



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

No. F. 11(1302)/DERC/2015-16/5035

I.A.No. 03/2019
In
Petition No. 77/2015

In the matter of: **Petition for seeking adjudication of dispute between the Distribution and Transmission Licensee along with (i) Complaint u/S 142 & 146 of the E.A 2003 seeking appropriate directives from the Commission in relation to disbursement of Short Term Open Access Charges by DTL and (ii) Petition u/s 62(6) of the E.A. 2003 seeking refund of excess tariff paid to DTL filed by TPDDL.**

Tata Power Delhi Distribution Ltd.

....Petitioner

Versus

Delhi Transco Limited

....Respondent

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

ORDER

(Date of Order: 13.05.2019)

1. The Instant Interim Application has been filed by the Petitioner to amend the prayer of the petition to the effect that the interest on STOA charge from the date of being due till the adjustment of these charges may be recovered from the Respondent.
2. The Petitioner has filed the instant petition for seeking appropriate directives from the Commission in relation to disbursement of Short Term Open Access Charges by DTL and (ii) refund of excess tariff paid to DTL.
3. The Petitioner has submitted that :
 - i. Despite being statutorily obliged to treat 75% revenues from Short Term Open Access ("STOA") as non-tariff income and utilize it to reduce the Transmission Tariff payable by the beneficiaries of Long Term Access ("LTA") including the distribution licensees of Delhi such as the Petitioner, the Respondent has failed to account for revenues from STOA. Accordingly, the Respondent is charging the Petitioner Tariff in excess of what it is entitled to and must compensate the Petitioner in terms of Section 62(6) of the Electricity Act, 2003 ("Act"). The Petitioner has raised the issue with DTL at various meetings and DTL has never disputed its liability to pay the STOA

refund charges. However, it failed to account for STOA revenues and give credit to the Petitioner and after repeated follow-up raised exorbitant demands under various heads to frustrate the claim of the Petitioner.

- ii. As per the Commissions' DERC (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2011 ("MYT Regulations") the revenues earned from Short Term Open Access is treated as revenue from other business. Accordingly, a Transmission Licensee is required to adjust the charges collected from STOA consumers towards reduction of transmission charges payable by long term and medium terms service of its transmission lines.
- iii. After notification of the MYT Regulations, the Respondent was regularly crediting the STOA charges to the Petitioner until January, 2013 when, arbitrarily and without any reasons given, the disbursement of STOA ceased, which is completely against the provisions of the MYT Regulations. The Petitioner has not been credited the STOA charges as on date, which is a blatant violation of the Commission's directives, orders, regulations, attracting the provisions of Section 142 of the Electricity Act, 2003.
- iv. The Petitioner has time and again, on multiple occasions, brought this concern to the notice of the Respondent, but the same has either not been responded to or answered convincingly or has been brushed aside. The first instance when the Petitioner first raised the issue of non disbursement of STOA charges was vide its letter TPD/PMG/CC-15/2014-15/01 dated 05.08.2014, to the Respondent seeking to place the issue on the agenda of the upcoming 15th Commercial Sub Committee (CSC) meeting on 11.09.2014, where it was decided that the reconciliation of accounts for all licensees would be done on quarterly basis by DTL. In response to query about the non-disbursement of charges, the Respondent submitted that the STOA charges were being adjusted against the past dues of the DISCOMs. A copy of the minutes of the 15th CSC meeting on 11.09.2014 has already been placed on record along with the Petition. However, despite such decision, no reconciliation exercise was undertaken, nor statement issued to the Petitioner.
- v. Thereafter, despite various follow-ups, the continuous assurances and in complete rejection of their statutory liability the Respondent failed to take any action for resolution of the issue. Due the continued indifference and casual approach of the Respondent, the Petitioner issued a letter bearing No. TPDDL/PMG/STOA/07042015 dated 07.04.2015 with a copy to the Commission, apprising them of all the developments, correspondences, meetings and attempts at amicable resolution of the issues and seeking

reconciliation of accounts and credit of STOA charges along with interest on delayed payments at the issue had been outstanding for a period of over 2 years.

