

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 7/RP/2020
In Petition No. 222/MP/2017**

**Coram:
Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member**

Date of Order: 28th of January, 2021

In the matter of

Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for review of the order dated 23.7.2019 passed by the Commission in Petition No.222/MP/2017.

**And
In the matter of**

KSK Mahanadi Power Company Limited
8-2-293/82/A/431/A,
Road No.22, Jubilee Hills,
Hyderabad

.....Review Petitioner

Tamil Nadu Generation and Distribution Corporation Limited
Western Wing, 6th Floor, NPKRR Maaligai,
144, Anna Salai,
Chennai - 600 002

.....Respondent

Parties present:

Shri Anand Ganesan, Advocate, KSK Mahanadi
Ms. Swapna Seshadri, Advocate, KSK Mahanadi
Shri Ashwin Ramanathan, Advocate, KSK Mahanadi

ORDER

KSK Mahanadi Power Company Limited (hereinafter referred to as “KSK” or “the Review Petitioner”) has filed the present Review Petition under Section 94(1)(f) of the

Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for review of the order dated 23.7.2019 (hereinafter referred to as 'Impugned order') in Petition No.222/MP/2017 on the grounds of non-consideration of extension of Delivery Date and Expiry Date as per the provisions of the Power Purchase Agreement (PPA) dated 27.11.2013 and payment of interest/ Late Payment Surcharge from the date when the amounts became due and till the date of actual payment.

2. The brief background of the case is that the Review Petitioner is in the process of establishing a 3,600 MW coal-based Thermal Power Project in District Akaltara of the State of Chhattisgarh, comprising of six units with an installed capacity of 600 MW each (hereinafter referred to as 'the generating station'). The Review Petitioner has entered into a Power Purchase Agreement dated 27.11.2013 with the Respondent, TANGEDCO for supply of a total contracted capacity of 500 MW from the generating station of the Petitioner in Chhattisgarh. The PPA was entered into pursuant to the Review Petitioner being selected as a successful bidder in a competitive bidding process initiated by the Respondent for procurement of electricity under Section 63 of the Act. The tariff under the PPA has been adopted by the Tamil Nadu Electricity Regulatory Commission in its order dated 29.7.2016. As per the bidding document, the Schedule Delivery Date (SDD) was 1.10.2013 and the Expiry Date was 30.9.2028 (15th anniversary of the Schedule Delivery Date). The PPA was signed on 27.11.2013 wherein Article 4.1.1 of the PPA provided the Scheduled Delivery Date as 1.6.2014 in accordance with the provisions of the agreement. However, Schedule 8 of the PPA provided for commencement of the

contract year from 1.10.2013 and the last contract year ending on 30.9.2028. It also provided the quoted tariff starting from 1.10.2013 to 30.9.2028. According to the Review Petitioner, in the original bidding documents, it was envisaged that the SDD shall commence from 1.10.2013. However, since the PPA itself was entered into only on 27.11.2013, the question of the commencement of the contract year being 1.10.2013 did not arise. Further, on account of the non-availability of open access, the supply of 281 MW commenced on 1.8.2015 whereas the supply of entire 500 MW capacity commenced on 1.10.2015. Thereafter, the Review Petitioner vide communication dated 30.1.2016 reiterated the provisions of the PPA and called upon the Respondent, TANGEDCO to confirm the applicability of the first year's tariff under the PPA for supply of electricity from 1.10.2015 to 31.3.2016. Since no response was received from the Respondent in this regard, the Review Petitioner vide its letter dated 3.3.2016 again claimed the differential amounts. In response, the Respondent vide its letter dated 27.6.2016 has acknowledged that there was a force majeure event. The Respondent, however, stated that in terms of the PPA, the extension of the Scheduled Delivery Date can be only for a maximum period of 6 month and no extension is agreeable to the Respondent. Aggrieved by the decision of the Respondent, TANGEDCO, the Review Petitioner filed the Petition No.222/MP/2017 along with following prayers:

“(a) Hold and declare that the Respondent is liable to pay the first year tariff as quoted, adopted and provided for in the PPA for the supply commencing from 01.08.2015 till 31.03.2016 being the first year of supply by the Petitioner to the Respondent;

(b) Pass an order directing the Respondent to pay the differential amounts of Rs. 282742785/-, being the tariff short-paid for the period till May, 2017 billing and any further tariff short-paid for the period after May, 2017 billing;

(c) Grant interest at the rate of SBIPLR for the amounts payable by the Respondent to the Petitioner, calculated from the date when the amounts became due and till the date of actual payment;

(d) Grant costs of the present proceedings in favour of the Petitioner and against the Respondent.”

3. The Commission after hearing the Review Petitioner and the Respondent, TANGEDCO disposed of the Petition No.222/MP/2017 vide order dated 23.7.2019 with the following observations/directions:

“(a) Non-availability of LTA to the Petitioner is a Force Majeure event in terms of the PPA.

(b) On account of Force Majeure, the deemed/extended Scheduled Delivery Date shall be 1.8.2015 i.e. the date from which seller started the supply.

(c) On account of Force Majeure, the Expiry Date of the PPA shall be extended upto 31.3.2019 i.e. six months after the Expiry Date as per PPA.

(d) The first contract year tariff (2013-14) as per original dates in the Schedule 8 of the PPA shall now be the applicable tariff for 2015-16, i.e. the first year of power supply. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable for the 2016-17 i.e. the second year of power supply and so on.

(e) The Petitioner is entitled to recover the difference in tariff in terms of the above extended Scheduled Delivery Date and revised tariff for respective contract years.

(f) No interest will be payable for difference in bills for the past period. However, if the Respondent does not pay the differential tariff within 60 days of raising of bills, it shall be liable to pay late payment surcharge as per rates provided in the PPA.”

