

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 132/MP/2017

Coram:

Shri Gireesh B Pradhan, Chairperson

Shri A.K.Singhal, Member

Shri A.S.Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order: 27.11. 2017

In the matter of

Petition under Section 79 (1) (f) of the Electricity Act, 2003 read with Regulation 44 & 45 of CERC (Terms and Conditions of Tariff), Regulations, 2014 seeking adjudication of dispute between Tata Power Delhi Distribution Limited with NTPC Ltd.

Petitioner

Tata Power Delhi Distribution Limited,
NDPL House,
Hudson Lines,
Kingsway Camp,
New Delhi 110009

.....**Petitioner**

Versus

NTPC Limited
NTPC Bhawan, SCOPE Complex, 7,
Institutional Area, Lodhi Road,
NewDelhi-110 003

..... **Respondent**

Parties Present:

ShriSanjay 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



Order

The Petitioner, Tata Power Delhi Distribution Limited (TPDDL), New Delhi has filed the present petition challenging the legality, validity and propriety of the illegal and arbitrary actions of NTPC Ltd., (a Generating Company/Respondent) as contained in the Thirteen Default Notices dated 31.05.2017 ("**Default Notice**") issued by NTPC and their letter dated 09.06.2017 rejecting the proposals for due date of payments submitted by the Petitioner on 08.06.2017 to be suitably incorporated in the PPA.

2. Brief facts of the case as stated by the petitioner leading to the filing of the present petition are the "Impugned Communications" as under:

(a) Thirteen Default Notices dated 31.05.2017 ("**Default Notice**") issued by NTPC informing TPDDL that it has failed to honour payment due on 31.05.2017 in relation to the energy supplied to TPDDL for the period of April 2017, and requested TPDDL to pay the amount due within twenty four (24) hours of the receipt of the Default Notices, failing which NTPC will be entitled to obtain payment through the invocation of the Letter of Credit(s).

(b) Letter dated 09.06.2017 from NTPC rejecting the proposals for due date of payments submitted by the Petitioner on 08.06.2017 to be suitably incorporated in the PPA, and directing TPDDL to:-

(i) Continue making payment by the last Bank working day of the calendar Month in which the energy invoices raised by NTPC as per the agreed provisions of PPA.



(ii) Provide unconditional, irrevocable, revolving consolidated Letter of Credit of requisite amount in a format acceptable to NTPC as agreed by TPDDL in PPA.

3. According to the petitioner the above communications are:

(a) In clear violation of Regulations 44 and 45 of the CERC (Terms and Conditions of Tariff) Regulations, 2014 ("**Tariff Regulations, 2014**"), and

(b) Contrary to Invoice No. NTPC/Commercial/energy Bill /05 2017 dated 08.05.2017 issued by NTPC for each of the thirteen plants ("**Invoice**"), which categorically provide that the due date of payment is 07.06.2017.

(c) Also, these are contrary to the express representations made by NTPC in email/ letters dated 31.05.2016, 01.06.2016, 27.07.2016, 31.08.2016 and 07.12.2016. In the said email/ letters NTPC has clearly stated while Petitioner cannot claim the higher rebate of 1.3% (as per the NTPC Scheme 2016-17) from the payments and 1% rebate shall be admissible in line with Regulation 44 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (herein after called the 2014 Tariff Regulations).

4. Against the above background petitioner has made the following prayers:

(a) Admit the Present Petition;

(b) Pass immediate directions restraining NTPC from enforcing payment of monthly Invoices on the last working day of the month contrary to Regulation 44 and 45 of the CERC Terms and Conditions of Tariff) Regulations, 2014;



(c) Hold and Direct that the due date for making payment shall be governed by Regulation 44 and 45 of the CERC Terms and Conditions of Tariff Regulations, 2014

(d) Direct NTPC Ltd. to amend the Power Purchase Agreement dated 08.05.2008 in terms of the amendments proposed by the Petitioner in Annexure P/13 so as to align the PPA in accordance with CERC Tariff Regulations, 2014

(e) Pass any other order which this Hon'ble Commission may deem fit.

5. The matter was listed for hearing on admission on 13.07.2017. After hearing the learned senior counsel for the petitioner and learned counsel for NTPC who accepted the notice on behalf of Respondent NTPC, the Commission admitted the petition and directed to issue notice to the respondent.

6. Affidavit of service was filed by the petitioner towards notice served to the respondent.

7. Based on the above, Respondent NTPC submitted its reply vide affidavit dated 28.07.2017. Rejoinder to the said reply has been filed by the petitioner vide its affidavit dated 10.08.2017.

