

**IN THE JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION
AT RANCHI**

Case No. 04 of 2018

Jharkhand Bijli Vitran Nigam Limited

..... Petitioner

**CORAM: HON'BLE MR. (DR) ARBIND PRASAD, CHAIRPERSON
HON'BLE MR. R.N. SINGH, MEMBER (ENGINEERING)**

For the Petitioner :

Mr. Navin Kumar, Advocate

ORDER

Date – 28th May 2019

1. The petitioner, Jharkhand Bijli Vitran Nigam Limited (**JBVNL**), has filed a petition under Section 86 1(b) of the Electricity Act, 2003 and in compliance of directives issued by JSERC in its tariff Order dated 21st June, 2017 and vide letter no. JSERC/Case (T) no. 08 & 10 of 2016/466 dated 06th Oct.2017 praying therein to accord approval of Power Purchase Agreement (**PPA**) dated 23.02.2012 (principal PPA) for procurement of 35 MW of power and another PPA dated 22.04.2013 (supplementary PPA) for procurement of entire quantity of power to be generated from the 1st unit of 63 MW inclusive of quantity mentioned in principal PPA, signed between JBVNL and Inland Power Limited (**IPL**).
2. This Petition is in compliance with the directives issued by Jharkhand Electricity Regulatory Commission (**JSERC**) to JBVNL to submit all the PPAs for approval which have not been approved by the Commission.
3. On examination of the petitions, the Commission found several discrepancies in the petition as under:-
 - (a) The petitioner had not provided the basis of contracting 100 % of the capacity vis-a-vis provision of the MoU (25% of the power from the proposed power plant).
 - (b) The Petitioner had not submitted the document certifying that the PPAs were executed with due approval of the Board of Directors of JBVNL.

Accordingly, the Commission directed the petitioner to give clarification in regard to the above discrepancies.

4. For PPA dated 23.02.2012 and PPA dated 22.04.2013, the Commission directed vide order dated 21.05.2018 to obtain approval of BoD on both

the PPAs (if not already obtained) and to make available copies of the petition to the members of the general public on request, and also to issue a public notice, inviting objections/comments/suggestions on both PPAs seeking approval of the Commission.

5. In Compliance thereof, the petitioner published public notice inviting objections/comments/suggestions on both PPAs dated 23.02.2012 and 22.04.2013 seeking approval of the Commission, in English and Hindi leading newspaper and the petitioner informed that no comments/suggestion/objections was received from any stakeholder or public.
6. Further, for giving one more opportunity to the stakeholder/public for giving objections/comments/suggestions on both PPAs, the Commission also issued notice for public hearing in the newspaper of Jharkhand edition. The public hearing was held on 22.02.2019 in the office of the Commission on the petition for approval of principal PPA dated 23.02.2012 and supplementary PPA dated 22.04.2013.
7. During public hearing, the representative of JBVNL submitted that the approvals of the Board of Directors were not accorded while signing the PPAs. However, the proposal is under consideration for post facto approval of the BODs.
8. The representatives of IPL were also present during the public hearing and made the submission that in compliance of the PPAs, IPL has been supplying the total power to JBVNL. They further submitted that JSERC has also been approving the tariff and have been doing true-up exercises for the total power being generated by the IPL. They also submitted a copy of the order of this Commission in Case no. 26 of 2014 dated 29th July, 2015 in which the Commission has held that the respondent-JBVNL cannot unilaterally deviate from the terms of PPAs and reduce the amount of power procured from IPL and this order was also upheld by the Hon'ble APTEL in Appeal no. 296 of 2016. They further submitted that the second appeal against the said order by the petitioner – JBVNL before the Hon'ble Supreme Court, Civil Appeal no. 11105/2017 was also dismissed and the Hon'ble Supreme Court upheld the orders of this Commission and Hon'ble APTEL. Thus, the issue of procurement of quantum of power to be supplied and other terms of PPAs have already been examined and approved by this Commission, which have also been upheld right up to the Hon'ble Supreme Court, and therefore, they are not open for adjudication by this Commission at this stage.

Submission of the Petitioner:

9. The Petitioner submitted that the erstwhile Jharkhand State Electricity Board (JSEB) was constituted on 10th March, 2001 under the Electricity Supply Act, 1948 as a result of the bifurcation of the erstwhile State of Bihar in 2000. Further, JSEB was unbundled into four companies on 28th June, 2013 by the Energy Department, Government of Jharkhand, viz., Jharkhand Urja Vikas Nigam Limited (JUVNL) being the holding company, Jharkhand Urja Utpadan Nigam Limited (JUUNL) undertaking the generation function of the erstwhile JSEB, Jharkhand Bijli Vitran Nigam Limited (JBVNL) undertaking the distribution function of the erstwhile JSEB and Jharkhand Urja Sancharan Nigam Limited (JUSNL) undertaking the transmission function of the erstwhile JSEB.
10. The Petitioner submitted that the State of Jharkhand has entered into a Memorandum of Understanding (MoU) with Inland Power Limited on 18th October, 2011 for setting up a 126 MW (2 x 63MW) thermal power station named as Inland Thermal Power Project, located at Inland Nagar, Block Gola, District Ramgarh, Jharkhand on a build, own and operate basis.
11. The Petitioner submitted that pursuant to the aforesaid MoU, a Power Purchase Agreement was signed between Jharkhand Bijli Vitran Nigam Limited (erstwhile JSEB) and M/s Inland Power Limited on 23rd February, 2012 (principal PPA) for procurement of 35 MW power from the 1st unit i.e. 63 MW on a long term basis for a period of 10 years.
12. The Petitioner submitted that a supplementary PPA was signed between Jharkhand Bijli Vitran Nigam Limited (erstwhile JSEB) and M/s Inland Power Limited on 22nd April, 2013 (supplementary PPA) for sale and purchase of entire quantity of power to be generated from 1st unit of 63 MW inclusive of quantity mentioned in principal PPA, on the same terms and conditions as on the principal PPA.
13. The Petitioner submitted that the PPAs (for purchase of 63 MW) has been signed on 23.02.2012 and on 22.04.2013 whose tariff has been determined by this Commission under section 62 of the Electricity Act, 2003 and this Commission has taken due cognizance of the PPA signed between IPL and JBVNL during determination of the tariff of IPL for the FY 2014-15, 2015-16 in May, 2014 and for FY 2016-17 to 2020-21 in May, 2017.
14. In response to the discrepancies, the Petitioner submitted that the supplementary PPA was signed in view of the scarcity of power and limited number of power plants, operational in the State and the State Government had under its policies to encourage investments in the

power sector and also announced various benefits and subsidies to be given to the investors/companies if they propose to establish power generating plants in the State.

15. In regards to the approval of Board of Directors, the petitioner submitted that the Board of Directors of the JBVNL in its 38th Meeting held on 25.02.2019 had given post facto approval on the Power Purchase Agreements (PPAs) dated 23.02.2012 and 22.04.2013 with all terms and conditions mentioned in the agreements, signed with IPL for supply of total generation from the 1st unit of 63 MW.

Commission's Analysis:

16. Under Section 86 (1) (b) of the Electricity Act, 2003 the State Commission has the responsibility to regulate the electricity purchase and procurement process of distribution licensees. Section 86 (1)(b) of the Electricity Act, 2003 reads as under:-

“Section 86 Function of State Commission: - (1) The state Commission shall discharge the following functions, namely:-

(a).....

