



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 319/MP/2020

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 16th of January, 2024

IN THE MATTER OF:

Petition under Section 79 (1) (a) read with Section 79 (1) (f) of the Electricity Act, 2003.

AND IN THE MATTER OF:

NTPC Limited,
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110003

...Petitioner

Versus

Electricity Department, Andaman and Nicobar Administration,
Vidyut Bhawan,
Port Blair – 744101

...Respondent

Parties Present:

Shri Venkatesh, Advocate, NTPC
Shri Ashutosh Srivastava, Advocate, NTPC
Shri Aashwyn Singh, Advocate, NTPC

आदेश/ ORDER

The Petitioner, NTPC Limited (NTPC), is a generating company and has set up a 5 MW solar PV power station (the project) at Garacharma in South Andaman District, Andaman and Nicobar Islands. On 27.11.2009, NTPC signed a Memorandum of Understanding (MOU) with the Electricity Department, Andaman and Nicobar Administration to promote Non-Conventional Energy. NTPC executed a Power Purchase Agreement (PPA) on 14.07.2011. The project was commissioned by NTPC on 15.04.2013. On 17.04.2013, the Joint Electricity Regulatory Commission (JERC), vide its order approved the PPA dated 14.07.2011. On 17.09.2013 & 01.10.2013, JERC clarified that as per JERC's order dated 17.04.2013, the billing rate would be Rs. 7.87/kWh (if accelerated depreciation benefits are availed) or Rs. 8.75/kWh (if accelerated depreciation is not availed). On 10.12.2013, JERC withdrew its letters dated 17.09.2013 & 01.10.2013 and clarified that the jurisdiction of tariff determination of the Petitioner lies with this Commission. On 09.02.2016, this Commission vide its Order in Petition No. 381/MP/2014 held that levelised Tariff in/kWh if accelerated depreciation benefit is availed shall be Rs. 7.87/kWh. However, NTPC filed a Review Petition No. 10/RP/2016 against the Order dated 09.02.2016. The Commission, after appreciating the submissions made by the parties, held that NTPC is entitled to a levelised tariff of Rs.9.35/kWh (after availing of the benefits of accelerated depreciation) as determined for the solar PV power project. Thus, by the aforesaid order, the tariff of the Petitioner's Project was revised to Rs. 9.35/kWh from Rs.7.87/kWh. NTPC has filed the present petition seeking adjudication of the disputes which have arisen between NTPC and the Electricity Department, Andaman and Nicobar Administration regarding the applicability of interest (Rs. 1.13 Crores) along with the Late Payment Surcharge (LPSC) (Rs. 1.44 Crores) on the arrears, on account of lower tariff paid by the Respondent, for the period April 2013 to July 2017. In addition to the above, the Petitioner has sought a refund of the Rebate (Rs. 0.22 Crores) deducted by the Respondent during the said period.

2. The Respondent, Electricity Department, Andaman and Nicobar Administration is operating & maintaining power generation, transmission & distribution systems and networks in the Andaman and Nicobar Islands for providing electric power supply to the general public and

also implements various schemes for the establishment of new power houses and T&D systems.

3. The Petitioner has made the following prayers:
- Direct the Respondent to make the payment for (i) Interest of Rs. 1.13 Crores (for the period up to date of order issued by this Hon'ble Commission in petition no.); and (ii) LPSC already billed and accrued further;*
 - Direct Respondent to refund the Rebate illegally deducted while making payment to the Petitioner;*
 - Pass such further /other order(s) /direction(s) /relief(s) as this Hon'ble Commission may deem fit and proper in the interest of justice.*

Factual Matrix:

4. The brief facts of the case are as under:

Location	Garacharma, Andaman & Nicobar Islands
Capacity	50 MW (Solar)
Power Purchase Agreement (PPA) was executed between NTPC and Electricity Department, Andaman & Nicobar Islands	14.07.2011
The Commission passed an order in Petition No. 256/2010 (Suo Motu), <i>inter-alia</i> , for Solar PV Power Projects with PPA signed after 31st March 2011 <ul style="list-style-type: none"> • Levelized Total Tariff (FY2011-12) @ 15.39 • Levelized Tariff (FY 2011-12) @ 12.94 	09.11.2010
Commercial Operation Date (CoD) of the project	15.04.2013
Joint Electricity Regulatory Commission (JERC) <i>vide</i> its Order approved the PPA dated 14.07.2011	17.04.2013
JERC sought clarification from the Respondent on the basis of billing of tariff for 5 MW Solar PV Power project and stated that as per JERC's Order dated 17.04.2013, the billing rate should have been Rs. 7.87/kWh (if accelerated depreciation benefits is availed) or Rs. 8.75/kWh	17.09.2013 & 01.10.2013
JERC withdrew the requests for clarification dated 17.09.2023 & 01.10.2023 on	10.12.2023
CERC passed its Order in Petition No. 381/MP/2014 (levelized tariff of Rs. 7.87/kWh was determined by CERC)	09.02.2016
CERC order in Review Petition No. 10/RP/2016	25.07.2017
NTPC issued revised invoice to the Respondent qua CERC order dated 25.07.2017	04.08.2017
Respondent released payment of Rs. 32,12,158 on	07.09.2017

<p>NTPC wrote letters to the Respondent seeking refund of difference amount @ Rs. 9.35/kWh, interest, rebate amount etc.</p>	<p>25.06.2018, 20.09.2018, 23.10.2018, 06.12.2018, 04.12.2019, 27.03.2019, 02.04.2019; 10.05.2019, 06.06.2019, 08.08.2019, 04.09.2019, 05.10.2019, 26.12.2019 (NTPC reiterated its stance and again sought reimbursement of the amount)</p>
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5. The present petition was filed on 03.03.2020. The Petition was listed for hearing on 11.08.2020, and the Commission directed the respondent to file its reply. Subsequent to the hearing held on 14.03.2023, NTPC filed its revised claims vide an additional affidavit dated 28.03.2023. The Respondent filed its reply on 18.08.2023. Further, the hearing was conducted on 21.08.2023 wherein the Commission, after hearing the submissions of the parties, reserved the matter for orders and directed the parties to file their respective submissions. Pursuant to the directions of the Commission dated 21.08.2023, NTPC filed Affidavit dated 28.03.2023 and submitted that since the date of filing of the petition, the respondent defaulted in its payments as a result the claim amount increased in the following manner: (a) Interest of Rs. 1.13 crores; (b) Late Payment Surcharge of Rs. 2.53 crores and (c) Refund of Rebate of Rs. 0.46 crores. Accordingly, NTPC sought the aforesaid amount from the Respondent.

Analysis and Decision:

6. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records and considered the submissions of the parties.
7. On the basis of the submissions of the contracting parties, the only issue that arises for adjudication is as under:

Whether the Petitioner is entitled to the following:

- a) interest for the period April 2013- July 2017 i.e. till 25.07.2017?*
b) Late Payment Surcharge (LPSC) on the outstanding amount?
c) Refund of rebate (if any) deducted by the Respondent?

8. Now, we proceed to discuss the above issue.

**Re: Interest for the period April 2013- July 2017 i.e. till 25.07.2017 and
Late Payment Surcharge (LPSC) on the outstanding amount**

9. Briefly, NTPC has submitted as under:

- a) The Petitioner executed the PPA with the Respondent on 14.07.2011 for the supply of 5 MW power from the project. The project was commissioned on 15.04.2013. The PPA was approved by the Joint Electricity Regulatory Commission (JERC) on 17.04.2013. The Petitioner started billing the Respondent for the energy supplied at Rs. 15.39/kWh (as per the CERC Order dated 09.11.2010), which was subsequently revised to Rs. 12.94/kWh retrospectively w.e.f. March, 2013. The extra amount, along with applicable interest on this account, was adjusted in the bills raised on 01.10.2013 for the energy supplied during September 2013.
- b) However, Subsequently, JERC vide its letters dated 17.09.2013 and 01.10.2013 sought clarification from the Electricity Department, Andaman and Nicobar administration on the basis of the billing of tariff for 5 MW Solar PV Power project and stated that as per JERC's Order dated 17.4.2013, the billing rate should have been Rs. 7.87/Kwh with accelerated depreciation benefits if availed or Rs.8.75/Kwh (if accelerated depreciation is not availed). The Respondent was regularly paying the bills raised by the petitioner for the energy supplied till August 2013. However, consequent upon the clarification sought by JERC, the Respondent stopped the payment of bills of NTPC. Subsequently, JERC vide its letter dated 10.12.2013, withdrew its letters dated 17.9.2013 and 1.10.2013 and clarified that the jurisdiction of tariff determination of NTPC lies with the Central Commission.
- c) Even after the JERC withdrew its letters dated 17.09.2013 & 01.10.2013 and clarified that the jurisdiction of tariff determination of the Petitioner lies with this Commission, the Respondent did not resume the payments against the energy supplied by NTPC at Rs. 12.94/kWh (with accelerated depreciation) and rather, adjusted all the payments made so far at Rs. 7.87/ kWh retrospectively.
- d) The Petitioner, through numerous communications as mentioned above, requested the Respondent to release the payment (along with interest) for energy supplied at the revised tariff of Rs. 9.35/kWh till July 2017. However, the Respondent denied the claim of interest on the ground that this Commission, in its Order dated 25.07.2017, has not given any finding regarding the interest component.

