

Rajasthan Electricity Regulatory Commission

Petition No: RERC/1277/17

In the matter of petition filed under Section 86 (1) (f) of the Electricity Act, 2003 for adjudication of dispute with Discoms.

Coram: **Sh. Vishvanath Hiremath, Chairman**
 Sh. R.P. Barwar, Member
 Sh. S.C. Dinkar, Member

Petitioner : Rajwest Power Limited. (RWPL)

Respondent(s):

1. Jaipur Vidyut Vitran Nigam Ltd. (JVVNL)
2. Ajmer Vidyut Vitran Nigam Ltd. (AVVNL)
3. Jodhpur Vidyut Vitran Nigam Ltd. (JdVVNL)

Date of hearings: 30.11.2017, 13.12.2017, 16.01.2018 and 09.02.2018

Present:

1. Sh. Aman Anand, Advocate for Petitioner
2. Sh. P. N. Bhandari, Advocate for Respondents

Date of Order:

29.05.2018

ORDER

1. M/s Rajwest Power Ltd. (hereinafter referred to as "Petitioner" or "RWPL") has filed this petition on 13.11.2017 under Section 86 (1) (f) of the Electricity Act, 2003 for adjudication of disputes with Discoms.

2. Petitioner in its petition submitted as under:

(i) M/s Rajwest Power Ltd. is a generating company and operating Lignite

based thermal generating station with a total capacity of 1080 MW, consisting of 8 units of 135 MW each at village Bhadresh in Barmer District of Rajasthan. Petitioner entered into PPA with Respondent Discoms on 26.10.2006 for sale of power from their station at the tariff as determined by this Commission from time to time.

- (ii) Commission vide orders dated 30.05.2014, 31.03.2015 and 31.03.2016 had allowed ad-hoc interim tariff for FY 2014-15, FY 2015-16 and FY 2016-17 respectively. Thereafter, Commission vide its order dated 19.06.2017 had determined the final fixed charges for FY 2014-15, FY 2015-16 and FY 2016-17.
- (iii) As the provisional fixed charges recovered by the Petitioner exceeded the final fixed charges as determined by the Commission vide order dated 19.06.2017, Commission directed Respondents for adjustment of the differential amount made.
- (iv) Further, the Commission vide its order dated 04.09.2017, passed in the review petition filed by the Petitioner against the order dated 19.06.2017, directed that the differential amount may be adjusted by the Respondents in future bills of the Petitioner, after giving due deduction for the amount payable by the Respondents. Commission further allowed adjustment of this amount in 12 equal monthly instalments along with interest as per law.
- (v) However, Petitioner vide its supplementary bill dated 06.09.2017 offered the Respondents to adjust the entire amount i.e. a sum of Rs. 271.08 crore from tariff bill for June 2017 and August 2017 towards the compliance of Commission's order dated 19.06.2017 and 04.09.2017 to avoid any liability on account of interest of deferred payment.

- (vi) Respondents accordingly issued payment advises on dated 15.09.2017 for adjustment of the differential of fixed charges and adjust a sum of Rs. 324.85 crore as against Rs. 271.08 crore offered by the Petitioner.
- (vii) However, while making the adjustments and releasing balance payment as per payment advise dated 15.09.2017, the Respondent no. 1 and 2, have illegally availed prompt payment rebate. The Petitioner submits that the prompt payment rebate cannot be claimed by the Respondents on adjustments as per the provisions of the PPA or in law since, PPA provides that rebate can only be availed in case of prompt payment and not in case of adjustment of amount against the payable amount. Further, Respondent no. 1 and 2 have already availed the rebate during the FY 2016-17 while making original payment to RWPL based on adhoc tariff approved by the Commission.
- (viii) Petitioner vide its letter dated 12.10.2017, 25.10.2017 and 11.11.2017 has requested the Respondent no. 1 and 2 to release the illegally claimed rebate of 2%. However, the Respondent no. 1 and 2 have failed to reply or even respond to the letters of the Petitioner, thus giving rise to a dispute in this regard.
- (ix) The Respondent no. 1 and 2 have illegally and unilaterally withheld a sum of Rs. 27.63 crore and 12.33 crore respectively towards interest from the monthly tariff bill raised by the Petitioner for the month of October 2017. Further while unilaterally and illegally withholding the amount as aforesaid, Respondent no. 1 and 2 have also illegally availed prompt payment rebate to the tune of Rs. 0.56 crore and Rs. 0.25 crore respectively
- (x) However, there has been no written communication or advice from the Respondent 1 and 2 for this deduction. Upon queries being made, Petitioner has been informed that these deductions have been made on

account of interest on the differential amount of Rs. 324.85 crore and on account of prompt payment rebate.

