

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 83/MP/2016

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Hearing: 2.6.2016

Date of Order : 3.6.2016

In the matter of:

In the matter of Petition under Section 79 of the Electricity Act, 2003 read with Article 17 of the Power Purchase Agreement dated 7.8.2007 between Sasan Power Limited and the M.P. Power Management Company Limited.

And

In the matter of:

Madhya Pradesh Power Management Company Limited
Shakti Bhawan, Vidyut Nagar
Jabalpur (M.P.) - 482008

.....**Petitioner**

Vs

- 1) Sasan Power Limited
1st Floor, H-Block, North Wing
Dhirubhai Ambani Knowledge City,
Navi Mumbai-400 709
Maharashtra
- 2) Western Regional Load Despatch Centre,
Power System Operation Corporation Limited
F-3, M.I.D.C. Area, Marol,
Andheri (EAST),
Mumbai-400093
- 3) Paschimanchal Vidyut Vitran Nigam Limited
Victoria Par, Meerut,
Uttar Pradesh- 250001

- 4) Purvanchal Vidyut Vitran Nigam Ltd.
Hydel Colony, Varanasi,
Uttar Pradesh- 221004
- 5) Madhyanchal Vidyut Vitran Nigam Ltd.
4-A, Gokhale Nagar, Lucknow
Uttar Pradesh- 226001
- 6) Dakshinanchal Vidyut Vitran Nigam Ltd.
220, KV Vidyut Substation
Mathura-Agra Bypass Road,
Sikandra Agra
Uttar Pradesh- 282007
- 7) Punjab State Power Corporation Ltd.
Shed C-3, Shakti Vihar, Patiala,
Punjab- 147001
- 8) Tata Power Distribution Ltd.
Tata Power DDL House,
Hudson Line,
New Delhi-110009
- 9) BSES Rajdhani Power Ltd.
BSES Bhawan, Nehru Place,
New Delhi- 110019
- 10) BSES Yamuna Power Ltd.
BSES Bhawan, Nehru Place,
New Delhi- 110019
- 11) Haryana Power Generation Corporation Ltd.
Shakti Bhawan, Panchkula,
Haryana- 134109
- 12) Ajmer Vidyut Vitran Nigam Ltd.
Hathi Bhata, Ajmer,
Rajasthan- 305001
- 13) Jaipur Vidyut Vitran Nigam Ltd.
Vidyut Bhawan, Jaipur,
Rajasthan- 302205
- 14) Jodhpur Vidyut Vitran Nigam Ltd.
New Power House, Jodhpur,
Rajasthan- 342003

15)Uttarakhand Power Corporation Ltd.
Urja Bhawan, Dehradun,
Uttarakhand- 248001

.....Respondents

Parties present:-

Shri G. Umapathy, Advocate, MPPMCL
Shri K.K. Agrawal, MPPMCL
Shri J.J. Bhatt, Senior Advocate, SPL
Shri Vishrov Mukherjee, Advocate SPL
Shri Janmali Manikala, Advocate, SPL
Shri Mayank Gupta, Advocate, SPL
Shri N.K. Deo, SPL
Shri S. Kant, SPL
Shri N. Kohli, SPL
Ms. Ranjita Ramachandran, Advocate, Rajasthan/Haryana
Shri Rajiv Srivastava, Advocate, UPPCL
Shri S.S. Barpanda, NLDC / WRLDC
Ms. Pragya Singh, WRLDC
Shri Ashok Rajan, WRLDC

ORDER

The present petition has been filed by Madhya Pradesh Power Management Company Limited under Section 79(1)(b), (c) & (f) of the Electricity Act, 2003 (2003 Act) read with Article 17 of the Power Purchase Agreement dated 7.8.2007 seeking to (i) quash the notice dated 20.5.2016 issued by Sasan Power Limited (SPL) to Western Regional Load Despatch Centre (WRLDC) for regulation of power supply on account of non-payment of dues by the petitioner under the PPA and (ii) for quashing the notices dated 20.5.2016 and 21.5.2016 issued by SPL to the petitioner under Article 11.5 of the PPA read with Regulation 4 of Central Electricity Regulatory Commission (Regulation of Power Supply), Regulations, 2010 (hereinafter "RPS Regulations").

