



Delhi Electricity Regulatory Commission

Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi –110 017.

No. F.11(1200)/DERC/2014-15/4668

Petition No. 25/2015

In the matter of: Petition seeking declaration and correct interpretation of the provisions of Energy Purchase Agreement (EPA) dated 20th January, 2010 and Amended EPA dated 27th July, 2011.

Timarpur Okhla Waste Management Co. Ltd.

....Petitioner

Vs.

BSES Rajdhani Power Ltd.

....Respondent No. 1

Delhi Transco Ltd.

....Respondent No. 2

Coram:

Hon'ble Shri Justice S. S. Chauhan, Chairperson

Hon'ble Dr. A. K. Ambasht, Member

Appearance:

1. Mr. Hemant Sahai, Adv. TOWMCL,
2. Mr. Buddy Ranganadhan, Adv., BRPL
3. Mr. Suresh Kumar Chaturvedi, Adv., DTL

ORDER

(Date of Order: 13.04.2020)

1. The instant petition has been filed by the Petitioner for resolution of dispute which has arisen between the petitioner and the respondents relating to interpretation, meaning and applicability of some of the provisions of the Energy Purchase Agreement (EPA) executed between the parties on 20.01.2010 and amended EPA dated 27.07.2011.

Brief Facts of the dispute

2. A dispute has arisen after the petitioner served EPA termination notice dated 10.09.2014 followed by another notice dated 16.09.2014 on Respondent No.1, for using the entire contracted power for captive use in respect to Okhla WtE plant in terms of the Energy Purchase Agreement dated 20.01.2010.

The relevant portion of the notice dated 10.09.2014 is reproduced below;

"In reference to the following recital of Energy Purchase Agreement dated 20.01.2010 as reproduced below,

AND WHEREAS, in case the generating company decides to use the entire power for its captive use, it shall serve a notice to the Procurer. Procurer reserves the right to disconnect the plant serving a reply to the notice and providing a reasonable timeframe i.e., maximum 6 months for alternate connectivity arrangement of the plant.

The Generating Company i.e. Timarpur Okhla Waste Management Company Private Limited hereby has decided to use the entire contracted power under the said EPA for its captive use with effect from 01.10.2014 as per the provisions of Electricity Act, 2003 and the Electricity rules framed thereunder.

Accordingly, the undersigned is issuing the instant notice for termination of the Energy Purchase Agreement dated 20.01.2010 with effect from 01.10.2014."

The petitioner in the notice dated 16.09.2014 quoted following (para 5 (iv) to 5(vi) of DERC Tariff adoption order dated 20.01.2011.

" 5(iv): The Petitioner applied to the Commission for captive consumption of power vide representation letter dated 19.08.2008 in response to which the Commission conveyed that the said matter should have been referred to the NDWPCL/Procurer (BRPL). Accordingly, TOWMCL obtained "no objection" from IEWMCL (erstwhile NDWPCL) for captive consumption, which was communicated to the Commission vide letter of (erstwhile NDWPCL) vide letter dated 29.06.2009. The letter states "Our Company has no objection if the Commission allows captive use of power generated from the project."

5(v): EPA was subsequently executed on 20 January 2010, under which the BRPL has right to purchase 50% of ex bus energy generated in the project (after deducting auxiliary consumption of 22%).

BRPL refused to allow the possible use of BRPL sub-station in the event of the Petitioner deciding to use the entire power for captive/third party sale, by inserting a clause in the EPA to effect the disconnection of the Waste Treatment plant. TOWMCL has agreed to this clause due to its requirement of signed EPA and subsequent submission to the Commission.

5(vi) TOWMCL subsequently approached the Commission through a Petition dated 21.08.2009 for grant of Open Access and Permission for captive consumption from its Waste to Energy Plant. The Commission vide its letter dated 23.10.2009, communicated to the Petitioner that the Commission is not vested with powers to adjudicate upon matters relating to grant of open access & permission for captive consumption of the power generated from its waste to Energy Plant located at Okhla; and advised the Petitioner to take recourse before the appropriate forum.

Pursuant to the above said communication, the Petitioner, during the period November 2009 to January 2010 sought permission for open access from DTL for connectivity at 220/66KV Sarita Vihar substation at 66 KV Level. DTL vide letter dated 14.01.2011 informed that the open access to transmission system of DTL is subject to-

- a).....
- b).....
- c).....
- d).....
- e).....

In view of the above we would like to state that right of TOWMCL to declare Okhla WtE plant as captive is integral part of bidding process as acknowledged by Bidding agency IEWMCL and also confirmed by DERC/DTL subject to above conditions.

.....
.....

In view of the above we request you to kindly process our OA application No. D-SLDC-007 & D-SLDC-008 dated 11.09.2014 for short term open access under captive arrangement."

3. Thereafter, the Respondent No. 1, vide letter dated 24.09.2014 disputed the unilateral termination of EPA dated 20.01.2010 and amendment to EPA dated 27.07.2011 as illegal and arbitrary. Further, the Respondent No.1 in the said reply invoked Clause 22 of the EPA for mutual resolution of the dispute.
4. However, in spite of several meetings between the parties, the settlement to resolve the issue between the parties failed. It was mutually decided by both parties to take up the matter to Commission for clarification.

PETITIONER'S SUBMISSION

5. On 20.01.2010, an Energy Purchase Agreement (EPA) was executed between the Petitioner and BSES Rajdhani Power Ltd and in terms thereof, the Respondent No.1 agreed to purchase 50% ex-bus energy after the plant's auxiliary consumption of up to 22% from the petitioner's 16 MW capacity Plant on monthly basis, for a period of 25 years for onwards supply to consumers of the Respondent. The relevant extracts from the EPA are reproduced below:

"AND WHEREAS, the Generating Company agrees to supply, 100% of ex-bus energy (after its own auxiliary consumption of upto 22%) from 16 MW capacity plant i.e., minimum 6.5 MW out of 13 MW at ex-bus from Waste to Energy generating plant facility to the procurer, under the terms and conditions set forth herein.

AND WHEREAS, the procurer agrees to purchase 50% of ex-bus energy (after plant's auxiliary consumption of upto 22%) from 16MW capacity plant on monthly basis, for the entire period of contract for its consumption from such plant at tariff adopted by the Delhi Electricity Regulatory Commission pursuant to the Competitive Bidding as per Regulations.

AND WHEREAS, in case the generating company decides to use the entire power for its captive use, it shall serve a notice to the Procurer. Procurer reserves the right to disconnect the plant serving a reply to the notice and providing a reasonable time frame i.e., maximum 6 months for alternate connectivity arrangement of the plant.

6. The said EPA dated 20.01.2010 was amended vide an amendment dated 27.07.2011 whereby the recital clause of EPA was amended regarding the quantum of power to be supplied by the petitioner to the respondent. The said amended recital is as follows:

"AND WHEREAS, Minimum 50% of Generation on daily basis subject to 60 MUs per year shall be supplied to Procurer i.e., BRPL by Generating Company i.e., TOWMCL."

7. In terms of aforesaid recital, the petitioner should supply minimum 50% of generation from its plant on daily basis which is subject to 60 MUs per year. Thus, rest of the 50% power with the Petitioner is surplus energy

remaining with it which can be utilized by the Petitioner for third party sale including the Respondent. For the above mentioned surplus energy, the Commission has not determined any tariff which can be supplied to Respondent's distribution licensee areas.

8. The project being non-conventional energy development project involving the use of Municipal Solid Waste to generate electricity, it is necessary to encourage the developer with a tariff which is not only cost reflective but also provides sufficient additional incentives to induce necessary investment. This is also necessary to enable the lenders and other investors to support the project. Other Renewable Energy Technologies like wind, solar thermal, solar power etc., which have a higher impact on the cost of purchase to the final consumer are being given promotional tariff by the State Commission. This renewable energy technology is not only relatively cost effective but is also to simultaneously solve the burgeoning problem of increasing Municipal Solid Waste.
9. The Electricity Act, 2003, envisages promotion of generation of Electricity from Non-Conventional Sources. Section 3 of Electricity Act 2003, provides that the Central Government shall, from time to time, prepare the National Electricity Policy and Tariff Policy, in consultation with the State Government and the Central Electricity Authority for development of the power system based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.
10. Section 86 (4) of the Electricity Act 2003 provides that State Commission in discharge of its functions shall be guided by National Electricity Policy, National Electricity Plan and Tariff Policy published under Section 3 of the Electricity Act, 2003.
11. The Petitioner has decided to use and utilize the power for captive purposes. The Petitioner duly qualifies the conditions as stipulated in section 2 (8) of the Electricity Act, 2003 read with Rule 3 (1) (a) (i) of Electricity Rules, 2005. Since inception of the project it was mandatory

that the Electricity generated in the plant had to be utilized as per the terms of the EPA.

