



Delhi Electricity Regulatory Commission

Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 110017.
F.11(2135)/DERC/2023-24/7873

Review Petition No. 36/2023

In

Petition No. 06/2023

In the matter of: Petition under Section 94(1) (f) of the Electricity Act, 2003 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 seeking review and clarification of the Order dated 10.03.2023 passed by the Commission in Petition No. 06/2023 seeking adoption of tariff discovered under Competitive Bidding process for procurement of 100 MW Hydro Power with Greenshoe Option of additional 100 MW to meet the Renewable Purchase Obligation.

Tata Power Delhi Distribution Ltd.

...Review Petitioner

Coram:

Hon'ble Justice (Retd.) Jayant Nath, Chairperson

Appearance:

Mr. Anand Srivastava, Advocate, TPDDL

ORDER

(Date of Order: 15.03.2024)

1. The instant Petition has been filed by TPDDL seeking clarification and review of the Order dated 10.03.2023 ("Original Order") passed by the Commission in Petition No. 06 of 2023 ("Original Petition"). The Original Petition was filed seeking adoption of tariff discovered under Competitive Bidding Process for procurement of 100MW Hydro Power with Greenshoe Option of additional 100MW to meet the Renewable Purchase Obligation (RPO) as well as to ensure sufficient power requirement during the peak summer months. The Petitioner has made the following prayer:
 - (a) Review/clarify the Original Order dated 10.03.2023 passed in the Original Petition.
2. The Petitioner has submitted the following:
 - i. The PPA entered between TPDDL and NVVNL was duly approved by the Commission and was based on the Model APP submitted before the Commission for its approval in terms of the Standard Bidding Guidelines and the Revised Guidelines.

- ii. In terms of the Standard Bidding Guidelines and Revised Guidelines, any deviation from the Model APP must specifically be approved by the appropriate Commission. In terms of the same, the Review Petitioner in the Original Petition had sought for specific approval of the deviations under the Model APP which were in variance from those provided under the Model APP in terms of the Bidding Guidelines. None of the deviations were structured to suggest that the tariff under the Model APP was a single part tariff.
- iii. That while the Commission was pleased to adopt the tariff at Rs. 5.99/kWh along with the deviations, the Commission while passing the Original Order has erred in observing that the tariff adopted at Rs. 5.99/kWh in terms of the Model APP was a single part tariff without any fixed cost implications.
- iv. The Commission has also not provided sufficient reason as to why the tariff was adopted as a single part tariff when the same was never pleaded by the Review Petitioner in the Original Petition. the Hon'ble Supreme Court while dealing with a case of review under Order 47, Rule 1 of the Civil Procedure Code, observed that what would constitute 'sufficient reason' would depend on the facts and circumstances of each case. The Supreme Court observed that the words 'sufficient reason' is wide enough to include a misconception of fact by a court (Board of Control for Cricket, India and Anr. vs. Netaji Cricket Club and Ors. [2005] 4 SCC 74, Para 90).
- v. The Review Petitioner herein is filing the present review petition seeking clarification and review of the Original Order on the following issues:
 - a) The tariff adopted by the Hon'ble Commission vide the Original Order was a two-part tariff and;
 - b) The adopted rate of tariff at Rs. 5.99/kWh was subject to variation in terms of the conditions prescribed under Article 11.3 and Article 12.3 of the Model APP
- vi. The Model APP was based on the Standard Bidding Guidelines as issued by the Ministry of Power. Further, in terms of the same, the Model APP provided for two types of charge in relation to the procurement of hydro power under the Model APP i.e., fixed charges and variable charges, respectively. The Article 11 of the Model APP provided for tariff wherein Article 11.1 of the Model APP categorically stated that the utility was obliged to pay the supplier a tariff comprising the sum of fixed charge and variable charge.
- vii. Therefore, it is categorically clear from the aforesaid that in terms of Article

11.1 of the Model APP, the tariff comprised of both the fixed charge and the variable charge which was to be paid by the utility i.e., TPDDL. Further, Article 12.1 of the Model APP provided for variable charge to be paid by the utility to the supplier in respect of the water utilized for supply of each kWh of electricity to the utility.

