

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 132/MP/2017

Subject : Petition under Section 79 (1)(f) of the Electricity Act, 2003 read with Regulations 44 and 45 of CERC (Terms and Conditions of Tariff) Regulations, 2014 seeking adjudication of dispute between petitioner and NTPC Limited.

Date of hearing : 22.8.2017

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

Petitioner : Tata Power Delhi Distribution Limited.

Respondent : NTPC Ltd..

Parties present : Shri Sanjay Sen, Senior Advocate, TPDDL
Shri Rahul Kinra, Advocate, TPDDL
Shri Ashutosh Kumar Srivastava, Advocate, TPDDL
Shri Sumit Sachdev, TPDDL
Shri Uttam Kumar, TPDDL
Shri M.G. Ramachandran, Advocate, NTPC
Ms. Poorva Saigal, Advocate, NTPC
Shri EP Rao, NTPC
Shri Vivek Kumar, NTPC

Record of Proceedings

At the outset, learned senior counsel for the petitioner submitted that the present petition has been filed restraining NTPC from enforcing payment of monthly invoices on the last working day of the month contrary to Regulations 44 and 45 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (2014 Tariff Regulations) and for direction to NTPC to amend the PPA dated 8.5.2008 in terms of the amendments proposed by the petitioner. Learned senior counsel further submitted as under:

a). The petitioner had duly complied with the provisions of Article 6.1 of the PPA and has paid the amount by the last Bank working day of the calendar month in which energy invoices were raised by NTPC. NTPC issued thirteen Default Notices to the petitioner in relation to each of its thirteen plants which supplies power to the petitioner and informing the petitioner that it has failed to honour payment due on 31.5.2017 in

relation to the energy supplied to the petitioner for the period of April 2017 and requested the petitioner to pay the amount due within 24 hours of the receipt of default notices, failing which NTPC will invoke the Letter of Credit.

b). The Default Notices and communication dated 9.6.2017 are in clear violation of Regulations 44 and 45 of the 2014 Tariff Regulations and contrary to invoice dated 8.5.2017 issued by NTPC for each of the thirteen plants which categorically provides that the due date of payment is 7.6.2017 i.e 30 days from the date of invoice.

c). The entire case of NTPC is based on the terms of the PPA and APTEL's judgment dated 24.1.2013 in Appeal Nos. 82 and 90 of 2012 [BSES Rajdhani Power Limited Vs. Central Electricity Regulatory Commission and Others] (BSES judgment) whereas the BSES judgment is in context of the 2009 Tariff Regulations and there is a fundamental difference between 2009 Tariff Regulations and 2014 Tariff Regulations. Therefore, the said judgment is not applicable in the present case.

d). The 2014 Tariff Regulations permits the beneficiary to pay the bills through NEFT/RTGS as against the 2009 Tariff Regulations where Letter of Credit was the only mode of payment for a beneficiary to avail 2% rebate. Therefore, in terms of 2014 Tariff Regulations, the Letter of Credit has now become a mode of payment security mechanism rather than mode of payment through which a beneficiary could avail rebate.

e). The BSES judgment was with respect to BRPL and BYPL and not the petitioner and it squarely provides that parties can renegotiate the terms of the PPA. Accordingly, the petitioner vide its letter dated 8.6.2017 had sent proposal to NTPC to align the terms and conditions of the PPA dated 8.5.2008 in line with the 2014 Tariff Regulations. However, the same was rejected by NTPC by its letter dated 9.6.2017.

f). As per the Statement of Reasons to the 2014 Tariff Regulations, it is clear that 'due date of payment' has not been used in Regulations 44 and 45 which deals with the mechanism for the rebate and late payment surcharge and therefore, specific definition for due date of payment is not required. The Regulations provides for a rebate of 1% if the payment is made within 30 days and a late payment surcharge of 1.5%, in case, the payment is delayed beyond 60 days. As the payments are to be made by the beneficiaries without surcharge within a period of 60 days, it is imperative that working capital towards 60 days receivables is provided.

g). NTPC has never disputed the applicability of rebate or late payment surcharge, as per the 2014 Tariff Regulations. NTPC by its e-mail dated 31.5.2016 and letters dated 1.6.2016, 27.7.2016, 31.8.2016 and 7.12.2016 has stated that the petitioner is entitled to rebate of 1% as per 2014 Tariff Regulations which provides for 1% rebate till 30 days from the presentation of invoice. On the other hand, NTPC on completion of only 23 days from the presentation of bill dated 8.5.2017 has issued Default Notices dated 31.5.2017. Once the petitioner is eligible for 1% rebate as per Regulation 44 of 2014 Tariff Regulations, then, the due date has to be 30 days from the date of

presentation of the bill. Accordingly, NTPC cannot insist on payments before 30 days from the presentation of the bill.