(b) 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;”

17. Various judgments have been pronounced by the Hon’ble Supreme Court and Hon’ble APTEL in which it has been held that the State Commission has the authority to approve the PPA signed between the Generating Company and the Distribution Licensee. In this regard Hon’ble APTEL vide order dated 10th July, 2013 passed in Appeal No. 112 of 2012 ruled in Para 95 (i) as follows:-

“The amended PPA dated 25.08.2004 should have been placed before the State Commission by the Electricity Board for obtaining approval of the state Commission in terms of Section 86(1)(b) of the Electricity Act,2003. Admittedly, the PPA was never placed for approval of the state Commission, the PPA does not become a legally enforceable and binding document before the parties and if there is some conflict between the terms of the unapproved PPA and the provisions of the Act, Rules and Regulations, it is the provisions of the Act, Rules & Regulations which would hold the field and not the terms of the PPA.”

18. Also, Hon’ble APTEL vide order dated 13.01.2011 passed in Appeal No. 70 of 2009 in Para 16 ruled as under:-

“From the above observations, it is clear that the scope of approval under Section 86(1)(b) of the Act includes the power to reject, modify, alter or vary the terms of the agreements of purchase of power and to further direct the distribution licensee to re-write the terms found reasonable by the state Commission.”

19. Several other judgements also make it clear that under section 86(1)(b), the distribution licensee is obligated to get the PPA signed by it, approved by the Commission.
20. JSERC through its tariff order dated 21.06.2017 and subsequent letters have directed JBVNL to produce the PPAs signed by it for power procurement before the Commission for examination and approval. JBVNL vide petition dated 07.03.2018 sent PPAs entered into by it with IPL for approval by the Commission.
21. The petitioner JBVNL under the present petition has sought approval for procurement of entire quantity of power from IPL at the tariff, to be determined by JSERC and the power procurement in question is being procured for 10 years by JBVNL through PPA dated 23.02.2012 and 22.04.2013 signed between IPL and JBVNL.
22. For procurement of entire quantity of power from IPL, it is pertinent to mention that the then Commission on 29th July, 2015, headed by Hon'ble Justice (Retd.) N.N. Tiwari along with Hon'ble Member (F) Shri Sunil Verma, by order in Case no. 26 of 2014 held that the respondent-JBVNL cannot unilaterally deviate from the terms of PPAs and reduce the amount of power procured from IPL. The relevant extract of the order is reproduced below:

“.....

27. Learned Counsel further submitted that there is no scope for the respondents to deny payment on the rate determined by the Commission. The respondents cannot unilaterally quote any other rate as per their whims and fancy. Since the terms of the agreement provides for purchase of the entire quantum of power generated by the petitioner from its 1st Unit, it is not open for the respondents to unilaterally decide to procure less quantum of power, which, if allowed, would defeat the entire purpose of setting up the plant and would cause serious prejudice to the petitioner who has made huge investment in the said plant.

28. As against the said submissions quoting the terms of the PPA and the statutory determination of tariff by the Commission, the respondents could not make any defence than to take plea of their poor financial condition in making payment on the rate determined by the tariff order

.....

36. The respondents, thus, cannot deny payment contrary to the agreed terms and in violation of the tariff order passed by this Commission.

37. In view of the clear term of contract for purchasing entire quantum of power purchased by the petitioner, the respondents cannot unilaterally deviate from the said terms and reduce the amount of power purchase at 25% of the total quantum of MoU in case the petitioner does not agree to sell power at the rate of Rs. 3.71 Paise per Unit, as desired by the respondents.”

23. The said order dated 29.07.2015 of this Commission in Case no. 26 of 2014 was upheld by the Hon'ble APTEL in Appeal no. 296 of 2016 and also the second appeal against the said order by the petitioner – JBVNL before the Hon'ble Supreme Court, Civil Appeal no. 11105/2017 was dismissed and the Hon'ble Supreme Court upheld the orders of this Commission and Hon'ble APTEL. Hence, it is not open to us at this stage to take a contrary view in the matter, and as such the approval sought by the JBVNL of these PPAs in connection to quantum of power to be procured are mere formalities.
24. Insofar, the tariff for the power purchase is concern, the MoU dated 18.10.2011 provides for the following Clause:
- “10.0 Sale of Power:***
- 10.1 The Government of Jharkhand or distribution licensees authorized by it will have the first right of claim on purchase up to 25% of power delivered to the system by the proposed power plant under terms of a Power Purchase Agreement to be mutually agreed on the basis of existing laws and regulations in force and the tariff for such power purchase will be determined by the appropriate Regulatory Commission.*
- 10.2 Out of 25% under first right of refusal to the State, the rate of 13% share will be as approved by the JSERC, and 12% share will be on variable cost by M/s Inland Power Limited.”*

