

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 424/MP/2019

Coram:

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 24th November, 2022

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 for execution of order dated 22.7.2019 in Petition No. 117/MP/2017 and initiation of proceedings / appropriate action under Section 142 read with Section 149 of the Electricity Act, 2003 and Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 against the Respondents for noncompliance of the order dated 22.7.2019 in Petition No.117/MP/2017.

And

In the matter of

D.B. Power Limited,
1A, 5th Floor,
Corporate Block, DB City Park,
DB City, Arera Hills,
Opposite MP Nagar, Zone-I,
Bhopal-462 016, Madhya Pradesh

....Petitioner

Vs.

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

Chairman cum Managing Director,
Tamil Nadu Generation and Distribution Corporation Limited,
6th Floor, Eastern Wing
144, Anna Salai,
Chennai- 600 002,
Tamil Nadu.

...Respondents

Parties Present:

Shri Deepak Khurana, Advocate, DBPL

Ms. Nishtha Wadhwa, Advocate, DBPL
Shri Vikas Adhia, DBPL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO

ORDER

The Petitioner, DB Power Limited, has filed the present Petition for execution of the order dated 22.7.2019 passed by the Commission in Petition No. 117/MP/2019 and initiation of proceedings/appropriate action under Section 142 read with Section 149 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') and Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 against the Respondents for non-compliance of the said order and further to direct the Respondents to forthwith comply with the said order.

Submissions of the Petitioner

2. The Petitioner has mainly submitted as under:

(a) The Commission in its order dated 22.7.2019 in Petition No. 117/MP/2017 filed by the Petitioner, had directed the Petitioner to revise its bills for power supplied to the Respondent, TANGEDCO in terms of the extended scheduled delivery date as decided. Accordingly, in terms of the order dated 22.7.2019, the Petitioner had raised its invoices for the differential amount for the capacity charges to tune of Rs. 112.25 crore and the Respondent was required to make payment towards the same within the period of 60 days of raising of such bills failing which it would attract the late payment surcharge as per the PPA. However, even after the period of two years, no amount has been paid by the Respondent till date.

(b) The Petitioner has been constrained to borrow working capital from Banks/financial institutions in order to operate the plant. Upon exhausting working capital limits due to accumulated past dues from the TANGEDCO which have now accumulated to more than Rs. 400 crore and in absence of working capital facilities to fund such short fall, the Petitioner would default in

its various obligations, including debt service obligations which will trigger irreparable consequences. Despite there being adjudication of the claims in favour of the Petitioner, the Respondents have failed to make the payment, thereby frustrating the order passed by the Commission.

(c) The very inaction on the part of the Respondents of not paying the amounts due and payable to the Petitioner in terms of the order passed by the Commission establishes utter contempt, disregard and disobedience being shown by the Respondents to the order passed by the Commission. Thus, the Respondents are clearly guilty of disobedience of the order dated 22.7.2019 and are, therefore, liable to be proceeded against under Section 142 and Section 149 of the Act.

(d) The Commission may also pass appropriate directions for execution and enforcement of order dated 22.7.2019 passed by the Commission in Petition No. 117/MP/2017.

3. Against the above background, the Petitioner has made the following prayers:

“(a) Direct the Respondents to comply with the Order dated 22.07.2019 passed in Petition No. 117/MP/2017 and to forthwith pay the pending aggregate amounts to the Petitioner i.e. an amount of Rs. 112,25,89,478.40/- as set out in paragraphs 7, 9 and 11 herein above;

(b) Issue appropriate directions for execution of the Order dated 22.07.2019 passed in Petition No. 117/MP/2017 including passing an Order for attachment of Bank Account(s) of the Respondent No. 1 (upon disclosure of the same by the Respondent No. 1) to realize the amount payable to the Petitioner as aforesaid;

(c) Initiate appropriate action against the Respondents, jointly and severally, under Section 142 of the Electricity Act, 2003 and/or any other appropriate provision/s of the Electricity Act, 2003, for contravention and disobedience of the directions issued by the Commission in Order dated 22.07.2019 passed in Petition No. 117/MP/2017;

(d) Pass such other and further order or orders as this Hon'ble Commission may deem fit and proper under the facts and circumstances of the present case as also in the interest of justice.”