8. The matter was heard on 22.08.2017.

9. During the hearing, learned senior counsel for the petitioner submitted that the present petition has been filed to restrain NTPC from enforcing payment of monthly invoices on the last working day of the month contrary to Regulations 44 and 45 of the 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 Notice of 31.5.2017 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] (herein after the 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 the 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) When NTPC itself in its invoice dated 8.5.2017 has categorically provided that last date of payment was 7.6.2017, 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.

10. Per Contra, 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 are 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 the 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.

11. Based on the directions of the Commission both the parties submitted their written submissions on the due date fixed by the Commission.

Analysis and Decision:

12. We have considered the submissions of the petitioner and respondent and perused documents on record.

13. The following points are also necessary for adjudication in the matter:

(a) TPDDL, a JV between Tata Power Company Ltd (TPCL) and Delhi Power Company Ltd (DPCL) is operating as a distribution licensee in accordance with the license granted on 11.03.2004 by the Delhi Electricity Regulatory Commission (DERC) under Section 20 of the Delhi Electricity Reform Act, 2000.

(b) On 31.03.2007, the DERC re-assigned all the existing PPAs from DTL to the distribution licensees operating in NCT of Delhi including the Petitioner, as per the respective load profile of the Distribution Companies. In view of the same, from 01.04.2007 onwards, the responsibility for arranging power for their respective areas of distribution supply was vested in the respective distribution licensees including the Petitioner.

(c) On 08.05.2008, pursuant to the Order dated 31.03.2007 passed by the DERC, the Petitioner executed consolidated PPA with NTPC for generating stations of NTPC allocated to the Petitioner.



(d) On 08.04.2016, TPDDL provided plant wise LCs to NTPC as per its letter of even date. Consequently, NTPC by its email dated 31.05.2016 and various letters thereafter informed the petitioner that it was not eligible for NTPC rebate of 1.3% since the petitioner is not maintaining the consolidated LC as per format acceptable to NTPC and does not fulfil the criteria of NTPC rebate scheme 2016-17. In absence of consolidated LC, the petitioner is entitled to rebate as per regulation 44 of the 2014 Tariff Regulations which provides that a rebate of 1% will be given if the payment is made on any date after 2 days and within a period of 30 days from presentation of bill.

(e) On 08.05.2017, NTPC issued an Invoice for each of its thirteen power plants which supplied electricity to TPDDL for the month of April, 2017. Invoice/s raised stipulated the due date of payment as 07.06.2017, i.e., 30 days from the date of Invoice.

(f) Petitioner's e-mail dated 31.05.2017 informed NTPC as under:-

“We shall be releasing Rs. 1,475,229,647/- against bill of Apr 17 raised on 8th May 2017 as per details given below on 7th June 2017 (Due date given on bill of NTPC) after availing rebate as per CERC Rebate Scheme @1%.

This is to inform you that payment of bill for plants ANTA, Auraiya & Dadri Gas has not been released because of purchase cost of the same is disallowed by regulator “DERC”. Kindly check the details and Confirm.”

(g) On the same date i.e. 31.05.2017 NTPC responded by issuing thirteen default notices (one of the “Impugned Communications”)

(h) Thereafter correspondence between the two parties began on 01.06.2017. TPDDL requested for withdrawal of the default notices and in their response



dated 03.06.2017, the NTPC asked TPDDL to make payment as per agreement and as per decision of Hon'ble Tribunal in the BSES judgment.

(i) On 08.06.2017, TPDDL responded reiterating its stand and non applicability of BSES judgment in the instant case. The petitioner also submitted options to respondent NTPC to amend the due date of payment.

14. The following issues arise for our consideration:

(a) What was the rationale for providing plant wise LC on 08.04.2016?

(b) Is there a fundamental difference between Tariff Regulations 2009 and 2014? Does mere addition/insertion of additional alternate mode of payments like NEFT/RTGS change the colour of Letter of Credit in the Regulations from a mode of payment as was the understanding till the bill in question to mode of security mechanism as is being made out by the petitioner?

(c) Does the period of 30 days as mentioned in the Tariff Regulations 2014 necessarily convey the same as allowable Credit period?

(d) Whether the provision 6.0 "Payment Mechanism" in the existing Power Purchase Agreement dated 08.05.2008 contravenes the Provision 44 and 45 of tariff regulations 2014?

(e) Relevance of stating due date as 07.06.2017 on invoice dated 08.05.2017 in the present context?

(f) Applicability of judgment of Hon'ble Tribunal in the case of BSES Rajdhani Power Limited vs CERC (Appeal no. 82 and 90 of 2012) in the instant case under adjudication.