4. However, being aggrieved by the aforesaid decision of the Commission in as much as (a) extension of Scheduled Delivery Date to 1.8.2015 instead of 1.10.2015; (b) extension of the Expiry Date only by 6 months; and (c) non-grant of interest, the Review Petitioner has filed the present Review Petition on the basis that there are errors apparent on the face of record along with the following prayers:

“(a) Admit the review petition, review and set aside the order dated 23.7.2019 of the Commission in Petition No. 222/MP/2017 on the aspects of Delivery Date, Expiry Date and payment of interest/Late Payment Surcharge as raised in the present review petition;

(b) Hold and direct that the Delivery Date shall be 5.10.2015 and the corresponding Expiry Date shall be 4.10.2030.

(c) Hold and direct that the Respondent shall be liable to pay Late Payment Surcharge at the rate of SBIPLR on the tariff payable to the Petitioner and the tariff paid.”

5. With regard to extension of SDD under the PPA, the Review Petitioner has submitted that the observations of the Commission in the Impugned order that the parties did not envisage part supply prior to the date of commencement of supply at the time of signing of the PPA and that if the Delivery Date was considered to be 1.10.2015 then there would be an issue with regard to the period of supply from 1.8.2015 to 30.9.2015 i.e. period prior to the date of commencement of supply of aggregated contracted capacity are error apparent on the face of record. The definition of the Delivery Date expressly provides that it shall be the date when the entire Aggregate Contracted Capacity (500 MW) starts and Clause 4.6.1 of the Schedule 4 of the PPA provides for a situation where there is part supply prior to date of commencement of supply. With regard to extension of Expiry Date under the PPA, the Review Petitioner has submitted that deciding the question of extension of the Expiry Date separately and limiting the extension for only 6 months is an error apparent on the face of record. The Impugned order is contrary to Article 4.7.5 of the PPA and also the very definition of the Expiry Date under the PPA. Under Article 4.7.5 of the PPA, not only does the Delivery Date get determined after providing for such extension, but also the Expiry Date. There is also an error apparent in as much as not considering that the PPA quotes tariff for 15 years, and if the tariff is only applied for 13 years, the entire evaluation and bidding process would be vitiated. With regard to non-grant of interest, the Review Petitioner has submitted that denial of the interest on the basis that the Review Petitioner continued to raise bills upon the Respondent without a decision on the extension of Schedule Delivery Date is an error apparent on the face of record as the Review Petitioner had raised the bills strictly in terms of the PPA and that the Respondent had

denied the payment of the full tariff in terms of the PPA despite being put to notice by the Petitioner of the provisions of the PPA. According to the Review Petitioner, it is entitled to the interest at the rate of SBIPLR per annum as provided for in Article 8.3.5 read with Article 8.6.8 of the PPA on the principal amount recoverable. The Review Petitioner has stated that once the Commission has adjudicated on the dispute and there is a decision on the extension of Delivery Date, interest/late payment surcharge is automatically payable. These are the amounts which were payable by the Respondent at the relevant time, which were not paid contrary to the terms of the PPA and on account of which the dispute had to be raised.

6. The matter was heard on admission on 16.7.2020 through video conferencing. During the course of hearing, the learned counsel for the Review Petitioner, mainly reiterated the submissions as made in the pleading, which are not repeated here again for the sake of brevity. After hearing the learned counsel for the Review Petitioner, the Commission reserved order on 'admissibility' of the Review Petition.

Analysis and Decision

7. We have considered the submissions of the learned counsel for the Review Petitioner and perused the documents on record. Under clause (f) of sub-section (1) of Section 94 of the Act, the Commission has been given the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 as regards review of its decisions, directions and orders. Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as "CBR") provides as under:

Review of Decisions, Directions and orders

“103(1).The Commission may, on an application of any of the persons or parties concerned made within 45 days of making such decision, directions or order, review such decision, directions or orders and pass such appropriate orders as the Commission deems fit.”

Further, Regulation 116 of the CBR provides as under:

“Extension or abridgement of time prescribed

116. Subject to the provisions of the Act, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission.”

In terms of the above provisions, a Review Petition can be filed by a party within a period of 45 days from the date of issue of the order. However, this period can be enlarged or curtailed, if the party is able to show sufficient reasons.

8. Petition No. 222/MP/2017 was disposed of by the Commission vide order dated 23.7.2019. The said order was posted in the website of the Commission on the same date. It is a settled principle that limitation would start from the date the order was posted on the website. Accordingly, the period of 45 days would start from the date the said order was posted in the website of the Commission i.e. 23.7.2019. In terms of this, the Review Petition should have been filed by 6.9.2019. It is however noticed that the Review Petitioner has filed this Review Petition on 10.9.2019, with a delay of 4 days.

9. In the instant Petition, the Review Petitioner has neither prayed for condonation of delay nor argued the same showing sufficient cause for the delay to be condoned during the hearing. The Review Petitioner has submitted that the Review Petition has been filed within time in terms of the limitation prescribed in the CBR. The Review Petitioner has been casual and lackadaisical in its approach in filing of the Review

Petition. However, even if the Review Petitioner has not made out any sufficient cause for condonation of delay nor prayed for the same, considering that the delay is only of 4 days in filing the Review Petition, the same is condoned. Accordingly, the Review Petition is admitted.

10. The Review Petitioner is directed to serve a copy of the Review Petition on the Respondents, by 5.2.2021 and the Respondents are directed to file their reply by 19.2.2021 with advance copy to the Petitioner who may file its response, if any, on or before 5.3.2021. The parties are directed to comply with above directions within the specified timeline and no extension of time shall be granted.

11. The Review Petition No. 7/RP/2020 will be listed for hearing in due course.

Sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member

sd/-
(P.K.Pujari)
Chairperson