) with Respondent No 1, Power Grid Corporation of India Ltd (PGCIL) for long-term access (LTA) for

conveyance of contracted quantum of power under the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2004 (Open Access Regulations) .

5. JPVL by its letter dated 17.12.2009 informed the petitioner that the PPA had become void. This claim of JPVL was contested by the petitioner. The dispute was referred to the Arbitration Tribunal in accordance with the PPA. The Arbitral Tribunal by its award dated 28.4.2011 upheld the contention of JPVL. The award was challenged by the petitioner before the Hon'ble Delhi High Court. The Hon'ble High Court (Single Judge) by judgment dated 15.5.2012 set aside the award on the ground that it was opposed to public policy. JPVL has filed an appeal before the Division Bench of the Hon'ble High Court and the said appeal is presently pending.

6. Meanwhile, JPVL commenced commercial operation of the generating station and started selling power on short-term basis, either through the petitioner or of its own, after availing the short-term open access (STOA), and did not supply power to the petitioner under the PPA. However, PGCIL started raising bills the petitioner for LTA under the BPTA from April 2012. Feeling aggrieved by the bills raised by PGCIL, the petitioner filed the Civil Writ Petition No 3617/2012 before the Hon'ble High Court. When the matter came up for hearing on 4.6.2012, the learned senior counsel for the petitioner, on being pointed out that the dispute between the petitioner and PGCIL could be raised before this Commission, withdrew the petition to file the petition before this Commission. The Writ Petition was disposed of accordingly. The present petition has been filed against the above background.

7. We heard learned senior learned counsel for the petitioner, the representative of PGCIL and learned counsel for JPVL.

8. On the question of maintainability, learned senior counsel submitted that the dispute relates to supply of power to four States and hence it is a dispute involving regulation of inter-State transmission of electricity under clause (c) of sub-section (1) of Section 79 of the Electricity Act. Accordingly, learned senior counsel submitted, this Commission has jurisdiction for adjudication of the dispute under clause (c) read with clause (f) of sub-section (1) of Section 79 of the Electricity Act. Learned senior counsel argued that order dated 4.6.2012 of the Hon'ble High Court was further determinative of this Commission's jurisdiction. Learned senior counsel further submitted that the dispute has to be dealt under the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access) Regulations (LTA Regulations) presently in force. He submitted that Regulation 32 of the LTA Regulations provides for redressal mechanism, according to which all disputes under the LTA Regulations are to be adjudicated by this Commission on an application made by the aggrieved person.

9. Learned senior counsel pointed out that clause (b) of sub-regulation (1) of Regulation 18 of the LTA Regulations apply to voluntary relinquishment of LTA and do not cover any situation where relinquishment is for the reasons beyond the control of LTA customer. In the present case, the relinquishment by the petitioner is not voluntary and it is because of the act of JPVL of non-supply of power who has declared the PPA as void. He argued that the LTA Regulations provide for penalty only in case of surrender and abandoning of LTA and cannot apply in a situation where the LTA customer is unable to avail LTA for reasons beyond its control. He submitted that the petitioner is being penalized by raising bills for ₹ 11 crore by PGCIL every month.

Learned senior counsel submitted that the petitioner has prayed for exemption from payment of the LTA charges under the BPTA and in view of JPVL's stand that PPA has become void, JPVL should pay these charges.

10. Learned senior counsel also submitted that it is a case of double charge, as STOA charges were already being recovered by PGCIL for the power being supplied from JPVL's generating station for which LTA was obtained. He further submitted that LTA was granted for supply to the States in the same region and not against LTA granted to any other region.

11. The representative of PGCIL submitted that LTA was granted to the petitioner for 704 MW and the petitioner was aware of its obligation to pay the LTA charges under the BPTA. He submitted that LTA is effective from 1.4.2012 and accordingly PGCIL raised bills from April 2012 and onwards. He alleged that the petitioner neither paid the LTA charges nor opened LC as required under this Commission's regulations. The representative of PGCIL pointed out that the petitioner was having dispute with JPVL since 2009 and it was aware that it might not be able to avail LTA and yet the petitioner did not relinquish its rights over LTA. In case the petitioner had surrendered its rights, it could be granted to some other person. He, however, clarified that presently only JPVL was availing the open access. He pointed out that it was a commercial decision of the petitioner to continue with LTA and hence it was under an obligation to pay the LTA charges. He pointed to clause 18.4 of the BPTA and urged that the petitioner should continue to perform its part of the obligations even during the pendency of the dispute. The representative of PGCIL submitted that arrears on account of the LTA charges payable by the petitioner have accumulated to the extent of ₹64 crore and the petitioner should be directed to pay the arrears. He argued that

the dispute relating to supply of power by JPVL was a bilateral dispute between the petitioner and JPVL. The representative of PGCIL urged that if payment is not made by the petitioner, this Commission should review the continuance of its trading licence. He pointed out that the petitioner is the interface between the generator and the purchaser and it cannot claim that it would not pay the generator because it has a dispute with the purchaser. Similarly, the petitioner cannot withhold the LTA charges payable to PGCIL for reason of dispute with JPVL. It was submitted that the question is not whether the petitioner is availing LTA, but the question really is that the petitioner was liable to pay the LTA charges under the BPTA. The representative of PGCIL stated that PGCIL is also collecting the LTA charges on behalf of other ISTS licensees and if payment is not made by the petitioner, the health of other ISTS licensees would be affected.

12. Learned counsel for JPVL submitted that the issues were twofold - jurisdiction vis-a-vis JPVL and maintainability of relief against JPVL. Learned counsel submitted that the dispute in the petition of raising of bills by PGCIL was between the petitioner and the PGCIL and hence JPVL should be dropped from the array of parties. Learned counsel submitted that JPVL is not a party to the BPTA which is an independent commercial agreement between the petitioner and PGCIL, without any reference to the PPA. The fact that the petitioner entered into the BPTA for evacuation of 704 MW from JPVL's generating station does not make JPVL a party to the BPTA. Learned counsel, referring to clauses (c) and (f) of sub-section (1) of Section 79 of the Electricity Act, submitted that the disputes between long-term open access customer and the transmission licensee only are covered. Learned counsel submitted that in the present case the dispute is between the petitioner, a long-term open access customer

and PGCIL, the transmission licensee. JPVL, a generating company, not involved with the inter-State transmission of electricity is not within the scope of clause (c). Learned counsel further pointed out that under the PPA, JPVL has the risk and title of the power up to the delivery point and power beyond the delivery point was to be carried at the cost of the petitioner and therefore, the petitioner was to pay the LTA charges. Learned counsel pointed out that JPVL had not at any stage agreed to pay the open access charges. He further submitted that even if JPVL would have agreed to pay the LTA charges, this Commission would not have the jurisdiction over the dispute because it would have been a commercial arrangement between JPVL and the petitioner and commercial arrangements are not covered under clause (c) of sub-section (1) of Section 79 of the Electricity Act. Learned counsel argued that JPVL was not a party before the Hon'ble High Court and has been made party for the first time in the present petition.

13. We have considered the submissions made by and on behalf of the parties.

14. We are of the considered view that the dispute raised by the petitioner *qua* PGCIL is maintainable. Apart from the fact that the dispute relates to inter-State transmission of electricity, the dispute also falls within the scope and ambit of Regulation 32 of the LTA Regulations. Yet another issue arising in the present proceeding is the extent to which PGCIL can claim LTA charges for transmission of power for which STOA charges are also being paid separately. This issue needs serious consideration and authoritative adjudication by this Commission.

15. Next we consider the question of maintainability of the relief sought *qua* JPVL. The relevant part of the prayer is –

“B. In view of Jaypee’s stand that PPA is void, direct Jaypee to pay LTOA charges for evacuation of power from the project;”

16. Article 4.3.1 of the PPA provides as under:

“4.3.1 The Company undertakes to sell to PTC and PTC undertakes to purchase and pay the tariff in accordance with this Agreement for the Contracted Power and the Contracted Energy from the Project. The risk and title to power and energy shall be transferred from the Company to PTC at the Delivery Point.” (Emphasis supplied)

17. Article 1.1 defines ‘Delivery Point’ as under:

“Delivery Point” means the point of interconnection with the CTU or a Transmission Licensee, from where open access in accordance CERC Inter-state Transmission Regulations is available and at which the risk and title of the Billable Power and Billable Energy shall pass from the Company to PTC.”

18. From the above provisions of the PPA it is seen that ownership of power purchased passed to the petitioner at the point of interconnection of JPVL’s generating station with the CTU or other transmission licensee. After transfer of ownership to the petitioner, the responsibility to carry electricity further to the destination point rested with the petitioner. In the absence of an agreement to the contrary, it is axiomatic to say, the costs for carrying power were to be borne by the petitioner. The petitioner has not brought to our notice any provision in the PPA or elsewhere that JPVL had agreed to share the cost of transfer of power beyond the Delivery Point, wholly or partly. Therefore, in our view, the LTA charges are payable by the petitioner while the State utilities that purchased power agreed to refund these charges to the petitioner under the PSA. The BPTA was executed between the petitioner and PGCIL and JPVL is not

party to the BPTA. The BPTA has no interlink with the PPA and the two are independent of each other. For these reasons, prayer B cannot be considered.

19. Learned senior counsel for the petitioner strenuously argued that the Hon'ble High Court (Single Judge) has decided that the PPA is not void and has directed JPVL to file a petition before this Commission for approval of tariff. Therefore, learned senior counsel argued that JPVL should pay the LTA charges because power was not supplied on account of default of JPVL. It is the petitioner's own case that JPVL has filed an appeal before the Division Bench against the judgment of learned Single Judge and the Division Bench has granted interim relief to the extent that JPVL need not approach this Commission for determination of tariff.

