

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi**

Appeal No. 34 of 2008

Dated this 16th day of February, 2009

**Coram : Hon'ble Ms. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member**

IN THE MATTER OF:

1. New Delhi Municipal Council
Through its Secretary
Palika Kendra, Sansad Marg,
New Delhi - 110001

... Appellant(s)

Versus

1. Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block,
Shivalik, Malviya Nagar,
New Delhi – 110 017.
2. Secretary (Power)
Govt. of NCT of Delhi,
Delhi Secretariat, I.P. Estate,
New Delhi.
3. Chief Executive Officer
BSES Rajdhani Power Ltd.
BSES Bhawan,
Nehru Place, New Delhi – 110 019.
4. Chief Executive Officer

BSES Yamuna Power Ltd.
Shakti Kiran Building,
Karkardooma,
Delhi – 110 092.

5. Chief Executive Officer
North Delhi Power Ltd.
Sub-Station Building, Hudson Lines,
Kingsway Camp,
Delhi – 110 009.

6. Managing Director
Pragati Power Corp. Ltd. (PPCL)
Himadari, Rajghat Power House,
New Delhi – 110 002.

7. Chairman-cum-Managing Director
Delhi Transco Ltd.
Shakti Sadan, Kotla Road,
New Delhi – 110 002.

... Respondent(s)

Counsel for the Appellant : Mr. Jayant Bhushan, Sr. Advocate
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Mr. Ashish Verma for NDPL

Mr. Surjadipta Seth

Mr. Sumeet Pushkarna,
Mr. Jitender Kumar
Mr. Yogesh Anand
Mr. C. P. Sugatha Kumar
Mr. M. L. Gupta, AM(Legal)
GNCTD & DTL

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The appeal is directed against the order of the Delhi Electricity Regulatory Commission (the Commission for short) dated 07.03.08 in Petition No. 1 of 2008. The petition No. 1 of 2008 was filed before the Commission by the appellant, New Delhi Municipal Council and the order has been passed in favour of the appellant. However, the order has a rider. The appellant is aggrieved of the rider and hence the appeal. The facts leading to the appeal are as under:

2) The Government of National Capital Territory of Delhi (hereinafter referred to as the NCTD) issued certain Policy Directions, under section 108 of the Electricity Act 2003

(hereinafter referred to as the Act) on 28.06.06 and 30.03.07 for the purpose of making power arrangements in Delhi beyond 01.04.07. As per Policy Directions dated 28th June, 2006, w.e.f 01st April, 2007 the responsibility for arranging supply of power in the NCTD was to rest with the distribution companies in accordance to the provisions of the Act and National Electricity Policy. The Commission was required to initiate all measures so that necessary arrangements were in place. A large number of PPAs had been signed by the erstwhile DVB and Delhi Transco Ltd. with various generating stations. The Policy Directions required that arrangements be worked out by the Commission with the distribution companies so that the transition to trade in power would be effected. The Policy Directions required the Commission to assign the PPAs amongst the different distributing companies which succeeded the DVB as well as to NDMC/appellant and MES. The Commission felt that the task of re-distribution of PPAs among the newly constituted distribution companies, the appellant and the Military Engineering Services (MES for short) should actually be performed by the Government and the Commission addressed several communications to the Government of NCT of Delhi in this regard. However, the Government reiterated the same direction by another communication dated 30.03.07. The Commission thereafter proceeded to redistribute the PPAs. It convened a meeting of all the stake holders including the Government, the distribution companies, the State transmission utility, the State

Load Despatch Center etc. on 30.03.07 and obtained the views of all the stake holders. The appellant abiding by the decision of Government of India asked for allocation of power exclusively by Badarpur TPS. After examining the views of all the distribution companies as well as the statutory provisions and the National Tariff Policy the Commission made the re-distribution of the generating capacities of the different generating stations. The salient features of the distribution order relevant for the present appeal are as under:

- “i) The NDMC and the MES would be allocated a capacity of 350 MW and 50 MW, respectively from the Badarpur TPS. Though the Commission visualizes pitfalls in allocating capacity only from a single power station, the Commission has gone along with what was submitted by these two Licensees when consultations took place on the 30th of March 2007.*

- ii) All existing PPAs (with the exception of Badarpur TPS, NCR Dadri TPS, IPGCL and the PPCL both existing and future capacities) shall be allocated amongst the three Distribution Companies, namely, the NDPL, BRPL and BYPL in a ratio which would be in proportion to the energy drawn by them from the*

date of unbundling to February 2007. For the NCR Dadri TPS, IPGCL and the PPCL, only 85% of the capacities shall be allocated amongst the three Discoms on the same principle. Insofar as Badarpur is concerned, only 85% of the capacity left after allocating to the NDMC and the MES would be allocated between the three Discoms, again on similar lines. The capacity allotted to each of the Distribution Companies arrived at on the basis of this principle is annexed along with this Order.

- iii) 15% of the capacity of NCR Dadri TPS, IPGCL and PPCL and the balance of what is left from the Badarpur TPS after allocating to the NDMC and the MES would be treated as unallocated share, analogous to what is done in the Central sector in respect of the Central Sector Power Units (CPSUs). This unallocated share of 15% would be at the disposal of the Government of NCT of Delhi and may be allotted by the Government to the Distribution Comapany(ies) whose consumers are likely to face a relatively higher retail tariff on account of this exercise of reassignment of PPAs. The cost of power from these plants are regulated and are lower than the cost at which power would be procured through*

bilateral arrangements and also through UI at present. In case no allocation from the unallocated capacity is done within the specified time frame, such unallocated capacity shall revert back to the three DISCOMs in the same ratio in which the capacity allocation was done. The Government may also use this unallocated share to meet any contingency or force-majeure condition that may arise in any particular geographical area in the NCT of Delhi.

iv) If the allocation results in any excess capacity in the hands of any of the Distribution Companies/Agency at any time, such excess capacity shall be offered to other Distribution Utilities in Delhi at the first instance and only if such spare capacity cannot be absorbed within Delhi, it shall be offered to others. Necessary arrangements for this purpose shall be evolved in the Power Procurement Group constituted by the Government of NCT of Delhi.

v)

vi)"

3) Subsequently, the appellant pursuant to a direction of Government of NCTD, approached the Commission seeking

allocation of its capacity of 350 MW from three power stations instead of only one through petition No. 1 of 2008. The appellant submitted in the application that the order dated 31.03.07 allocating 350 MW of power to it from Badarpur TPS be suitably modified and it be reallocated power in terms of statutory directions of the Government of NCT of Delhi as contained in letter dated 18.12.07. The letter dated 18.12.07 prescribed Badarpur TPS Dadri Power Plant, Pragati Power Corporation Ltd. as sources from where the appellant could receive electricity in bulk. The appellant asked for redistribution of the bulk purchase source as under:

Sl.	Source	Power in MW
1.	Badarpur Thermal Power Station of NTPC	125
2.	Dadri Power Plant of NTPC	125
3.	Pragati Power Plant of PPCL	100
	Total	350

4) The object behind seeking allocation from more than one source was to secure reliability of electricity. The Commission accepted the prayer for reallocation of power as requested by the appellant. The Commission however observed, *inter alia*, that the appellant was not actually in need of 350 MW of power as its consumption has never exceeded 286 MW and further that while making an alteration in the earlier redistribution, the Commission has to take into account the needs of the other distribution

companies as well. The effective part of the Commission's order is reproduced below:

“11. The Commission has considered the issues raised by the parties and gone through the minutes of the meeting held in the Ministry of home Affairs, Govt. of India as also the decisions taken therein. The Commission also appreciates the binding nature of the directions given to NDMC by the MHA in terms of sub-section 1 of Section 201 of the NDMC Act, 1994. The Commission feels that the concern of NDMC to secure reliable power is genuine considering the sensitivity of the area of its supply where many strategically important buildings and offices are located. It is also equally important for the Commission to ensure that the interests of the consumers living in other areas of Delhi are not jeopardized because of review of reassignment order and giving supply to NDMC from three different plants as proposed by it. It is an admitted fact that tariff from BTPS is relatively higher than the tariff from Dadri and Pragati Power Stations. The argument of DISCOMs that they will not be able to get extra power ranging from 20 to 30 MW due to transfer of gas from IPGCL to PPCL for which they

have given their consent already, is not without substance. Similarly, it is also a fact that PLF in the case of Dadri TPS is 97% as compared to BTPS where PLF is 87% which will facilitate NDMC to get higher quantum of energy. The concern of DISCOMs that NDMC should not be treated differently and given preferential treatment at the cost of other consumers cannot be brushed aside. The Commission feels that the Review Petition of NDMC cannot be considered or decided in isolation. The Commission is under statutory obligation to watch the interests of the consumers as well as the electricity sector as a whole in NCT of Delhi. Once the Petitioner has made a request for review of the Reassignment Order, the Commission has to see that such review does not lead to discrimination or disadvantage and is not detrimental or cause any prejudice to the millions of other consumers residing in the area of other DISCOMs.

12. *While considering the Petition of NDMC the Commission has also gone into the data available with SLDC for last 8-10 months which reveal that the actual consumption of electricity in the NDMC area at no point of time had exceeded 286/287 MW and that*

too for a very short duration. Infact, the NDMC has not been able to give any justification as to why it needs 350 MW. The experience of about 10 months of scheduling in the Intra-State ABT regime in Delhi also brings out this fact. The surplus power available with NDMC in 2007-08 has been disposed of by them which resulted in estimated average power purchase cost to be lower by atleast 50 paisa/kwhr when compared to other Distribution Companies.

13. Considering all the above factors and the overall interests of the consumers as well as the electricity sector as a whole in NCT of Delhi, the Commission allows the Petition of NDMC with some rider, and reallocate power in the following manner:

Sl.	Source	Power in MW
1.	Badarpur Thermal Power Station of NTPC	125
2.	Dadri Power Plant of NTPC	125
3.	Pragati Power Plant of PPCL	100
	Total	350

14. The above allocation shall be subject to the condition that 15% of this allocated power would be treated as unallocated share, analogous to what is done already by the Commission in its order dated 31.03.2007 and is also akin to the practice

*adopted by the Central Govt. in this regard. This unallocated share of 15% would be at the disposal of the Government of NCT of Delhi. **It is clarified here that by carving out 15% unallocated share from the allocation of NDMC, the total allocation is not reduced and as and when the NDMC needs more power the same would be available to it but, the only difference would be that NDMC would have to approach the Govt. of NCT of Delhi for allocation of power out of the unallocated share of 15%. NDMC would also be eligible to get allocation from 299 MW of unallocated capacity carved out in the Commission's Order dated 31.03.2007, if required. It is further clarified that the Government of NCT of Delhi may also use the total unallocated share of (299MW + 53MW) to meet any contingency or force majeure condition that may arise in any particular geographical area in the NCT of Delhi.***

5) The appellant challenges this order on the plea that the Commission had no jurisdiction to change the initial distribution of capacity while reallocating the source of purchase and therefore the order to that extent is bad. The order has also been challenged on merit.

6) The appellant has given a long list of challenges in the memorandum of appeal. Grounds have been further crystalised in

a written submission. The grounds can be briefly enumerated as under:

- (i) Although the reallocation of power from three sources instead of one would have some effect on the price and actual energy available to other DISCOMs but these were not the considerations on which the Commission had made the first allocation as the allocation was not correlated to either the cost of energy or the actual energy available.
- (ii) The electricity in the NDMC area is cheaper because of the peculiar consumer profile with large commercial consumption, low theft, proper bill recovery and low demand during off-peak hours. Therefore, consideration of the cost aspect was not relevant and all that the Commission was required to consider was source of allocation and not the quantity to be allocated.
- (iii) Although the allocation was 350 MW, the actual availability was between 15 to 20% less which was just enough to meet peak load of the appellant at the relevant time. Thus the observation of Commission

that the appellant was getting more than the required amount of electricity was incorrect.

