

WEST BENGAL ELECTRICITY REGULATORY COMMISSION

WEST BENGAL

Petition No. OA-340/20-21

Date of hearing: 9th December, 2021

Time of hearing: 14.30 hours

Quorum:

Shri Sutirtha Bhattacharya, Chairperson

Shri Durgadas Goswami, Member

Shri Pulak Kumar Tewari, Member

In the matter of

Application made by the West Bengal State Electricity Distribution Company Limited (WBSEDCL) for issuance of appropriate order under regulation 2.1.3 (c) of the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2013 as amended so that the consumers of WBSEDCL do not require to bear high energy cost of Thermal Power Station located at Raghunathpur, Purulia District, West Bengal (RTPS) of Damodar Valley Corporation (DVC).

And

In the matter of

**The West Bengal State Electricity Distribution Company Limited
Vidyut Bhavan
Block DJ, Sector – II
Salt Lake City
Kolkata 700 091..... Petitioner**

And

In the matter of

**Damodar Valley Corporation
DVC Tower, VIP Road
Kolkata 700 054.**

..... Respondent

Representatives attended:

West Bengal State Electricity Distribution Company Limited (WBSEDCL)

[Petitioner]

- 1. Sri Amit Kapur, Senior Advocate,**
 - 2. Sri Subrata Chowdhury, AGM (HR&A)**
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Damodar Valley Corporation (DVC) [Respondent]

- 1. Sri M. G. Ramachandran, Senior Advocate,**
- 2. Smt. Anushree Bardhan, Advocate**

Background

- a) During the last hearing held on 18th May, 2021 in the subject matter, the Commission, after hearing both the parties, directed both the parties to submit their written note on the following queries of the Commission.
- b) Whether the petition filed by WBSEDCL is maintainable;
- c) Whether the e-mail dated 23.04.2018 issued by DVC is a part of the PPA;
- d) Whether WBSEDCL has raised any objection to the higher rate being charged by DVC to any forum;
- e) Whether the single line rail connection to RTPS which was supposed to be completed by 2018, is a part of PPA;
- f) When the tariff is determined by the CERC, what prompted DVC to send the e-mail confirming that the price of energy charge will be reduced to the extent of Rs. 2.00 to Rs. 2.20 per kWh. DVC is not supposed to determine the tariff and in fact DVC has gone beyond their jurisdiction;
- g) WBSEDCL is the licensee of WBERC and WBSEDCL has the right to approach the licensor for adjudication of dispute arising out of the PPA. The case is not for determination of tariff which is within the jurisdiction of CERC. But, in this case certain obligations, as has been committed by DVC before preparation of PPA, is not being complied with by DVC, for which the State Commission is the right forum to adjudicate the dispute; and
- h) Whether the act of DVC by offering reduced price is an inducement to the contract or not.

On receipt of the written notes from both the parties on the queries mentioned hereinabove, the hearing was held on 9th December, 2021 as scheduled.

SUBMISSION DURING HEARING

1.0 The Commission heard both the parties. The Ld. Sr. Advocate of WBSEDCL has submitted, inter-alia, that –

- a) The petition is maintainable before the Commission in terms of various sections of the Electricity Act, 2003, Electricity Rules, 2005, Regulations of the Commission and several directions of the Hon'ble Supreme Court.
- b) The present PPA is a negotiated PPA, which was premised on the representations of DVC through email dated 23.04.2018, which is a promissory estoppel, and therefore the said email forms an integral part of the PPA.
- c) Since DVC has made representations under the email dated 23.04.2018 as to the establishment of the single line rail connectivity by December, 2018, the same is undoubtedly is a part of the PPA.
- d) WBSEDCL has raised the objection to the higher rate being charged by DVC under the PPA only before this Commission, being the appropriate forum, by way of the present petition.
- e) DVC's representation to make power available to WBSEDCL at cheaper rates is undoubtedly an inducement to the contract. Had it not been for the said representation made by DVC vide its email dated 23.04.2018, WBSEDCL may not have entered into a PPA with DVC to procure costly power, the burden of which is borne by the consumers of the State of West Bengal.

Detailed submissions by WBSEDCL have been made along with facts, figures and documents in the written submission which also form part of their submissions made during the hearing.