15. The above issues being related to each other have been dealt in consolidated manner in following paragraphs:

16. From the submissions of the parties, it is evident that right from the date of signing the PPA on 08.05.2008 till raising of the bill on 08.05.2017 (raised by NTPC for energy supplied in the month of April, 2017) i.e. a period of nine years, there was no dispute between the two parties so far as the due date of payment is concerned. The same was understood and implemented faithfully by both the parties.

17. The 2014 Tariff Regulations got notified on 21.02.2014. From the submission of the petitioner it is also noted that the bills raised by NTPC during FY 2016-17 had the last date of payment exactly 30 days from the invoice date. From the written submissions made, it can be construed that the understanding regarding due date for payment between the two parties continued for almost three years after the 2014 Tariff Regulations were notified. However, in between, a year before the present dispute i.e. on 08.04.2016 the petitioner TPDDL provided plant wise LCs to NTPC, thereby resulting into host of communications between the parties. Respondent NTPC by its email dated 31.05.2016 and through various letters thereafter, informed the petitioner that it was not eligible for NTPC rebate of 1.3% since the petitioner was not maintaining the consolidated LC as per format acceptable to NTPC and that it did not fulfil the criteria of NTPC rebate scheme 2016-17. In absence of consolidated LC, the petitioner was entitled to rebate as per Regulation 44 of the 2014 Tariff Regulations which provides that a rebate of 1% will be given if the payment is made on any date after 2 days and within a period of 30 days from presentation of bill. The Regulation 44 of the 2014 Tariff Regulations reads as under:



"44. Rebate

(1) For payment of bills of the generating company and the transmission licensee through letter of credit on presentation or through NEFT/RTGS within a period of 2 days of presentation of bills by the generating company or the transmission licensee, a rebate of 2% shall be allowed.

(2) Where payments are made on any day after 2 days and within a period of 30 days of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed."

18. According to the petitioner, the Regulation has two parts (a) Rebate of 1% and (b) payment to be made within 30 days of the presentation of bills. Thus respondent NTPC cannot on the basis of PPA or otherwise apply only part of the Regulation i.e. 1% rebate and not allow the time allocated in the regulation to secure the said regulated rebate of 1%.

19. Petitioner has stated that the approach of NTPC is also in direct contradiction to their own understanding, bills and letters which categorically provides:

(a) thirty (30) days to make payments from the date of presentation/receipt of invoice

(b) NTPC's statement that Regulation 44 of CERC Tariff Regulations, 2014 will be applicable to Petitioner and rebate applicable to Petitioner is in terms of Regulation 44(2) of CERC Tariff Regulations, 2014, which provides that the Petitioner is entitled for a rebate of 1% if payments are made by the Petitioner on any date after 2 days and within a period of 30 days from the presentation of the bills.

20. The communications of respondent in pursuance of the provision of clause 6.7 of the PPA that recognizes the applicability of the 2014 Tariff Regulations as against



petitioner's claim that the clause pertaining to Rebate as provided for in the 2014 Tariff Regulations is fundamentally different from the corresponding provisions of the 2009 Tariff Regulations, is the crux of the dispute.

21. Clause 6.7 of PPA dated 08.05.2008 entered into between the parties states as under:

"6.7 Payment Rebate and Surcharge

Rebate and Surcharge applicable on the payment of bills as per CERC regulations, as amended from time to time, or any other rebate scheme as may be offered by NTPC and agreed to by NDPL shall be applicable to NDPL."

22. A comparison of the rebate clause as per the 2009 Tariff Regulations and the 2014 Tariff Regulations is as under:

Tariff Regulations 2009	Tariff Regulations 2014
<p><u>34. Rebate.</u> (1) For payment of bills of the generating company and the transmission licensee through letter of credit on presentation, a rebate of 2% shall be allowed.</p>	<p><u>44. Rebate.</u> (1) For payment of bills of the generating company and the transmission licensee through letter of credit on presentation or through NEFT/RTGS within a period of 2 days of presentation of bills by the generating company or the transmission licensee, a rebate of 2% shall be allowed.</p>
<p>(2) Where payments are made other than through letter of credit within a period of one month of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed.</p>	<p>(2) Where payments are made on any day after 2 days and within a period of 30 days of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed.</p>



23. As per the petitioner, the Regulation 44 of the 2014 Tariff Regulations is quite clear and unambiguous as it recognises payment (for purposes of securing rebate) date to be 30 days from the date of presentation of bill and thus the petitioner cannot become a defaulter (so as to permit invocation of L.C.) before expiry of 30 days. Petitioner has argued that if Regulation provides for rebate to be given for payment made within 30 days, NTPC cannot insist on payment in present case on or before the 23rd day (i.e. being the last day of the calendar month).