2. The petitioner has submitted that the Commission in its order dated 8.8.2014 in Petition No.85/MP/2013 held that the declaration of COD by SPL on the basis of the

certificate of Independent Engineer issued on 30.3.2013 was not as per the provisions of the PPA and since the generating station failed the performance test in accordance with the PPA, the power generated during the period between 31.3.2013 and 15.8.2013 would be treated as infirm power. Further, the Commission decided the COD of first unit of Sasan UMPP as 16.8.2013. Aggrieved by the said order, SPL filed Appeal No. 233 of 2014 before the Appellate Tribunal for Electricity (Appellate Tribunal). The Appellate Tribunal vide judgement dated 31.3.2016 set aside the Commission's order dated 8.8.2014 holding that petition filed by WRLDC was not maintainable and all the procurers including the petitioner accepted the COD of the first unit of Sasan UMPP as 31.3.2013 and waived the right to fulfillment of the obligations in terms of Article 6.3 read with Schedule 5 of the PPA. The petitioner is stated to have filed Civil Appeal No.5246 of 2016 in the Hon'ble Supreme Court challenging the judgement of the Appellate Tribunal. It was submitted by the learned counsel for the petitioner that the matter is likely to be listed before the Hon'ble Supreme Court after the summer vacation.

3. The petitioner has submitted that pursuant to the issue of the judgement dated 31.3.2016 in Appeal No. 233 of 2014, SPL sent letter dated 1.4.2016 to MPPMCL enclosing a statement indicating the amount of pending monthly bills and late payment surcharge totaling ₹ 434.43 crore against MPPMCL. SPL vide its letter dated 10.5.2016 intimated the petitioner that an amount of ₹440.81 crore including late payment surcharge calculated as on 30.4.2016 (₹ 355.52 crore as principal + ₹85.29 crore as late payment surcharge) is due and payable by the petitioner in respect of the monthly bills from March 2013 to March 2016. SPL vide the said letter sought payment of the entire

amount of ₹440.81 crore within 7 days from the date of notice, failing which SPL would offer a part or whole of the share of petitioner's contracted capacity to the non-defaulting procurers or third parties in accordance with the PPA. Subsequently, SPL vide its letter dated 12.5.2016 addressed to Tata Power Delhi Distribution Limited (TPDDL) intimated that notices under Article 11.5.2 of the PPA to the defaulting procurers had been issued and there was possibility of electricity from the share of defaulting procurers to be made available to TPDDL and accordingly, sought in principle expression of interest of TPDDL to receive the electricity as per the terms of the PPA. SPL sent a notice dated 16.5.2016 under Regulation 4 of RPS Regulations for regulation of 25% of petitioner's contracted capacity to be issued to other non-defaulting procurers/third parties in terms of the PPA. The petitioner vide its letters dated 16.5.2016 and 17.5.2016 contested the notices issued by SPL for regulation of power supply and requested to withdraw the notices. The petitioner also wrote to WRLDC vide its letter dated 18.5.2016 not to entertain the request of SPL to schedule the contracted power to any other procurer or third party. SPL vide its letter dated 20.5.2016 intimated WRLDC regarding implementation of the regulation of power supply in case of MPPMCL with effect from 0000 hrs of 25.5.2016 to 2400 hrs of 23.6.2016 and requested WRLDC to prepare and implement the implementation plan to regulate supply of power.

4. The petitioner has submitted that SPL had also issued a notice dated 21.5.2016 to the petitioner invoking Article 11.5 of the PPA read with Regulation 4 of RPS Regulations stating that as on 18.5.2016, ₹ 205 crore is payable by the petitioner on account of the orders of the Commission allowing various change in law events and in the event of failure to pay the said amounts before expiry of 7 days from the date of

notice, SPL would be entitled to proceed with offering part or whole of the petitioner's shares in the contracted capacity to the non-defaulting parties and/or third parties.

5. The petitioner has submitted that WRLDC vide its letter dated 23.5.2016 in response to SPL's letter dated 20.5.2016 stated that the default trigger date would be the next working day after the completion of 60 days from the date of service of the bill which would get over on 31.5.2016 and accordingly, advised SPL to send a revised request for preparation of the implementation plan under Regulation 4 of RPS Regulations.

6. The petitioner has submitted that the notices issued by SPL and WRLDC proposing to curtail power of the petitioner are illegal, arbitrary and unethical due to the following reasons:

(a) Default on the part of the petitioner has not been established.

(b) SPL is not entitled to issue revised bills unless WRPC revises the REA in the light of the judgement of Appellate Tribunal dated 31.3.2006.

(c) In the absence of proper bill, the default trigger date has not occurred and therefore, notices for regulation of power supply cannot be maintained.

(d) As regards the bills covered under the notice of 21.5.2016, the petitioner has enclosed a statement at Annexure XV according to which the total outstanding as on 18.5.2016 is ₹189.16 crore. The petitioner is stated to be making regular payments of monthly bills and claiming rebate as per Article 11.3.5 of the PPA.

