

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION: SHIMLA

...PETITION NO. 3/2001

IN THE MATTER OF:

National Thermal Power Corporation Ltd

...PETITIONER

Versus

HP State Electricity Board

...RESPONDENT

AND

IN THE MATTER OF "APPROVAL OF ESCROW ARRANGEMENT
BETWEEN HPSEB AND POWER TRADING CORPORATION,
INDEPENDENT POWER PRODUCERS/ANY OTHER POWER
PRODUCER" HELD ON 29-1-2002.

ORDER

S S GUPTA
CHAIRMAN:

The matter came up for hearing today the **29th January, 2002.**
Following were present:

PETITIONER-NTPC

Sh Rakesh Chopra, Sr.
Mgr.(Comm.)
Sh U P Gupta, Sr. Mgr. (Law)
Sh Inder Chandel, Advocate

RESPONDENT-HPSEB

Sh J S Chandel, Dir. (I/S)
Sh R C Vaidya, Xen.(Comm.)
Sh Gian Swarup, AE(I/S)
Ms Anjula Khajuria, Advocate

The Power of Attorney by the respondent-HPSEB in favour of Ms Anjula Khajuria, Advocate was filed and ordered to be taken on record.

Vide interim order of 26-11-2001 the commission had allowed the respondent's application for extension of time for filing objections against the instant petition and directing the parties to come up prepared to open the arguments as to the maintainability of the petition and the jurisdiction of this Commission in the matter.

The Commission enquired from the learned counsel for the respondent-HPSEB if the objections had now been filed in compliance with the directions of 26-11-2001. The Ld. counsel for the respondent submitted that the issue of jurisdiction of the Commission and the maintainability of the petition need to be settled first of all following which she would file the oral objections instead of the written objections. The Commission agreed with the submission and directed the petitioner to commence the arguments in respect of the jurisdiction of the State Commission and the maintainability of the petition. The Ld. Counsel for the petitioner-NTPC cited sub sections (c) and (d) of Section 22, Sections 12, 23 and 42 of the Electricity Regulatory Commissions Act, 1998 (Act 14 of 1998) together with Sections 148(A) and 151 of the Code of Civil Procedure to prove the point that the Commission is a civil court and all proceedings before the Commission are deemed to be the judicial proceedings. He also filed a copy of the order dated 18-9-2001 from Maharashtra Electricity Regulatory Commission in the case No.12/2001 titled “NTPC vs. MSEB and others” which was ordered to be taken on record. Para-8 of the said order together with the relevant excerpts of the judgment of Karnatka High Court in the case of “Sujata Touring Talkies vs State of Karnatka” reported in AIR 1986, Page 21 was relied upon in support of the contention that the Commission did, indeed, enjoy the jurisdiction over this matter.

The Ld. counsel for the respondent-HPSEB Ms Anjula Khajuria was thereafter called upon to reply to the arguments addressed by the Ld. counsel for the petitioner. She cited Section 13 of the Electricity Regulatory Commissions Act, 1998 to contend that since NTPC was a Central Generating Utility and supplying power to many States, the matter in consideration could be rightly termed as inter-State matter and that, therefore, fell within the jurisdiction of the Central Electricity Regulatory Commission and not the State Commission. She further argued that the Maharashtra Electricity Regulatory Commission’s order was not relevant in this particular case since it had relied upon the order of Orissa Electricity Regulatory Commission which was governed by the Orissa Electricity Reforms Act.

The Ld. counsel for the petitioner wrapped up the arguments by pointing out the infirmities and the anomalies in the reply arguments to the extent that Section 13 broadly confers the functions of regulating the tariff in respect of generation/sale/purchase/transmission of inter-state nature whereas the instant caveat petition had prayed for restraining the respondent from signing of the PPAs with

power trading corporation/independent power producers/other power producers from the projects in operation/to be commissioned in future and entering into escrow arrangements with the IPPs which may fall within the purview of Section 21 (c) of the Electricity Regulatory Commissions Act, 1998 and hence in the jurisdiction of the State Commission.

The Commission has heard the parties with rapt attention, perused the OERC and MERC orders in the similar petitions/applications filed before the two Hon'ble Commissions. Without being influenced in any manner by the orders of the Orissa Electricity Regulatory Commission and Maharashtra Electricity Regulatory Commission, let us discuss the petition vis-à-vis the provisions of the law.

