



BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW

Petition No. 1958/2023

(Date of Order: 25.5.23)

PRESENT:

Hon'ble Sri Raj Pratap Singh, Chairman

Hon'ble Sri V. K. Srivastava, Member (Law)

Hon'ble Sri Sanjay Kumar Singh, Member

IN THE MATTER OF:

Review Petition under section 94(1)(f) of the Electricity Act, 2003 read with Regulation 150 of the UPERC (Conduct of Business) Regulations, 2004 seeking partial review of the Mid Term review of Business Plan Order dated 22.11.2022 passed by Commission in Petition No. 1526 of 2019.

AND

Petitioner

Noida Power Corporation Limited (NPCL), Electric Sub-Station, Knowledge Park-IV, Greater Noida, Gautam Buddha Nagar-201310.

The following were present:

1. Mr. Sanket Srivastava, Head (Power Purchase, NPCL)
2. Mr. Alok Sharma, Head (Legal, NPCL)
3. Mr. Buddy Ranganathan (Advocate)
4. Ms. Divya Chaturvedi (Advocate)
5. Ms. Srishthi Rai (Advocate)

ORDER

(Date of hearing: May 09, 2023)

Background

1. The Commission had approved the Business Plan for the Petitioner ('NPCL') for the Control Period from FY 2020-21 to FY 2024-25 on November 26, 2020 in the Petition No. 1526 of 2019. The Petitioner aggrieved by the said Order, preferred an Appeal before the Hon'ble APTEL vide Appeal No. 72 of 2021. Hon'ble APTEL has decided the said Appeal vide Order dated August 23, 2022 and remitted certain issues for a fresh decision on them.
2. In compliance to the direction of the Hon'ble APTEL Order dated August 23, 2022, the Commission issued an Order on November 22, 2022. The Petitioner aggrieved by the Order and filed a Review Petition seeking a limited / Partial review wherein the Commission has disallowed the Petitioner to procure power beyond June 09, 2029, i.e., the term of distribution license of the Petitioner as on the Judgement dated August 23, 2022 passed by the Hon'ble APTEL.
3. The relevant portion of the Order is reproduced below:

Quote

Currently, the Petitioner has only one long term PPA with M/s DIL which is related party and where the PPA term is going beyond the licence period as approved by the Commission. In view of the Hon'ble APTEL Order regarding license tenure upto June 09, 2029 the Petitioner is now allowed to procure power for the period upto license tenure i.e., June 09, 2029 and obtain Commission's approval under Section 86(1)(b) and in accordance with Section 63 of Electricity Act, 2003.

Unquote

4. The Petitioner further submitted that it has challenged Order of Hon'ble APTEL dated August 23, 2022 before the Hon'ble Supreme Court vide Civil Appeal bearing Diary No. 42179 of 2022.
5. The Petitioner also submitted that the Commission has inadvertently disallowed the Petitioner to procure power and to execute Long Term Power Purchase Agreements (herein after referred to as 'LT-PPA') beyond June 09, 2029. Long Term Power Purchase arrangements, as envisaged by the Petitioner in the Impugned Order are the only measure to ensure stability of power supply for its Consumers all through the year.

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6. The Petitioner also stated that it has been entrusted with the responsibility of providing reliable, continuous, regular and economic power to consumers within its license area. In order to abide by its duty to supply on request under Section 43 of the Electricity Act, 2003 ("**Electricity Act**"), the Petitioner undertakes regular assessment of the demand for electricity from consumers in its license area and makes arrangements for commensurate power procurement from various sources. Further, to meet the future demand for power in a reliable manner, it is essential that the Petitioner makes arrangements for power procurement on a long term basis. This Commission has also from time to time emphasized the urgent need for the Petitioner to formalize a firm long term power procurement arrangement for meeting the load requirements of consumers at large in the licensed area.
 7. It is further, submitted that the dependency on short term power procurement not only creates uncertainty about availability of the power and exposes the consumers to the vagaries of the market but also adversely affects the financial position of the Petitioner. It is imperative to point out that the Petitioner has planned to procure power for consumers in its licensed area, considering the projected growth of the population, industrial boom, and growth in power requirement during peak and non-peak hours. The Petitioner also submitted that the Commission has inadvertently overlooked the benefits of Long Term Power Purchase. LT-PPAs between the Generator and the Discom protects against the risk of fluctuating energy prices and supplies. This disallowance of the LT-PPAs may prove to be detrimental for consumers of the licensed area.
 8. It has also been submitted that the Commission inadvertently did not consider the exponential growth in the licensed area of the Petitioner resulting into higher power requirements. The Commission without taking into consideration various aspects of LT-PPAs has disallowed the Petitioner to procure power beyond June 09, 2029. Such disallowance by the Commission puts burden on the Petitioner to engage into various Short Term Power Purchase arrangements to meet the increasing demand in its licensed areas. The Commission is well aware of the adversities of the procurement of power on short term basis. The cost of power purchased on short term basis is highly volatile, fluctuating and has become expensive day by day. This might lead to a situation wherein the Petitioner might be constrained to procure power from the Power Exchanges, consequently burdening the consumers to pay a higher Tariff. It is also contention of the review applicant that the Commission has overlooked the financial impact and interest of the end consumers, by not allowing the Petitioner to procure long term power and to engage in LT-PPAs. The Petitioner also submitted that the long term power purchase of the Petitioner Company is mere 37% of its total power portfolio. The Commission may kindly be aware that the long term power purchase for majority of the distribution licensees in the Country is more than 80-85%. Long term power purchase will