- viii. The Article 11.2 and Article 12.2 of the Model APP categorically provided for base fixed charge and base variable charges to be paid by the utility. Article 11.2 of the Model APP thus stated that the parties agree that the fixed charges applicable for availability shall be paid based on the offer of the supplier for the base year. Similarly, Article 12.2 of the Model APP stated that a base variable charge shall be applicable as agreed between the parties for the base year to be paid by the utility to the supplier in terms of the offer of the supplier. In terms of Article 11.2 and Article 12.2 of the Model APP, both the fixed charges and variable charges were to be paid by the utility to the supplier in terms of the agreement between such utility and supplier.
- ix. the Original Order had also approved the deviations from the Model APP as sought by the Review Petitioner. Thus, it is clear that the Commission while passing the Original Order not only adopted the tariff but also approved the terms and conditions prescribed under the Model APP.
- x. The Commission in terms of the Original Order has made an error apparent on record by observing that the tariff adopted at Rs. 5.99/kWh was a single part tariff, despite the fact that the Model APP approved by the Commission specifically provided for both the fixed and the variable charges. Further, it is submitted that such error is even more glaring considering that no submissions pertaining to the adoption of tariff as a single part tariff was made by the Review Petitioner during the hearing in the Original Petition. Further, even the Original Order does not record any such averment or submission made by the Review Petitioner. Therefore, the Model PPA as approved by the Commission was structured as a two-part tariff comprising of both the fixed charges and the variable charges.
- xi. The Model APP (based on the Standard Bidding Guidelines) submitted for approval with the Original Petition not only provided for a two-part tariff i.e., fixed charge and variable charge but also provided a methodology for calculation of such charges from time to time. In regard to the same, the Article 11.3 of the Model APP provided for fixed charge wherein it categorically included the variation in price fixed charges due to deviation in Wholesale Price Index ("WPI").

- xii. The Article 11.3 of the Model APP stated that for the purposes of determination of fixed charges payable to the supplier by the utility, fixed charges are to be revised annually. Further, the revision in the base fixed charge was to reflect 20% of the total variation in WPI occurring between January 31 preceding the bid date and January 31 of the accounting year.
- xiii. Similarly, Article 12.3 provides for computation of variable charges wherein Article 12.3.2 of the Model APP states that for the purposes of determining the variable charges payable to the supplier, variable charges are subject to revision on annual basis. Further, the revision in the variable charge was to reflect 20% of the total variation in SPI occurring between January 31 preceding the bid date and January 31 of the accounting year.

Commission Analysis

- 3. The instant Petition has been filed by TPDDL under section 94(1)(f) of Electricity Act, 2003 seeking clarification and review of the Order dated 10.03.2023 passed by the Commission in Petition No. 06 of 2023.
- 4. The right to review has been conferred by Section 114 of Civil Procedure Code, 1908 (CPC hereinafter). The limitation and conditions are provided under Order 47, Rule 1 of CPC.

The Order 47, Rule (1) of Code is given below: “Application for review of judgment. - (1) Any person considering himself aggrieved-
(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
(b) ,
(c) ,
and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order”
- 5. In this regard the Hon'ble Supreme Court of India in Lily Thomas Vs Union of India & Ors on 5th April 2000 held the following:

“56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can

be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise."