7. The petitioner has prayed for quashing the notices dated 20.5.2016 and 21.5.2016 issued under Article 11.5 of the PPA read with Regulation 4 of RPS Regulations and has sought a direction to SPL to issue supplementary/arrear bill in accordance with the Regional Energy Account issued by WRPC and in terms of the judgement dated 31.3.2016 issued by the Appellate Tribunal. The petitioner has also sought an interim order for directing SPL not to discontinue supply of power to the petitioner pending disposal of the present petition.

8. On 26.5.2016, learned counsel for the petitioner mentioned the matter and committed to pay ₹100 crore before 31.5.2016 and requested the Commission to issue directions to SPL not to discontinue power supply to the petitioner. Learned senior counsel for SPL opposed grant of stay on the notices for power supply issued by SPL. The Commission directed MPPMCL to make payment of ₹100 crore to SPL on or before 31.5.2016 and subject to compliance of the said direction, SPL was directed not to take any coercive action till the next date of hearing.

9. During the hearing of the petition on 2.6.2016, learned counsel for the petitioner submitted that the petitioner has already made a payment of ₹96 crore as against its commitment to pay ₹100 crore by 31.5.2016. Learned counsel submitted that the said payment has been made towards the dues on account of change in law events allowed by the Commission in various orders and submitted that the balance amount would be paid within one week. Learned counsel took us through the various paras of the notices dated 20.5.2016 and 21.5.2016 issued by SPL and the responses of the petitioner to these notices. Learned counsel further took us through the various provisions of the

PPA and emphasized that SPL needs to raise supplementary bills for claiming the amount due. Learned counsel further submitted that SPL was raising the bills on the basis of the COD dated 31.3.2013 whereas the petitioner was making payments on the basis of the COD dated 16.8.2013. Learned counsel submitted that SPL had never raised a dispute on the payment of the bills which has become final and therefore, after the judgement of Appellate Tribunal dated 31.3.2016, SPL should raise the supplementary bill which has not been done. The representative of the petitioner clarified that in terms of the order dated 8.8.2014 of the Commission in Petition No.85/MP/2013, the power injected between 31.3.2013 till 15.8.2013 was to be treated as infirm power whereas in terms of the judgement of the Appellate Tribunal, the power injected during the period would be treated as firm power and therefore, REA needs to be revised for the said period and supplementary bill is required be raised on the basis of revised REA.

10. Learned senior counsel for SPL submitted that there is no need to raise the supplementary bill as the same is required to be raised only for incremental tariff and not for the base tariff. Learned senior counsel submitted that SPL had filed Petition No.84/MP/2014 before the Commission for recovery of the bills considering COD as 31.3.2013 and the said petition is yet to be disposed of. Learned senior counsel further submitted that as regards the petitioner's contention for revision of REA, WRPC vide its letter dated 30.5.2016 has clarified that REA for the period 31.3.2013 to 31.3.2014 would be revised after receiving the data from WRLDC in line with the judgement of the Appellate Tribunal and as of now, there is no revised data submitted by WRLDC for revision of REAs for this period. Learned senior counsel submitted that the quantum of

power purchased by the petitioner is known and so also the difference in tariff to be paid by the petitioner after the judgement of the Appellate Tribunal and accordingly, the statement has been prepared and demand raised. Learned senior counsel further submitted that as advised by WRLDC, a revised letter dated 31.5.2016 for regulation of power supply considering the default trigger date as 31.5.2016 has been issued.

11. Learned counsel for UP representing Respondent Nos. 3 to 6 submitted that the bills raised earlier by SPL on the basis of COD as 31.3.2013 are not valid since the issue of COD was under consideration of the Commission and the Appellate Tribunal. Learned counsel submitted that SPL is required to raise supplementary bill as per the PPA in the light of the judgement dated 31.3.2016 of the Appellate Tribunal.

12. Representative of NLDC/WRLDC submitted that WRLDC has submitted the data to WRPC for issuing the revised REA. He further submitted that WRLDC has received letter dated 31.5.2016 from SPL for preparation of implementation plans for all defaulting procurers including the petitioner and sought clarity whether WRLDC can go ahead with implementation plan as per the notices issued by SPL.

13. We have considered the submissions of learned counsel for the petitioner, learned senior counsel for SPL, learned counsel for UP distribution companies and representative of NLDC/WRLDC. We have gone through the records. We are of the view that the contention of learned senior counsel for the petitioner that SPL was raising the bills with 31.3.2013 as the COD of first unit of Sasan UMPP is not correct as the Commission had determined the COD of the unit as 16.8.2013 vide its order dated

