



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 17.

No. F.11(1581)/DERC/2018-19/

IA No. 02 of 2019
in
Petition No. 40/2018

In the matter of : **Petition regarding various issues/differences having arisen between the Petitioner and State Generating Utilities i.e. IPGCL & PPCL on the outstanding dues including the incorrect levy of LPSC.**

M/s Tata Power Delhi Distribution Ltd.

....Petitioner

Vs.

M/s Indraprastha Power Generation Company Limited & Anr.

...Respondents

Coram: Hon'ble Mr. Justice S S Chauhan, Chairperson

ORDER

(Date of Order: 28.05.2019)

1. The instant Petition has been filed by Tata Power Delhi Distribution Ltd. (TPDDL) for adjudication on various issues/differences having arisen between the Petitioner and State Generating Utilities i.e. IPGCL & PPCL on the outstanding dues including the incorrect levy of Late Payment Surcharge (LPSC). The petitioner has made the following prayers:
 - i. Adjudicate and issue appropriate direction to the Respondent to revise the outstanding dues as well as withdrawal of arbitrary Late Payment Surcharge;
 - ii. Issue directions to Respondents to provide necessary documents towards the amounts disputed by the Petitioner; and
 - iii. Grant Carrying Cost towards the claims sought by the Petitioner from Respondents.
2. The petitioner has submitted that the differences in the outstanding dues have arisen primarily on account of:
 - i. Issues pending before Hon'ble Tribunal in Appeal No. 284 & 288 of 2015;
 - ii. Income tax amount for FY 2007-08 to FY 2011-12; and
 - iii. Unilateral adjustment of subsidy amounts by Delhi Government in favour of IPGCL and PPCL which has impaired cash flow and the ability of the Petitioner to make timely payments.

3. The Petitioner has also filed an Interim Application in the present petition for seeking urgent directions, wherein it has prayed for the following:
 - i. Direct the respondents to allow rebate in terms of Regulation 138 of Tariff Regulations, 2017;
 - ii. Direct the Respondents to re-align the PPA in accordance with Regulation 137 of Tariff Regulations, 2017, allowing 60 days period to pay the dues of Respondents instead of realizing payments through LC after 30 days from the presentation of the bills as provided under Clause 6.1.1 of the PPAs; and
 - iii. Clarify that the LPSC shall be attracted only after expiry of 60 days from the date of bill till a reasonable period (to be determined by the Hon'ble Commission), failing which LC may be revoked.
4. The Respondents IPGCL and PPCL in their reply on the Interim Application have submitted that:
 - i. The petitioner is seeking orders from the Commission on issues, which do not even arise in the main petition and the purpose of TPDDL in the present application is only to continue to avoid its obligation of furnishing LC in favour of the Respondents for securing bulk power supply from their Power Stations;
 - ii. TPDDL continued to make the payment to the energy bills raised by the Respondents till September, 2015. However, since October, 2015 TPDDL started defaulting in the paying of the energy bills, on the apparent ground that the energy bills are not in terms of the tariff order issued by the Commission for TPDDL. It was not the case of TPDDL that the tariff orders passed by the Commission for the Respondents are not followed.
 - iii. TPDDL by its letter dated 01.10.2015 had, inter-alia stated as under:

"we are constraint to note that invoices raised upon us are in fact, not as per the Power Procurement Cost determined by the Hon'ble DERC in the said tariff order."
 - iv. The Clause 6.6.2 of supplementary PPA with TPDDL on 14.02.2011 for power supply from the Respondents power stations have same provisions regarding prioritization and adjustment of payment received.
 - v. Further, Clause 6.7 of the PPA signed with IPGCL and PPCL reads as under:

*"6.7 Payment Rebate and Surcharge
Rebate and Surcharge shall be applicable on the payment of bills as per DERC regulations or such competent authority as amended from time to time, or any other rebate as may be offered by IPGCL and agreed to by NDPL shall be applicable to NDPL."*

- vi. Thus, rebate is applicable as per DERC Regulations as amended from time to time. In this regard, it is to mention that any payment received by the petitioner in a month is to be adjusted against outstanding as per clause 6.6.2 of the power purchase agreement. The excess amount after adjusting all the dues received in a month is eligible for rebate as per current DERC Regulation, 2017. The question of payment of current dues in full would arise only after the payment of the outstanding amounts, which TPDDL has failed to pay. Therefore, there is no question of any rebate being allowed in the present case.
 - vii. Further, there is no provision making only current payment when outstanding payments are due and then claiming rebate on current bills. Therefore, the prayer of TPDDL for allowing rebate without payment of the outstanding dues is erroneous and is liable to be rejected.
 - viii. In terms of Regulation 137 of the Tariff Regulations, the LPSC is applicable for the bills raised by the generating entity or transmission licensee for delay in payments by beneficiaries as the case may be, beyond a period of 60 days from the date of billing.
 - ix. Regulation 137 does not provide for any due date for payment of the Energy bills. It only deals with the delayed payment surcharge and the date from which that would kick in.
 - x. Due date is not defined in the Tariff Regulations. Therefore, there is no inconsistency whatsoever between the Tariff Regulations and the PPAs on the definition of the due date.
5. This matter has already been deliberated in Petition No. 51/2016 and it was held that there is no need to align the PPA with the Regulations because PPA itself caters the need for such alignment because in the PPA it is mentioned that Rebate and surcharge shall be applicable on the payment of bills as per DERC Regulations or such competent authority as amended from time to time. Therefore, there is no deviation or conflict between the terms of PPA and the provision of Regulations rather the Regulations have been adopted in the PPA and thus such alignment has already been provided in the PPA.
6. **In view of the above the IA is not allowed.**
7. In respect of the issues in the Petition, the Petitioner has submitted that:
- I. After several attempts to reconcile the amounts due and payable to IPGCL and PPCL a meeting was finally held on 18.04.2017 between officers of the petitioner and IPGCL and PPCL under the chairmanship of Secretary (Power) to discuss the issues related to outstanding dues of IPGCL-PPCL and TPDDL. In the said meeting:

- a. It was agreed that issues of RPH and minimum guarantee off take charges pending in Appeal No. 284 and 288 of 2015 filed by IPGCL and PPCL before the APTEL will be finalised after decision in the Appeal. As such, IPGCL and PPCL will settle their claims arising in respect of these two issues as and when the same are decided by the Tribunal. However, contrary to the said understanding IPGCL and PPCL are still claiming the same under the outstanding dues and are levying LPSC on the same as is evident from the latest Reconciliation issued by IPGCL and PPCL by their letters dated 25.06.2018 and 26.06.2018 respectively.
- b. It was also decided that IPGCL and PPCL shall not insist for the diversion of the subsidy amount from Delhi Government. However, IPGCL and PPCL even after agreeing that there shall be no diversion of subsidy amounts has again sought diversion of subsidy amounts which were allowed by the Delhi Government by its Sanction Orders dated 07.09.2017 and 14.11.2017. The same was in complete violation of scheme of the Electricity Act, 2003 which under Section 65 mandates release of subsidy in advance to the distribution licensees and the directions contained in the various Tariff Orders issued by the Commission. The unilateral diversion of subsidy amounts also impairs the cash flow of the Petitioner and its ability to pay its power purchase costs which comprises 80% of its ARR. In this regard it is also noteworthy that the amount so adjusted by the IPGCL and PPCL by diversion of subsidy amounts includes:
 - i. Amounts that are without any basis and not attributable to any fault of the Petitioner viz. Income tax bills.
 - ii. Arbitrary and Mechanical levy of LPSC on the incorrect outstanding dues of the Petitioner, i.e., amounts which are not due and payable by the petitioner and are disputed by the Petitioner and/or are still sub-judice.
- c. On the issue of LPSC, it was discussed that the Petitioner:
 - i. Was to pay the LPSC charges on undisputed amount i.e. amount excluding the amounts involved in Appeal No. 284 and 288 of 2015 pending before the APTEL from July 2016 onwards.
 - ii. Seek clarification from DERC in regard to the effective date of applicability of LPSC for the intermediate period from the date of billing i.e. October 2015 to the date clarification of this Commission i.e. 15.07.2016.

- II. The IPGCL is claiming Income Tax liability including the carrying cost on the Income tax as per this Commissions clarification dated 03.04.2017 and has also levied LPSC on the amount payable by the petitioner. However, while claiming the same IPGCL has not considered the interest on the amount of Rs. 4.54 crore already paid by the petitioner to IPGCL against Income Tax for FY 2008-09 and 2009-10 while levying carrying cost and LPSC on the same. Further, IPGCL even after repeated letters/e-mails has till date not provided back up calculation, documents in support of its demands towards Income tax.
- III. Accordingly, the Petitioner issued a letter to DERC on 15.05.2017 seeking waiver/withdrawal/exemption of LPSC levied by IPGCL and PPCL in their bills. DERC vide letter dated 29.05.2017 on the issue of waiver/exemption of LPSC for the period starting from October 2015 up till July, 2016 clarified that levy of LPSC has to be in terms and conditions of PPA and the same has to be resolved bilaterally. Further, regarding applicability of rate of LPSC in delay of payment of dues has to be in accordance with DERC MYT Regulations, 2011.
- IV. The petitioner has issued various letters to IPGCL and PPCL to allow for a waiver in the LPSC for energy dues arising in the intermediate period between October, 2015 uptill July, 2016 when the Order dated 15.07.2016 was passed by DERC directing the Petitioner to pay the outstanding dues of IPGCL and PPCL. However, IPGCL and PPCL have till date not provided waiver on the LPSC payable on the outstanding dues and has not arrived at a final reconciliation. In this regard it is noteworthy that Petitioner has paid the principal amount for this intermediate period. It is only the LPSC that is still pending reconciliation.
- V. Apart from the above issues there are other issues which need adjudication by this Commission for instance, this Commission by Tariff Order dated 31.08.2017 had allowed Annual Fixed Charges on the basis of DERC MYT Tariff Regulations, 2017. However, the IPGCL and PPCL were calculating as per DERC MYT Tariff Regulations, 2011. As such the petitioner on 05.12.2017 issued a letter to IPGCL and PPCL seeking refund of Rs. 10.91 crore for refund of Annual Fixed Cost (AFC) charged by IPGCL and PPCL. It was only after the Commissions clarification dated 23.02.2018 that on 13.03.2018, IPGCL and PPCL provided credit notes for excess recovery of AFC. Admittedly, the said conduct of IPGCL and PPCL of excessively billing the petitioner without the mandate requires IPGCL and PPCL to pay the carrying cost on the same. Contrary to the same, IPGCL and PPCL are denying the carrying cost to the petitioner and on the other hand are levying the LPSC on the amounts disputed by the petitioner for the period starting from October, 2015 till July, 2016.

- VI.** It is in view of the aforesaid conduct of IPGCL and PPCL, it is submitted that the LPSC as levied by IPGCL and PPCL is not a pass through in terms of directives issued by this Commission.
8. The Respondents IPGCL and PPCL in their reply to the Petition have submitted that:
- I.** In so far as the understanding being relied upon by the Petitioner in terms of the meeting dated 18.04.2017 between the Petitioner & Respondents and under the chairmanship of the Secretary (Power). It is stated that while payment of these charges were accepted to be not pressed upon until the decision of the APTEL, it cannot be disputed that the Respondents are well within their rights to raise bills and charge amounts pertaining to the said charges. This is particularly in view of the stay granted by the APTEL *vide* order dated 15.12.2015.
- II.** Further, it is so for the reason that in the event the Appeals before the Appellate Tribunal are allowed, the Respondents would be prejudiced to the extent of these charges, if the bills are not raised at the appropriate time and would get barred by limitation.
- III.** In the meeting, the Respondents have only stated that the issue will get finality after the decision by the APTEL. This does not mean that the Respondent will give up the claims itself. It only means that the Respondents will not take any coercive steps for recovery of the said amounts. All allegations to the contrary are wrong and denied.
- IV.** The issue raised by the Petitioner with regard to non provision of corrected invoices/credit bills by the Respondents is factually incorrect. The submissions in this petition is entirely wrong, misleading and is denied. It is stated that the Respondents have already sent the revised Income Tax bill/Credit note to the Petitioner by e-mail dated 30.06.2017.
- V.** That to the extent LPSC has been claimed on the amounts that are forming part of the Appeal Nos. 284 and 288 of 2015, although a stay had been granted by the APTEL *vide* order dated 15.12.2015, there was an understanding in terms of the meeting dated 18.04.2017 that the amounts would not be payable until the decision of the APTEL.
- VI.** However, the Respondents are well within their rights to raise bills for the same. This is particularly for the reason that in the event the Appeals before the APTEL are allowed, the Respondents ought not to be prejudiced for not claiming these amounts at the appropriate time, and thereafter being barred by limitation. Further, if it is found that the Respondents are entitled to the claims, interest on the same/LPSC is a natural consequence.