6. In Petition No. 06 of 2023, the Petitioner had submitted bidding documents along with the Petition for seeking approval of the Agreement for Procurement of Power and adoption of tariff discovered under Competitive Bidding process for procurement of 100MW Hydro Power with a Green Shoe Option of additional 100MW to meet the Renewable Purchase Obligation as per Regulation 4 of DERC (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulation, 2021 and Regulation 27 of DERC Business Plan Regulations 2019, read with Guidelines for Procurement of Electricity for Medium Term from Power Stations set up FOO Basis along with approval of certain deviations from Model Bidding Documents issued by MOP. The Petitioner in Petition No. 06 of 2023, had in its prayer mainly sought approval of the following:
- a. To approve execution of APP of 100 MW hydro power along with an additional capacity of 100 MW through Greenshoe Option from L1 Bidder (NVVNL) at L1 Tariff;
 - b. To approve the deviations as sought through the Clarifications issued by the Petitioner on 13/12/2022;
 - c. To approve the adoption of tariff as discovered through the process of competitive bidding as mentioned in Table 11;
 - d. To approve the purchase of power for a period of 5 years and subsequent signing of the APP with the successful bidder for a total capacity of 200MW after exercising the Greenshoe Option at the tariff which was discovered by the Competitive Bidding Process.
7. The Petitioner in its prayer (c) of the Petition No. 06 of 2023 sought approval of the table 11 of the Petitioner which contains details of final bid Award. The table is reproduced below:

Table 11- Details of final bid Award

Bidder Name	Capacity (MW)	Rate (INR/UNIT)
NTPC Vidyut Vyapar Nigam Limited	200 MW [100 MW + 100 MW]	5.99

8. It is also noted that the Model APP is based on the Guidelines for procurement of Electricity for Medium Term from Power Stations set up on Finance, Own and Operate (FOO) basis issued by MOP, GOI (Standard Bidding Guidelines) and the guidelines amended on 30.01.2019 (Revised Guidelines). The Tariff is comprising of

Fixed Charges and Variable Charges and was also discovered during e-Reverse Auction (e-RA) process. Further, Model APP followed by the petitioner during execution of PPA with Supplier and the Tariff discovered during e-RA process is also subject to price variation in terms of the conditions prescribed under Model Agreement for Power Procurement (APP).

9. Accordingly, the Commission in its Order dated 10.03.2023 of Petition No. 06 of 2023, approved Table 11 along with deviation from the Model Bidding Documents. The relevant paras of the Petition are reproduced below:

Para-40

"40. The Petitioner wish to appraise this Hon'ble Commission that the final tariff of Rs. 5.99/ Unit discovered through the E-Reverse Auction is competitive and the same can be compared with some of the recent bids for Hydro Power procurement..."

Para-44

"44. The Petitioner hereby submits the instant petition to the Hon'ble Commission for adoption of following tariff obtained through the process of Competitive Bidding under Section 63 of the Act.

Para-46

"46. In view of the above submissions, the Petitioner respectfully prays this Hon'ble Commission that:

....

(c) To approve the adoption of tariff as discovered through the process of competitive bidding as mentioned in Table 11;"

10. In Petition 06 of 2023, the Commission had approved the procurement of 100 MW Hydro Power along with an Additional Capacity of 100 MW and as prayed by the Petitioner, had also adopted the tariff as discovered through the process of competitive bidding as mentioned in Table 11 i.e., Rs. 5.99/kWh. The Commission at that time also approved the deviations sought by the Petitioner from the Model APP.
11. Now, the Petitioner has submitted for review of the inconsistency arising out of approval of single-part tariff and has also submitted in Para 16(b) of the instant petition as follows:

"16. Review Petitioner herein is filing the present Review Petition seeking clarification and review of the Original Order on the following issues:

....

b) *The adopted rate of tariff at Rs. 5.99/kWh was subject to variation in terms of the conditions prescribed under Article 11.3 and Article 12.3 of the Model APP.*
..."

12. Keeping in view the erroneous prayer of the Petitioner in Petition No. 06 of 2023 and the error apparent arising out of the same, the Commission adopts the rate of tariff at Rs. 5.99/kWh to be a two-part tariff, i.e., fixed charge and variable charge which is subjected to variations prescribed in Article 11.3, 11.4 and 12.3 of the Model APP.
13. In view of above, the Review Petition is allowed to the extent mentioned in para 12 of this Order.
14. Ordered accordingly.

Sd/-
Justice (Retd.) Jayant Nath
Chairperson