- vi. In the intervening period, the Commission was pleased to seek comments on the Petition filed by DTL for true up for the period of FY 2012-13 to 2014-15 and ARR for FY 2015-16, to which the Petitioner submitted its comments, in which the first issue raised was the non disbursement of STOA charges.
- vii. After two years of seeking reconciliation of accounts and regular follow up, the Respondent issued letter No. F.DTL/203/F-1190/2015-16/Opr-Comml/Mgr(Comml)/39 dated 20.05.2015 in the nature of a provisional bill demanding dues from the Petitioner to the tune of Rs. 48.9 crores as LPSC on outstanding dues, which sum is arbitrary, incorrect, grossly inflated and clearly issued mala fide. The bill also reflects STOA adjustment to the credit of the Petitioner of Rs. 54.59 crores, for the period up to March, 2015 on account of past dues.

4. Per contra the respondent has submitted that :

- i. During the period i.e. 01.07.2002 to 31.03.2007, the power procurement was dealt by DTL as per policy directions of Delhi Government, during the said period there were substantial amounts due and payable on account of power purchase cost and also other issues which were not paid by the distribution licensees.
- ii. The Commission vide order dated 12.11.2009 trued up the expenditure made on purchase cost and directed the Respondent, DTL to recover from the distribution licensees in the energy supplied to them during FY 2005-06. The relevant extracts of the order as follows:-

"The approved amount would be recoverable from the distribution licensees in the ratio of energy supplied to them during FY 2005-06. The effect of this order shall be made within one month from the date of issue of this order."

- iii. In compliance of the above mentioned order, DTL had raised power purchase adjustment bills to all the distribution licensees in the year 2009. The amounts raised on the petitioner in the year 2009 on account of the above aggregated to Rs. 62.52 crores. However, as against the bills raised by DTL, the payments of the said bills were made by the Petitioner only in the year 2011. Therefore, the surcharge bill was raised to TPDDL on 30.09.2011 amounting to Rs. 18.69 Crores.

- iv. It is also a well settled principle of law that payments made are to be first adjusted against surcharges due and thereafter the balance amount, if any against the principal amount due and payable. Accordingly, in the circumstances, the payment made by the Petitioner in the year 2011 were adjusted first against late payment surcharge and then against the principal amount.
 - v. It is stated that under the Regulations of the Central Electricity Regulatory Commission (CERC), the Commission's and also as per distribution licensees' agreements with DTL and generators, late payment surcharge is payable. The general law of interest on delayed payment is also well settled. In light of the above, it is stated that the surcharge amount of Rs. 18.69 crores and late payment surcharge on it, total amounting to Rs. 24.95 crore have been adjusted from the amount of Short Term Open Access charges (STOA) payment to Petitioner by the DTL.
 - vi. Further, the contention of the Petitioner that the DTL had approached the Government of National Capital Territory of Delhi (GoNCTD) for the payment of Pension Trust is wrong and misconceived. It is submitted that the subsidy amount of Rs. 19.16 crores was forwarded by the Government of NCT of Delhi for onward remittance to the pension trust. This is as per the orders of GoNCTD dated 12.09.2013. The above amounts never accrued to the account of DTL. However, the Petitioner has wrongly adjusted the said amount against the wheeling charges bills raised by the DTL to the Petitioner for the months of September, 2013 to December, 2013. In fact, DTL and pension trust are two separate entities and cannot be mixed by the Petitioner and used as an excuse for non-payment of bills of DTL.
 - vii. Further, the Petitioner has unilaterally stopped payment of wheeling charges and has not released any payment on account of wheeling charges from April, 2016 to July, 2016 amounting to Rs. 110.34 crores.
 - viii. The total outstanding amount after adjusting STOA charges and including applicable late payment surcharge from the Petitioner as on 31.08.2016 is Rs. 177.73 crores.
5. From the submissions made by the Parties it is evident that there was some reconciliation of accounts between the parties and the STOA charges as demanded by the Petitioner have been adjusted against the dues of the Petitioner by the Respondent. In view of the above reconciliation no intervention of the Commission is required as much it is related to reimbursement of STOA charges.