4. The matter was heard on 14.1.2020 and notice was issued to the Respondents to file their reply. Reply to the Petitioner has filed by the Respondent, TANGEDCO and the Petitioner has also filed rejoinder thereof.

Reply of the Respondent, TANGEDCO

5. The Respondent, vide its reply dated 25.8.2021, has mainly submitted as under:

(a) Aggrieved by the Commission`s order dated 22.7.2019, the Respondent has filed an Appeal bearing No. 91 of 2020 along with IA No. 2064 of 2019 (seeking stay of the order) before the Appellate Tribunal for Electricity (APTEL) which is pending for consideration. Further, on the consent of both the parties, the said appeal was included in the list of final hearing matters of APTEL.

(b) The Respondent had also moved IA No. 1252 of 2021 seeking urgent hearing of pending appeal and/or the application for stay. Since the APTEL was not inclined to hear the pending appeal out of turn, the Respondents did not press for the said application for urgent hearing as recorded by the APTEL in its order dated 13.8.2021.

(c) However, without prejudice to the Respondent`s submissions in pending appeal, the Respondent has already paid Rs. 55 crore to the Petitioner in terms of the Commission`s direction dated 6.8.2021, which has been duly acknowledged by the Petitioner.

(d) The Respondents are not guilty of any wilful or deliberate disobedience or non-compliance with the order which already stipulated that in case payment not made within 60 days, the Respondents would be required to pay Late Payment Surcharge. Therefore, the question of non-compliance of the order dated 22.7.2019 does not arise.

(e) Given the pendency of appeal, any direction to make any further payments would cause undue financial burden and hardship to the Respondents since TANGEDCO is already under severe financial hardship.

(f) In the above circumstances, no case of wilful, deliberate or intentional non-compliance has been made out which can warrant the initiation of proceedings under Section 142 and Section 149 of the Act.

6. The Petitioner in its rejoinder dated 23.9.2021 has mainly submitted as under:

(a) The only plea raised by the Respondent in its reply to resist the present Petition is that its appeal against the order dated 22.7.2019 is pending before the APTEL. The said plea, however, is untenable inasmuch as pendency of appeal does not operate as stay of the execution of the order appealed against.

(b) The order dated 22.7.2019 passed by the Commission stipulates the payment of LPS in case payment is not made within 60 days does not mean that the order is not required to be complied with. The said stipulation is not a licence to the Respondent to not comply with the order or delay or defer the compliance of order as sought to be contended by TANGEDCO. The submission of TANGEDCO is an abuse of process of law and in itself establishes the contumacious conduct of the Respondent and Respondent's intent to not comply with the order passed by the Commission.

(c) At the time of filing of present Petition, the liability of the Respondent under the order dated 22.7.2019 was around Rs. 112.25 crore (toward the invoices raised for the period uptill June, 2019). Thereafter, the Petitioner has raised further invoices claiming capacity charges as per the order dated 22.7.2019. However, the Respondent is not paying the capacity charges as per the Commission's order and lesser payment being made by the Respondent on the purported ground of appeal against the said order being pending before the APTEL. The amount towards capacity charges due & payable by the Respondent to the Petitioner under the order dated 22.7.2019 uptill August, 2021 is Rs. 132.98 crore. Further, an amount of Rs. 32.88 crore is due & payable towards LPS in terms of the said order against which the Petitioner has raised the invoices. Accordingly, a total amount of Rs. 165.87 crore has become due and payable from the Respondent.

Analysis and Decision

7. We have considered the submissions of the Petitioner and the Respondent, TANGEDCO. The present Petition has been filed by the Petitioner seeking execution of the Commission's order dated 22.7.2019 in Petition No. 117/MP/2017; seeking directions to the Respondents to forthwith pay the pending aggregate amounts to the Petitioner under the said order and seeking initiation of proceedings/appropriate action against the Respondents, jointly or severally, under Section 142 read with Section 149 of the Act for non-compliance of the said order.

