

In Re: Ntpc Ltd.

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Court : Central Electricity Regulatory Commission CERC

Decided On : Nov-06-2007

Judge : B Bhushan, R Krishnamoorthy

Appellant : In Re: Ntpc Ltd.

Judgement :

1. The applicant has made the present application to seek permission for setting up and operation of power exchange through a separate company being promoted jointly by the applicant and other stakeholders, namely NHPC and NCDEX.2. Under the guidelines of the Commission for setting up of power exchange, any company incorporated under the Companies Act, or a consortium of companies who have entered into a formal agreement on issues critical to the setting up of the power exchange may make an application for this purpose, provided that the persons managing the affairs of such company or consortium have adequate knowledge and understanding of the electricity laws. While making the application, the applicant is required to submit copies of its Memorandum and Articles of Association. In case of the consortium, a formal agreement, among other things is also to form part of the application. These guidelines further provide that the Commission may grant permission to an applicant. However, permission is granted in favour of incorporated company with limited liability, registered exclusively for the purpose of setting up of power exchange; this condition is applicable when the application is made by the consortium.

3. The applicant in its application has stated that it is in the process of promoting a separate company jointly with other stakeholders for setting up and operating the power exchange. For this purpose NHPC and NCDEX who were approached are stated to have given their consent.

It is further stated that finalization of the joint venture agreement is in progress. The applicant has also submitted the draft rules and bye-laws of the proposed power exchange.

4. The applicant has published public notices in the newspapers keeping in view the Commission's guidelines contained in the order dated 6.2.2007 in suo motu Petition No.155/2006. In these notices, it has been stated that power exchange is proposed to be set up by a separate company being promoted by the applicant, jointly with NHPC and NCDEX who have "in principle" agreed to join as promoters. It is further stated that some other stakeholders are also expected to join.

5. In response to the public notices published by the applicant, Shri B.B. Jindal and Shri S.S. Kalsi have filed their objections to grant of permission to the applicant for setting up of the power exchange. The objections filed by them are being dealt with in detail. They have questioned the role and locus of the applicant in making the present application, as the applicant is a generating company.

6. We heard Shri M.G. Ramachandran, Advocate for the applicant and the objectors in person.

7. Shri Jindal in his objections has stated that the application is not in accordance with Sections 14, 15 and 52 of the Electricity Act, 2003 and has been made without fulfilling the norms of capital adequacy, credit worthiness for grant of licence for trading in electricity. It has been stated that the application for grant of permission for setting up of the power exchange is to be made by the person concerned and not its promoters, etc. According to Shri Jindal, the applicant's proposal to act as a promoter for setting up of power exchange is in the nature of cartel and is, therefore, in violation of the Competition Act, 2002 and, therefore, it is necessary to obtain prior approval of the Competition Commission of India under this Act. It is contended that the question of grant should arise only after the

Competition Commission has accorded its approval. Therefore, according to Shri Jindal in the first instance a company is to be formed in accordance with the provisions of the Competition Act, 2002.

8. Shri Kalsi in his objections has stated that there is a possibility of participants having more than 50% of the shares and, therefore, ring fencing between the management and ownership cannot be ensured. In the opinion of Shri Kalsi, trading of power through the power exchange will lead to escalation of prices of the electricity. It is stated that certain vital market design parameters have not been elaborated or listed in the applicant's proposal placed before the Commission. It is alleged that the applicant's proposal does not have any suggestions on handling of transmission charges and transmission losses. Shri Kalsi has accordingly opposed grant of permission to applicant to set up and operate the power exchange. Shri Kalsi has suggested that the operation of RLDCs should be with an independent and neutral agency as stipulated in the National Electricity Policy and has been further suggested that permission for setting up of power exchange be granted in favour of independent and neutral agency without any commercial interest.

9. We have considered the objections raised by Shri Jindal and Shri Kalsi in the light of comments of the applicant on these objections.

Shri Jindal's objections are mainly based on his understanding that the power exchange will be trading in electricity. It needs to be clarified that the role of power exchange is to facilitate trading by bringing sellers and buyers at a common platform. The power exchange is expected to promote competition in sale and purchase of electricity by facilitating trading. The activities of the power exchange cannot be said to be anti-competitive. The Commission has already granted permission to another applicant for setting up a power exchange. The power exchange proposed to be set up by the present applicant shall therefore not be a monopoly. It would have to compete with the first power exchange for business. Besides, its potential customers also have other options for trading: bilaterally with others (contracting directly or through a trader), and with the grid as Unscheduled Interchange (UI). It is thus clear that establishment of proposed power exchange

would only add to the options available, and not inhibit competition. The objections in this regard are therefore not sustainable.

10. The power exchange itself will not be permitted to undertake trading in electricity. The requirements of credit-worthiness, capital adequacy as specified for an electricity trader does not apply in the case of a person setting up the power exchange. In fact, the guidelines issued by the Commission do not specify the capital adequacy, credit-worthiness requirements for a person desiring to establish a power exchange. The guidelines specified by the commission provide for de-mutualisation of the power exchange and ring fencing between ownership, management and participation. This should take care on the concerns of the objectors.

11. The objectors' main point is that NTPC Ltd., the applicant should not be granted permission for establishing the power exchange because of its role as a generator and also having a subsidiary trading company. At the hearing it was stated on behalf of the applicant that in addition to NTPC, NHPC and NCDEX, some other organizations have also evinced their interest to join as promoters of the proposed company, to be incorporated to set up the power exchange. This fact also follows from the notices published by the applicant that other major stakeholders are expected to join the company being promoted. All this would imply that the constitution of the consortium for the setting up the power exchange is not yet finalized. After an agreement between the various stakeholders has been arrived at, the promoters will have to take steps for incorporation of the company for the purpose.

12. Learned Counsel for the applicant insisted that since the guidelines provide for making of application for permission by a consortium, the present application is in order.

13. The guidelines envisage that the application for setting up of power exchange can be made by a company or by a consortium in which case, a copy of the agreement arrived between the members constituting the consortium is to be filed. In the present case, the application has been made by the applicant for grant of permission for setting up and operation of the power exchange through a separate

company which is yet to be formed. The applicant is not seeking permission in its own favour. Neither can it make application on behalf of a company which is not in existence as yet. We agree with the Counsel for the applicant that the application can be made by a consortium (of NTPC, NHPC and NCDEX) and in that case, formal agreement arrived at among the members is also to be placed on record. Such a provision in the guidelines is made for the reason that a consortium is formed only after the persons concerned have formally made an agreement to that effect. In the present case, we have been informed that the names of the stakeholders who are to be the part of the Consortium have not yet been firmed up.

Till such time the stakeholders who are to promote the company are identified and a formal agreement has been arrived at, the consortium cannot be said to have been formed.

14. At the hearing it was reiterated on behalf of the applicant that steps were being taken to form a separate company to be responsible for setting up the power exchange. We direct that this application may be kept pending till such time a separate company under the Companies Act is registered for setting up and operating the power exchange. The company so registered shall get the application revived as and when established. Such a company shall be substituted as the applicant in place of the present applicant, NTPC. The concerned company shall publish fresh notices in accordance with the guidelines contained in the order dated 6.2.2007 *ibid*. The documents required under the guidelines shall also be placed on record by the newly formed company.

15. We also gather that Power Grid Corporation of India Limited, which is presently notified as the Central Transmission Utility also proposes to join as a promoter of the company to be set up. Law envisages an independent role for the Central Transmission Utility, particularly when it is controlling the Regional Load Despatch Centres also.

Accordingly, we observe that the Corporation, which is required to have a neutral and impartial role under the law should not be joining as a promoter of the company to be incorporated for establishing a power exchange.