2.0 The Ld. Sr. Advocate of DVC submitted, inter-alia, that -

- a) In terms of section 79(1)(f) of the Electricity Act, 2003 and in terms of the order passed by the Hon'ble Supreme Court in cases Energy Watchdog – vs – Central Electricity Regulatory Commission & Ors. (2017) 14 SCC 80 and Renusagar Power Co. Ltd. -vs- General Electric Co. (1984) 4 SCC 679; Gujarat Urja Vikas Nigam Limited -vs- Essar Power Limited, etc. the generation and sale of electricity by DVC's RTPS to WBSEDCL is subject to the regulatory and adjudicatory control of the Central Commission. Any aspect on the issues raised by WBSEDCL namely

prior termination of the PPA dated 25.01.2019 is also subject to the regulatory and adjudicatory control of the Central Commission and not this Commission.

- b) The email dated 23.04.2018 does not form a part of the PPA dated 25.01.2019. WBSEDCL has not shown any provision of the PPA referring to the email dated 23.04.2018 or that the energy charges will be billed by DVC as per the contents of the email dated 23.04.2018.
- c) Single line rail connectivity with RTPS was commissioned on 20.02.2021. The delay in completion of the work was due to unavoidable reasons which are beyond the control of DVC. The reasons for the delay are sub-judice before the CERC for determination of tariff for the period 2019-24 for RTPS. In the tariff proceedings before the Central Commission, WBSEDCL is also a party and any issue regarding the delay of railway connectivity ought to be raised by WBSEDCL before the Central Commission. This Commission cannot deal with tariff determination process of RTPS which falls under the jurisdiction of the Central Commission.
- d) WBSEDCL has filed the present petition objecting to the energy charge rate claimed by DVC. Besides, there have been some correspondences starting since 23.04.2018 through email.
- e) DVC has not given any commitment to WBSEDCL for reduction of energy charge rate but predicted in optimistic way. The agreement signed between DVC and WBSEDCL states that the energy charge rate will be charged as per the formula prescribed by the Central Commission. As there was no fixed price contract between DVC and WBSEDCL, the argument of assurance of reduced energy charge rate is not tenable.
- f) The email dated 23.04.2018 sent by DVC is by no way an inducement to the contract entered into between DVC and WBSEDCL. If the same was an important consideration for entering into an agreement, WBSEDCL ought to have got incorporated the same in the PPA dated 25.01.2019 instead of agreeing that the tariff including energy charges will be as determined by the Central Commission. Further, even this Commission, while allowing procurement of power from RTPS for a period 3 years has not made any reference to the email dated 23.04.2018 and even WBSEDCL has not made any such reference before this Commission during the proceedings for power procurement from RTPS.

It is a settled principle that due regard is required to be given to sanctity of the terms and provisions of the PPA executed between the parties. The Courts cannot create or write or rewrite contracts between the parties.

Detailed submissions by DVC have been made along with facts, figures and documents in the written submission which also form part of their submissions made during the hearing.

3.0 After submission of the Ld. Sr. Advocate of DVC, the Ld. Sr. Advocate of WBSEDCL prayed before the Commission to allow him an opportunity to give his comments on the case of Motilal Padampat Sugar Mills Co. Limited -vs- State of UP (1979) 2 SCC 409 on the direction of the Hon'ble Supreme Court regarding promissory estoppels referred by the Ld. Advocate of DVC which was not cited in the written submissions.

4.0 The Commission opined that an opportunity may be given to WBSEDCL to give their comments on the promissory estoppels referred by DVC as stated in paragraph 3.0 above.

ORDER

5.0 In view of the above, the Commission directs WBSEDCL to submit to the Commission their rejoinder on the written note of the DVC to the extent of reference of the new case of Motilal Padampat -vs- State of UP only within two weeks from the date of the order, upon receipt of which, a date will be fixed by the Commission to declare order on this matter.

Sd/-
(PULAK KUMAR TEWARI)
MEMBER

Sd/-
(DURGADAS GOSWAMI)
MEMBER

Sd/-
(SUTIRTHA BHATTACHARYA)
CHAIRPERSON

DATE: 27.12.2021

Sd/-
SECRETARY