only help the Petitioner to ensure reasonable and reliable power supply to the consumers of Greater Noida.

9. The long term PPAs have inherent provision for reassignment of the same in case of change in ownership of the licensees, if any. The Commission may also incorporate appropriate provisions in the upcoming long term PPAs of the Discoms to strengthen the same with regard to change in ownership, if any. It is also submitted that the Commission overlooked that the licensed area is evolving as a Smart City, being most modern urban development center of National Capital Region and the fast-developing center of attraction for people from Delhi, Noida, Ghaziabad, Gurgaon and Faridabad. Further, the Petitioner submitted that the Commission has inadvertently overlooked the future plans of the State Government for the Petitioner's licensed area. The State Government has envisioned the Petitioner's licensed area as the preferred Foreign Direct Investment destination of India and has invited investments from across the globe via various platforms. The Commission also did not take into consideration the following projects of the State as well as Central Government, planned for the development of the licenses area, which are:

- Noida International Airport
- Medical University
- Data Center
- Convention Center
- Night Safari

10. The Petitioner submitted that, the Commission has condoned the major load growth factors evident in the licensed area. Some of which are illustrated below for reference:

- Greater Noida (West)
- Delhi Mumbai Industrial Corridor (DMIC)
- Multi Modal Transport Hub (MMTH)
- Multi Modal Logistics Hub (MMLH)
- IITGNL

11. It is also submitted that the submissions clearly show the Petitioner has come with a bona fide intention to serve the consumers. However, it is imperative to state that the Commission has taken an anticipatory view against the Petitioner in spite of the matter being sub judice before the Hon'ble Supreme Court. It is humbly submitted that the consumers of the Petitioner should not be penalised for legal tangles and differences especially, when the matter related to the term of license is pending before Hon'ble Supreme Court in Appeal bearing Diary No. 42179 of 2022. Further, the subsequent to the Order dated November 22, 2022 in Petition No. 1526 of 2022 (the impugned order herein), the Petitioner has floated multiple tenders for purchase of power on medium term basis. However, only one tender got

4

materialised and petition for adoption of tariff has been filed before the Commission for adoption of tariff and approval of PPA.

12. The Petitioner would be required to purchase 28.07% of renewable power in FY 2023-24 which will be increased to 47.33% by FY 2029-30 as per Ministry of Power (MoP) notification new RPO trajectory. In the absence of long term power such RPO compliance would be very difficult to meet from short term sources. It is also submitted that the Commission has recently in Petition No. 1869 of 2022 vide its order dated February 14, 2023 allowed the State Distribution Licensees to purchase long term power. Pertinently, the Commission has granted licenses to the State Distribution Licensees till 2035.
13. Further, in terms of Section 94 of the Electricity Act, 2003, for the purposes of any proceedings under the Electricity Act, 2003 this Commission has the same powers as are vested in a Civil Court under Civil Procedure Code (**'CPC'**) inter alia in respect of reviewing its decisions, directions and Order. Further, in terms of Regulation 51 of the Conduct of Business Regulations, any person aggrieved by a direction, decision or Order of this Commission from which (a) no Appeal has been preferred; or (b) from which no Appeal is allowed, may file a review, subject to the provisions of CPC, within 90 (Ninety) days of the date such direction, decision or Order. In terms of the said Regulation, the Commission for the purposes of any proceedings to review its decisions, directions and Order is vested with the same powers as are vested in a Civil Court. Further, as per the settled position of law which also finds mention in Section 114 read with Order 47, Rule 1 of CPC, a review may be preferred in case of (a) discovery of new and important evidence, which could not be produced at the time of hearing; (b) error apparent on the face of record; and (c) for any other sufficient reason. It is respectfully submitted that it is a trite and well-settled principle of law that any person aggrieved by an order or decision of any adjudicatory body and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decision / order was passed by the Court or on account of some mistake or error apparent on the face of record, or for any other sufficient reason, may apply for the review of such an order / decision.
14. The Petitioner submitted that there are sufficient reasons as mentioned hereinabove for this Commission to review its Order dated November 22, 2022 passed in Petition No. 1526 of 2019 on the limited aspects raised in the instant Review Petition and allow the Petitioner to execute LT-PPAs to ensure reasonable and reliable power supply to the consumers of Greater Noida area.
15. Therefore, the Petitioner prayed the followings:
 - A. Partial / Limited of Review its Order dated November 22, 2022 passed In Petition No.1526 of 2019 on the aspects as illustrated/ submitted herein above.