Pursuant to aforesaid MoU dated 18.10.2011; a Power Purchase Agreement (Principal PPA) was signed between JBVNL and IPL on 23.02.2012 which provides that the petitioner JBVNL have the first right of claim on purchase up to 25% of power, for which 12% of power will be procured on the variable cost only and the balance 13% of power will be procured at the tariff determined by JSERC i.e. variable cost plus fixed cost. The relevant extracts of the Principal PPA dated 23.02.2012 is reproduced below:

“F. The generation Tariff of Seller which is payable by the Buyer shall be as determined by Jharkhand State Electricity Regulatory Commission(JSERC) Out of 25% of 63 MW i.e. 15.75 MW, Board will purchase 12% of 63 MW i.e. 7.56 MW at variable cost only and balance at the tariff determined by Hon'ble JSERC.”

Further, on 22.04.2013 a supplementary PPA was signed between JBVNL and IPL for purchase of entire quantity of power to be generated from 1st unit of 63 MW inclusive of quantity of power of principal PPA, on the same terms and conditions as mentioned in the Principal PPA. The relevant extracts of the supplementary PPA dated 22.04.2013 is reproduced below:

“Whereas the Buyer ‘Jharkhand State Electricity Board’ and the seller ‘Inland Power Limited’ are mutually agreed for the purchase and

sale of entire quantity of power to be generated from the 1st unit of 63MW inclusive of quantity mentioned in earlier Principal PPA.

Whereas parties are mutually agreed that all the terms and condition will remain the same as on the Principal PPA.

Whereas this supplementary Power Purchase Agreement will be treated as a part of the Principal PPA signed on 23rd February 2012.”

On closer examination of the MoU dated 18.10.2011 and the Principal PPA dated 23.02.2012, it transpires that the petitioner-JBVNL has to procure 25% power from IPL under first right of refusal at the levelised tariff. Levelised tariff is the weighted average rate of 12% power procured at the variable cost only and 13% power procured at the rate approved/determined by JSERC i.e. variable cost plus fixed cost. Further, the supplementary PPA provides that the terms and conditions of the supplementary PPA are same as on the Principal PPA and also the supplementary PPA will be treated as a part of the Principal PPA.

25. Hence, it derives from the above observations that the tariff applicable for the supplementary PPA, which is for entire quantity of power to be generated from the 1st unit of 63 MW will be same as of the levelised tariff of the Principal PPA i.e. weighted average of 12% power procured at variable cost only and 13% power procured at the tariff approved by the JSERC.
26. Further, the Commission also finds that the PPAs are approved (post facto) by the Board of Directors of JBVNL.

FINDINGS

27. Considering the facts and circumstances mentioned above and also in view of the findings of this Commission in Case No.26 of 2014 dated 29.07.2015, the approval of the PPAs for procurement of entire quantity of power, as sought by JBVNL is approved at the tariff specified in Principal PPA dated 23.02.2012 as described herein above in para 25.
28. The Commission also observe that since the JBVNL is now fully aware of the need for approval of the PPA by the Commission, in future, no PPA should be acted upon without the prior approval of the Commission.
29. With the above observations, the petition is disposed off accordingly.

Sd/-

(R.N. Singh)
Member (Engg)

Sd/-

(Dr. Arbind Prasad)
Chairperson