8. Earlier, the Petitioner had filed Petition No. 117/MP/2017 *inter-alia* seeking declaration that the delivery date and the expiry date for supply of 117 MW power under the PPA dated 19.8.2013 are 1.8.2015 and 31.6.2030 respectively, and the delivery date and expire date for supply for 91 MW power under the PPA dated 19.8.2013 are 5.10.2015 and 4.10.2030 respectively and direction to the Respondent to pay the amount towards shortfall in tariff for the period 1.8.2015 till 31.3.2017. The Commission, after hearing the parties, vide its order dated 22.7.2017 had directed as under:

"53. In view of the above, the Schedule Delivery Date of 1.10.2013 in Schedule 8 of the PPA (for Schedule Delivery Date) shall be substituted by 15.3.2015. Similarly, the Expiry Date of 30.9.2028 in the Schedule 8 of the PPA shall be substituted by 31.3.2029. Thus, the first contract year tariff (2013-14) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2014-15, even though the actual supply had not started during this period. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2015-16 i.e. the first year of actual power supply and so on.

54. The Petitioner has prayed to direct the Respondent to pay the amount of Rs.18,73,53,192/- towards shortfall in tariff for the period from 1.8.2015 to 31.3.2017. We are not inclined to decide on the exact amount to be paid by the Respondent. However, we direct the Petitioner to revise its bills for power supplied to the Respondent in terms of the Extended Scheduled Delivery Date as decided above. The Respondent shall make payment within 60 days of

raising of bills by the Petitioner failing which it would be required to pay late payment surcharge in terms of the relevant provision of the PPA.”

9. The Petitioner has submitted that in terms of the Commission`s order dated 22.7.2019, the Petitioner had raised invoices for the differential amount for the capacity charges to the tune of Rs. 112.25 crore and the Respondent was required to make payment towards the same within the period of 60 days of raising of such bills. However, even after two years, no amount has been paid by the Respondent. During the course of hearing on 6.8.2021, the learned counsel for the Respondent submitted that the Respondent has filed an appeal against the order dated 22.7.2019 along with application for stay thereon which was then pending before APTEL for consideration. The Commission after hearing the learned counsels for both the parties, directed the Respondent to pay Rs. 55 crore i.e. approximately 50% of outstanding dues of Rs. 112.50 crore. Relevant portion of Record of Proceedings for the hearing dated 6.8.2021 is extracted as under:

“4. Considering the submissions of the learned counsels for the parties, the Commission noted that till date there is no stay on the operation of the order dated 22.7.2019 passed in Petition No.117/MP/2017 and that the considerable time has passed since the issuance of the aforesaid order. Taking note of the attitude of utter disregard for law and non-compliance of quasi-judicial order on the part of the Respondent, TANGEDCO, the Commission directed the Respondent, TANGEDCO to pay Rs. 55 crore i.e approximately 50% of outstanding dues of Rs. 112.25 crore to the Petitioner against the invoices raised in terms of the order dated 22.7.2019 within fifteen days failing which proceedings under Section 142 of the Act would be initiated against officials of TANGEDCO for non-compliance of the direction of the Commission.”

10. The matter was thereafter listed for hearing on 21.1.2022. During the course of hearing, learned counsel for the Petitioner submitted that pursuant to the direction of the Commission vide Record of Proceedings for the hearing dated 6.8.2021, TANGEDCO has made the payment of Rs. 55 crore on 19.8.2021. However, no further

payment has been made by TANGEDCO in compliance of the order dated 22.7.2019. He further submitted that immediately after the aforesaid direction to TANGEDCO for making payment, it proceeded to file IA No.1252 of 2021 before the APTEL seeking urgent hearing of its pending appeal and/or application for stay against the order dated 22.7.2019. However, after arguments, the said IA was withdrawn by TANGEDCO as recorded in APTEL's order dated 13.8.2021. Thus, there is no embargo on the present execution proceedings and TANGEDCO ought to be directed to make payment of outstanding dues in terms of the Commission's order dated 22.7.2019. The learned counsel submitted that the amount towards capacity charges due and payable by TANGEDCO to the Petitioner in terms of order dated 22.7.2019 up to August 2021 is Rs. 132,98,38,314/-. Further, an amount of Rs. 32,88,64,683/- is due and payable towards LPS. Thus, total outstanding amount due and payable by TANGEDCO works out to Rs. 165,87,02,997/- against which only Rs. 55 crore has been paid. The aforesaid outstanding amount is not disputed. In addition, payment towards the regular energy charges and Change in Law claims are also not being made by TANGEDCO for which the Petitioner has filed a separate petition seeking appropriate directions to TANGEDCO for making payment.

