

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No. 22/MP/2019

Coram:

Shri P.K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S. Jha, Member

Date of Order: 8th January, 2020

In the matter of

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 and Article 8.3 of the Power Purchase Agreement dated 19.08.2013 entered into between the Petitioner and the Respondent, for recovery of Late Payment Surcharge on account of delay in payment of Monthly Bills of the Petitioner by the Respondent

And

In the matter of

D.B. Power Ltd.
Office Block 1A, 5th Floor,
Corporate Block, DB City Park,
DB City, Arera Hills,
Opposite MP Nagar, Zone-I,
Bhopal- 462016

...Petitioner

Versus

Tamil Nadu Generation and Distribution Corporation Ltd.
6th Floor, Eastern Wing
144, Anna Salai
Chennai- 600 002
Tamil Nadu.

...Respondent

Parties present:

Shri Deepak Khurana, Advocate, DBPL

Shri Tejasv Anand, Advocate, DBPL

Shri S.Vallinayagam, Advocate, TANGEDCO

ORDER

The Petitioner, DB Power Ltd., is a generating company within the meaning of clause (2) of Section 28 of the Electricity Act, 2003 ("the Act"). The Petitioner has set up



a 1200 MW (2x600 MW) coal based Thermal Power plant at village Badadarha, in District Janjgir Champa, Chhattisgarh. The Respondent is a Distribution Licensee in the State of Tamil Nadu within the meaning of clause (17) of section 2 of the Act. On 19.8,2013, the petitioner entered into agreement to supply 208 MW of electricity to the Respondent and has been supplying power with effect from 1.8.2015.

Background

2. The brief facts of the case are as follows:

- a) That PPA provides for payment of Monthly Bills to the Petitioner for the power supplied to the Respondent, by due date which is 30th day after a Monthly Bill or a Supplementary Bill is received and duly acknowledged by the Procurer (Respondent);
- b) PPA further provides remedy on failure to make monthly payment by due date that a Late Payment Surcharge shall be payable by the Respondent to the Petitioner at the rate equal to SBI-PLR per annum, on the amount of outstanding payment, calculated on day to day basis (and computed with monthly rest), for each day of delay;
- c) In the instant case, the petitioner has raised Late Payment Surcharge accumulated as on 20.1.2016 which was acknowledged by the Respondent on 7.2.2017 but the Respondent expressed its inability on account of its acute financial position and requested the Petitioner to withdraw the demand. Subsequently, communications were exchanged between the petitioner and the Respondents.
- d) The petitioner has also submitted the difficulty in its loan repayment to the project lenders which has caused the project non-performing assets leading to shutdown of operations.



e) The present petition is filed by the petitioner seeking directions to the Respondent for making late payment surcharge up to December, 2018.

3. The main prayers of the Petitioner are as under:

- a. *Direct the Respondent to pay an amount of Rs. 95,99,76,788.87 due towards the Late Payment Surcharge up to December, 2018 to the Petitioner along with interest @18% p.a. from the Due Dates of payment of the respective Monthly Bills till the date of actual payment by the Respondent;*
- b. *In the interim, pending final adjudication of the present Petition, direct the Respondents to forthwith make payment of Rs. 71.49 crores i.e. 75% of the amount due towards the Late Payment Surcharge upto December, 2018;*
- c. *Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*

4. The Petition was admitted on 5.3.2019. The Commission directed respondent to file its reply vide Record of proceedings dated 5.3.2019, 7.5.2019 and 21.8.2019. However, the Respondent has not filed its reply. Accordingly, we proceed to dispose the petition based on available information on record.

Submission of the Petitioner

5. The petitioner vide affidavit dated 21.1.2019 submitted as under:

- a) That Article 8.3 of the PPA provides for payment of Monthly Bills by the Due Date to the Petitioner which is defined in Article 1.1 of the PPA. Article 8.3.5 of the PPA provides that in the event of delay in payment of a Monthly Bill by the Respondent beyond its Due Date, a Late Payment Surcharge shall be payable by the Respondent to the Petitioner at the rate equal to SBI-PLR per annum, on the amount of outstanding payment, calculated on day to day basis (and computed with monthly rest), for each day of delay.
- b) The Respondent has delayed the payment of Petitioner's Monthly Bills beyond their respective Due Dates and the petitioner vide its letter dated 22.1.2016 pointed out the delay in making payment of Monthly Invoices by the Respondent and gave the details of interest (Late Payment Surcharge) accumulated as on



20.1.2016 and subsequent letters dated 17.3.2016, 14.10.2016, 21.11.2016 and 30.11.2016.