12. The petitioner is a 100 % subsidiary of Jindal Urban Infrastructure Ltd. (JUIL), which in turn is 100% subsidiary of JITF Ecopolis (JITF) which is owned by Jindal Saw Limited. The Jindal Saw Limited holds 26% of paid-up share capital of the petitioner. Since the petitioner collectively wanted to utilize the power for its own purpose, therefore, it requested the respondent by showing its intention for captive use. The petitioner relied upon the provision of the EPA which stipulates that in case the generating company decides to use the entire power for its captive use, it shall serve a notice to the procurer. Procurer reserves the right to disconnect the plant serving a reply to the notice and provide a reasonable time frame i.e. maximum 6 months for alternate connectivity arrangement of the plant. A notice was served by the petitioner on 10.09.2014 and 16.09.2014 making its intention clear that the petitioner is intending to use the power for captive purpose.
13. It has been stipulated in the agreement/EPA that the right of the petitioner for use of the Electricity for captive purpose enjoys a preference. Yet, the respondents on one pretext or the other raised dispute and vide letter dated 27.11.2014, alleged that in the discussion held on 30.09.2014 the respondent never agreed that petitioner can use its power for captive purpose and suggested to invoke clause 22 of the EPA for the resolution of dispute amicably. The said provision of clause 22 of the EPA has been exercised and also exhausted by the petitioner. Despite this, the matter is unresolved and a dispute has been raised by the respondent without any basis and purpose. The petitioner states that since inception of the project including at the time of the Request for the Proposal (RFP) and Request for Qualification (RFQ), it was mandated that the electricity to be generated in the plant had to be utilized only as per the terms and conditions of the EPA. It is a matter of record that the EPA executed between the parties provided that, the electricity would be supplied to BRPL only until Petitioner declared to use the entire power for captive use.

14. Captive use of the power generated by the plant was not restricted in any manner whatsoever at the time of RFP, RFQ and even the Concession Agreement. Therefore, the captive use of the power generated by the plant was evident since the conceptualization of the plant. Further, at all times thereafter i.e, during the process of negotiations, deliberations and finalization of the EPA, execution thereof, final approval by the DERC and amendment of the EPA thereafter, the captive use by Petitioner of power generated by the Plant was expressly stated and agreed upon.
15. It is a matter of record that, BRPL acknowledged and agreed on the option of the Petitioner to use the entire power generated by the plant for its captive use. As per the provisions of the EPA, Respondent No. 1 is required to provide a reasonable time frame (maximum of 6 months) for alternate connectivity arrangement of the Plant from its sub-station, in order to allow Petitioner to use the power generated by the Plant for captive purposes.
16. During the proceedings of Petition no. 18/2010, Respondent has taken the position that it would disconnect the plant in the event of Petitioner deciding to use the entire power for captive/third party sale. That the DERC, while according approval to the EPA vide Order dated 20.01.2011 in Petition No.18/2010, had observed that the said provision relating to captive use was inserted in the EPA by the Parties to give effect to the agreement arrived between the parties. As and when Petitioner decides to use the entire power for captive use, it would not be required to provide power to BRPL.
17. The entire power is a well understood term and it means power being the subject matter of EPA with the respondent, which is only 8 MW. The EPA was executed only for 50% of the then plant capacity i.e 16 MW ex-bus energy (after auxiliary consumption of up to 22%). In the circumstances, Respondent No. 1 is only entitled to 50% of the then plant capacity i.e, 16MW ex-bus energy (after auxiliary consumption of up to 22%). The respondent in no manner can claim 50% of the entire generation of electricity, in case the generation exceeds the limit of 16MW (by optimum utilization of plants and machinery) or the target of 60 MUs supply is achieved. It means there is sealing of 60 MUs per

annum and once this level is achieved, the respondent cannot compel the petitioner to supply further power. It has no link with the current generation and the petitioner cannot be compelled to supply 50% of its generation in case the generation exceeds the limit of 16MW. The maximum supply as stipulated in the amended EPA of 60 MUs will act as cap and will discharge the petitioner from any obligation under the EPA if this target is achieved in a year, generation made in the balance per year shall be free from any obligation under EPA.