11. *Per contra*, the learned counsel for the Respondent submitted that as per direction of the Commission vide Record of Proceedings for the hearing dated 6.8.2021, TANGEDCO has made payment of Rs. 55 crore against the outstanding claims of Rs. 112.25 crore as claimed in the Petition. It was further submitted that while TANGEDCO had moved IA No. 1252 of 2021 seeking urgent hearing of its pending appeal and application for stay, APTEL was not inclined to hear the pending appeal out of turn and accordingly, TANGEDCO did not press its application for urgent listing as recorded by APTEL in its order dated 13.8.2021. However, TANGEDCO's appeal

and the application seeking stay on the order dated 22.7.2019 remain pending before APTEL and were currently listed at Sr. 13 in the list of final hearing matters to be heard by Bench No.2 of the APTEL. The learned counsel also stated that the order dated 22.7.2019 already stipulates that in case payment is not made within 60 days, TANGEDCO would be required to pay LPS. Hence, in the event TANGEDCO does not succeed in the appeal filed before APTEL, the consequence set out in the order would nevertheless apply. The learned counsel further stated that the claims of the Petitioner in terms of order dated 22.7.2019 are only for differential capacity charges and it was not the case as if TANGEDCO had not been paying any tariff for supply of power by the Petitioner. It was also submitted that any direction of making payment of entire outstanding amount as prayed for by the Petitioner would render TANGEDCO's application for seeking stay on the order dated 22.7.2019 infructuous and that the issues of non-payment of energy charges/ Change in Law claims and the subsequent Petitions filed by the Petitioner are extraneous to the present proceedings. The learned counsel had also sought permission for making balance payment in instalments.

12. After hearing the learned counsel for the parties, vide Record of Proceedings for the hearing dated 21.1.2022, the Respondent, TANGEDCO was directed to pay Rs.70 crore against the invoices raised in terms of order of the Commission dated 22.7.2019. Relevant portion of Record of Proceedings is extracted as under:

“4. ...as on date, there is no stay on the Commission's order dated 22.7.2019 passed in Petition No. 117/MP/2017 and that it is well settled principle of law that mere pendency of an appeal does not operate as stay or suspension of the order appealed against. The Commission also observed that up to August 2021, the total outstanding amount payable by TANGEDCO in terms of order dated 22.7.2019 works out as Rs. 132,98,38,314/- towards principal and Rs. 32,88,64,683/- towards LPS, which has been neither contested nor disputed by TANGEDCO and that till date, TANGEDCO has made the payment of Rs. 55 crore and that too only after direction issued by the Commission vide order dated 6.8.2021. In view of the above, the Commission directed the Respondent,

TANGEDCO to pay Rs.70 crore against the invoices raised in terms of the order dated 22.7.2019 within fifteen days of this order, failing which proceedings under Section 142 of the Act would be initiated against officials of TANGEDCO for non-compliance of the direction of the Commission.”

13. The matter was further listed for hearing on 27.9.2022. During the course of hearing, the learned counsel for the Petitioner submitted that as clearly noted vide Record of Proceedings for the hearing dated 21.1.2022, the total outstanding amount payable by TANGEDCO to the Petitioner in terms of order dated 22.7.2019 was Rs. 132.98 crore towards principal and Rs. 32.88 crore towards LPS which was neither disputed nor contested by TANGEDCO. Till date, TANGEDCO only made the payment of Rs. 55 crore and Rs. 70 crore in terms of the directions of the Commission dated 6.8.2021 and 21.1.2022 respectively. The learned counsel also stated that TANGEDCO's appeal along with application for stay against the Commission's order dated 22.7.2019 had been dismissed by the APTEL. As on date, the outstanding amount is approximately Rs. 56.21 crore (inclusive of late payment surcharge) which has also been reconciled with TANGEDCO. In this regard, summary of reconciliation was circulated and referred to. The learned counsel also clarified that the aforesaid outstanding amount has not been included in the amount communicated by TANGEDCO for liquidation of its arrears under Rule 5(2) Electricity (Late Payment Surcharge and Related Matters) Rules, 2022 on account of the pendency of appeal filed by it before the APTEL. In view of the above, the learned counsel urged that TANGEDCO may be asked to pay the balance outstanding amount as reconciled between the parties.