- c) Respondent vide its letter dated 7.2.2017 responded to the petitioner and expressed its inability to pay the dues on account of its acute financial position and requested the Petitioner to withdraw the demand. The Petitioner vide its letter dated 13.2.2017 to the Respondent, sought payment of late payment surcharge. The Petitioner provided the details of the Supplementary Bills for Late Payment Surcharge for the period from March, 2016 to January, 2017. The petitioner wrote various letters dated 18.1.2017, 29.8.2017 and 12.10.2017 seeking payment of late payment surcharge. The Respondent vide letter dated 27.11.2017 again expressed its inability to discharge its liability and requested the Petitioner for waiver of late payment surcharge.
- d) The Petitioner pointed out that delay in payment of Bills by the Respondent was compelling the Petitioner to avail higher borrowing from the lenders towards working capital thereby increasing the burden of interest and associated cost on the Petitioner and causing financial stress to the Petitioner.
- e) The petitioner vide its letters dated 12.2.2018, 10.4.2018 to the Respondent giving updated details of the Supplementary Bills raised by the Petitioner for Late Payment Surcharge on the Respondent totaling to an amount of Rs. 53,45,58,384.00, requested the Respondent to clear the dues so as to enable the Petitioner to pay the interest bearing working capital loan taken by the Petitioner from the Banks. Vide its letter dated 4.1.2019, the Petitioner submitted details of pending Late Payment Surcharge amounting to Rs. 95,99,76,788.87 and



requested the Respondent for reconciliation of bills and payments from 1.8.2015 till 4.1.2019.

- f) The petitioner submits that though the Respondent has clearly acknowledged the said liability, but has refused to discharge the same. Therefore, the Respondent is liable to be directed by this Commission to forthwith discharge its admitted liability by making payment of the outstanding dues to the Petitioner, as per the details furnished by the Petitioner vide its letter dated 4.1.2019.
- g) The petitioner submits that the Petitioner's asset is on the verge of becoming a Non-Performing Asset due to non-servicing of the debt to the Project lenders. On account of non-payment by the Respondent, the Petitioner is further constrained to borrow funds from banks/institutions, working capital loans for payment of the said taxes and duties and increased price of coal on account of change in law in order to operate and run the plant to supply electricity to the Respondent.
- h) According to petitioner, the claim made by the Petitioner under this Petition, in terms of the PPA entered between the parties has been admitted by the Respondent. If the Respondent does not clear the dues in the terms of the PPA, the Petitioner will continue to suffer irreparable harm and injury and would default in its loan repayment to the project lenders resulting in its project being declared as a Non-Performing Asset. This would then result in shutting down the operations of the Petitioner's Company leading to further cascading effects and dire consequences. The Petitioner's project is in the list of stressed projects submitted by the Ministry of Finance, Government of India in July, 2018.

6. The learned counsel of the Respondent has not objected to the liability of Late Payment Surcharge in terms of PPA. On 7.5.2019, the Commission directed the



9. It is evident from the Respondent letters dated 7.2.2017 and 27.11.2017 that though the Respondent was aware of the Petitioner's claim towards Late Payment Surcharge, it could not pay the Late Payment Surcharge due to its financial crunch. Through the said letters, Respondent requested the Petitioner for waiver of the Surcharge claimed. The Commission, vide Record of Proceedings dated 5.3.2019, 7.5.2019 and 21.8.2019 directed the Respondent to file its reply. However, Respondent has not filed its reply inspite of Commission's direction. The Commission vide Record of Proceedings dated 7.5.2019 directed the Respondent to pay Rs. 20 Cr to the Petitioner, which has been paid and the same has been confirmed by the Petitioner on 21.8.2019.

10. In view of the above discussion, it is evident that Respondent is under 'default of payment' towards Late Payment Surcharge in terms of the PPA. The extract of Article 8.8 of the PPA in regard to payment of Supplementary bills is as under:

"Payment of Supplementary Bill

8.8.1 Either Party may raise a bill on the other Party ("Supplementary Bill") for payment on account of;

i) Adjustments required by the Regional Energy Accounts (If applicable);

ii) Tariff Payment for change in parameters, pursuant to provisions in schedule 4; or

iii) Change in Law as provided in Article 10, and such Supplementary Bill shall be paid by the other Party.

8.8.3 In the event of delay in payment of a supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable at the same terms applicable to the Monthly Bill in Article 8.3.5."

11. Accordingly, Respondent is directed to pay the remaining amount under Late Payment Surcharge claimed by the Petitioner within three month from the date of issue of this order, after reconciliation of bills with the Petitioner. However, with regard to Petitioner's prayer for directing the Respondent to pay the Late Payment Surcharge along with interest @18%, it is held that interest on non-paid Late Payment Surcharge is covered by the provisions of PPA as quoted above which takes care of compounding on



monthly basis at the rate of SBI-PLR as quoted in PPA. Further, on repeated default of payment by the Respondent, Petitioner has the option to regulate the power of the Respondent in terms of CERC (Regulation of Power Supply) Regulations, 2010.

12. Petition No. 22/MP/2019 is disposed of in terms of above.

Sd/-
(I.S. Jha)
Member

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

Sd/-
(P. K. Pujari)
Chairperson