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- B. Pass such other and further orders as the Commission may deem fit and proper in the facts and circumstances of the case.

Submission made by the Petitioner vide Email dated May 08, 2023:

16. Without prejudice to the rights and contentions contained in the Review Petition, in terms of the issued by the Commission, the Petitioner now proposes to invite bids for the procurement of power through tariff based competitive bidding process envisaged under Section 63 of the Electricity Act, 2003. In terms of the above, the bids are proposed to be invited as per Package A for the procurement of power for a period of 6 (six) years viz. till the term / tenure of its License, as laid down by the Hon'ble APTEL in its Judgement dated August 23, 2022 issued in Appeal No. 72 of 2021 & I.A. Nos. 82 of 2021 & 1025 of 2022.
17. The Petitioner however bona fide believes that the procurement of power for a limited period of 6 (six) years may not discover a competitive price as compared to a procurement of power for a longer period of 25 (twenty-five) years. The Petitioner therefore submits that the proposed bid can also provide for an alternative for procurement of power for a period of 25 (twenty-five) years to assess the market conditions and for the Commission to examine as to which alternative will be more beneficial in the interest of the consumers. Accordingly, vide Package B, bids may be permitted to be invited for the procurement of power for a period of 25 (twenty-five) years with the disclosure that (a) currently, the issue pertaining to the term / tenure of the Petitioner License is pending before the Hon'ble Supreme Court vide Diary No. 42179 of 2022 and other connected Civil Appeals and (b) in the event the term / tenure of the Petitioner License is held to be valid till June 09, 2029, the respective Power Purchase Agreements (PPAs) will be assigned to the successor company of the Petitioner.
18. In this regard, it is noteworthy that Solar Energy Corporation of India Limited (SECI) had vide its letters / e-mails dated November 14, 2022 and February 17, 2023 *inter alia* requested the Petitioner to convey the quantum of power required by it, in pursuance of the Request for Selection (RFS) published by SECI on November 02, 2022 inviting tenders from Renewable Energy (RE) generators / developers to set up 1200 MW wind-solar hybrid power projects connected to ISTS network (Tranche-VI Scheme). The said tender inter-alia aims to supply RE power with assured peak power supply to the distribution companies for a period of 25 (twenty-five) years. Accordingly, the Petitioner vide its letter dated February 27, 2023 had expressed its willingness to offtake 100 MW wind-solar hybrid power under the Tranche- VI Scheme, subject to discovery of a competitive / reasonable rate and subject further to the approval of the Commission. A copy of the letters/emails dated November 14, 2022 and February 17, 2023 issued by SECI and the letter dated February 27, 2023 issued by the Petitioner were also submitted by the Petitioner.

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19. Pursuant thereto, SECI has vide its letter dated April 21, 2023 informed the Petitioner regarding the following tariffs, which have been discovered through competitive bidding process (e-reverse auction) under Section 63 of the Electricity Act, 2003:

Sl. No.	Tariff Discovered (Rs./kWh)	Project Capacity awarded to Bidders				CUF proposed by Bidder (%)
		Solar (MW)	Wind (MW)	ESSS (MWh)	Project Capacity (MW)	
1.	4.63	150	108.9	100	100	52.06
2.	4.69	750	960	600	600	72
3.	4.72	150	151.2	120	120	60.66
4.	4.73	380	380	380	380	60

Note: SECI's Trading Margin of Rs.0.07/kWh is applicable over and above the discovered Tariff

20. The Petitioner had floated 5 (five) tenders for procurement of power on medium-term basis, however, only 1 (one) tender got materialised, while the rest remained inconclusive. The Petitioner believes that the reason for limited / no participation in the bids floated is because of very high rates in the short / medium-term market due to which most of the suppliers are not interested in the medium term tenders. The results of the medium-term tenders floated by the Petitioner are as under:

S.No	Bid Details	Period	Duration	Quantum (MW)	Rate at CTU (Rs./kWh)	Tender Date	Status
1.	MT-Thermal	FY 2023-24 to FY 2025-26	RTC	100	4.05	15.10.2022	LOA issued to TPTCL (JITPL).
2.	MT-Non-Solar	FY 2023-24 to FY 2025-26 (During Apr-Sep (RTC) & Oct-Mar (Peak))	RTC	50	-	18.10.2022	Single Participation. Tender Foreclosed
3.	MT-Hydro with HPO	FY 2023-24 to FY 2025-26 (During Apr-Sep) (RTC) & Oct-Mar (Peak)	RTC/Peak	50	-	19.10.2022	No Participation. Tender Foreclosed
4.	MT-Non-Solar	FY 2023-24 to FY 2025-26 (during May-Sep)	RTC	100	-	22.11.2022	Single Participation. Tender Foreclosed
5.	MT-Non-Solar	FY 2023-24 to FY 2025-26 (During May-Sep)	RTC	100	9.00	29.12.2022	Higher rates. Tender Foreclosed

21. A copy of the Order dated March 06, 2023 issued by the Commission in the Petition No. 1926 of 2022 adopting the afore-mentioned tariff of Rs. 4.05 / kWh in terms of the Agreement for

Procurement of Power entered into between the Petitioner and Tata Power Trading Co. Ltd. (TPTCL) and a copy of the e-reverse auction sheet depicting the afore-mentioned tariff of Rs. 9/kWh were also submitted by the Petitioner.

22. The Petitioner submitted that the bids under both Packages A and B can be sought from the same participating bidders to be given as 2 (two) different alternatives retaining the discretion with the Petitioner to select the lowest bid under either of the 2 (two) packages. The Petitioner will exercise the right in respect thereof based on the decision to be taken considering the competitive advantage of accepting the long term bid only if the Commission considers it to be appropriate and economical in the consumer interest, notwithstanding that the License of the Petitioner as at present will expire in the year 2029 as per the afore-mentioned decision of the Hon'ble APTEL in its Judgement dated August 23, 2022. The above may be considered by the Commission at the time of hearing of the Review Petition.
23. The Petitioner further seeks liberty to approach the Commission with a separate Petition for approval, in case of any deviation with the Standard Bidding Documents notified / published by the Ministry of Power, Government of India.
24. The Petitioner craves leave of the Commission to make additional submissions, if required and deemed fit by the Commission.

Commission's Analysis

25. The Petitioner, during the proceeding of Mid Term Review of Business Plan Order in compliance to the Hon'ble APTEL Order, had also submitted the details of upcoming projects of Central and State Govt. like Noida International Airport, Medical University, Data Centre, Convectional Centre, Night Safari etc. Taking into consideration the submission made by the Petitioner, the Commission issued the Mid Term Review Order.
26. Hon'ble APTEL vide its order dated August 23, 2022 had set the end of the licence period of NPCL as on June 09, 2029.
27. Taking into consideration of the same the Commission had issued Mid Term Review of Business Plan Order for the Control Period from FY 2020-21 to FY 2024-25 dated November 22, 2022. Accordingly, a clear speaking has been done in regard to long term power purchase arrangement which is as follows:

Quote

2.5.42 Currently, the Petitioner has only one long term PPA with M/s DIL which is related party and where the PPA term is going beyond the licence period as approved by the Commission. In view of the Hon'ble APTEL Order regarding license tenure upto June 09, 2029 the Petitioner is now allowed to procure power for the period upto license tenure

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i.e., June 09, 2029 and obtain Commission's approval under Section 86(1)(b) and in accordance with Section 63 of Electricity Act, 2003.

Unquote

28. Further, cases when "Review" is maintainable is dealt in catena of judgements of Hon'ble Supreme Court. Grounds of review have been clinchingly gathered and stated in the Hon'ble Supreme Court Judgement of Kamlesh Verma v. Mayawati and Ors. (2013) 8 SCC 320 for a review Petition to be maintainable, relevant para of which is quoted below: -

Quote

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record; (iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki[(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

20.2 When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negative.

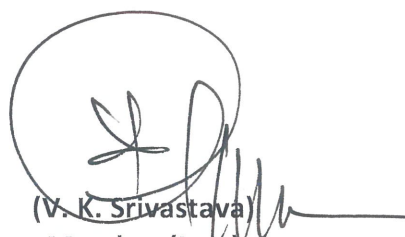
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29. The instant Petition fails to find its space in the above meticulously delineated structure for maintainability of review. Therefore, the instant Petition does not fall under the purview of the "Review" & is being dismissed.

30. However, the Commission told the counsel of the Petitioner that they can address all their issues in the coming Business Plan cycle for the consideration of the Commission.

31. With this the Petition is disposed of.


(Sanjay Kumar Singh)
Member


(V. K. Srivastava)
Member (Law)


(Raj Pratap Singh)
Chairman

Place: Lucknow

Dated: 25 May, 2023