The petitioner has an arrangement to supply 116 MW of electricity to respondent and the respondent is obliged to make the due payment for the above electricity in accordance with a mutual agreement between the parties. According to the petitioner, the respondent owes to the petitioner a sum of Rs.56.81 crores including surcharge of Rs.18.31 crores for the electricity supplied prior to the filing of the petition. The petitioner has an apprehension that the escrow arrangements proposed with the new power producers would seriously prejudice the interest of the petitioner in regard to the payment of the outstanding amounts and the amounts becoming due for the electricity generated and supplied by the petitioner to the respondent. The petitioner avers that signing such escrow arrangements and earmarking receivables in the above manners to the exclusion of the applicant/petitioner will prejudice the public interest and the interest of the consumers. The petitioner, therefore, has prayed that this Commission may order that new escrow arrangement will be entered into by the respondent after ensuring that it is able to meet its payment obligations in respect of the existing supplies from the petitioner such that existing supplies have a preferential charge on the revenues of the respondent over the charge of the new supplies.

In his arguments and by citing Sections 12, 23 and 42 of the Electricity Regulatory Commissions Act, 1998 together with the Sections 148(a) and 151 of the Code of Civil Procedure the Ld. counsel for the petitioner wanted to make the point that the Commission was a civil court. The Ld. counsel need not have gone to all those pains of proving the point. Section 42 of the Electricity Regulatory Commissions Act, 1998 is very clear on the issue and is reproduced herebelow:

S-42. PROCEEDINGS BEFORE COMMISSION.- All proceedings before the Commission shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860) and the Commission shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973(2 of 1974).”

Let us now peruse sub sections (c) and (d) of Section 22 and sub sections (a), (b), (c) and (d) of Section 13 of the Electricity Regulatory Commissions Act, 1998 which respectively confer the functions on the State Commissions and the Central Commission, the same are reproduced hereunder:

S-22. FUNCTIONS OF STATE COMMISSION: (1)(a)&(b).....

(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;

(d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act.

(2)(3)...”

S-13. FUNCTIONS OF CENTRAL COMMISSION.- The Central Commission shall discharge all or any of the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies, other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of energy including tariff of the transmission utilities;

(d) to promote competition, efficiency and economy in the activities of the electricity industry;

(e) to (i).....”

The critical examination and the comparison between the functions of the State Commissions and the Central Commission as stipulated in the Act *ibid* would lead to an irresistible deduction that while the Central Commission shall discharge the functions of regulating the tariff in respect of the generating companies owned and controlled by the Central Government, other than those owned and controlled by the Central government if such generating companies enter into or otherwise have a composite schemes for generation and sale of electricity in more than one State or the inter-State transmission of energy including tariff of the transmission utilities, the function of the State Commissions as envisaged in sub section (c) of Section 22 is to regulate the power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating station or from other source for transmission, sale, distribution and supply in the State. The subtle difference between “regulating tariff” and “procurement process of the State utilities”, instead of being confused by labyrinthine and overlapping definitions needs to be appreciated by application of the touchstone boundary condition as the ‘general public interest of the State’ and the ‘interest of the consumers of the State’ which in the context of Himachal Pradesh shall be in the exclusive domain of the State Commissions.

Since the respondent Board has not filed any objections on merit and wanted to settle the question of jurisdiction of the Commission and the maintainability of the petition before filing the objections, it is not possible for the Commission to verify the authenticity of the figures of receivables of the petitioner from the respondent. Without, however, going into the merits of the case, the Commission is convinced that any financial transaction and the manner of handling of the same between the petitioner and the respondent is inextricately linked with the general public interest of the State of Himachal Pradesh and the electricity consumers of the State of Himachal Pradesh and to that extent the matter in discussion falls within the jurisdiction of this Commission. The issue of jurisdiction of the State Commission and the maintainability of the petition are thus decided in favour of the petitioner-NTPC.

This is only a caveat petition requiring that the payment obligations towards NTPC must be taken into account before any new escrow arrangement that HPSEB may

enter into and that NTPC be impleaded as a necessary party while applying for approval of PPA with any IPP where escrow arrangements are proposed to be made.

The Commission has listened to the arguments with attention, perused the necessary provisions of the law as heretofore and given a very careful thought to the matter. The Commission hereby allows the caveat petition filed by the petitioner NTPC with the directions to the respondent HPSEB that its payment obligations towards the petitioner NTPC must be taken into account before any new escrow arrangements are entered into by the respondent HPSEB and that the petitioner NTPC should be impleaded as a necessary party while applying for approval of PPA with any IPP where the escrow arrangements or amendments to any existing escrow arrangement with any IPP are proposed by the respondent HPSEB. The caveat petition is so disposed of.

The Commission also determines the final fee for the petition at Rs.50,000/-. Fee already paid shall be adjusted towards the amount so determined now.

It is so ordered.

Dated, Shimla: 29-1-2002

-Sd/-
(S. S.Gupta)
Chairman