- (iv) Although the Commission said that it was not reducing the allocation of quantum the rider in fact amounted to reducing the quantum as 53 MW fell in the hands of Government of NCTD which the Government could allocate to any other DISCOM. Soon after the impugned order was passed the Government of NCTD allocated the 15% share of the appellant to the respondent No.3 viz. BSES Rajdhani Power Limited.
- (v) The effect of 53 MW being taken away from the appellant has resulted in shortage particularly in the months of July, August and September, 2008.
- (vi) The Commission has gone beyond its jurisdiction in passing the impugned order.

7) The appeal is opposed by the other distribution companies. It is contended on their behalf that the Policy Direction under section 108 of the Act issued by the Government of NCTD on 28.06.06 and 30.03.07 gave the Commission the responsibility for re-arranging supply of power to the various distribution companies. Thus Policy

Direction also requires the Commission to carry out the reassignment of PPAs. At no point of time the appellant challenged the exercise of the power of reassignment of PPAs by the Commission. The respondents contend that section 23, 86(1)(k) as well as section 94 of the Act confer the power on the Commission to pass the impugned order.

8) It is further contended on behalf of the other distribution companies that the impugned order does not prejudice the appellant in any way since 15% un-allocated share of the appellant could still be available to the appellant if it could justify the need before the Government of NCTD. The other DISCOMs have made an effort to show how they would be impacted by the redistribution of sources of power in favour of the appellant. Admittedly, the Badarpur TPS was providing power at the costliest rate. When the purchase from the costliest source by the appellant is reduced, the costliest power would now have to be purchased by the other distribution companies. At the same time the other distribution companies would have to forgo, to the extent of appellant's purchase, the cheaper power which they have been purchasing from other generating companies.

9) It is further submitted on behalf of the other distribution companies that for the period from September 2007 to March 2008, the maximum and minimum load requirements by the entire area

covered by the appellant & MES have been 231 MW and 60 MW respectively and that at no point of time the actual consumption of electricity in the area covered by the appellant exceeded 286/287 MW as against the allocation of 350 MW.

10) The other DISCOMs also point out that the appellant has been able to sell surplus power to DISCOMs outside Delhi which has yielded huge profits to it.

Decision with reasons:

11) We will first examine the merit of the order. If the Commission is asked to make any amendment in the initial order dated 31.03.07 it cannot be asked to do the amendment in a mechanical manner. It cannot be denied that the allocation of source of power has to be done keeping in view the requirement of each distribution area as well as the price at which electricity is available from different sources. It is not disputed that the appellant caters to the sensitive area where important offices of Government of India is located. The need to provide quality services in this area is in the national interest. The Commission, while passing the impugned order, has been fully aware of this important factor. However, the Commission felt that even after meeting its requirement the appellant had spare capacity in its hands. As can be seen, from the portion of the order quoted above, that even the representative of the appellant did not dispute this fact and could not give any justification for continuing

with the quantum that had been earlier given to appellant. The appellant says that subsequent to the order it has faced huge shortage. That may call for an application for another reallocation. But it cannot be a ground to challenge the impugned order. The Commission while passing the impugned order has rightly taken care of the need of the appellant and has found that the appellant was getting more than the requirement. The Commission is compelled to disturb the first arrangement as while the appellant was having surplus energy the other DISCOMs were working under shortage. On behalf of the Government of NCTD also it was expressed that while taking care of the request of the appellant the Commission should not overlook the requirement of the other DISCOMs. Thus the Commission has worked in a just and equitable manner in reconsidering the quantum of energy to be allocated to the appellant as well as the other DISCOMs.

12) Apart from the quantity of power required the cost at which it can be procured is also an important factor. There is no reason why the other distribution companies should not have equitable share in the cheaper power. It is not the case of the appellant that the consumers in its area belong to the weaker section of the society and are not able to pay for the power at which it is procured by it.