24. Per Contra the learned Counsel for respondent submitted that only issue which TPDDL has sought to raise is that the Regulation 44 of the 2014 Tariff Regulations which deals with the mechanism of Rebate (para materia to Regulation 34 of the 2009 Tariff Regulations except for provision for RTGS/NEFT) for payment within 30 days from date of presentation of the bill, necessarily means a credit period to be 30 days and that the due date for payment of the bill should be considered as 30 days from the presentation of the bill.

25. According to learned Counsel for respondent, the claim of TPDDL is liable to be rejected since the 2014 Tariff Regulations (or the 2009 Tariff Regulations) do not deal with the credit period or the due date. In fact, in the Statement of Reasons related to the 2014 Tariff Regulations, the Commission specifically declined the suggestion made by one of the beneficiaries to define the due date for payment of the bill, stating that it is not necessary. Relevant portion is stated as under:

"5.35.2 Some stakeholders suggested that the definition of



"Controllable factors" and "Un controllable factors" may be added. One beneficiary suggested that "Due date of Payment" should be defined in the Regulations because the generating companies sometimes consider due date as two days from the bill date and some time as 30 days from the bill date. The Commission clarifies that the term "controllable" and "un-controllable" are self-explanatory and the factors covered under these terms have been enumerated in Regulation 12 and hence there is no need to specifically include a definition for the same. As regards definition of "Due date of Payment", it is clarified that "Due date of payment" has not been used in Regulation 44 and Regulation 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."

26. The respondent has further stated that the above view taken by the Commission is consistent with the well settled principle that the PPA between the parties is a commercial arrangement, though the terms and conditions of the PPA are subject to the provisions of the applicable Regulations.

27. In the above context, the clause related to rebate in the two Regulations needs to be analysed to see if there is any fundamental difference between them. Clause 1 as per the 2009 Tariff Regulations is modified in the 2014 Tariff Regulations to the extent of insertion of the following -

"or through NEFT/RTGS within a period of 2 days of presentation of bills by the generating company or the transmission licensee"

28. The rationale for the above as per SOR is reproduced hereunder:

"Stakeholders' Comments/Suggestions:

44.2 Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) has proposed to avoid opening of revolving L.C. as it is a recurring expenditure to the beneficiaries. Alternatively, direct payment may be released within 3 days of presentation of bills supported by a backup L.C. covering the monthly bills in order to provide a security to the generating company/transmission licensee.



Further, Power Grid has proposed for payment through NEFT/RTGS in place of LC as this will save the LC operating charges and also its reinstatement every month. GRIDCO has proposed for rebate of 2% for payment of bills through LC (or any other mode having standby LC) within 2 days and a rebate of 1% for payment of bills through any other mode on 30th day.

44.3 Chhattisgarh State Power Generation Company Limited (CSPGCL) proposed for linking the rebate (%) to the working capital interest rate as the Rebate compensates the saving on working capital interest. Further, the rebate should also be computed on daily basis in order to incorporate interest on all short term borrowings.

Commission's Views

44.4 The Commission has gone through the suggestions of the stakeholders and is of the view that it would be appropriate to include payment through NEFT/RTGS for payment of bills and claiming rebate. Accordingly, the Commission has decided to modify the draft Regulation on Rebate as under:

"44. Rebate (1) For payment of bills of the generating company and the transmission licensee through letter of credit on presentation or through NEFT/RTGS within a period of 2 days of presentation of bills by the generating company or the transmission licensee, a rebate of 2% shall be allowed.

(2) Where payments are made on any day after 2 days and within a period of 30 days of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed."

29. From the above it can be seen that Commission continued with the words "through letter of credit on presentation" as a mode of payment along with addition of NEFT/RTGS as an additional mode of payment. Nowhere, explicitly or implicitly it has recognized LC on presentation as payment security mechanism and NEFT/RTGS as the mode of payment.

30. Clause 2 as per the 2009 Tariff Regulations is more or less similar except for dropping the words other than through letter of credit. This is in view of the fact of

recognition of other mode of payment in clause 1. Mention of within a period of one month in Regulations 2009 gets reworded to after 2 days and within 30 days in Regulations 2014 to align the same with clause 1 wordings with rebate of 1% remaining the same.

