

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

**I.A. NO. 382 OF 2017
IN
APPEAL NO. 150 OF 2017**

Dated : 31st July, 2017

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson
Hon'ble Shri I.J. Kapoor, Technical Member.**

IN THE MATTER OF:

**Shri Rama Shankar Awasthi)
200, Green Wood Govt. Society,)
Omega-1, Greater Noida-201308 &)
Anr.) ... Appellant(s)**

AND

**Uttar Pradesh Electricity Regulatory)
Commission)
Vibhulikhand, Kisan Mandi Bhawan,)
Gomti Nagar, Lucknow-226010 & Ors.) ... Respondents**

Counsel for the Appellant(s) : **Mr. Anand K. Ganesan**
Ms. Swapna Seshadri
Ms. Neha Garg

Counsel for the Respondent(s) : **Mr. C.K. Rai**
Mr. Umesh Prasad for **R-1**

Mr. C.S. Vaidyanathan, Sr. Adv.
Ms. Divya Chaturvedi
Ms. Arunima Kedia for **R-2**

Mr. Sanjay Sen, Sr. Adv.
Ms. Mandakini Ghosh
Mr. Aditya Shankar
Mr. Sameer Kumar for **R-3**

Mr. Altaf Mansoor for **R-4**

Mr. Puneet Chandra for **R-5**

ORDER

1. The Appellants who are consumers have filed the instant appeal challenging order dated 20/04/2016 passed by the Uttar Pradesh Electricity Regulatory Commission (“**the State Commission**”). By the impugned order the State Commission has approved the PPA entered into between Respondent No.2-Noida Power Corporation Limited (“**NPCL**”), a distribution licensee and Respondent No.3-M/s Dhariwal Infrastructure Limited (“**M/s Dhariwal**”) which is a generating company for procurement of 185 MW power for a period of 25 years at an indicative tariff of Rs.4.79/Kwh subject to future escalation. In the instant application the Appellants have prayed that the impugned order be stayed during the pendency of the present appeal and that an interim order be passed restricting the grant of open access to NPCL and M/s. Dhariwal.

2. The background of the case needs to be stated. On 29/09/2014 NPCL had filed a petition being Petition No.971 of 2014 before the State Commission for approval of PPA with M/s Dhariwal under Section 62 of Electricity Act, 2003 (“**the said Act**”). On 27/01/2015 the State Commission passed an order

rejecting approval of the PPA as long term power purchase was not through competitive bidding process. NPCL challenged the order of the State Commission dated 27/01/2015 before this Tribunal in Appeal No.88 of 2015. This Tribunal, by order dated 28/05/2015, remanded the matter to the State Commission as it felt that the State Commission had not given reasons as to why it had chosen competitive route. This Tribunal observed that the State Commission has noted submissions and judgments on the issue of procurement of power through negotiated route under Section 62 and competitive route under Section 63 but had not discussed the said submissions and had not given any reasons as to why it chose competitive route. No opinion was expressed on the merits of the case. Pursuant to the above order the State Commission reheard the matter and approved the PPA dated 26/09/2014 between NPCL and M/s Dharwal for a period of 25 years at an indicative tariff of Rs.4.79/Kwh. As stated above, this order is challenged in this appeal.

3. Mr. Anand K.Ganesan learned counsel appearing for the Appellants submitted that the State Commission has ignored this Tribunal's order dated 28/05/2015. This Tribunal directed it to give reasons. The State Commission did not even frame the issue

of competitive bidding process as against Section 62 power procurement. The State Commission only considered whether the expected tariff under Section 62 is competitive or economical tariff as compared to other sources namely short term sources and power exchange. Inasmuch as The State Commission has not followed this Tribunal's judgement dated 28/05/2015 it is liable to be set aside. Counsel pointed out that it is NPCL who had made a grievance that the State Commission had not given reasons for rejecting Section 62 power procurement as against competitive bidding process. The impugned order suffers from the same flaw because while reversing the previous decision it has not given any reasons for selection of Section 62 power procurement as against competitive bidding process. It is improper for NPCL to now contend that the impugned order is a reasoned order. Counsel submitted that NPCL and M/s Dhariwal are sister companies. It is in their interest to purchase power in this manner and both would obviously support each other. Counsel submitted that power procurement is tied for 25 years on long term basis, through a negotiated route and tariff is to be determined under Section 62. The entire purchase cost would be a pass-through to the consumers. Counsel submitted that only

affected party are the consumers. The impugned order is passed behind their back. No public notice was issued. The impugned order has been passed in complete violation of the principles of natural justice and may be set aside on that ground. In this connection counsel relied on **Nav Bharat Ferro Alloys Ltd v. Andhra Pradesh Electricity Regulatory Commission in Appeal No.173 of 2015 dated 02/03/2016.** Counsel submitted that during the course of hearing of various applications filed in this appeal it has transpired that all affidavits filed by NPCL before the State Commission are not on oath as they were not notarised. This is a serious defect which goes to the root of the matter and on that ground also the impugned order deserves to be set aside. Counsel submitted that the recent competitive bidding process conducted by other licensees in Uttar Pradesh discovered tariffs of much less than Rs.4 per unit. Therefore, assuming competitive bidding process under Section 63 is not to be followed the State Commission could have invited other offers to supply electricity at cost cheaper than that indicated by M/s Dhariwal. Counsel pointed out that M/s Dhariwal has offered to supply power to the Maharashtra distribution licensee at a tariff of Rs.2.99 per unit.

Therefore, there is no reason why NPCL has to procure power at almost Rs.5/- per unit plus other charges from M/s Dhariwal which is its sister concern. Counsel submitted that in the circumstances this is a fit case where the impugned order deserves to be stayed.