- e) The interest is being claimed by the Petitioner for the difference in tariff for the period from April 2013 to July 2017 (i.e. payment of Rs. 7.87/ kWh as against Rs. 9.35/ kWh as determined in Order dated 25.07.2017). The Respondent cannot just pay the difference of the tariff without providing the interest on the same. The payment of interest on the principal amount directly flows from the direction to pay the principal amount. Payment of interest is normal accretion to the capital, and therefore, a grant of the same is a matter of right for the party in whose favour a sum of money is awarded. Therefore, the Petitioner cannot be denied the time value of money which has accrued due to differential tariff.
- f) Hence, the Petitioner is entitled to interest on the differential price being paid now by the Respondent and the Respondent be directed to pay Rs. 1.13 Crores as interest accrued on differential tariff for the period from April 2013 to July 2017.
- g) Reliance is placed on APTEL judgement dated 20.12.2012 in the matter of *SLS Power Limited v. Andhra Pradesh Electricity Regulatory Commission and Ors*; judgement dated 13.04.2018 in the matter of *Adani Power Limited v. CERC & Ors* in A.No. 210 of 2017; Hon'ble Supreme Court judgement in *Enviro Legal Action v. Union of India & Ors [(2011)8 SCC 161]*; *Alok Shanker Pandey v. Union of India [(2007) 3 SCC 545]* etc.
- h) NTPC has raised invoices dated 04.08.2017 amounting to Rs. 55,434,124 against which the Respondent released only 44,130,836 till 31.03.2019, and the interest amount was not released.
- i) NTPC, vide letter dated 02.04.2019, requested the Respondent to release the withheld amount with respect to the interest amount unpaid to NTPC. The relevant extract of the letter dated 02.04.2019 is as under:

.....
At the outset we would like to thank ED A&N Admn. for releasing the long outstanding dues of Rs. 4,35,72,878/-(partial amount) before the completion of the FY 18-19. In this regard we would like to re-iterate as below:

- 1. You are aware that CERC vide review order dtd 25.07.17 has finalised the tariff of 5MWp solar PV plant @ Rs. 9.35/Kwh. Accordingly, the revision bills corresponding to the tariff difference were claimed by NTPC in the month of Aug'17. The details attached at annexure-I, which comprises of revision bills for the period Apr'13- Jun'17 and interest claim.**
- 2. Against the said claim, ED A&N Admn. has released only the payments towards the July'17 energy bill @ Rs.7.87/kwh and also withheld the payments pertaining to the tariff difference & interest component. Please note that, even after the issuance of CERC Tariff order, ED A&N Admn.**

has continued to release the payments @ Rs.7.87/kwh till Dec'17 egy bill.

.....

4. Further, ED A&N Admn. while releasing the tariff difference payments on 31.03.19 for the period Apr'13- Nov'17 has not released the interest claimed in July'17 egy bill and Late Payment Surcharge claimed in Oct'17 & Nov'17 energy bills. Details enclosed at annexure-III.

Relevant extracts of Annexure – III is as under:

Months	Bill Amount	Invoice Date	Due date	Amount released earlier	Amount released on 31.03.2019	Balance outstanding
July 2017	40,276,065	04.08.2017	03.10.2017	-	40,276,065	-
	11,303,288			-	-	11,303,288
	3,854,771			3,244,604	610,167	-

- j) The Respondent in complete disregard to the regulatory framework and express provision of the PPA, has denied the applicability of LPSC on the late payment of the revised bills. If the payment is made beyond a period of 60 days from the date of billing, the generating company, levies LPSC on the outstanding amount of the invoices.
- k) NTPC has raised the invoices, including the LPSC, on unpaid amounts since July 2017. For the purpose of calculation of LPSC, the same would be imposed if the bills remained unpaid beyond 60 days of the date of the bill. The cash deficit due to delayed payments results in additional borrowing of money or use of earnings by the Petitioner, which could have been utilized by the Petitioner. Reliance is placed on the Hon'ble Supreme Court's judgement in the matter of *Tamil Nadu Generation and Distribution Corporation Ltd (2014)11 SCC 53*.

10. *Per contra*, briefly, the Respondent has submitted that:

- a) NTPC's claim for interest charges towards the difference amount does not appear to be justified as the cause of dispute over the tariff cannot be attributed alone to the Electricity Department while there has been no default of payment during the entire period of the claim. PPA dated 14.07.2011 does not stipulate any provision for consideration of interest claim.
- b) Further, RE Tariff Regulations, 2012, governed by the Commission and amended from time to time, do not have a provision for admissibility of interest levied by NTPC. Hence, the claims made by the Petitioner towards interest charges may not be

allowed, and appropriate directions may be issued to the Petitioner regarding the inadmissibility of the interest.