6. During the course of hearing the Petitioner submitted that STOA charges have been reimbursed/adjusted by the Petitioner after a considerable delay of three years from January, 2013 to March, 2016, which has resulted in a loss to the Petitioner and therefore the Petitioner may be allowed to seek interest on the delayed payment of SOTA charges through amendment in prayer clause in the Petition and has filed the present Interim Application No. 03 of 2019.
7. The Petitioner in support of his claim of interest on STOA charges has made the following submissions:
 - i. The matter of T.N. Generation & Distribution Corpn. Ltd. V. PPN Power Generating Co. (P) Ltd. (2014)11 SCC 53 the Supreme Court reiterated the law in relation to award of interest.
 - ii. It is settled law that any person who wrongfully withholds money due to another must compensate the person for who has been denied use of the money due to it. Therefore, in terms of the settled principles of the law, the Petitioner/Applicant must be awarded interest on the STOA charges withheld by the Respondent from January, 2013- to March, 2016.
 - iii. Since, the adjustment during April to June, 2016 has been admitted the entitlement of the petitioner towards STOA Charges stands admitted. Therefore, the claim of interest is for restituting the petitioner to the position it would have been in the event the Regulations of the Commission were complied with in letter and spirit.
8. Whereas the Respondent has opposed the Interim Application on the following grounds:
 - i. That 'interest' is a substantive right and can be granted only in case there is a specific provision in law or under a contract or otherwise if the condition for grant of interest in equity is satisfied. The grant of interest in equity is satisfied. The grant of interest in equity does not arise merely because the settlement of claims between the parties was pending. It is further stated that the grant of equity arises only if there is default by one party, such as a breach of contract, wrongful detention etc. It is reiterated that DTL had not wrongfully withheld the amounts but was only setting it off against the amounts due from TPDDL to DTL. This is consistent with principles of set-off under Order 8, Rule VI of the Civil Procedure Code, 1908.
 - ii. In the circumstances, it will set an incorrect precedent if TPDDL is allowed the interest as TPDDL itself was the defaulting party in the present case and had delayed its payments to DTL. TPDDL cannot, therefore, ask for interest

due to the delay resulting merely from the adjustment of amounts between the parties.

- iii. The reliance placed by TPDDL on the judgment of T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating (P) Ltd. (2014)11 SCC 53 is entirely misplaced. In the said judgment, there was a specific provision in the PPA regarding the payment of interest, which is not applicable to the present case. Therefore, the claim of TPDDL in view of the said judgment has no basis.
9. After reconciliation of account and adjustment of STOA charges the prayer of the Petitioner for reimbursement of STOA charges does not survive. Only question left for adjudication before this Commission is about grant of interest on late payment of STOA charges, as prayed in the Interim Application. To adjudicate on the issue following two points have to be decided:
- i. Whether interest is payable on the delayed payment treating it wrongfully withholding the money when there are claims and counter claims;
 - ii. Whether this Commission has jurisdiction to grant interest in such cases.
 - iii. Whether the Petitioner can resile from the conciliation process.
10. The submissions of the parties have been considered and it is observed that certainly the STOA charges had not been reimbursed to the Petitioner in due time by the Respondent. There have been claims and counter claims about dues, which is not the subject matter of the instant petition and therefore cannot be deliberated upon before the Commission.
11. On the issue of payment of interest, the Petitioner seeks interest on the principle of equity or restitution. The Respondent has cited the judgment of Hon'ble Supreme Court in NTPC Ltd. vs. M.P. State Electricity Board and Ors. and has submitted that interest may not be levied on the principle of equity or restitution. The aforesaid judgment is distinguishable and not applicable in the instant case. In NTPC case the matter was regarding retrospective reduction in tariff in which the interest was claimed on the excess amount demanded as per the directions of the Commission and not in violation of provisions of the Regulations. Therefore, it was held that interest cannot be claimed on their principle of equity or restitution. The Hon'ble Supreme Court in NTPC Ltd. vs. M.P. State Electricity Board, MANU/SC/1272/2011 has held as under:

"30. In the facts of the present case, however, this controversy as to whether tariff fixation is legislative or quasi-judicial need not detain us

any further. As held by the Constitution Bench, price fixation is really legislative in character, but since an appeal is provided under Section 111 of the Act, it takes a quasi-judicial colour. That by itself cannot justify the claim for interest during the period when the proceedings were pending for the tariff fixation. The tariff that was being charged at the relevant time was as per the previous notifications. Once the tariff was finalized subsequently, NTPC has adjusted the excess amount which it has received. It cannot be said that during this period the NTPC was claiming the charges in an unjust way, to make a case in equity. Our attention has been drawn to the industry practice which also shows that on all such occasions interest has never been either demanded or paid when the price fixation takes place. As held by us hereinabove, claim for interest could not be covered under Section 62(6). The provision for interest has been introduced by Regulations subsequent to the period which was under consideration before the Commission. If we apply the propositions in Rallia Ram (supra) and Watkins Mayor (supra), we find that the terms of the supply agreement, the governing Regulation and notifications did not contain any provision for interest. The industry practice did not provide for it as well. In view thereof, interest could not be claimed either on the basis of equity or on the basis of restitution."

12. Usually, wrongfully withholding of money entails interest payment. On the question what constitutes 'wrongfully withholding money', one must understand that when there is an amount due and the person does not pay without any reasonable excuse and keeps it to himself, such withholding of money may tantamount to wrongfully withholding money. However, if there are claims and counter claims and if there are chances that some of the amount may get adjusted then it may not be a case of wrongfully withholding money. It is also to be understood that only by making counter claim; one cannot escape from the clutches of wrongfully withholding money. The claims should be prima facie genuine and there should be likelihood of it being considered by the opposite party. In the instant case it is understood that there were some claims and counter claims between the parties and such claims may not be termed as frivolous claims because there had been reconciliation of the account and as a result the amount payable against STOA charges has been adjusted. By the aforesaid facts, it is evident that though the STOA charges had been withheld by the Respondent, it cannot fall in the category of wrongfully withholding money, which may entail payment of interest. In such a situation it will not be prudent to grant interest for the period when the STOA charges had been withheld.

13. It is also observed that neither the Regulations nor the bilateral agreement between the parties (PPA) provides for payment of interest on the delayed payment of STOA charges. It is also established that the reimbursement of STOA charges were not made as per the provisions of the Regulations and hence there is violations of the provisions of the Regulations. For the violations of the provisions of the Regulations, action may be initiated for imposition of penalty under Section 142 of the Electricity Act, 2003. However, keeping in view the submissions from the Petitioner not insisting on imposition of penalty and the fact that accounts have been reconciled resulting in adjustment of STOA charges, initiation of action for imposition of penalty u/S 142 of the Electricity Act, 2003 may not be warranted.
14. This Commission has jurisdiction to adjudicate as per the provisions of the Electricity Act, 2003, extant Regulations or to declare the terms of bilateral agreements approved by it. Whereas, in the instant case neither Regulations nor PPA provides for payment of interest on delayed payment of STOA charges.
15. In view of the above discussions, it is beyond the jurisdiction of this Commission to give directions on the issue of payment of interest. Accordingly, the Interim Application No. 03 of 2019 does not survive and the Petition is dismissed as discussed above.

Sd/-
(Justice S S Chauhan)
Chairperson