8.8.2014 and the said order held the field till it was set aside by the judgement dated 31.3.2016 by the Appellate Tribunal. SPL was required to raise bill in accordance with the judgement dated 31.3.2016 after the said date. It is noticed from the pleadings that the SPL raised a bill on 1.4.2016 alongwith a statement of outstanding dues against all procurers. The petitioner has submitted that claims of the petitioner arising on account of the judgement of the Appellate Tribunal holding COD as 31.3.2013 should be raised as a supplementary bill as per the provisions of the PPA. Further, the petitioner has submitted that for the period 31.3.2013 to 15.8.2013, revised REA is required to be issued as the injection of power during this period which was considered as infirm power in terms of the order dated 8.8.2014 is now required to be considered as firm power. The petitioner has submitted that only after issue of the revised REA, the petitioner can raise the supplementary bill in terms of the PPA. In our view, the statement raised by SPL vide letter dated 1.4.2014 is a valid bill and the petitioner cannot escape the liability for payment by raising the dispute on technical grounds. Article 11.6.9 of the PPA clearly provides that procurers shall be under obligations to pay the bill during the period of dispute. Further, learned counsel for the petitioner raised the issue of late payment surcharge. Learned senior counsel for SPL submitted that late payment surcharge may be dealt with separately and the petitioner be directed to pay at least the principal amount. We are of the view that the petitioner should liquidate the principal amount in terms of the bill raised vide SPL's letter dated 1.4.2016. Further, we agree with WRLDC that default trigger point is 31.5.2016 in terms of RPS Regulations on expiry of 60 days from the date of the issue of letter dated 1.4.2016.

14. The petitioner has submitted that in respect of the notice dated 21.5.2016 which pertains to the arrears arising out of the order of the Commission allowing various change in law events, the petitioner has been paying the bills regularly and the balance outstanding amount will be liquidated by 30.6.2016. We have noted that there is no dispute with regard to the bills covered under change in law and the undertaking of the learned counsel for the petitioner to liquidate the said amount in weekly installments within June 2016. As regards the dues covered under notice dated 20.5.2016, learned counsel for the petitioner submitted that due to financial constraints, the petitioner be permitted to pay the same in installments. Learned senior counsel for SPL submitted that the Commission may pass appropriate order and it may be clarified that in the event of failure of the petitioner to pay by the scheduled dates, the petitioner shall invoke regulation of power.

15. Considering the submission of the parties, we issue the following directions:

- (a) All outstanding dues on account of orders for change in law events shall be liquidated in weekly installments by 30.6.2016.
- (b) The principal amount (excluding the late payment surcharge) covered under the notice dated 20.5.2016 (on account of change in COD) shall be paid in three equal monthly installments by 5.7.2016, 5.8.2016 and 5.9.2016.
- (c) As regards late payment surcharge, we direct SPL and the petitioner to make efforts to settle the issue amicably. In case of dispute, either party is at liberty to approach the Commission for adjudication and appropriate direction.

(d) In case of default in payment as per our directions in sub-para (a) & (b) above, SPL will be at liberty to act in terms of the RPS Regulations read with the provisions of the PPA.

16. Learned counsel for UP (respondent nos. 3 to 6) submitted that the arrangement made in case of MP may be extended to UP. Learned senior counsel for SPL opposed the prayer and submitted that the direction issued in case of MP cannot be extended in the case of other procurers in the absence of appropriate applications for relief. We are of the view that SPL has issued notices to other procurers on account of default in payment. However, none of the other procurers have filed petitions against the notices for regulation of power. In the absence of proper petition seeking specific relief, no direction can be issued in favour of other procurers. However, considering the fact that other procurers have been arrayed as respondents in the present petition, we direct that if other procurers approach SPL for accommodation, SPL may consider their case in the light of our directions in para 15 above.

17. The representative of NLDC/WRLDC sought guidance with regard to the implementation plan for regulation of power supply in respect of the procurers in whose respect notices have been received from SPL. It is clarified that in the light of our directions in para 14 above, the notices for regulation of power supply in respect of the petitioner shall not be given effect to. In case of the failure on part of the petitioner to comply with our directions given in para 14 above, SPL shall be at liberty to act as per RPS Regulations after giving fresh notice to the petitioner and WRLDC. As regards the

other procurers, WRLDC shall take necessary action as per the decision taken by SPL in the light of our observation in para 16 above and conveyed to WRLDC.

18. Learned counsel for the petitioner submitted that the petitioner has filed a Civil Appeal in the Supreme Court against the judgment of the appellate Tribunal for Electricity dated 31.3.2016 in Appeal No.233 of 2014 and the directions to be issued by the Commission in the present petition may be made subject to the directions of the Hon'ble Supreme Court in the Civil Appeal. It is clarified that our directions in para 14 above are subject to such modification as may be considered necessary in the light of the directions to be issued by the Supreme Court in Civil appeal No. 5246 of 2016.

19. The petition is disposed of in terms of the above directions.

sd/-
(M.K. Iyer)
Member

sd/-
(A.S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson