Central Electricity Regulatory Commission
New Delhi

RECORD OF PROCEEDINGS

Petition No. 125/2011

Subject: Signing of PPA by NTPC Ltd during the period October, 2010 to 5.1.2011 for supply of 37000 MW of electricity abusing its dominant position and thereby causing adverse effect on competition in electricity industry.

Date of Hearing: 26.6.2012

Coram: Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member

Petitioner: Association of Power Producers, New Delhi

Respondent: NTPC, New Delhi

Parties present: Shri Amit Kapur, Advocate, APP
Shri A.Jain, Advocate, APP
Shri S.K.Sharma, APP
Shri M.G.Ramachandran, Advocate, NTPC
Shri C.K.Mondal, NTPC
Shri A.Dua, NTPC
Shri A.Basu Roy, NTPC
Shri Rohit Chabra, NTPC
Shri R.B.Sharma, Advocate
Shri K.K.Agrawal, MPPMCL

During the hearing, the learned counsel for the petitioner, APP handed over written submissions in the matter and mainly submitted as under:

(a) This petition has been filed under Section 60 and 66 of the Electricity Act, 2003 (the Act) against the conduct of the respondent No.1, NTPC, executing Power Purchase Agreements (PPAs) for 39000 MW capacity between the period October, 2010 and 5.1.2011 which is much beyond its capacity. The said PPAs would harm consumer interest, as the generation of power would be delayed leading to demand-supply gap and consequent increase in the price of power for end consumers.

(b) NTPC has abused its dominant position in the market by blocking the upstream market for coal supply and foreclosing the downstream market for competitors. The PPAs have adverse effect on competition as it will impede the development of the power sector and pose serious fuel risk. By entering in to PPAs for 39000 MW, NTPC would get preference for allocation of coal mines over private players which would be in addition to 60% of available coal for their projects. The IPPs have to contend with the 35% of the balance coal as 5% is earmarked for captive power projects.

(c) As the exemption from competitive bidding was to expire on 5.1.2011, in terms of the tariff policy, NTPC in order to avoid competition and to subvert the government policy

undertook massive signing of PPAs (for 39000 MW capacity) within a short span of three months. This exercise has been undertaken by NTPC without developing the ability to complete the said projects to be set up under the said PPAs.

(d) There are significant gaps in consents and clearances for the projects to be undertaken by NTPC. Moreover, the Government of India, out of the eight coal mine allotted to NTPC had taken five coal mines back from NTPC due to slow development of coal mine.

(e) In the last three years there has been PPAs for only 7745 MW signed for long term basis through Case-1 bidding. It is not possible for the Discoms and SEBs to enter into PPAs for supply of power with other Generating companies/private utilities over and above the anticipated demand for which they had already entered into PPAs with NTPC. If NTPC is allowed to execute the said PPAs there would be no competitively determined market price for long term market for power.

(f) NTPC conduct of committing to supply power in excess of its capacity amounts to an exclusionary and anti-competitive conduct. Hence, Commission should exercise its powers under Section 60 of the Act and direct NTPC not to implement the said PPAs since its implementation would have adverse effect in competition in the electricity industry. It is an established position that building up excess capacity and large scale buying may amount to exclusionary and anti-competitive conduct as laid down in the following judgments of US:

(a) Unites States-v- Aluminum Company of America
(b) Unites States-v- Griffith
(c) Lorain Journal Co-v- United States
(d) Aspen skiing Co-v- Aspen Highlands Skiing Corporation.

(g) Based on past record, it can be said with certainty that NTPC cannot complete these projects in time. Inspite of the fact that NTPCs capacity targets have been scaled down from 3160 MW (2008-09) to 1320 MW (2011-12), it has failed to meet its annual capacity targets. The capacity added by NTPC in 2011-12 is 1820 MW and the total capacity addition by NTPC as per XII plan is 7300 MW, which includes the 750 MW by joint ventures of NTPC. During the last four years (2008-12) only 6300 MW capacity has been added by NTPC. It is therefore unlikely that NTPC would be able to add 39000 MW capacity during the remaining time left for commercial operation of the said projects. Thus, NTPCs objective in tying-up large capacity through PPAs is to circumvent competition by foreclosing the upstream and downstream market.

(h) From the details of the projects submitted by affidavit dated 30.8.2011, the members of the petitioner (association) have shown efficiency in making their projects operational eve before the scheduled date of commercial operation.

(i) NTPC generated 31.65% of the total thermal power generated in the month of February, 2011 and its nearest competitor as per actual power generation is Mahagenco, which produced 6.91%(approx) of total power generated in India during the said period. Thus, the relative strength of NTPC is far more than its nearest competitor. The conduct of NTPC to prevent the private players from entering into electricity market is not only against the spirit of the Act, the Tariff policy, but also against the principles laid down by the Hon'ble Supreme Court in Tata Power Co Ltd-Vs-Reliance Energy Ltd (2009) 16 SCC 659, where the primary objective of the Act is to free the generating companies from the shackles of license regime had been recognized and the judgment in PTC-v-CERC (2010) 4 SCC 603.

(j) Out of all the generating companies, NTPC is much larger than its closest competitor and thus enjoys a dominant position in the market. In this connection the judgments in United Brands-Vs-Commission of European Communities (1978 ECR 207) and order dated 25.5.2011 of the Competition Commission of India in MCX Stock Exchange Ltd-v-National Stock Exchange of India Ltd are noteworthy.

(k) The Competition Commission of India in its order dated 8.12.2011(copy enclosed) has considered "State' as a separate market while dealing with the issue of supply and distribution of electricity. It has also observed that specific issues relating to electricity industry are within the domain of sectoral regulators.

(l) Taking into consideration all the factors cumulatively, the conduct of NTPC would severely affect the development of market and it is therefore prayed that the Commission may exercise it powers under Section 60 and 66 of the Act and take measures to prevent NTPC from implementing the said PPAs.

2. In response to the above, the learned counsel for the respondent No.1, NTPC submitted mainly as under:

(a) By this petition, some of the fundamental principles of the Act appear to have been ignored by the petitioner. Under the Act, generation has been de-licensed and there is no restriction on putting up any generation capacity. The role of every authority under the Act has been related to the functions which it performs and thus, even Section 66 and 60 of the Act should be related to the functions of the Commission. The functions of the Commission under Sections 79(1)(a) and 79(1)(b) of the Act is for regulation of tariff of central generating companies and other companies (under a composite scheme) respectively and it is not for the Commission to make arrangements/provide for fuel linkages.

(b) The prayer of the petitioner for cancellation/not to implement the PPAs entered into by NTPC from October, 2010 to 5.1.2011, on the basis that coal companies may not provide coal to the petitioner, since NTPC would get priority in coal allocation, is in the nature of deciding which generating companies would get coal or not and has thus converted the functions of this Commission as a coal regulator.

(c) The Tariff policy which had provided the exemption from competitive bidding for procurement of power from public sector generating companies' upto a particular point of time has not been challenged by the petitioner, who is private generating companies. Hence, the question of alleged anti-competitive conduct of NTPC does not arise at all.

(d) On a specific query of the Commission as regards the status of the PPAs entered into by the petitioner, the learned counsel for the petitioner clarified that the PPAs entered into are as per the procedure adopted by it in respect of all other PPA's of the petitioner. He also clarified that based on the PPAs signed with the distribution licensees, the Government of India makes allocation of power as per established policy, and cabinet approval is granted. The learned counsel further submitted that in terms of Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005, the distribution licensees have also got their PPAs approved by the State Regulatory Commissions read with rule 8. He also clarified that these PPAs are valid contracts between the parties which are to be implemented in future and only if conditions subsequent does not get satisfied/complied the issue of enforceability of PPA would arise.

(e) The Commission in the 2009 Tariff Regulations has permitted a period of 52 months for implementation of the project from the date of the grant of investment approval. Out of the projects for 39000 MW capacity contracted by NTPC, investment approval of the

board for projects totaling 11000 MW (approx) capacity had already been obtained and for the projects with the balance capacity, investment approval would be taken after environmental and other clearances are obtained.

(f) The petitioner by alleging anti competitive conduct and abuse of dominant position by NTPC has questioned the role of various governmental authorities including the Cabinet for granting approval for 39000 MW and the order of the State Commissions approving the PPAs. The Central Government which also encourages private participation in power sector cannot be stated to have colluded with NTPC to prevent the petitioner from getting coal linkage.

(g) Though the petitioner has pointed out to only 4 private sector projects which have been completed in time, NTPC has placed on record the details of the IPP projects which are under development or recently commissioned, the list of capacities from each of these projects, along with the statement of the total capacities agreed to by the IPP's, prior to 5.1.2006 through negotiated deals and after 5.1.2006 in terms of competitive bidding under Section 63 of the Act which works out to a total capacity of 105324 MW, which is much more than the capacity contracted by NTPC upto 5.1.2011.

(h) Merely because some of the projects of NTPC have been delayed, it cannot be said that NTPC has signed PPAs without developing the ability to complete the said projects to be set up under the said PPAs. As regards submissions that coal mine blocks of NTPC were being cancelled, only the captive coal block allotted to NTPC, which could not be exploited on account of severe law and order problem, got cancelled and the same is being reallocated to us in the same area. Apart from this, there has been no cancellation of the coal linkages by the government. Some of the coal mines of private parties have also been cancelled for non exploitation by them. It is for the coal ministry to deal with the allocation of coal blocks to parties and the petitioner thus cannot seek the cancellation of PPA entered into by NTPC on the ground that NTPC would get preference in coal allocation.

(i) In case the State Government or the distribution licensee of the state decides for procurement for power from the generating stations of NTPC on negotiated basis, despite the option for procurement of power through competitive bidding available to them, the negotiations are held in a transparent manner, reports are prepared and after conclusion, the parties sign the PPAs. The allegation of the petitioner that it had rushed to sign PPAs during October, 2010 to 5.1.2011 is not tenable, since the PPAs were entered into only after prolonged and transparent negotiations by the parties, which is permissible under the Tariff policy.

(j) The petitioners have not submitted any clarification as regards the status of the 105324 MW capacity projects in the private sector. Despite this, it has through this petition alleged that NTPC has abused its dominant position as regards the 39000 MW capacity contracted by it and has sought its cancellation. NTPC cannot be blamed for the non performance of the petitioner to exploit its capacity. As the capacity contracted is in line with the tariff policy, the prayer may be rejected.

(k) The tariff for the generating stations of NTPC are determined by the Commission after prudence check and the State Regulatory Commissions regulates the power procurement process of the distribution licensees from generating stations like NTPC. The State Regulatory Commissions having approved the PPAs of distribution licensees for procurement of power from NTPC, it cannot be said that NTPC has abused its dominant position and entered into PPAs with distribution licensees to avoid competition.

(l) In Madura Coats-Vs-Hindustan Petroleum Corporation Ltd, (2004) CPJ 7, the MRTP Commission by its order dated 19.12.2003 has held that policy decision uniformly available to all dealers cannot have effect of preventing, distorting restricting competition. As NTPC has acted in line with the provisions of the tariff policy and signed PPAs with distribution licensees prior to 5.1.2011, the same is not anti-competitive and there is no abuse of dominant position.

(m) On a query by the Commission as regards the XIIth plan, the learned counsel submitted that the same is under the consideration of the Planning Commission. On a further query, if the PPAs entered into are valid, the learned counsel for NTPC reiterated that these are valid PPAs which have been approved by the State Regulatory Commission on petitions filed by the distribution licensees and not the generating companies of NTPC. The learned counsel prayed that it may be granted liberty to file written submissions in the matter.

3. The Commission directed NTPC to file the following information, on affidavit, in respect of all the projects for which PPAs were signed from 1.10.2010 to 5.1.2011, as under, on or before 16.7.2012:

(i) Project-wise status of different clearances such as land acquisition for power plant, Environmental and Forest clearances for power plant, Water allocation from State Government/Central Water Commission, Fuel linkage and any other clearance.

(ii) Project wise latest status of Investment approval along with the commissioning schedule.

(iii) The list of projects of NTPC which have been identified by CEA for benefit in XIIth Plan.

(iv) List of projects of NTPC for which coal linkage is yet to be accorded but the same are recommended for linkage by CEA/MoP.

4. The parties are directed to file their written submissions in the matter on or before 16.7.2012. Subject to these, order in the petition was reserved.

By order of the Commission

Sd/-
(T.Rout)
Joint Chief (Law)