18. The petitioner approached the respondent requesting that EPA does not require the petitioner to continue to supply the energy in case the target of 60MUs has been achieved and the rest of the power generated in the year is free from any condition under the EPA, the petitioner is free to opt for captive use of the power being a subject matter of EPA. However, the respondents on one pretext or other have refused and neglected to consider the request by misreading the provisions of the Act and the EPA. The petitioner in this regard has sent various letters on 10.09.2014, 16.09.2014, 21.10.2014, 24.11.2014 and 22.01.2015 and various correspondences followed by a Director and CEO level meeting in this regard on 14.01.2015.
19. The project in question has been set up in public interest and owing to heterogeneous nature of waste, low tariff and collapse of carbon market, the said project is continuously running into losses.
20. After exhausting all remedies, the petitioner has invoked the provisions of Section 86 (1) (f) of the Electricity Act, 2003 for resolution of dispute.

RESPONDENT'S SUBMISSIONS

21. Per contra, Respondent No.1 refuted the submission made by the Petitioner. Petitioner is wrongly interpreting the subject matter already heard by the Commission vide Petition No. 18/2010 filed by the Petitioner. Respondent never agreed that the Petitioner can use its entire power for captive purpose and clarified the same to the Petitioner vide their letter dated 27.11.2014 and that any reference to that extent in the communication dated 21.10.2014 & 24.11.2014 is denied.

22. On 19.08.2008 the petitioner applied to the Commission for captive consumption of power vide representation letter, in response to which the Commission conveyed that the said matter should have been referred to NDWPCL/Procurer (BRPL).
23. On 21.08.2009, Petitioner approached the Commission through a petition for grant of Open Access and Permission for captive consumption from Waste to Energy Plant.
24. On 23.10.2009, the Commission vide its letter, communicated to the Petitioner that the Commission is not vested with power to adjudicate upon matters relating to grant of open access & permission for captive consumption of the power generated from its waste to Energy Plant located at Okhla; and advised the Petitioner to take recourse before the appropriate Forum.
25. The petitioner is attempting to interpret the abovementioned amended recital clause, restricting the right of the Respondent to 60 MUs only which is contrary to the terms of the EPA read with Order dated 20.01.2011 passed by the Commission, and amended EPA dated 27.07.2011. The Order dated 20.01.2011 passed by the Commission has attained finality for the same has not been challenged. In its order dated 20.01.2011, the Commission had issued clear directions that both the parties shall abide by the terms and conditions of the Letter of Intent and the EPA, thereby clarifying that the Petitioner is under a contractual obligation to adhere by the terms and conditions.
26. The respondent No.2 Delhi Transco Limited in its reply submitted that the instant petition is relating to the interpretation of the term "Entire Power" and declaration relating to entitlement of use of power between the petitioner and Respondent No.1, which arose out of the agreement/EPA dated 20.01.2010 and 27.01.2011, wherein the respondent has nothing to do as after 01.04.2007, the Power Purchase Liability have been transferred to the relevant DISCOMs and thereafter, the DISCOMs are directly dealing with the generator and therefore, the respondent No.2, DTL has nothing to do in the present controversy.

27. The petitioner has made the following prayers;
- a. direct, declare and hold that petitioner is entitled to use the share of power of the respondent, i.e. 50% of generation of power being subject matter of EPA dated 20.01.2010 and amended EPA dated 27.07.2011 for captive purpose.
 - b. Direct, declare and hold that "Entire Power" means 50% of 16MW, ex-bus energy, after auxiliary consumption of upto 22%, this will not apply on the generation over and above 16MW and;
 - c. Direct, declare and hold that the total supply of energy is limited to 60MUs per annum and petitioner cannot be compelled to supply more than 60MU to respondent in case the target of 60MUs is achieved early in the year, the Petitioner is free to sale the balance power in market.

COMMISSION'S ANALYSIS

28. The above prayer has been made in the light of the provision made in the EPA dated 20.01.2010 and amended EPA 27.07.2011 and has drawn the attention of the Commission towards particular provision of the EPA dated 20.01.2010 wherein the following provision has been made:

"AND WHEREAS, In case the generating company decides to use the entire power for its captive use, it shall serve notice to the Procurer. Procurer reserves the right to disconnect the plant serving a reply to the notice and providing a reasonable timeframe i.e. maximum 6 months for alternate connectivity arrangement of the plant."