20. The above contention of the petitioner is to be examined in the context of the relief sought against JPVL. The petitioner has sought direction to JPVL to pay the LTA charges for evacuation of power from the project in view of JPVL's stand that PPA is void. In our opinion, the relief sought against JPVL cannot be granted in case JPVL's stand that PPA is void, is valid. In that case, the question of JPVL paying the LTA charges should not arise. The proceeding pending before the Hon'ble High Court does not have any direct or indirect bearing on the relief claimed against JPVL as the issues arising therein relate to the rights and obligations of the parties under the PPA. We may also consider the different scenarios depending upon the outcome of JPVL's appeal. If JPVL's appeal succeeds and the PPA is declared void, the question of direction to JPVL for shouldering the responsibility for payment of the LTA charges should not arise. In case the appeal fails, there may be either of the two possibilities. The supply power to the petitioner in terms the PPA may commence. In such a

situation, the LTA charges have to be borne by the petitioner. In the alternative, the petitioner may claim compensation under the PPA. In any eventuality, therefore, JPVL cannot be fastened with the liability to pay the LTA charges because of the pending proceedings and thus prayer B cannot be approved. Incidentally, we have not referred to the possibility of either party approaching the Hon'ble Supreme Court because in that eventuality too the outcome of the discussion shall not be different.

21. The petitioner claims to have filed the petition under clause (c) read with clause (f) of sub-section (1) of Section 79 of the Electricity Act. Section 79 of the Electricity Act defines the functions of this Commission. The relevant clauses of sub-section (1) of Section 79 are extracted below:

“79. (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) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.

(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;

22. Under clause (f), this Commission is empowered to adjudicate upon disputes involving the generating companies and the transmission licensees relating to the matters connected with clauses (a) to (d) and to refer any dispute for arbitration. Under

clauses (a) and (b) this Commission is assigned the function of regulation of tariff of the generating companies, the function assigned under (c) is to regulate the inter-State transmission of electricity and the function entrusted under clause (d) is to determine tariff for inter-State transmission of electricity. JPVL as a generating company is not involved in the inter-State transmission of electricity. For this reason also, the petition under clause (c) read with clause (f) *qua* JPVL is not maintainable and the prayer B cannot be allowed.

23. The BPTA was signed in accordance with Regulation 11 of the Open Access Regulations, which provided as under:

“A long-term customer shall enter into Bulk Power Transmission Agreement with the transmission licensee for use of inter-state transmission system for twenty five or more years.”

24. Regulation 16(i) of the Open Access Regulations provided that the “the annual transmission charges shall be determined and after deducting the adjustable revenue from the short-term customers, these charges shall be shared by the long-term customers in accordance with the terms and conditions of tariff notified by the Commission from time to time. Regulation 16 (i) has been repealed by Regulation 34 of the LTA Regulations. In accordance with Regulation 26 of the LTA Regulations, the transmission charges are shared by the long-term and medium-term customers of the transmission line in accordance with the terms and conditions of tariff determined by the Commission. Thus the LTA Regulations do not contemplate that the transmission charges shall be paid by any person other than a long-term customer or the medium-term customer of the transmission system. In view of the clear provisions of the statutory regulations, the petitioner does not have any right under law to claim any relief against JPVL for payment of the LTA charges arising under the BPTA.

25. The present petition is filed pursuant to order of the Hon'ble High Court dated 4.6.2012 in Writ Petition (C) No. 3627/2012 filed by the petitioner. The extracts from the order are reproduced below:

“After some arguments, on it being pointed out that disputes between the petitioner and the respondent No. 1 can be raised before the Commission, under the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulation 2004 and Electricity Act 2003, learned senior counsel for the petitioner wishes to withdraw the petition and to approach the Commission. Learned senior counsel for the petitioner submits that the Commission may be directed to dispose of the dispute within a time bound manner. Learned counsel for the Commission, who appears on an advance notice, submits that the Commission would examine the matter expeditiously.” (Emphasis supplied)

26. Admittedly, the petitioner did not claim any relief against JPVL in those proceedings and therefore JPVL was not a party in the proceedings before the Hon'ble High Court; there were two parties, PGCIL and this Commission. When it was pointed out that the disputes between the petitioner and Respondent No 1 (PGCIL) could be raised before this Commission, the Writ Petition was withdrawn. Thus, liberty was granted to the petitioner to approach this Commission to raise its dispute with PGCIL before this Commission. From these facts it appears that the relief presently claimed against JPVL is an afterthought.

27. We have examined the matter from various angles and have always come to the conclusion that prayer B is not maintainable and is, therefore, rejected at admission stage itself.

28. There are certain issues raised in the petition which are of general nature, for decision on which the assistance of JPVL may prove fruitful. Besides, the petitioner has made averments *qua* JPVL and it may be necessary to hear JPVL on those matters.

Therefore, we do not accept the argument of JPVL for its deletion from array of the respondents.

29. In the light of the foregoing discussion, we direct that the petition be admitted after deletion of prayer B, while retaining JPVL as respondent.

30. IA No 36/2012 filed by JPVL stands disposed of accordingly.

31. The respondents are directed to file their replies by 30.11.2012 with advance copy to the petitioner.

32. The matter shall be listed for hearing on 11.12.2012 for further directions.

sd/-
(M.Deena Dayalan)
Member

sd/-
(V.S.Verma)
Member

sd/-
(S Jayaraman)
Member

sd/-
(Dr. Pramod Deo)
Chairperson