14. On the other hand, the learned counsel for the Respondent, TANGEDCO submitted that, as per her instruction and without prejudice to the right of the Respondent to second appeal, TANGEDCO will make the payment of balance

outstanding amount of approximately Rs. 40 crore within a month. The learned counsel pointed out that as per Annexure B to the Petitioner's rejoinder, the total outstanding amount was Rs 165.87 crore out of which TANGEDCO has already paid Rs. 125 crore in terms of the directions of the Commission. The learned counsel also added that she did not had any instruction on the further reconciled amount as claimed by the Petitioner and the amount covered under the present execution Petition is to the extent of Rs. 165.87 crore only.

15. In rebuttal, learned counsel for the Petitioner submitted that the balance outstanding amount of approximately Rs. 56.21 crore had been worked out by taking into the account the LPS for the further period to which the Petitioner is entitled to in terms of the Commission's order dated 22.7.2019 in Petition No. 117/MP/2017.

16. After hearing the learned counsel for the parties, vide Record of Proceedings for the hearing dated 27.9.2022, the Commission took on the record the submission of the learned counsel for TANGEDCO that it shall make the payment of approximately Rs. 40 crore as outstanding in terms of order dated 22.7.2019 within a month. Moreover, for the balance amount, the parties were directed to reconcile within 15 days and consequently, the Respondent, TANGEDCO was directed to pay such amount to the Petitioner within 15 days thereafter. Both the parties were also directed to file the compliance status within a week thereafter. Relevant portion of the Record of Proceedings for the hearing dated 27.9.2022 is extracted as under:

"4. After hearing the learned counsels for the parties, the Commission took on record the submission of the learned counsel for TANGEDCO that the payment of approximately Rs. 40 crore as outstanding in terms of the order dated 22.7.2019 shall be made by TANGEDCO within a month. For the remaining amount, the Commission directed the parties to reconcile such amount within 15 days and consequently, TANGEDCO to pay such amount to the Petitioner within 15 days thereafter. Both the parties will file the compliance status within a week thereafter."

17. It is noticed that despite our clear direction to the parties to file a compliance status with regard to the payment of Rs. 40 crore and the balance amount after reconciliation, no such compliance status has been received from the parties so far. In our view, since substantial amount of outstanding dues under the order dated 22.7.2019 has been paid by the TANGEDCO to the Petitioner in terms of our earlier directions, no purpose would be served to keep the Petition further pending. As to the differential amount due to the LPS as pointed out during the hearing on 27.9.2022 (i.e. difference b/w Rs. 56.21 crore as per the Petitioner and Rs. 40 crore as per TANGEDCO), TANGEDCO was already directed to make payment towards such charges after the reconciliation. However, in view of the parties having not filed a compliance status, TANGEDCO is again directed to comply with the direction issued under the Record of Proceedings for the hearing dated 27.9.2022 and to make the payment of the balance amount within 15 days from the date of this order, if not already done so.

18. Before parting, we are constrained to take a strict note of the conduct of TANGEDCO in failing to make payment against the claim of the Petitioner for differential capacity charges in terms of the Commission's order dated 22.7.2019 in Petition No. 117/MP/2017. The mere excuse for not making such payments for all along, as already noted above, appears to be a filing/pendency of an appeal and stay application before the APTEL. Admittedly, there had been no stay on the Commission's order dated 22.7.2019 all along till the dismissal of the said appeal by the APTEL vide judgment dated 25.8.2022. In the meanwhile, TANGEDCO continued to dishonour the claim of the Petitioner for differential capacity charges in terms of order dated 22.7.2019 despite a well settled position in law that mere filing of appeal does not operate as a stay. In our considered view, the approach adopted by

TANGEDCO has been wholly misdirected. However, keeping in view that TANGEDCO did make the payments to the Petitioner during the pendency of this petition, we refrain ourselves from initiating the actions against the Respondents under Section 142 and Section 146 of the Act as prayed for by the Petitioner. However, we caution the Respondents to completely avoid such a conduct in future.

19. In light of the above discussion the Petition No. 424/MP/2019 is disposed of.

sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member