29. Relying upon this arrangement in the EPA, the Petitioner has claimed that in case the Petitioner so wishes to use his entire power for captive use he shall be given liberty to that extent to use entire power for captive use. However, the Petitioner had earlier approached this Commission for adoption of tariff and for approval of Energy Purchase Agreement (EPA) executed between the parties w.r.t. 16MW of plant to be setup. In the said order in Petition No. 18/2010 dated 20.01.2011 while adopting the tariff the Commission had made some observation which shall be deemed *obiter dicta* as that issue was neither directly raised nor was required to be adjudicated in that petition. A passing observation made by the

Commission at earlier point of times without the issue being raised by the parties claiming their rights on the basis of EPA, such observation which has been made and that too overlooking the provisions of the EPA dated 20.01.2010 will be out of the context and the said observation will be treated as *per incuriam*. The observation made by the Commission at earlier point of time in Petition no. 18 of 2010 on 20.01.2011 was as follows;

“After supplying the allocated energy to BRPL, if there is any surplus energy generated from the plant, TOWMCL shall be entitled to use remaining energy for captive purpose/to be sold to Third Party, after obtaining open access from SLDC, Delhi and other Agencies as applicable”.

30. While recording this finding, it is clear that the Commission ignored the relevant clause of the EPA dated 20.01.2010. If the said clause is to be understood in the right context, then interpretation which can be adopted by the Commission is only to the effect that if the Petitioner wants to use the entire generation for captive purpose then it will have to find out an alternate arrangement for connectivity, apart from connectivity which is continuing. Thus, it is for the petitioner to make alternate arrangement for connectivity when he claims under this clause, and if it fails to arrange alternate connectivity, then obviously it will not be entitled for the benefit of this clause. From the reading of the above clause, it is clear that the intention of the parties while entering into EPA has to be looked into and liberty has to be given to the Petitioner to go for captive generation, if it so desires. In the above circumstances, the Petitioner will be entitled for captive generation as provided in the EPA by making alternate arrangements, for connectivity.

31. The Commission on 20.01.2011 in Petition No. 18/2010 had *inter alia* passed following order in the matter:

“3. This present Petition No. 18/2010 has been filed on 11.05.2010 by TOWMCL in accordance with directions of the Commission vide its Interim Order No. F.3(164)/Tariff/DERC dated 31.03.2008, in Petition no.37/2007. The direction of the Commission to the Petitioner viz, Timarpur Okhla Waste Management Company Pvt. Ltd. (TOWMCL) as given in clause 21 of the said interim Order, are reproduced below:

"21. The Commission further directs the M/s NDWPCL to provide certificate of conformity of the bidding process according to clause 6.2 of the guidelines issued by the Central Government. Further, the procurer has to make public bid document indicating all the components of the tariff quoted by all the bidders after signing the PPA or PPA becoming effective, whichever is later. The Commission will adopt the tariff in terms of Section 63 of the Act after receiving the signed PPA or PPA becoming effective, whichever is later. The Commission will adopt the tariff in terms of Section 63 of the Act after receiving the signed PPA along with certificate by the Evaluation Committee. This interim order will become part of the order to be issued by the Commission on adoption of tariff in terms of Section 63 of the Act."

32. Subsequent to Commission's order dated 20.01.2011, the EPA dated 20.01.2010 was amended vide an amendment dated 27.07.2011 whereby the recital clause of EPA was amended regarding the quantum of power to be supplied by the petitioner to the respondent. The said amended recital is as follows:

"AND WHEREAS, Minimum 50% of Generation on daily basis subject to 60 MUs per year shall be supplied to Procurer i.e., BRPL by Generating Company i.e., TOWMCL."

33. That from a 13MW plant after adjusting for plant's auxiliary consumption of 22% from 16 MW capacity, the Commission observed that the maximum annual generation at ex-bus would be as follows:

At 13MW ex-bus capacity

13MW x 24hrs. x 365days/1000 = 113.88 MUs

50% of above generation is equivalent to 56.94 MUs which was capped to 60MUs in a year for BRPL.

CONCLUSION

34. In the light of the above discussions and reasons therein, it is ordered that the Petitioner will be entitled for captive generation as provided in

the EPA dated 20.01.2010 and amended EPA dated 27.07.2011, while making alternate arrangements for connectivity and if the Petitioner fails to arrange alternate connectivity, then he will not be entitled for the benefit of this clause. It is further ordered that 50% of the maximum annual generation at ex-bus which is equivalent to 56.94 MUs with a cap of 60 MUs in a year would be for BRPL. The Petition is disposed off accordingly.

Sd/-
(Dr. A.K. Ambast)
Member

Sd/-
(Justice S. S. Chauhan)
Chairperson