31. We are, therefore, of the view that there is no fundamental difference on the aspect of Rebate in the two regulations. Also through the SOR, the Commission has already clarified (as stated in para 25 of this order) that due date of payment has not been used in Regulation 44 and Regulation 45 of the 2014 Tariff Regulations. The Commission in its order dated 26.03.2012 in petition no. 177/2011 had noted that the Regulation 34 and 35 of 2009 Tariff Regulations clearly provide that payment through LC has been allowed in the 2009 Tariff Regulations as a matter of incentive for early payment and not as a payment security mechanism. The relevant portion of the order is as under:

"31. We have considered the submissions of the petitioners and NTPC. Regulation 34 and 35 of 2009 Tariff Regulations provide as under: "34. Rebate For payment of bills of the generating company and the transmission licensee through letter of credit on presentation, a rebate of 2% shall be allowed. Where payments are made other than through letter of credit within a period of one month of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed. 35. Late Payment Surcharge In case of the payment of any bill for charges payable under these regulations is delayed by a beneficiary beyond a period of 60 days from the date of billing a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company or the transmission licensee as the case may be." The above provisions of the regulations clearly provide that payment through LC has been allowed in the 2009 Tariff Regulations as a matter of incentive for early payment and not as a payment security mechanism. However, in order to protect their commercial interests, the parties have mutually agreed and provided for a payment security mechanism in the PPA/BPTA."



32. Thus, our findings as quoted above will apply in this case also since we have already held that there is no fundamental difference in the provision of Rebate in the Regulations. These findings of the Commission were upheld in the judgment dated 24.01.2013 by Hon'ble Appellate Tribunal in Appeal No. 82 and 90 of 2012 in the case of BSES Rajdhani Power Ltd -v- CERC and Ors. Relevant extract of the judgment is as under:

"27. In view of the detailed discussion made by the Central Commission, we agree with the findings of the Central Commission. The Regulations do not have a provision dealing with maintenance and operation of Letter of Credit as payment of Security Mechanism. The parties have mutually agreed and a provided terms and conditions of maintaining Payment Security Mechanism in the PPA in order to protect their commercial interest. The Appellants have entered into the PPA and have been maintaining Letter of Credit according to the provision of the PPA. It is now not open for the Appellants to question the provision regarding invoking of Letter of Credit by NTPC as per the PPA having pursued the same since entering into the PPA on 5.6.2008 with NTPC. Therefore, we do not incline to interfere with the findings of the Central Commission."

Thus the BSES judgment applies in the instant case.

33. Further, Petitioner has also relied on provisions of Regulation 45 of the 2014 Tariff Regulations for billing by respondent NTPC stating that "60 days to beneficiary to pay Invoices from the date of billing. NTPC is entitled to late payment surcharge at the rate of 1.50% per month only after expiry of 60 days. As such any insistence of payment by NTPC prior to the expiry of sixty days is contrary to Regulation 45 of the 2014 Tariff Regulations."

34. The petitioner has also relied on the SOR of 2014 Tariff Regulations quoting as under:

"5.35.2 Some stakeholders suggested that the definition of



"Controllable factors" and "Un controllable factors" may be added. One beneficiary suggested that "Due date of Payment" should be defined in the Regulations because the generating companies sometimes consider due date as two days from the bill date and some time as 30 days from the bill date. The Commission clarifies that the term "controllable" and "un-controllable" are self-explanatory and the factors covered under these terms have been enumerated in Regulation 12 and hence there is no need to specifically include a definition for the same. As regards definition of "Due date of payment", it is clarified that 'Due date of payment' has not been used in Regulation 44 and Regulation 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...

28.22 The Commission has considered the concerns of the beneficiaries on reduction of receivables. 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."

35. The Regulation 45 of the 2014 Tariff Regulations is as under:

"45. Late payment surcharge

In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary of long term transmission customer/DICs as the case may be, beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be.

36. We are of the opinion that there is no fundamental difference between the 2009 Tariff Regulations and the 2014 Tariff Regulations as regards provisions related to late payment surcharge. Reliance of the petitioner on paragraph 28.22 of the SOR quoted above is misplaced as the same is with reference to provision related to Interest on working capital.



37. We hold that the provision related to the "Payment Mechanism" in existing Power Purchase Agreement do not contravene the provision 44 and 45 of Tariff Regulations, 2014.

38. We would also like to mention here that the due date mentioned on the invoice of respondent remained irrelevant in view of the past conduct and understanding of the parties. Respondent as a leading generating company in the country needs to be more careful in raising invoices in future as regards due date of payment.

39. In view of the above, the petitioner's prayer (b), (c) and (d) as referred in paragraph 4 above is therefore rejected.

40. This order disposes of Petition No. 132/MP/2017.

sd/-
(M.K. Iyer)
Member

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson

