

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 123/MP/2015

Coram:
Shri Gireesh B.Pradhan, Chairperson
Shri A.K.Singhal, Member
Shi A.S.Bakshi, Member
Dr. M.K.Iyer, Member

Date of Hearing: 19.11.2015

Date of Order: 24.11.2015

In the matter of

Default in payment of Unscheduled interchanges (UI) charges and Deviation charges in excess of the drawal schedule by Vandana Vidyut Limited and default in opening of Letter of Credit towards the non-payment of UI and DSM charges.

**And
In the matter of**

Western Regional Load Despatch Center
F-3, MIDC Area, Marol,
Andheri (East), Mumbai

Petitioner

Vs.

Vandana Vidyut Limited
Vandana Vidyut Bhawan, M.G.Road,
Raipur, Chhattisgarh-492 001

Respondent

Member-Secretary
Western Regional Power Committee
F-3, MIDC Area, Marol,
Andheri (East), Mumbai

Proforma Respondent

The following were present:

Shri S.S.Barpanda, WRLDC
Ms. Pragya Singh, WRLDC
Shri Nishant Menon, Advocate, VVL



Shri Abhishek Birthray, Advocate, VVL
Shri R.V.Mathe, VVL

ORDER

This petition has been filed by the Western Regional Load Despatch Centre under Regulation 10 of the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and related matters) Regulations, 2014 (Deviation Settlement Regulations) for default in payment of Unscheduled Charges/Deviation Charges in excess of the drawl schedule by the respondent, Vandana Vidyut Limited. The petitioner has made the following prayers:

- (a) Direct Respondent No. 1 to clear the outstanding dues of the UI/Deviation charges of Rs. 8,32,72,763/- as on 29.3.2015 within the next 15 days;
- (b) Direct Respondent No. 1 to pay interest as per Regulation 10.2 of the CERC (Deviation Settlement Mechanism and Related matters) Regulations, 2014 of Rs.70,91,585/- as on 31.3.2015 within the next 15 days.
- (c) Direct Respondent No. 1 to open Letter of Credit as per the advice given by the petitioner on immediate effect;
- (d) Direct Respondent No. 1 to clear the outstanding dues of Rs. 13,30,953/- and applicable surcharge thereof towards payment of fee and charges of WRLDC with immediate effect and subsequently pay the monthly fee and charges of WRLDC regularly on or before the due date.
- (e) Direct Respondent No. 1 to pay the monthly bills of DSM charges being issued by the Respondent No. 2 (WRPC) on the respondent in future, regularly within the stipulated period of 10 days of the issue of the Deviation Charges;
- (f) Issue appropriate directions under Regulation 25A of the CERC (Open Access in inter-State Transmission) Regulations, 2008 and any amendment thereof;
- (g) Take appropriate action against the Respondent No. 1 under Section 142 of the Electricity Act, 2003 for violation of Regulation 10 of the DSM Regulations, 2014
- (g) The Hon`ble Commission may pass any or such further orders or orders as may be deemed just and proper in the facts and circumstances of this case.”



2. The petitioner has submitted that the respondent is a generating company having an installed capacity of 270 MW (2X135 MW) at Raipur, Chhattisgarh. The COD of the first unit of the generating station was declared on 10.4.2014. After declaration of COD of the first unit, in the absence of permanent connectivity, the respondent has been selling power through STOA bilateral/Power Exchange and the same has been facilitated by WRLDC as per the provisions of the Central Electricity Regulatory Commission (Open Access in inter-State in Transmission) Regulations, 2008 (Open Access Regulations) through the interim connectivity granted by CTU through LILO of 400 kV Korba-Birisingpur one ckt. at the respondent`s generating bus.

3. The petitioner has submitted that as per Regulation 10 Deviation Settlement Regulations, the respondent is required to pay the deviation charges within 10 days of the issue of the deviation statement by the Regional Power Committee and for delay beyond 12 days, the defaulting entity shall be liable to pay interest @ 0.04% per day. The petitioner has further submitted that as per Regulation 10 (4), all regional entities are required to open Letter of Credit (LC) equal to 110% of its average payable weekly liability for deviations.

4. The petitioner has submitted that the net outstanding dues as on 29.3.2015 against the respondent stood at ₹ 8.32 crore including interest of Rs. 70.91 lakh. The petitioner has submitted that the issue of non-payment of UI/DSM charges by the respondent was discussed in the various meetings of Western Regional Commercial Committee and Western Regional Power Committee. The petitioner has submitted that the respondent is not liquidating the outstanding UI/DSM dues despite repeated requests.



5. The petitioner has submitted that the respondent has also not opened the LC as per the provisions of Regulation 10 (4) of the Deviation Settlement Regulations which is clear cut violation of the said Regulations. The petitioner has submitted the petitioner has not been liquidating the fee and charges for WRLDC since October, 2014

6. The matter was heard on 9.6.2015. The Commission directed the respondent to pay substantial amount by 10.7.2015 and open LC within a week.

7. The respondent in its reply dated 17.7.2015 has submitted as under:

(a) The petitioner raised bills towards UI/DSM and fee and charges. However, certain discrepancies were observed in the UI/DSM bills. The respondents vide its letter dated 4.4.2014 sought clarification from the petitioner in this regard. However, the petitioner did not file its response. Without prejudice its contention qua discrepancies in the bills and need for their reconciliation.

(b) Due to severe financial crisis, cancellation of allotment of the coal block by the Hon`ble Supreme Court, inadequate and irregular supply of coal, market slowdown, lack of long term PPAs, non-availability of adequate infrastructure/power corridor for supply of power and non release of working capital by the bankers, the respondent could not make payment of outstanding UI/DSM charges.

(c) Since the generating station has been shut down, it has not been able to settle the UI/Deviation charges in terms of Deviation Settlement Regulations

(d) A proposal has been submitted to the bankers for flexible structuring of existing long term project loan and for immediate disbursement of funds to enable it to pay the outstanding UI/DSM charges. The said proposal was approved by the bankers on the certain terms and conditions precedent which needs to be complied with before disbursement for the loan amount and final disbursement of funds is expected to take about 3 to 4 months.

(e) Ministry of Coal in its Memorandum dated 30.6.2015 has decided that the power plants, which are already commissioned, but do not have long term PPAs, will be supplied the coal at notified price plus 40% premium and such power plants can sell the generated power on merchant basis. This arrangement would help the respondent to re-start its operations and enable it to match the present power rate available in the market on merchant basis. In view of this development, the respondent expects that it would be able to overcome the ongoing intense financial crisis.

(f) As per the Commission's direction, despite best efforts, the respondent could not arrange funds to liquidate the outstanding UI/DSM charges and open the Letter of Credit. The respondent has requested to direct the petitioner to reconcile the outstanding bills and grant three months time to pay the outstanding UI/DSM dues.

8. During the next hearing on 18.8.2015, learned counsel for the respondent submitted that in compliance of the Commission's direction, the respondent has paid ₹ 7.81 crore and balance amount would be paid with interest after reconciliation of



certain discrepancies observed in the UI/DSM/bills. Learned counsel for the respondent submitted that LC could not be opened despite efforts of the respondent and requested for three months time to liquidate the entire outstanding UI/DSM charges.

9. The Commission directed the respondent to take steps to liquidate the entire outstanding amount and open and Letter of Credit within two months.

10. During the course of hearing on 19.11.2015, the representative of the petitioner submitted as per the Commission`s direction dated 18.8.2015, the respondent was required to pay substantial amount and open Letter of Credit. However, the respondent has not complied with the Commission`s direction. Learned counsel for the respondent submitted that on account of circumstances beyond the control of the respondent, payment could not be made and LC could not be opened. Learned counsel sought time to make the payment of entire outstanding UI/DSM charges.

11. We have considered the submissions of the petitioner and the respondent. The petitioner has requested to issue appropriate directions to the respondent to clear outstanding UI/deviation charges, fees and charges, and open the LC as per the Deviation Settlement Regulations. The petitioner has further prayed for issue of direction under Regulation 25A of Open Access Regulations and initiate action under Section 142 of the Act.

12. Regulation 10 of the Deviation Settlement Regulations provides for the schedule of payment of deviation charges and payment security for settlement of



deviation dues as under:

“(1) The payment of Deviation shall have a high priority and the concerned constituent shall pay the indicated amounts within 10 (ten) days of the issue of statement charges for Deviation including Additional charges for Deviation by the Secretariat of the respective Regional Power Committee into the “Regional Deviation Pool Account Fund” of the concerned region.

(2) If payments against the charges for Deviation including Additional charges for Deviation are delayed by more than two days, i.e., beyond twelve (12) days from the date of issue of the statement by the Secretariat of the respective Regional Power Committee, the defaulting constituent shall have to pay simple interest @ 0.04% for each day of delay.

(3) All payments to the entities entitled to receive any amount on account of charges for Deviation shall be made within 2 working days of receipt of the payments in the “Regional Deviation Pool Account Fund” of the concerned region.

Provided that –

(i) in case of delay in the Payment of charges for Deviations into the respective Regional Deviation Pool Account Fund and interest there on if any, beyond 12 days from the date of issue of the Statement of Charges for Deviations the regional entities who have to receive payment for Deviation or interest thereon shall be paid from the balance available if any, in the Regional Deviation Pool Account Fund of the region. In case the balance available is not sufficient to meet the payment to the Regional Entities, the payment from the Regional Deviation Pool Accounts Fund shall be made on pro rata basis from the balance available in the Fund.

(ii) the liability to pay interest for the delay in payments to the “Regional Deviation Pool Account Fund” shall remain till interest is not paid; irrespective of the fact that constituents who have to receive payments have been paid from the “Regional Deviation Pool Account Fund” in part or full.

(4) All regional entities which had at any time during the previous financial year failed to make payment of Charges for Deviation including Additional Charges for Deviation within the time specified in these regulations shall be required to open a Letter of Credit (LC) equal to 110% of its average payable weekly liability for Deviations in the previous financial year, in favour of the concerned RLDC within a fortnight from the date these Regulations come into force. Provided that –

(i) if any regional entity fails to make payment of Charges for Deviation including Additional Charges for Deviation by the time specified in these regulations during the current financial year, it shall be required to open a Letter of Credit equal to 110% of weekly outstanding liability in favour of respective Regional Load Despatch Centre within a fortnight from the due date of payment.

(ii) LC amount shall be increased to 110% of the payable weekly liability for Deviation in any week during the year, if it exceeds the previous LC amount by more than 50%.

13. The petitioner has submitted that after declaration of COD of the first unit, in the absence of permanent connectivity, the respondent was selling power through STOA bilateral/Power Exchange through an interim connectivity and the same has been facilitated by WRLDC as per the provisions of the Open Access Regulations. As per the above provisions of the Deviation Settlement Regulations, payment of deviation charges enjoys highest priority and is required to be paid within 10 days of the issue of the Deviation charges statement by the Regional Power Committee. In case of delay beyond 12 days of issue of the statement, the defaulting entity is liable to pay interest 0.04% per day. According to the petitioner, as on 29.3.2015 an amount of ₹ 9 crore is outstanding against the respondent towards deviation charges. As per clause (4) of Regulation 10 of the Deviation Settlement Regulations, all the regional entities which had any time during the previous financial year failed to make payment of charges for deviation are required to open a Letter of Credit (LC) equal to 110% of its average payable weekly UI liability in the previous financial year, in favour of the concerned RLDC. The petitioner has submitted that the respondent has not opened LC.

14. On the request of the learned counsel for the respondent, the Commission vide Record of Proceedings for the hearing 18.8.2015, allowed two months time to the respondent to take steps to liquidate the entire outstanding amount and open and Letter of Credit. However, the respondent did not comply with the Commission's directions. In our view, the respondent has not only failed to comply with the provisions of the Regulations, but also has not honoured its own commitment and directions of

the Commission. It is further noted that the outstanding deviation charges has accrued against the respondent in the course of its injection of power under short term open access for selling through the Power Exchange/bilateral trade. In other words, the petitioner has earned revenue from sale under short term bilateral and collective transactions and should have settled the deviation charges from the said revenues. Therefore, reliance of the respondent on various factors as enumerated in its affidavit dated 17.7.2015 as the reasons for non-payment of UI/DSM charges cannot be accepted.

15. The petitioner has also submitted that the respondent has not liquidated the RLDC fees and charges. It is noted that connectivity of the petitioner to the grid and grant of access is contingent upon its commitment to pay the various statutory charges including RLDC fee and charges. Therefore, the respondent cannot escape its statutory liability on account of its financial crisis or its inability to generate funds.

16. The Commission vide order dated 2.9.2015 in Petition No. 142/MP/2015 has dealt with the issue of curtailment of the STOA to the defaulting entities as under:

“52. Regulation 25A of the Open Access Regulations provides as under:

25A. When so directed by the Commission, the National Load Despatch Centre or the Regional Load Despatch Centre, as the case may be, shall not grant short-term open access for bilateral transaction (including transactions through Power Exchange) to the entities and associates of such entities, who consistently and wilfully default in payment of Unscheduled Interchange (Deviation) charges, transmission charges, reactive energy charges, congestion charges, fee and charges for National Load Despatch Centre or Regional Load Despatch Centre including the charges for the Unified Load Despatch and Communication Scheme and Unscheduled Interchange (Deviation) charges to SLDC by an intra-State entity for a short term inter-State transaction”

53. The above provisions empower the NLDC and RLDCs to deny short term open access to the entities who default in payment of UI/Deviation charges, transmission



charges, and fees and charges of NLDC/RLDC. The only caveat is that NLDC/RLDCs would deny short term open access in those cases where the Commission has issued necessary directions to that effect. Two questions arise in connection with operation of Regulation 25A. First, what would constitute “wilful and consistent” default to serve as trigger point for invocation of regulation 25A of Open Access Regulations? Second, whether such directions should be sought from the Commission on case to case basis or the Commission should specify the circumstance or event on occurrence of which NLDC/RLDC would automatically invoke the provisions of Regulation 25A of Open Access Regulations.

54. As regards the „wilful and consistent default“ , the Commission has dealt with the same in order dated 25.1.2013 in Petition No. 213/MP/2012. Relevant extract of the order is as under:

“11. The word 'wilful' has not been defined in the Open Access Regulations. Black's Law Dictionary defines the word 'wilfulness' as "an act done intentionally and designedly, a conscious failure to observe care; conscious; knowing; done with stubborn purpose, but not with malice." The Supreme Court in Ramachandra N. Kulkarni v. State of Mysore {AIR 1964 SC 1701} has held that a review of various decisions brings out clearly the guiding principle that the meaning to be attached to the words 'wilful' or 'wilfully' has to be ascertained on a close examination of the scheme and nature of the legislation in which the words appear and the context in which they are used. Therefore, the existence of wilful and consistent default on the part of an entity has to be considered in the context of the Open Access Regulations i.e. the requirement for prompt liquidation of transmission charges and other charges. Where an entity has received the bill but has not made the payment by the due date which affects the cash flow position of the transmission licensee or the system operator, such default will be considered as wilful. If such default is prolonged beyond a reasonable period, then the default will be considered as consistent.”

55. It is to be noted that while RPS Regulations can be invoked for default on the part of a regulated entity to pay the dues of generating companies and transmission licensees, Regulation 25A can be invoked for wilful and consistent default in paying UI/deviation charges, transmission charges, reactive energy charges, congestion charges, and fees and charges for NLDC/RLDCs. Therefore, only in case of default in payment of transmission charges, both Regulation 25A of Open Access Regulations and RPS Regulations can be invoked. In our view, when regulation of power supply under RPS Regulations is resorted to for default in payment of transmission charges, Regulation 25A should be invariably invoked as otherwise the defaulting entity would defeat the regulation of power supply by scheduling under short term open access. Therefore, the “wilful and consistent” default will be construed differently in both cases. **In our view, default in payment for a period of 90 days from the due date of payment of UI/deviation charges, transmission charges, reactive energy charges, congestion charges and RLDC fees and charges shall be considered as trigger point for invocation of Regulation 25A of Open Access Regulations to deny short term open access to the defaulting entity.** However, where a transmission licensee resorts to regulation of power supply, denial of open access under Regulation 25A of Open Access Regulations shall be triggered from the date of commencement of regulation of power supply under RPS Regulations. As regards the second issue as to whether NLDC/RLDCs will be required to approach the Commission for

invoking Regulation 25A of Open Access Regulations on case to case basis, it is clarified that NLDC/RLDCs shall be guided by the principle of default trigger date as clarified above and shall not be required to approach the Commission for specific directions in this regard on case to case basis.”

As per the above order, the concerned RLDC is empowered to curtail STOA for default in payment of transmission charges, deviation charges, reactive energy charges, RLDC fees and charges, etc.

16. We direct the respondent to liquidate the entire UI/deviation charges, RLDC fees and charges, and open the LC for required amount as per the Deviation Settlement Regulations immediately failing which WRLDC shall be at liberty to invoke Regulation 25A of the Open Access Regulations.

17. The petitioner has prayed for initiation of action under Section 142 of the Act against the respondent. Since we have directed the petitioner to deny the short term open access to the respondent in terms of Regulation 25A of the Open Access Regulations, there is no requirement for taking action under Section 142 of the Act at this stage.

18. The petition is disposed of in terms of the above.

SD/-
(Dr. M.K.Iyer)
Member

SD/-
(A.S.Bakshi)
Member

SD/-
(A.K.Singhal)
Member

SD/-
(Gireesh B.Pradhan)
Chairperson