

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 1971 of 2021.

In the Matter of:

Petition under Section 62 read with Section 86 (1) (b) of the Electricity Act, 2003 for approval of PPA signed by GUVNL with Gujarat State Electricity Corporation Limited (GSECL) for 800 MW Wanakbori Unit No. VIII on 1st January 2011.

Petitioner : Gujarat Urja Vikas Nigam Limited (GUVNL)
Represented By : Ld. Adv. Mr. Anand Ganesan with Ms. Sailaja Vachhrajani and Mr. S. S. Mistry
V/s.
Respondent : Gujarat State Electricity Corporation Limited
Represented By : Mrs. K. H. Chadderwala, Mr. Nitin B. Kansara, and Mr. Y. A. Pathak
Objector : Utility Users' Welfare Association
Represented By : Mr. Bharat T. Gohil

CORAM:

**Mehul M. Gandhi, Member
S. R. Pandey, Member**

Date: 19/03/2022.

DAILY ORDER

1. The present matter was heard on 10.03.2022.
2. Heard Ld. Adv. Mr. Anand Ganesan, on behalf of the Petitioner GUVNL in the present matter. It is submitted that considering requirement of power in the State at relevant time, the Petitioner had executed Power Purchase Agreement (PPA) with the Respondent Gujarat State Electricity Corporation Limited (GSECL) for procurement of electricity generated from 800 MW Coal based Unit No. VIII at Wanakbori Thermal Power Station for the period of 30 years. The Petitioner by way

of present Petition has approached the Commission for approval of said PPA executed between the parties and ideally the said Petition for approval ought to have been at relevant time. However, since the Petition is filed under Section 62 of the Electricity Act, 2003 and PPA has not been executed under competitive bidding process under Section 63 of the Electricity Act, 2003, the PPA contains all tariff and technical parameters as per MYT and Tariff Regulations of the Commission except PPA tenure of 30 years instead of 25 years. It is submitted that since the PPA was executed on 01.01.2011 prior to MYT Regulations special allowance in PPA tenure was considered at relevant time and even otherwise if the plant is capable of supplying electricity after term of 25 years, the same is generally allowed. It is submitted that in any case the tariff under said PPA to be governed as per MYT Regulations of this Commission.

3. In response to query of the Commission as to whether the Petitioner has received the copy of the submissions from the objector UUWA, Ld. Adv. for the Petitioner submitted that GUVNL has not received the same till date and requested that the copy may be made available so that the Petitioner can file its reply to submissions of UUWA, within a weeks' time.
 4. Mrs. K. H. Chadderwala appearing on behalf of the Respondent GSECL, submitted that 800 MW coal based Unit No. VIII at Wanakbori is now operating/running at its full rated capacity although earlier there was delay due to design change and some other issues.
 5. Mr. Bharat Gohil, appearing on behalf of the Objector Utility Users' Welfare Association (UUWA), agreed that copy of the submissions filed by UUWA in present matter will be provided to the Petitioner to enable filing of reply. It is submitted that the present Petition is unique in nature wherein the Petitioner GUVNL has prayed to approve Power Purchase Agreement executed with the Respondent GSECL on 01.01.2011 for procurement of 800 MW power from its Wanakbori Generating Unit No. 8. It is submitted that on that ground itself present Petition is not admissible and maintainable when this Commission is approached almost after a decade.
- 5.1. It is submitted that there are two routes under the Electricity Act, 2003 for procurement of power by Distribution Licensee, viz, (i) cost plus basis under

Section 62 wherein the Commission has to determine the cost of power supply by considering various expenditure as controllable and uncontrollable and for which the Commission has framed Tariff Regulations and Multi Year Tariff Regulations under Section 181 of Electricity Act, 2003 and (ii) Adoption of the tariff discovered under competitive bidding process under Section 63 of the Electricity Act, 2003 as per the guidelines prescribed by Ministry of Power, Government of India.

5.2. It is further submitted that CERC vide its letter dated 01.06.2010 has issued statutory advice to Ministry of Power, Government of India regarding timeframe for tariff based competitive bidding as per provisions of the Electricity Act, 2003 and National Tariff Policy. Referring to para 4, 5 & 6 of the said letter, it is submitted that the present Petition has been filed in gross violation of said statutory advice dated 01.06.2010 by CERC given under Section 79(2) of the Electricity Act, 2003 to Ministry of Power, Government of India. It is submitted that CERC in its statutory advice dated 01.06.2011 has on basis of tariff as per cost plus route of different 14 generating plants under Section 62 and tariff discovered under competitive bidding as per guidelines of Ministry of Power, Government of India has stated that tariff under competitive bidding route is preferable and cost plus tariff approach is not in interest of consumers.