13) The DISCOMs have cited sections 23, 86(1)(k) as well as section 94 of the Electricity Act 2003 as giving jurisdiction to the Commission for passing the impugned order. Section 23 empowers the Commission to pass orders for regulating supply, distribution and consumption of electricity for the purpose of maintaining efficient supply and for securing equitable distribution of electricity. Section 86(1)(k) says nothing more than that the Commission shall discharge functions as may be assigned to it under the Act. Section 94 gives power to the Commission to pass certain interim orders and certain powers of the civil court in the matter of procedure.

14) The impugned order is passed to modify an earlier order namely the one dated 31.03.07. The order dated 31.03.07 was passed in compliance with the direction, purportedly issued under section 108 of the Act by the Government of NCTD. The impugned order was passed on an application by the appellant for modification in the order dated 31.03.07. If the appellant does not dispute that the order dated 31.03.07 was within jurisdiction of the Commission it cannot dispute the jurisdiction of the Commission in passing the subsequent impugned order. Section 108 of the Act directs that the Commission shall be guided by Policy Directions that may be issued in public interest by the Central Government. The Government of NCTD vide its direction dated 28.06.06, *inter alia*, said the following:

“(c) A large number of power purchase agreements have been signed by erstwhile Delhi Vidyut Board and Delhi Transco Limited with various generating stations of National Thermal Power Corporations, National Hydroelectric Power Corporation Limited, Nuclear Power Corporation of India Limited, Rajasthan Atomic Power and other companies and, therefore arrangements would have to be worked out by Delhi Electricity Regulatory Commission with the distribution companies so that the transition to trade in power would be effected. Such assignment can be done in a manner to take care of different load profile of the distribution companies, New Delhi Municipal Council and Military Engineering Services.”

15) In fact the Government of NCTD wanted the Commission to reallocate the power purchase agreements held by the erstwhile Delhi Vidyut Board amongst the distributing companies, NDMC (the appellant) and MES. The Commission was of the opinion that the redistributing of PPAs was not one of its functions. However, on the insistence of the Government the order dated 31.03.07 was passed by the Commission. It can be said that the Government’s power to redistribute the PPAs was delegated to the Commission and the Commission exercised the power delegated by the Government. When the application for modification of that order is filed the same

delegation of power needs to be exercised. The appellant which made the application before the Commission cannot say that the Commission did not have power to entertain that application. Nor is it the case of the appellant that the power delegated came to an end immediately on passing the order dated 31.03.07.

16) Once it is decided that the Commission had the power to entertain the application for modification of the order dated 31.03.07 it cannot be said that the Commission could not have made the corresponding modification in the order relating to the quantum of power to be assigned to the appellant. As soon as the appellant is allowed to draw power from sources other than Badarpur TPS the power available to other distributing companies which were drawing powers from other generating companies had to reduce. The other distributing companies were required to forgo their drawal from other generating companies and at the same time were required to draw power from the Bardarpur TPS. This made the other distributing companies to buy costly power and permitted the appellant to buy costly power in place of cheaper power. The Policy Direction dated 28.06.06 did not specify the quantum to be allocated to the appellant. The quantum to be allocated was also determined by the Commission. Since the Commission had the delegated power to redistribute the PPAs and at the same time the power, as mentioned in section 23 of the Act, the Commission was

entirely within its jurisdiction to change the quantity to be allocated to the appellant.

17) In the present case, although the Commission has said that 15% of the power allocated to the appellant be considered to be un-allocated power it has not deprived the appellant of this 15% (being in excess of the requirements of the appellant) as this 15% has been placed in the hands of Government of NCTD to be given to the DISCOMs/the appellant/MES who may need it. Thus the appellant, in case of necessity, could ask for power out of this 15% by proving its requirement to the Government. We find prudence in the Commission's order as thereby the Commission has taken care to equitably distribute the power available within the State of Delhi while assuring the sensitive area of the appellant sufficient supply of power as and when needed. Accordingly, we are not inclined to interfere with the order. The appeal is accordingly dismissed with costs.

Pronounced in the open court on this **16th day of February, 2009.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member