

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.119/MP/2021

Coram:

**Shri I.S Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 7th February, 2023

In matter of:

Petition under Section 79 (1) (f) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 23.3.2011 seeking appointment of Arbitrator for resolution of disputes between Tata Power Delhi Distribution Limited and THDC Limited.

And

In matter of

Tata Power Delhi Distribution Limited,
NDPL House, Hudson Lines
Kingsway Camp,
Delhi-110 009

...Petitioner

Vs.

THDC India Limited,
Corporate Office, Rishikesh,
Pragatipuram, By Pass Road,
Rishikesh-249201, Uttarakhand.

...Respondent

Parties present:

Shri Venkatesh, Advocate, TPDDL
Shri Ashutosh K. Srivastava, Advocate, TPDDL
Shri Bharath Gangadharan, Advocate, TPDDL
Shri Jayan Bajaj, Advocate, TPDDL
Shri Anurag Bansal, TPDDL
Ms. Anushree Bardhan, Advocate, THDC
Ms. Tanya Sareen, Advocate, THDC
Shri Rajesh Sharma, THDC
Shri Mukesh Kumar Verma, THDC
Shri Ajay Vaish, THDC
Shri Rakesh Singh, THDC



ORDER

The Petitioner, Tata Power Delhi Distribution Limited has filed this Petition seeking the following reliefs:

- (a) Allow the Petition and appoint an arbitrator for adjudication of the dispute between the parties;*
- (b) Pass such other and further Order(s) as this Hon'ble Commission may deem fit and proper in the fact and circumstances of the present case.*

1. The Petitioner, in this petition, has sought the appointment of arbitrator for resolution of disputes between the Petitioner and the Respondent, through arbitration, in terms of Section 79(1)(f) of the Electricity Act, 2003 ('the Act') read with Article 12 of the Power Purchase Agreement (PPA) dated 23.3.2011. The PPA was executed by the parties for supply of power from the (1000 MW) Tehri Pumped Storage Plant (in short 'the Project') to be constructed by the Respondent. It has submitted that the tentative COD of the Project was 31.12.2014, but the same has not been commissioned till date. The Petitioner has further submitted that it was constrained to terminate the PPA vide letter dated 12.1.2021, due to reasons such as (a) an unexplained delay of seven years in the commissioning of the Project by the Respondent (b) the levelized tariff calculated by the Respondent at the time of execution the PPA was Rs.4.51/kWh, which is now expected to be around Rs.10/- to Rs.11/-per kWh, which is solely attributable to the delay in the commissioning of the Project and the resulted increase in associated costs (c) the Petitioner had to make alternative arrangements to meet its power purchase requirements, which resulted in severe financial implication for the Petitioner (d) the purchase of power from the project at high rates is impractical/ imprudent and significantly different from the estimated tariff, at the time of executing the PPA. The Petitioner has also submitted that the Respondent vide its letter dated 29.1.2021, has refused to accept the termination notice stating that since the construction of the project is underway, the Petitioner is bound by the terms of the



PPA. It has accordingly submitted that the termination of the PPA by the Petitioner (vide letter dated 12.1.2021), and the subsequent denial of the same by the Respondent, to accept such termination (vide letter dated 29.1.2021), has resulted in disputes between the parties, within the meaning of Article 12 of the PPA. The Petitioner has also stated that an effective adjudication of the disputes between the parties, would necessarily require leading of evidence as well as examination of witnesses, to be carried out by an Arbitral Tribunal. Placing reliance on the judgement of the Hon'ble Supreme Court in *GUVNL vs Essar Power Limited (2008) 4 SCC 755*, the Petitioner has submitted that the Commission has the jurisdiction to entertain the present petition, and also the power to refer the dispute between the parties to arbitration.

2. During the hearing of the Petition on 'admission' on 19.7.2021, the learned counsel for the Petitioner made elaborate submissions in support of the prayer in paragraph 1 above. However, the learned Senior counsel for the Respondent, raised preliminary objections on the 'maintainability' of the petition. Accordingly, the Commission after permitting the Respondent, to file its reply, listed the matter for hearing on maintainability.

3. In compliance to the above directions, the Respondent vide its reply affidavit dated 6.8.2021, has submitted that the Petition has not been filed in terms of Section 79(1)(f) of the Act. It has also submitted that the Petitioner has to file a substantive petition, on merits, dealing with the disputes which has arisen between the parties and raise appropriate material. The Respondent has also submitted that the jurisdiction of the Commission is not to discharge a ministerial function of referring a matter to arbitration, at the choice of the Petitioner, without reaching an informed decision on the Commission itself adjudicating the matter. The Respondent, while pointing out that the



PPA executed by the parties contained no provision for premature termination of PPA, on account of any delay in the commissioning of the project, has submitted that the procurer (Respondent herein), having entered into PPA, cannot proceed to change its mind and seek release from its obligations under the PPA. It has added that the only avenue opened to the Respondent is to apply to the Central Government for reallocation of the capacity allocated to it by the Central Government and if the Central Government finds another alternative procurer, then the original arrangement with the procurer will get cancelled. Until this, the procurer continues to have obligations under the PPA. The Respondent has stated that the reference to arbitration under section 158 of the Act cannot be claimed by the Petitioner as a matter of right. In this background, the Respondent has submitted that the petition is not maintainable and the same may be rejected.

4. The Petitioner has filed its rejoinder affidavit dated 27.8.2021 mainly reiterating the submissions made in the Petition, along with case laws, in support of its prayer to refer the disputes to arbitration.

5. During the hearing of the Petition on 5.8.2022, the learned counsel for the Petitioner and the Respondent made detailed oral submissions in the matter. The Commission, after permitting the parties to file their written submissions, reserved its order in the matter. In terms of the permission granted by the Commission, the learned counsel for the Petitioner has filed the copy of the judgement dated 14.11.2022 in Appeal No.397/2022 (APSPDCL vs APERC & anr) and Appeal No.127/2022 (JSW vs PTC & anr) in support of its prayer to refer dispute to arbitration. Also, note of submissions has been filed on behalf of the Respondent.

6. While the matter was pending consideration of the Commission, the learned counsel for the Respondent, during the proceedings of the Commission, on 17.1.2023,



mentioned that the Respondent vide its letter dated 3.1.2023, has accepted the Petitioner's letter dated 12.1.2021, terminating the PPA dated 23.3.2011. Also, the learned counsel for the Respondent, while seeking permission of the Commission to place said letter dated 3.1.2023, on record, prayed that the petition may be disposed of in terms of this development, as the relief sought for by the Petitioner, in the petition, require no further consideration by the Commission. The learned counsel for the Petitioner, while confirming the issuance of the letter dated 3.1.2023 by the Respondent, submitted that it has no objection to the disposal of the petition, in terms of the same. Based on the submissions of the parties, the Respondent letter dated 3.1.2023 (*which is enclosed as Annexure-A to the letter dated 18.1.2023 addressed to the Commission*) is taken on record.

7. It is evident from the letter dated 3.1.2023, that the Respondent, in order to avoid long drawn litigation and cost, has decided to agree to the premature foreclosure / termination of the PPA (by the Petitioner), without any cost and risk. Accordingly, the Respondent, while requesting the Petitioner to treat the PPA as being foreclosed, has also suggested the execution of a formal foreclosure termination agreement by the parties, to record the understanding relating to mutual foreclosure of the PPA.

8. Admittedly, the Petitioner, in the present petition, has contended that disputes have arisen between the parties, as the Petitioner's termination of the PPA (vide letter dated 12.1.2021) was not accepted by the Respondent (vide letter dated 29.1.2021). Accordingly, the Petitioner has sought the appointment of an 'arbitrator' to adjudicate the alleged disputes between the parties. With the Respondent agreeing to the termination of the PPA (by the Petitioner) vide its letter dated 3.1.2023 and the Petitioner having confirmed the same (as in para 6 above), the alleged disputes stand mutually settled by the parties herein. In this background, the prayer of the Petitioner,



in this petition, seeking appointment of an arbitrator for adjudication of the disputes, in terms of Article 12 of the PPA, do not survive for consideration of the Commission. In other words, the prayer of the Petitioner in paragraph 1 above, has been rendered infructuous. Accordingly, the petition is disposed of as infructuous. The parties are permitted to execute a formal foreclosure termination agreement to record the understanding, in terms of the said letter dated 3.1.2023.

9. Petition No.119/MP/2021 is disposed of in terms of the above.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I. S. Jha)
Member