- VII.** Further, with regard to the amounts pertaining to the intermediate period, Commission has already expressed its view in a letter dated 29.05.2017 wherein it has been clarified that the LPSC has to be charged in terms of the PPA and the matter is to be resolved mutually.
- VIII.** While the right to claim LPSC on delayed payments by the Petitioner is the right of the Respondents, it is not open to the Petitioner to claim a waiver of these charges as matter of right. It is submitted that the Petitioner is merely raising this issue as an attempt to justify its own delay in payments in terms of the aforesaid meeting.
- IX.** Further, the Supplementary PPA signed between the Parties provides as under:
- “6.7 Payment Rebate and Surcharge*
Rebate and surcharge shall be applicable on the payment of bills as per DERC Regulations or such competent authority as amended from time to time, or any other rebate scheme as may be offered by IPGCL and agreed to by NDPL shall be applicable to NDPL.”
- X.** With regard to the issue of diversion of subsidy, the Petitioner has contended that it was decided that the Respondents would not insist on diversion of subsidy funds from the Delhi Government, but the Delhi Government has vide sanction orders dated 07.09.2017 and 14.11.2017 proceeded to divert funds to the Respondents for payment of overdue amounts. The contentions of the Petitioner in this regard have no merit, are wrong, misleading and denied.
- XI.** It is stated that firstly the understanding arrived at with respect to the Respondents not insisting on diversion of funds was on the basis that the Petitioner would also adhere to its commitments. As pointed out by the Respondents in the letter dated 20.06.2017, the Petitioner had not adhered to its commitments.
- XII.** In terms of the meeting dated 18.04.2017, the Petitioner was to settle outstanding dues by 30.04.2017, and further also pay the current monthly bills becoming due by 7th of every month. Having failed to do so, the Petitioner cannot claim as a matter of right that no subsidy fund could have been diverted.
- XIII.** The issue of diversion of subsidy or delay in payment of subsidy is a matter between the Petitioner and the Delhi Government, and the Respondents have no role in it.
- XIV.** In fact the sanction orders of the Delhi Government also specifically state that the funds are being diverted for payment of the outstanding dues of the

Respondents. In this regard the Respondents crave leave to place reliance on the Hon'ble Appellate Tribunal's Order dated 23.05.2014 in a batch of matters involving the Respondents herein wherein it held as under:

"10. We find that the Government of NCT of Delhi by orders dated 12.09.2013 and 24.03.2014 credited amounts of subsidy payable to the DISCOMs to the Applicants towards outstanding dues of the Respondents DISCOMs as part of their liabilities. Thus, there is a clear directions by the Government of NCT of Delhi in these orders to adjust the amount towards only the outstanding dues.

12. In view of above, the amount of Govt. subsidy and UI amounts credited to the Applicants have been correctly adjusted only against the outstanding dues but not against the current dues from January, to March, 2014 as per the directions of the Govt. of NCT".

XV. The Hon'ble Commission vide its order No. F.3(401)/Tariff-Engg./DERC/2016-17/5257/2701 dated 23.02.2018 has clarified as under:

"In connection to the above, it is being clarified that annual fixed cost (AFC) approved in the said tariff orders is applicable for entire FY 2017-18. Further, IPGCL/PPCL should raise capacity charges in a manner that approved AFC for FY 17-18 is recovered during the same financial year, i.e. FY 17-18. The part of approved AFC which is left after invoicing for period 01.04.2017 to 31.08.2017 only needs to be recovered in the balance months of FY 17-18."

Accordingly, the Respondents after receiving above directions from the Hon'ble Commission in the month of February, 2018 issued a credit note dated 13.03.2018 in favour of the Petitioner.

XVI. The claims of the Respondents are in consonance with Regulations 137 of DERC MYT Tariff Regulations 2017, which provides that LPSC is applicable for the bills raised by generating entity or transmission licensee for delay in payments by beneficiaries as the case may be.

9. On the basis of the submissions of the parties there are four issues to be decided or adjudicated by this Commission namely:
- i. Payment of Minimum Guarantee Off-take (MGO) and Rajghat Power Station (RPH) charges (Pending before Hon'ble APTEL in appeals No. 284 and 288 of 2015).
 - ii. Income Tax for FY 2007-08 to 2011-12.
 - iii. Unilateral Diversion Subsidy by GoNCTD
 - iv. LPSC and carrying cost.

10. **Minimum Guarantee Off-take (MGO) and Rajghat Power Station (RPH) charges:**

The parties have mutually agreed in the meeting held under the Chairmanship of Secretary (Power) GoNCTD on 18.04.2017 that as these issues are pending before the APTEL vide Appeal No. 284 and 288 of 2015 and the judgement on the same is still awaited, the amount on account of both these two issues will be settled in line with the orders passed by the APTEL. It was decided that IPGCL/PPCL shall set aside both these issues, viz., RPH tariff and MGO until decided in APTEL. In view of the above, no intervention from the Commission is required and the parties shall act as agreed by them in the aforesaid meeting.

11. **Income Tax for FY 2007-08 to 2011-12**

The Petitioner submits that the issue was raised because the Respondents had not provided the requisite documents for verification, but now the same has since been provided by the Respondents and therefore, the Petitioner does not wish to press the matter before this Commission.

12. **Unilateral Diversion of Subsidy**

This Commission's view is that the subsidy should be paid in advance to the DISCOMs as per the provisions of the Section 65 of the Electricity Act, 2003. This Commission has reiterated its view to the GoNCTD vide letter dated 19.02.2018 and the same stand was affirmed on affidavit before the Hon'ble High Court of Delhi by this Commission in W. P. (C) No. 422 of 2018. The Petitioner has informed that on this issue of unilateral diversion of subsidy it has filed a W.P (C) No. 422 of 2018 before the Hon'ble High Court of Delhi and the judgement/decision of the Hon'ble High Court is awaited. As Hon'ble High Court of Delhi is seized of the matter, the same cannot be deliberated before this Commission.

13. **LPSC and Carrying Cost**

The Petitioner submits that the Respondents had filed petitions (No. 91 and 92 of 2015) before the Commission for non payment of monthly bills of the respondents, which was decided on 15.07.2016 wherein TPDDL was directed to pay energy bills as per the terms of PPA. On the other hand the Petitioner had also sought a clarification on wrong billing of Annual Fixed Cost (AFC) by the Respondents which was clarified by DERC on 23.02.2018. Due to the disputes pending before the Commission, both the parties had claims and counter claims and after the decision of this Commission the payments were cleared. LPSC is sought by the Respondent against the withheld amount by the Petitioner whereas Petitioner is seeking carrying cost on the excess AFC amount retained by the Respondent till the date the credit note was issued by Respondents on the clarification issued by DERC. The contention of the Respondents that there is no provision in the extant Regulations for payment of LPSC or carrying cost on the amount which is unbilled but resting with the party because LPSC is applicable against billed amount is correct and acceptable, and therefore the Petitioner cannot claim LPSC against such excess charged AFC. Nonetheless, provisions of section 62 (6) may also be

looked into which provides that If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

14. DERC vide letter dated 29.05.2017 had already clarified that as per the MYT Regulations, 2011, the LPSC is payable on the defaulted amount of pending bills and therefore, the Petitioner is liable to pay LPSC on the defaulted payment. However, it is also a fact that a certain amount in respect of higher AFC charged by the Respondents from the Petitioner was resting with the Respondents till the date a credit note in respect of excess AFC was issued in favour of the Petitioner on clarification in this regard issued by this Commission. Such amount which was resting with the Respondents may be adjusted against pending bills and treated as part payment towards unpaid bills as per the principle of set off. In such a situation the petitioner is liable to pay LPSC against the amount of unpaid bills setting off the excess amount of AFC resting with the Respondents during the specific period.
15. With the observations and directions given in paras 10 to 14 hereinabove, the petition is disposed of.

Sd/-
(Justice S S Chauhan)
Chairperson