4. Mr. Vaidhyadnan learned senior counsel appearing for NPCL submitted that M/s Dhariwal is in the process of finalising its petition for determination of tariff and shall be filing the same shortly. The generation tariff for M/s Dhariwal will then be determined by the State Commission in terms of Section 62 and 64 of the said Act after conducting requisite public hearing. Counsel submitted that thus consumers will have an opportunity to participate in the tariff determination process. The issues raised in the present appeal can be raised before the State Commission and the present appeal may be accordingly disposed of. Counsel further submitted that the power procured in terms of the PPA from M/s Dhariwal forms about 60% of the average power requirement of NPCL. If power flow in terms of the PPA is stopped by this Tribunal, NPCL will face acute shortage of power supply to its consumers in its license area. NPCL will be constrained to procure power on a day-ahead basis which will

have adverse impact on the consumers. Counsel submitted that balance of convenience therefore lies in favour of NPCL. Counsel submitted that the impugned order was passed by the State Commission in terms of this Tribunal's Order dated 20.04.2016. This case must be viewed against the background of the fact that several attempts made by NPCL to procure power through competitive bidding process had failed. Counsel submitted that the fact that M/s Dhariwal is a sister concern of NPCL was disclosed to the State Commission. Counsel pointed out that there are several instances where such companies by entering into PPA while maintaining arms-length have acted within four corners of regulatory framework. The allegation of collusion is therefore unwarranted. Counsel submitted that the State Commission has jurisdiction to approve the PPA and the impugned order has been passed by the State Commission within the prescription of regulatory frame work. So far as the issue of notarisation of pleadings before the State Commission is concerned, it is submitted that it is well settled that defects in notarisation of affidavits do not vitiate the entire proceedings. Counsel further submitted that this issue can be only decided at the final hearing. It was urged that interim relief sought by the

Appellants has now become infructuous as supply of power under the PPA has already commenced. By pressing this application, the Appellants are effectively seeking adjudication of the appeal at this stage which should not be allowed. Counsel submitted that the Appellants have no *prima facie* case. Counsel pointed out that provisional tariff, which is determined by the State Commission vide impugned order is subject to final adjudication of M/s Dhariwal's tariff petition. The said tariff is subject to truing up by the State Commission. Hence, the consumers will not be disadvantaged. The application, therefore, deserves to be dismissed.

5. We have also heard Mr. Sen, learned Senior Advocate appearing for M/s Dhariwal, Respondent No.3. Counsel submitted that in this case there is no breach of principles of natural justice. The consumers are not affected by the source of power. They are affected only by tariff of power. They can avail of the opportunity to be heard during public hearing, which will be conducted at the time of determination of generation tariff of M/s Dhariwal. Counsel further urged that the Appellants cannot draw any mileage from the fact that M/s Dhariwal has put in a

bid for supply of power from its Unit – I of the Project to the distribution licensee in the State of Maharashtra. Unit- I of M/s Dhariwal was lying idle for the last three years. Counsel submitted that it was therefore considered appropriate to check the readiness of Unit – I by operating the unit for a short period of about three months by supplying power to distribution licensee in the State of Maharashtra overriding commercial interest. No use can be made by the Appellants of this circumstance. Other submissions of Mr. Sen are similar to the submissions of Mr. Vaidyanathan and hence we need not repeat them.

6. At this interim stage, we are not inclined to go into the merits of the case. But, we have no hesitation in expressing our prima facie opinion that the State Commission has not followed directions given by this Tribunal in its Order dated 28/05/2015 in Appeal No.88 of 2015. The State Commission was directed to give reasons as to why it had exercised discretion in favour of competitive bidding process. This Tribunal had not expressed any opinion on merits of the case. This was expressly clarified in the Order dated 28/05/2015. We also prima facie feel that while

reversing its earlier decision in the impugned order, the State Commission should have stated why it had taken the earlier decision and why it was reversing it.

7. Now the crucial question is whether we should stay the impugned order. While considering this prayer, we have to consider the ground realities. It is pointed out to us that the power procured in terms of the PPA from M/s. Dhariwal forms about 60% of the average power requirement of NPCL. If at this stage, we stop the power flow, there will be an acute shortage of power for supply to the consumers. It is pointed out to us that in case power supply is stopped, NPCL will be constrained to procure power on a day ahead basis through short term open access causing uncertainty in terms of sourcing of power as well as availability of transmission corridor. Mr. Ganesan has countered this submission by saying that NPCL and M/s. Dhariwal are responsible for raising untenable objections and obstructing the admission of the appeal. Counsel made serious grievance about Respondent No.2 filing unaffirmed affidavits before the State Commission. Undoubtedly, we will have to look into these serious submissions, which are denied by NPCL and

M/s. Dhariwal. But at this stage, it is not possible to stay the impugned order as it may cause disturbance in the system and inconvenience to the consumers.

8. It is submitted by counsel for NPCL and M/s. Dhariwal that provisional tariff determined by the State Commission vide the impugned order is subject to final adjudication of M/s. Dhariwal's Tariff Petition and the said tariff is subject to being truing up by the State Commission. We do not want to express any opinion on this. The State Commission in its wisdom is expected to take appropriate steps and look into grievances of stakeholders particularly consumers expeditiously.

9. In the circumstances, we dismiss the stay application. We make it clear that all observations made by us in this order are *prima facie* observations and if the State Commission deals with any proceedings connected to this matter, it shall do so independently and in accordance with law.

10. List the main appeal on **12th September, 2017**. In the meantime pleadings be completed.

11. Pronounced in the open court on this **31st day of July, 2017.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]