h). NTPC itself in its invoice dated 8.5.2017 has categorically provided for a last date of payment being 7.6.2017, then it could not have issued a Default Notice on 31.5.2017 i.e. a week before the due date as per invoice. NTPC has been consistently following the same approach of providing 30 days credit period to the petitioner to pay the bills of NTPC. However, the petitioner was paying the bills of NTPC by the last working day of the calendar month in order to avail rebate as per NTPC Rebate Scheme. However, once NTPC has withdrawn its scheme and has directed the petitioner to avail rebate as per 2014 Tariff Regulations, NTPC cannot now insist for payment prior to expiry of 30 days from the date of presentation of bills.

i). It is a settled law that a regulation overrides the existing contracts between the regulated entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation. Accordingly, the PPA between the petitioner and NTPC has to be read in consonance with the 2014 Tariff Regulations which categorically provides 60 days to the petitioner to make payment of any invoice raised by NTPC. As such, the Default Notice dated 31.5.2017 issued by NTPC is premature and illegal. In support of his contentions, learned senior counsel relied upon the judgment of the Hon'ble Supreme Court in PTC India Limited Vs. CERC and Others [2010 (4) SCC 603] and Laxmi Devi Vs. State of Bihar and Others [(2015) 10 SCC 241] and the APTEL's judgment dated 6.8.2009 in Appeal No. 7 of 2009 in Lanco Amarkantak Power Limited Vs. MPERC and Others.

2. In his rebuttal, learned counsel for NTPC Ltd submitted as under:

a). The petitioner has, without any reservation or condition, been complying with the obligation, namely, the liability to pay the bill by the last bank working day of the calendar month in which energy bills are raised by NTPC since the beginning i.e. 2008 till the purported raising of the dispute for the first time, on the bills raised by NTPC in the month of May, 2017. Therefore, for about 9 years, the conduct of the petitioner is clearly an acceptance of its obligations to discharge the bill by the last bank working day of the calendar month. The petitioner has no reason or justification to claim anything contrary to the same, after so many years. Therefore, the doctrine of past practice applies.

b). The petition is liable to be dismissed on well accepted grounds of laches. The long established course of conduct, based on clear provisions of the PPA, cannot now sought to be varied unilaterally by the petitioner.

c). The PPA which was duly agreed to by the parties provides for payment by the petitioner for supply of electricity in the preceding month latest by the end of the month. Therefore, the bills raised by NTPC for the power supplied during the preceding month is due and payable on the petitioner by the last working day of the succeeding month. This, in fact, is allowing the petitioner the credit period of 30 days against the energy

supplied during the previous month. Therefore, the claim raised by the petitioner is without any merit.

d). NTPC had never disputed the applicability of rebate or late payment surcharge, as per the Tariff Regulations. However, as held by the Commission and confirmed by the APTEL, the payment mechanism and due date have not been subject matter of the Regulations and are left to be bilaterally agreed to between the parties.

e). The petitioner is wrongly relying on 2014 Tariff Regulations as deviating from 2009 Tariff Regulations in view of the provisions made for payment through RTGS, NEFT, etc. This will not make any difference to the due date. There is no stipulation in the 2014 Tariff Regulations with respect to the due date. The Statement of Reasons to the 2014 Tariff Regulations clearly shows that the Commission did not incorporate any stipulation in regard to the due date. These aspects are being raised by the petitioner after more than 3 years of the notification of the 2014 Tariff Regulations.

f). The applicability of the 2014 Tariff Regulations is restricted to the Rebate and Late Payment Surcharge only. The Commission in the Statement of Reasons to the 2014 Tariff Regulations clarified that Regulations 44 and 45 of the 2014 Tariff Regulations deals with mechanism for Rebate and Late Payment Surcharge only. Article 6.7 of the PPA provides specific provision regarding the payment of Rebate and Late Payment Surcharge. The petitioner and NTPC shall duly abide by the Rebate and Surcharge scheme as notified by the Commission under the 2014 Tariff Regulations. The due date and Letter of Credit besides not being provided in the Tariff Regulations, are governed by the express provisions of the PPA, namely Article 6.1 and 6.2.

3. After hearing the learned senior counsel for the petitioner and learned counsel for NTPC at length, the Commission directed the parties to file their written submissions by 15.9.2017 with an advance copy to each other. The Commission directed the parties that due date of filing the written submissions should be strictly complied, failing which, the order shall be passed based on the documents available on record.

4. Subject to the above, the Commission reserved the order in the petition.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Legal)**