5.3. It is also submitted that the Hon'ble APTEL in its judgment dated 31.03.2010 in Appeal No.'s 106 & 107 of 2009 in the case of BSES Rajdhani Power Limited V/s. DERC has made the issue crystal clear that the Commission is bound to approve only the tariff which is found lower either under cost plus route of Section 62 or by competitive bidding under Section 63 of Electricity Act, 2003. It is further submitted that as per Article 141 of the Constitution of India, this Commission is required to follow the principle laid down by Hon'ble APTEL in its judgment dated 28.07.2016 in Appeal No. 188 of 2015 in matter of *Torrent Power Limited vs. U.P. Electricity Regulatory Commission & Ors.*

5.4. It is also submitted that the status of Petitioner GUVNL is a trader and is deemed trading licensee under Section 131(2) read with Section 14 of Electricity Act, 2003 and not a Distribution licensee and accordingly has no authority to procure power on behalf of Distribution Licensees/Discoms as per provision of the Electricity Act, 2003 and Regulations made thereunder and the judgment dated 28.07.2016 in

Appeal No. 188 of 2015 of the Hon'ble APTEL in the case of Torrent Power Limited V/s. UPERC & Ors. which permits such type of arrangement and also gives the jurisdiction or power to the Commission to approve such arrangement and agreement. There is no authorisation of four subsidiary distribution companies of the Petitioner GUVNL for such procurement. Therefore, all four DISCOMs are required to be made parties to the present Petition. This Commission has issued Notification No. 2 of 2013 regarding guidelines for procurement of power and Clause 5 of said guidelines clearly stipulates that distribution licensees to initiate process for procurement of power in case of shortfall; whereas in present case there is no approval by DISCOMs. Similarly, Clause 9 of above guidelines provides for getting prior approval of the Commission which is still pending and yet power is being procured.

- 5.5. Referring to para 2, 6, 9, 10, 12 and 17 of the Commission's Guidelines for Procurement of Power by Distribution Licensee notified vide Notification No. 2 of 2013, it is submitted that Clause 2 states that in order to ensure standardization and reduce subjectivity in power procurement and to protect consumers' interest through a process of transparent and economic procurement of power, the Commission direction to all Distribution Licensees in the State is to follow the procedure laid down in Guidelines for procurement of power. It is submitted that the PPA has been executed on 01.01.2011 and the approval by trading licensee is proposed by virtue of the present Petition after 10 years is not only a mockery of the Regulatory Statutory Institution but also a clear cut case of bye passing the Regulatory Authority by proving that the Petitioner is regulating the regulatory body which is a big stigma on the credential of the Commission. It is also submitted that the Petitioner GUVNL is not a Distribution Licensee and also not submitted the details regarding quantum of power, justification for selecting a particular source/technology and the draft PPA document, which is in contravention and violation of the Guidelines of the Commission. It is also submitted that the present Petition has been filed for the approval of PPA by a trading licensee instead of distribution licensee who have entered into the PPA on 01.01.2011, which is required to be submitted for approval of the Commission on or before 02.03.2011. Moreover, there is no application seeking condonation of delay in filing Petition for seeking approval of PPA.

- 5.6. It is further submitted that the Petitioner has filed the present Petition under Section 62 of the Electricity Act, 2003. Therefore, question arises since it does not fulfil the criteria in view of the fact that tariff under Section 62 is required to be determined by the Commission only in the case when there is a supply from a generating company to the distribution licensee and the Petitioner GUVNL is not a distribution licensee. Therefore, the Commission has no jurisdiction to determine the tariff and approve the PPA under Section 62(1)(a) of Electricity Act, 2003. There is no approval of tariff on cost plus basis under Section 62 of Electricity Act, 2003 in terms of approval of PPA between any of the Discoms and GSECL which gives jurisdiction to the Commission to approve such PPA. It is submitted that it is the sole responsibility of the Distribution licensee to procure the power to cater to their consumers in their licensed area. Therefore the present Petition is not admissible & maintainable and accordingly required to be dismissed.
- 5.7. It is also submitted that the Petition is also not fulfilling the requirement of Section 86(1)(b) of the Electricity Act, 2003, since as per said Section this Commission is empowered to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. Since, GUVNL is not a Distribution Licensee and therefore, the Commission cannot approve/regulate such power procurement in terms of approval of PPA between a trading licensee and a generating company.
- 5.8. After referring para 4.10.1 of Tariff Order dated 17.01.2009 in Petition No. 945 of 2008, it is submitted that even if it is assumed that the Petitioner GUVNL has been provided with any authority from Govt. of Gujarat being its instrumentality whereby it may be considered that GUVNL has been entrusted with the work of procurement of power on behalf of DISCOMs forever but the Commission is required to act independently according to the provisions of the Electricity Act, 2003 read with objects and reasons for enacting the said Act, wherein there is no provision that any trading licensee can procure power on behalf of the Distribution Licensees and GUVNL has also not produced any back to back power sale agreement with any of the Discoms. It is also submitted that while trying to find out

the base on which the Commission is approving such Bulk Supply Power tariff beyond its jurisdiction and in violation of provision of the Electricity Act, 2003, Regulations, Rules, National Tariff Policy, National Electricity Plan, it is found that nowhere the Commission is empowered to do so. Even under Section 108 of the Electricity Act, 2003 the Commission is not empowered to allow the Petitioner GUVNL to procure power on behalf of Discoms.

- 5.9. It is further submitted that such type of Petition cannot be allowed wherein the proposal for approval is delayed by more than 10 years when the guidelines clearly state time limit of 30 days. It is also submitted that the Petitioner has also failed to justify the power procurement without following competitive bidding process as per guidelines prescribed by MoP, GoI under Section 63 of the Electricity Act, 2003 from Wanakbori power generating station of 800 MW of its subsidiary company GSECL and how the consumers are going to be benefited by such procurement of power on cost plus tariff wherein the fixed charge per unit is more than the power available in IEX / open market. The financial burden on account of inefficiency and imprudent investment of GUVNL and GSECL units cannot be thrust upon the consumers and that to in total contravention, gross violation of all provision of Electricity Act, 2003, National Tariff Policy, Statutory Advise to MoP, GoI by CERC, the judgments of Hon'ble APTEL, GERC Guidelines for Procurement of Power by Distribution Licensee, 2013.
- 5.10. It is submitted that the present Petition filed by GUVNL is in gross violation of the provision of the Electricity Act, Regulations, Rules, policies etc. because the necessary data on which cost plus basis tariff is proposed to be determined is not submitted along with the Petition, wherein monetary liabilities of the parties is to be determined and hence is liable to be rejected as per Section 64 (3) (b) of the Electricity Act, 2003 read with Clauses 31, 42 and 44 of GERC (Distribution Licensee) Regulations, 2005, Commission's Guidelines for Procurement of Power by Distribution licensee, Clause 21 (a)(i) of GERC (Licensing of Electricity Trading) Regulations, 2005, Clauses 5.1 and 8.4.2 of National Tariff Policy 2005 and 2016, Sections 61, 62 and 86 (1)(a) and (b) of Electricity Act, 2003 and also in view of the judgment held by the Hon'ble Supreme Court and mentioned by Hon'ble Delhi High Court in W.P (C) No. 17063 of 2006 and CM No. 14064 of 2006 in the case of Harvindar Motors V/s. B.S.E.S. Rajdhani Power Limited.

- 5.11. It is submitted that the Commission is bound under Article 141 of Constitution of India to follow the principle laid down by the Hon'ble APTEL in its Order Dated 21.07.2006 passed in Appeals No. 155, 156, 157 of 2005 in the case of BSES Rajdhani Power Limited V/s. DERC, 2007 ELR (APTEL),1370. Therefore, it is requested that the Commission needs to reject the present Petition being not in line with the provision as required by the Electricity Act and the Regulation framed thereto and also when the facts and data are not provided along with the Petition is contrary to the requirement of the law.
- 5.12. It is submitted that the Commission has to act as per the Order dated 27.06.2007 of the CERC in Petition No. 33/2007 in Petition No. 26/2007 in the case of NTPC Limited Vs. UP Power Corporation Limited wherein it is stated that it is fundamental principle of construction that Rules/Regulations made under the Statute are treated exactly as if they were in the Statute and have same effect. It is further submitted that Clause 5.8.5 of the National Electricity Policy contemplates that all efforts will have to be made to improve the efficiency of operations in all the segments of the industry and suitable performance norms of operations together with incentives and disincentives will need to be evolved along with appropriate arrangement for sharing the gains of efficient operations with the consumers for ensuring the protection of consumers' interests on the one hand and to provide motivation for improving the efficiency of operations on the other side.
- 5.13. It is also submitted that Clause 5.8.6 of National Electricity Policy (NEP) contemplates that competition will bring significant benefits to consumers, in which case, it is competition which will determine the price rather than any cost plus exercise on the basis of operating norms and parameters. All efforts will need to be made to bring the power industry to this situation as early as possible, in the overall interest of consumers. Clause 5.13.4 of NEP also states that the Central Government, the State Governments and Electricity Regulatory Commissions should facilitate capacity building of consumer groups and their effective representation before the Regulatory Commissions for enhancement of the efficacy of regulatory process.
- 5.14. It is submitted that Clause 5.1 of National Tariff Policy, 2005 and 2016 contemplates competition in different segments of the electricity industry as one of

the key features of the Electricity Act, 2003. Competition will lead to significant benefits to consumers through reduction in capital costs and also efficiency in operations. It will also facilitate determination of price/tariff competitively. The Central Government has already issued detailed guidelines for tariff based competitive bidding process for procurement of electricity by distribution licensees for medium or long-term. All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and where Regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity. Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of competitive bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition.

5.15. It is submitted that Clause 8.4.2 of National Electricity Policy states that existing PPAs with the generating companies would need to be suitably assigned to the successor distribution companies. The State Governments may make such assignments taking care of different load profiles of the distribution companies so that retail tariffs are uniform in the State for different categories of consumers. Thereafter, the retail tariffs would reflect the relative efficiency of distribution companies in procuring power at competitive costs, controlling theft and reducing other distribution losses.

5.16. It is submitted that the Commission has not implemented Clause 8.4.2 of National Tariff Policy 2005 and 2016 to get the PPAs assigned to Distribution Licensees as per their load profile even after 17 years of enactment of the Electricity Act, 2003 and 15 years of National Tariff Policy resulting in increase of consumers' tariff in terms of fixed cost payment to the generating companies without supply of electricity more particularly gas based stations of GSECL. It is also submitted that PLF of GSECL is only around 30% and still availing full fixed cost for its old plants whose life is already over. On one hand annual PLF keeps reducing year on year basis but on other hand capacity is being increased. It is necessary that units of

GSECL qualify under Merit Order but as per the Tariff Regulations framed by the Commission wherein recovery of fixed cost is allowed on Plant Availability Factor (PAF) rather than PLF whereas previously, the GERC (Terms & Conditions of Tariff) Regulations, 2005 allowed fixed cost recovery on PLF and not on PAF.

- 5.17. It is submitted that the Petitioner has filed the present Petition for approval of PPA dated 01.01.2011 without any prior approval of such power procurement arrangement from GSECL for 800 MW. The whole scheme of power procurement from GSECL is without any justification or how it will be beneficial as against competitive bidding route, what will be capital investment in plant, land, machinery, what kind of technology is to be used, what kind of fuel is to be used, whether Fuel Supply Agreement and Fuel Transportation Agreement is executed with the fuel supplier and transporter by the generator, whether construction contract has been awarded by competitive bidding, how the boilers and generating machinery is to be procured, whether imported or indigenous and by open bidding process or the supplier is selected with limited tenders, date of commissioning, performance guarantee test is done or not, scheme of finance, amount of loan is 70% from the financial institution or not, financial terms, tenure and its agreement, rate of interest, details of mortgage to be given against the loan, sources of fund for 30% equity, details of manpower and so many other aspects are required to be approved by the Commission at the relevant time before entering into PPA.
- 5.18. It is submitted that the Petitioner GUVNL has entered into more PPAs than its total demand of 16000 MW and is still continuing to enter in PPAs. The burden of fixed cost to be paid to generators is being borne by the consumers of Gujarat and the situation has become worst because tariff in Gujarat is so high that the industries like steel, plastic, textile, foundry have become sick and are not able to compete in the national as well as international market. The generation is delicensed activity by enactment of the Electricity Act, 2003. In case of GUVNL and GSECL are getting the returns without generating the electricity, which has led to this situation of higher tariff. The Discoms with whom this PPA is to be allotted is also a necessary party to this Petition and the Petitioner GUVNL is also required to further submit back to back sale agreement with the Discoms.

5.19. Based on the above submissions, it is requested that the Commission may dismiss the present Petition and to allow the prayers of UUWA as stated in its submissions.

6. We note that Ld. Adv. Mr. Anand Ganesan appearing on behalf of the Petitioner GUVNL submitted that copy of submissions filed by UUWA may be made available to enable filing reply to same and Mr. Bharat Gohil appearing on behalf of UUWA has agreed to serve copy to the Petitioner as well as to the Respondent GSECL. Accordingly, we direct the Petitioner and the Respondent GSECL to file their reply in response to submissions filed by UUWA.

7. Next date of hearing will be intimated separately.

8. Order accordingly.

Sd/-
[S. R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Place: Gandhinagar.

Date: 19/03/2022.