- c) The payment of all the monthly invoices raised by NTPC against the energy charges was made within the period of 60 days. The claim submitted by NTPC for LPSC appears to be unfounded as the payments were being released by the Electricity Department on time. The LPSC was imposed on account of a difference amount due to the differential tariff & accrued interest, which is beyond the purview of the relevant provisions of the RE tariff regulations. The imposition of LPSC needs to be confined only to the delayed disbursement of payment against the monthly invoices for the energy charges and thus should not be construed for the amount, which was the result of the dispute in the applicability of tariff placed before the CERC for consideration for the said period. The Commission may dismiss the admissibility of LPSC in order to avoid unnecessary financial burden on the government exchequer.

11. We note that the Commission, vide Order dated 09.02.2016 in Petition No. 381/MP/2014, has held as under:

The petitioner has made the following prayers:

“(a) Declare that the Respondent, Electricity Department, A&N Administration is required to pay to NTPC the tariff for generation and sale of power from the Solar Power Project of 5 MW established by NTPC at Garacharama in South Adnaman District as per the tariff terms and conditions contained in the Order dated 9.11.2010 passed in Petitioner No. 256 of 2010 (suo moto) by the Hon’ble Commission;

(b) Direct the Respondent, Electricity Department, A & N Administration to pay tariff at the rate applicable as per the Order dated 9.11.2010 passed by this Hon’ble Commission at all times and direct them to pay all outstanding arrears including the amount adjusted by the Respondent in the past with Late Payment Surcharge at the rate as provided in the Power Purchase Agreement;

(c) Direct the Respondent, Electricity Department, A&N Administration to duly pay and discharge all amounts for the generation and sale of solar power as per the applicable tariff terms and conditions contained in the Order dated 9.11.2010 passed in petition No. 256 of 2010 (suo moto);

(d) Direct that the Respondent, Electricity Department, A&N Administration shall be liable to pay exemplary damages to NTPC for the willful act on their part in denying the legitimate payment due to NTPC; and

(e) Pass such further order/orders as this Hon’ble Commission may deem just and proper in the circumstances of the case.”

...

...

21. *The intent of the regulation is clear, wherein the applicability of generic tariff determined for a particular year may only be valid for the following year, if the plant is fully commissioned before the end of next year. This will not be applicable if the*

PPA was signed in a financial year which was two years (or more) before the financial year in which commissioning of the Solar PV project took place. Accordingly, the following generic tariff determined by the Commission for Solar PV for the year 2013-14 vide order dated 28.02.2013 in Petition No. 243/SM/2012 shall be applicable to the petitioner:

<i>Ref CERC's order Dated in petition number</i>	<i>Description of the relevant clause</i>	<i>Total Levelised Tariff ₹/Kwh for Solar PV</i>	<i>Benefit of Accelerated depreciation for solar PC</i>	<i>Levelised Tariff in /Kwh if Accelerated Depreciation benefit is availed.</i>
<i>Dated 28.02.2013 in petition No. 243/SM/2012</i>	<i>Regulation 5 of the RE Regulation provides that the control period for determination of tariff for RE projects shall be of 5 years. The first year of the control period is from 2013-14.</i>	8.75	(0.88)	7.87

22. The petition is disposed of with the above.

12. We note that NTPC in Review Petition No. 10/RP/2016 prayed as under:

- a) admit the present review petition and review the Order dated 9.02.2016 passed in Petition No. 381/MP/2014 on the aspects mentioned herein above;
- b) Rectify the order in regard to the grant of appropriate tariff for the Solar Power Project and
- c) pass any such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.

13. The Commission, vide Review Order dated 25.10.2017, has, *inter-alia*, held as under:

11.

.....

The Petitioner has submitted that it started the execution of the project in September 2012 and completed the execution by 31.3.2013. However, the project was fully synchronized on 15.4.2013 and accordingly, achieved COD with effect from that date. There is no dispute with regard to the date of commercial operation. The Commission has decided in the impugned order that the generic tariff for the year 2013-14 would be applicable. The Petitioner is aggrieved about this finding and has submitted that generic tariff for the year 2012-13 should be made applicable in its case as there is no prohibition in the RE Regulations to allow tariff for the year subsequent when the actual commercial operation is delayed beyond the subsequent year. We find that RE

Regulations provide that generic tariff of a financial year when PPA is executed will be applicable if the project is commissioned by the 31st March of the following year. However, the RE Regulations are silent as to what should be the treatment of the applicability of generic tariff if the actual commercial operation is delayed beyond the following year when the PPA was executed. **In the case of the Petitioner, had the project declared commercial operation on 31.3.2013, the generic tariff for the year 2011-12 would have been applicable as per the RE Tariff Regulations.** Since, the project was executed during the financial year 2012-13 and achieved commercial operation on 15.4.2013, generic tariff for the year 2013-14 has been made applicable. **If we go by the provisions of RE Regulations, the generic tariff for the year 2012-13 would be applicable in a case where the PPA was signed during 2012-13 and project is executed on or before 31.3.2014 i.e. during 2013-14.** On the same analogy, it stands to reason that the **Petitioner having achieved commercial operation on 15.4.2013 (i.e. during 2013-14) should be entitled for the generic tariff for the year 2012-13. If the generic tariff for the year 2013-14 is allowed on account of the generating station having declared under commercial operation on 15.4.2013 while the project was implemented in the year 2012-13, it would result in partial recovery of the cost of the project by the Petitioner. We find that there are sufficient reasons to review the impugned order and direct that the Petitioner shall be eligible for the generic tariff for the financial year 2012-13 as determined by the Commission by its order dated 27.3.2012.** Accordingly, para 21 of the impugned order shall be modified as under:

“21. The intent of the regulation is very clear wherein the applicability of generic tariff determined for a particular financial year may only be valid for the following financial year if the plant is commissioned before the end of the next financial year. This will not be applicable if the PPA was signed in a financial year which was two years or more before the financial year in which the commissioning of Solar PV project took place. However, **the regulations are silent about the generic tariff of which year shall be applicable if the COD has been delayed beyond the end of the next financial year of the year in which PPA was signed. In the view of the Commission, generic tariff of the year immediately preceding the financial year when the Solar PV project achieved COD should be applicable in such cases. In the present case, since the project achieved COD on 15.4.2013 (i.e. during the Financial Year 2013-14), the generic tariff for the preceding financial year i.e. 2012-13 shall be applicable. Accordingly, the following generic tariff determined by the Commission for Solar PV projects for the year 2012-13 vide order dated 27.3.2012 in Petition No. 35/MP/2012 shall be applicable to the Petitioner:**

Ref CERC's order dated in petition number	Description of the relevant clause	Total levelised Tariff ₹/Kwh for Solar PV	Benefit of accelerated depreciation for solar PV	Levelised Tariff in ₹/Kwh if accelerated depreciation

Dated 27.3.2012 in Petition No. 35/MP/2012	Regulation 5 of the RE Regulation provides that the control period for determination of tariff for RE projects shall be of 5 years. The first	10.39	1.04	9.35
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14. From the above, we note that the Commission allowed the Review Petition filed by NTPC and allowed the tariff @ Rs. 9.35/kWh for the project.

15. We observe that the relevant clauses of the PPA dated 14.07.2011 stipulate as under:

Definition of Tariff:-

“Tariff Tariff shall be rate of electricity from the station as determined by CERC based on Central Electricity Regulatory Commission (Terms and Condition for Tariff determination from Renewable Energy Sources) Regulations, 2009 as amended from time to time and shall remain valid for 25 years from COD”

5.0: Tariff:-

“5.0 Tariff

5.1 The Tariff for the electricity supplied from the Station would be applicable rate in Rs/kWh for the relevant year of commissioning as notified by CERC from time to time based on the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009 as amended from time to time.”

6.0: Billing and Payment:-

“6.1 BILLING:

...

6.1.5 All payments made by the A & N Administration, shall be appropriated by NTPC for amounts due from the A&N Administration in the following order of priority:

- i) towards Late Payment Surcharge, payable if any;
- ii) towards earlier unpaid bill (S), if any; and
- iii) towards the statutory dues like income tax, other tax, royalty etc in the current bill (S).
- iv) towards the other charges in current Monthly Bill”

6.1.7: Rebate and Late Payment Surcharge: -

“Rebate and Late Payment Surcharge shall be as per Terms and Conditions of Tariff issued by CERC as applicable from time to time. No rebate shall be payable on the bills raised on account of taxes, duties, royalty /cess etc.

16. We observe that the relevant provisions of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff) Regulations, 2014 (Tariff Regulations, 2014) as amended

vide the *Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment) Regulations, 2015 dated 05.11.2015* (Amendment Regulations, 2015) stipulate as under:

2. Scope and extent of application

(1) *These regulations shall apply in all cases where tariff for a generating station or a unit thereof and a transmission system or an element thereof including communication system used for inter-State transmission of electricity is required to be determined by the Commission under section 62 of the Act read with section 79 thereof.*

(2) *These regulations shall not apply for determination of tariff in case of the following:*

...

(b) *Generating stations based on renewable sources of energy whose tariff is determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012, as amended from time to time or any subsequent enactment thereof.*

(7) **In case of the new projects**, *the generating company or the transmission licensee, as the case may be, may be allowed tariff by the Commission based on the projected capital expenditure from the anticipated COD in accordance with Regulation 6 of these regulations:*

Provided that:

(i) *the Commission may grant tariff upto 90% of the annual fixed charges claimed in respect of the transmission system or element thereof based on the management certificate regarding the capital cost for the purpose of inclusion in the POC charges in accordance with the CERC (Sharing of Inter State Transmission charges and losses), Regulation, 2010 as amended from time to time:*

(i a) *The difference between the tariff determined in accordance with proviso (i) above and the tariff determined in accordance with Regulation 6 of these regulations shall be recovered or refunded with simple interest at the rate equal to the bank rate as on 1st April of the respective year, in three equal monthly instalments.*

(8) **In case of the existing projects**, *the generating company or the transmission licensee, as the case may be, may be allowed tariff by the Commission based on the admitted capital cost as on 1.4.2014 and projected additional capital expenditure for the respective years of the tariff period 2014-15 to 2018-19 in accordance with the Regulation 6:*

Provided that:

(i) *the generating company or the transmission licensee, as the case may be, shall continue to bill the beneficiaries or the transmission customers / DICs at the tariff approved by the Commission and applicable as on 31.3.2014 for the period*

starting from 1.4.2014 till approval of tariff by the Commission in accordance with these regulations:

(i a) The difference between the tariff determined in accordance with proviso (i) above and the tariff determined in accordance with Regulation 6 of these regulations shall be recovered or refunded with 2 simple interest at the rate equal to the bank rate as on 1st April of the respective year, in three equal monthly instalments.

17. We observe that the relevant provisions of the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012* (RE Tariff Regulations, 2012) stipulate as under:

3. Scope and extent of application

These Regulations **shall apply in all cases where tariff, for a generating station or a unit thereof based on renewable sources of energy,** is to be determined by the Commission under Section 62 read with Section 79 of the Act.

Provided that in cases of wind, Small Hydro projects, Biomass power based on Rankine cycle, non-fossil fuel based cogeneration projects, Solar PV, Solar Thermal power projects, Biomass gasifier and Biogas power project these Regulations shall apply subject to the fulfillment of eligibility criteria specified in regulation 4 of these Regulations.

2. Definitions and Interpretation

2) Save as aforesaid and unless repugnant to the context or if the subject-matter otherwise requires, words and expressions used in these regulations and not defined, but defined in the Act, or the Indian Electricity Grid Code or the Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations, 2009 shall have the meanings assigned to them respectively in the Act or the Indian Electricity Grid Code or the Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations, 2009.

20. Late payment surcharge.

In case the payment of any bill for charges payable under these regulations is delayed 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.

18. From the above, we note that as per Tariff Regulations, 2014 read with Amendment Regulations, 2015, in case of new/existing generating projects, the differential tariff shall be recovered or refunded with simple interest at the rate equal to the bank rate as on the 1st April of the respective year, in three equal monthly instalments. However, we observe that the Petitioner set up a 5 MW solar PV power station (the project) at Garacharma in South Andaman District, Andaman and Nicobar Islands and achieved COD on 15.04.2013.

We note that *Tariff Regulations 2014* apply in cases where a tariff for a conventional generating station for inter-State transmission of electricity is required to be determined by the Commission under section 62 of the Act read with section 79 thereof. *Tariff Regulations, 2014* are not applicable in cases for determination of tariff of generating stations based on renewable sources of energy. We observe that the *RE Tariff Regulations, 2012* are applicable to the project of the Petitioner. We observe that as per the *RE Tariff Regulations, 2012*, there is no provision for levying of interest on the differential tariff and, as such, no provision regarding recovery of the same.

19. Hon'ble Supreme Court vide judgement dated 15.02.2007 in the matter of *Alok Shanker Pandey v. Union of India* [(2007) 3 SCC 545] has held as under:

*“7. It may be mentioned that there is misconception about interest. **Interest is not a penalty or punishment at all, but it is the normal accretion on capital.** For example, if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B.”*

20. APTEL vide judgement dated 22.05.2019 in A.No. 308 of 2017 titled as *Lanco Amarkantak Power Limited v. HERC & Ors.* has held as under:

“93. Our findings and analysis

- ii) *...Under these circumstances the Appellant was forced to arrange additional funds to keep the plant in operation and generate electricity to supply power as per its commitment. The State Commission has accordingly redetermined tariff and has given enhanced tariff from the date of commencement of supply.*
- iii) *The payment of interest was a issue framed by the State Commission, however, the State Commission did not record any reason for not granting the same. The most important aspect in this Appeal is that the Appellant incurred additional expenditure over and above the capped tariff of Rs. 2.32/kWh and accordingly the State Commission redetermined it to Rs.2.8875/kWh for FY 2011- 12 and Rs.2.9218/kWh for the FY 2012-13. Though the differential amount have been paid by the Respondent No.3 to Appellant. No carrying cost/interest was paid. **However, it is pertinent to note that the differential amount between the capped tariff and the redetermined tariff was payable in the FY 2011-12 and FY 2012-13 but was actually paid subsequently after a gap of several years. It is a well established fact that money not paid in time but paid subsequently at a much later stage after lapse of several years, losses its real money value to a great extent and is effectively less money paid.***

- iv) Therefore, for equity and restitution payments made at a later stage, of the amount, due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value. This is a proven concept of time value of money to safeguard the interest of the receiving party...
- vi) *In view of the above it emerges that the State Commission committed an error by not taking these aspects into consideration while deciding on the matter and not granting interest to the Appellant.*
- vii) *The Respondent No.3 have submitted that interest cannot be paid until the amount is crystallized. It is pertinent to note here that though the amount was crystallized by the State Commission vide their Impugned Order but the most important fact to be kept in mind is that the State Commission redetermined the tariff from the date of commencement of supply which clearly shows that the due date is the date of commencement of supply. In such matters the crucial point for consideration is that interest is not a penalty or punishment at all. But, it is the normal accretion on capital. Equity demands that the paying party should not only pay back the principal amount but also the interest thereon to the recipient and therefore the argument of the Respondent does not hold any ground and needs to be rejected.*

21. From the above, we note that the following *ratio decidendi* emerges:

- a) As per the law of equity, the paying party should pay back the principal amount along with the interest applicable.
- b) Any payment made at a later stage which ought to have been made in the past must be compensated by way of appropriate interest in order to compensate for loss of money value.
- c) In cases of redetermination of tariff, the interest by way of compensation is also required to be paid for the differential amount to be paid.

22. In the instant petition, we note that on 09.02.2016, this Commission, vide its Order in Petition No. 381/MP/2014, held that levelised Tariff in/kWh if accelerated depreciation benefit is availed of shall be Rs. 7.87/kWh. However, after NTPC filed a Review Petition No. 10/RP/2016, the Commission, after appreciating the submissions made by the parties, held that NTPC is entitled to a levelised tariff of Rs.9.35/kWh (after availing the benefits of accelerated depreciation). Thus, the differential amount between the capped tariff and the redetermined tariff was payable from the date of the commissioning of the Petitioner project, i.e. 15.04.2013 but was actually paid subsequently after a gap of several years. We are of the view that money not paid in time is effectively less money paid. As such, we hold that the Petitioner is eligible for the *interest (simple interest at the rate equal to the one year*

marginal cost of lending rate (MCLR) of the State Bank of India as on 1st April of the respective year plus 350 basis points) on the differential tariff amount for the period April 2013-July 2017 i.e. till 25.07.2017.

23. Further, another issue raised is about compensation qua late payment surcharge. We have gone through the detailed revised computation submitted by NTPC, we note that NTPC has raised invoices in the months of August 2017-December 2017 for the energy bill corresponding to the months of July 2017-November 2017, respectively, viz. July 2017 energy bill, invoice raised on 04.08.2017; for August 2017- on 01.09.2017; for September 2017- on 03.10.2017; for October 2017 - on 02.11.2017; for November 2017- on 01.12.2017. However, the Respondent released payments in parts on 31.03.2019. The payments being made by the Respondent after the due date of the respective invoices raised till December 2017. We also note that Regulation 20 of *RE Tariff Regulations, 2012* stipulates that “*in case the payment of any bill for charges payable under these regulations is delayed 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.*” In view of the above, we hold that the Petitioner is eligible for a late payment surcharge on the amount not paid by the Respondents within the due date.

Re: Refund of rebate (if any) deducted by the Respondent

24. NTPC has submitted that the Respondent, despite not being eligible, has been deducting Rebate on the payments made against the energy bills raised by the Petitioner, and the said action of the Respondent is clearly against the PPA executed between the parties and the settled principles of law. *Per-contra*, the Respondent has submitted that payment through Letter of Credit (L.C.) is allowed if the payment is not made within seven days, but in all cases where a rebate claim of 2% was availed of by the Respondent, the payment against each of those monthly invoices was made within permissible time-period for invocation of L.C. Whereas for the rest of the invoices, 1% rebate claim was availed of by the Respondent as in those instances the payment was released to NTPC after 7 days but within a period of one month from the presentation of the invoice/bill. The Respondent had also established & maintained the Letter of Credit (LC) in the past for payment security. However, none was invoked by the NTPC as there has been no default of payment on the part of the Respondent. Therefore, the rebate claim availed of by the Respondent against the invoices submitted by

NTPC is in accordance with the provisions of PPA and cannot be referred to as an unlawful deduction.

25. Relevant provisions of the PPA stipulate as under:

6.1.7: Rebate and Late Payment Surcharge

Rebate and Late Payment Surcharge shall be as per Terms and Conditions of Tariff issued by CERC as applicable from time to time. No rebate shall be payable on the bills raised on account of taxes, duties, royalty /cess etc.”

6.2 ESTABLISHMENT OF LETTER OF CREDIT (LC) AND PAYMENT SECURITY MECHANISM:

6.2.1 *Payment of bills for the supply of power from the Station shall be made by the A & N Administration through cheque at the designated account or Electronic Fund Transfer within seven days of billing. In the event payment is not made within seven days of the billing NTPC shall realise the payment through irrevocable revolving Letters of Credit (LC) to be established by A & N Administration in favour of NTPC with a public sector /scheduled commercial bank at least one month prior to the commencement of power supply from the Station.*

6.2.2 *The LC shall cover 200% of the one month's estimated billing in respect of electricity supplied from the Station to A B N Administration.*

...
6.2.4 *The LC shall be established for a minimum period of one year, A&N Administration shall ensure that LC remains valid at all times during the entire / extended validity of this Agreement. **LC shall be renewed not later than 30 days** prior to expiry of existing LCs.*

...

26. Regulation 19 of the *RE Tariff Regulations, 2012* stipulates as under:

19. Rebate

(1) For payment of bills of the generating company through letter of credit, a rebate of 2% shall be allowed.

(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, a rebate of 1% shall be allowed.

27. From the above, we observe that the rebate shall be as per the RE Tariff Regulations, whereas no rebate shall be payable on the bills raised on account of taxes, duties, royalty /cess, etc. Payment of bills for the supply of power shall be made by the A & N Administration through cheque at the designated account or Electronic Fund Transfer within seven days of billing. In the event payment is not made within seven days of the billing, NTPC shall realise the payment through irrevocable revolving letters of credit given by the Respondent in favour of NTPC. The letter of credit shall be established for a minimum period of one year and shall

remain valid at all times during the entire/extended validity of this Agreement. The Letter of credit shall be renewed not later than 30 days prior to the expiry of the existing letter of credit. A rebate of 2% can be only availed if the Respondent makes the payment of bills through a letter of credit. Further, a rebate of 1% can be availed by the Respondent if the bills are paid by the Respondent through other payment methods within one month of the presentation of the bills.

28. We note that NTPC vide letters dated 30.03.2018, 25.06.2018, 06.12.2018 and 26.12.2019 requested the Respondent to re-validate the letter of credit. The relevant extract of the letter dated 26.12.2019 is as under:

Dear Sir,

This has reference to our earlier letters to ED A&N Admn. with respect to the subject matter. In this connection we would like to seek your kind intervention in the issues cited below

.....

*2. Re-validation of Letter of credit: Vide various reminders we have requested ED A&N Admn. to re-validate the LC to the requisite value to comply with the provisions of Power Purchase Agreement signed between NTPC & ED A&N Admn. It may please be noted that **LC opened by ED A&N Admn. for an amount of of Rs, 1.07 Crs was expired on 07.03.19.** It is pertinent to mention here that **there is no LC existing for a period of more than 9 months towards the supplies from Portblair Solar PV plant, which is in violation to the PPA provisions. You are kindly aware that, LC being the payment security mechanism available with NTPC, maintaining requisite value of LC's with beneficiaries is a statutory requirement.***

3. Signing of Reconciliation Statement: Signing of reconciliation statement by ED A&N Admn. is pending since 31.03.2017. Vide various correspondences we have requested ED A&N Admn. to submit the signed reconciliation statement. You are aware that, reconciliation of dues is a statutory requirement. Since, the reconciliation statement is pending for more than two years, our statutory auditors are seriously objecting to this.

In view of the above, your kind intervention is solicited in order to resolve the long pending issues so as to comply with the provisions of PPA, statutory requirements.

29. From the above, we observe that the letter of credit opened by the Respondent for an amount of Rs. 1.07 Crores expired on 07.03.2019. The Respondent has not placed any document on record to demonstrate that it has revalidated/extended the letter of credit. From the documents submitted by NTPC, we note that NTPC raised bills/invoices as per directions of this Commission vide its Order dated 25.07.2017, and the Respondent has released the payments within one month from the date of presentation of the bills/invoices as specified in the PPA read with *RE Tariff Regulations, 2012*. We observe that the letter of credit opened by the

Respondent for an amount of Rs. 1.07 Crores expired on 07.03.2019. Therefore, as per PPA read with *RE Tariff Regulations, 2012*, the payment of bills by the Respondent through a letter of credit is eligible for a rebate of 2% (on the eligible payments) till 07.03.2019. After 07.03.2019 a rebate of 1% (on the eligible payments) shall be applicable as the letter of credit expires on 07.03.2019. The Respondent has stated post this date (07.03.2019), a 1% rebate claim was availed of by the Respondent as in those instances, the payment was released to NTPC after 7 days but within a period of one month from the presentation of the invoice/bill. However, since the bills/invoices/ Auditor's certificate are not placed on record, we hereby direct the contracting parties to carry out reconciliation of the invoices (qua rebate) raised supported by the auditor certificate and settle the payment of rebate as per Regulation 19 of the *RE Tariff Regulations, 2012* within sixty (60) days from the date of this Order.

30. The issue is decided accordingly.

31. Petition No. 319/MP/2020 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
आई. एस. झा
सदस्य

Sd/-
जिष्णु बरुआ
अध्यक्ष