- (xi) There is no provision of payment of interest in a scenario where provisional fixed charges, recovered by the generating company, exceed the final fixed charges determined by the Commission. The provision for levy of any such interest is absent in the PPA, Tariff Regulations and/or any of the order of the Commission, which may be applicable to the present dispute. Reliance in this regard is placed by the Petitioner on the decision of the Hon'ble Supreme Court in the case of NTPC v. M.P. State Electricity Board and others reported at (2011) 15 SCC 580.
- (xii) Therefore, the action of the Respondent no. 1 and 2 in illegally and unilaterally making adjustments from the monthly tariff bills raised by the Petitioner and illegally claiming prompt payment rebate has led to the filing of the present petition for adjudication of these disputes.
- (xiii) Respondent no. 3 has not made payment against the tariff bills of August, 2017 to October, 2017; but the Petitioner apprehends that it would follow the same approach as the other two Discoms of the State of Rajasthan.
- (xiv) In view of the aforesaid facts and circumstances, it is prayed to:
 - (a) Direct the Respondent no. 1 and 2 to release a sum of Rs. 27.63 crore and Rs.12.33 crore respectively being the amount illegally withheld/adjusted by the them on account of interest on differential amount from the monthly tariff bills of the Petitioner; and
 - (b) Direct the Respondent no. 1 and 2 to release a sum of Rs. 3.21 crore and Rs. 2.12 crore, respectively, being the amount illegally withheld/availed as prompt payment rebate on adjustments, from the monthly tariff bills of the Petitioner, as more particularly detailed in

Appendix 1 to this Petition; and

(c) Restrain the Respondent no. 3 from illegally withholding/adjusting any amounts from the pending or future tariff bills of the Petitioner on account of interest on Differential Amount and/or as prompt payment rebate on adjustments.

3. Notice was issued to Respondents on 04.12.2017 for filing the reply on the petition. Respondents have filed their reply on 16.01.2018 and 09.02.2018.

4. In the reply dt. 16.01.2018, Respondents have submitted as follows:

(i) Commission while determining the tariff for RWPL's power station for the year 2014-15 to 2016-17 vide its order dated 19.06.2017 had directed RWPL to bill/adjust the difference in tariff approved by the Commission in the order and the tariff charged by RWPL as provisionally approved by the Commission for the period FY 2014-15 to FY 2016-17.

(ii) Subsequently, Petitioner filed a review petition against the order dated 19.06.2017 and the review petition has been rejected by the Commission vide order dated 4.9.2017 in toto as Petitioner could not establish any patent error in the order dated 19.6.2017 of the Commission.

(iii) The scope of review petition is very limited. The Petitioner cannot raise fresh issues and the Commission too would not like to travel beyond the order of 19.6.2017.

(iv) In this regard para 10 of the order dt. 19.06.2017 is reproduced as under:

"10. Under Order XLVII Rule 1 of Civil Procedure Code (CPC), any person considering himself aggrieved by an order against which no appeal has been preferred, may apply for review for the order to the court, which passed such order on any of the following grounds:

(i) Discovery by the applicant of new and important matter of 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

- (ii) On account of some mistake or error apparent on the face of the record, or Page 14 of 22 RERC/1222/17*
- (iii) For any other sufficient reason."*

- (v) A review petition is either allowed or rejected. Since there is no patent error, the review petition was rightly rejected in toto by the Commission.
- (vi) The directions issued in the order dt. 19.06.2017 regarding adjustment of the excess amount was quite logical and no error could be established by the Petitioner against the said directions.
- (vii) After rejecting the review petition, the Commission may not like to amend the terms and conditions of adjustment as per order dated 19.6.2017. That order is now in full force as soon as the review petition was rejected.
- (viii) In the normal course, no fresh directions can be given while rejecting the review petition but as a onetime exception, the Commission has sympathetically considered the Petitioner's situation, and allowed certain instalments. The Respondent Discoms, out of high regard for the Commission, have complied with the directions contained in the concluding part of above review order dated 4.9.2017.
- (ix) It is strange that Petitioner is still not satisfied and is indirectly seeking further review of the review order dated 4.9.2017 which is just not permissible under the law.
- (x) Since the order dated 09.04.2017 has been fully complied with, therefore the petition deserves to be summarily rejected. Once the review petition has been rejected by the Commission, the original order of 19.06.2017

has come into operation and therefore the Petitioner's attempt to further defer the implements of that order should be firmly curbed.

(xi) Petitioner has already filed appeal against the order of 19.06.2017 before the Hon'ble APTEL, therefore the it should not be allowed to continue parallel proceedings in two forums.

(xii) Discoms have been facing acute financial crisis and huge payments remain unpaid for which LPS has to be paid by them. In the latest order dated 03.08.2017, Commission while disposing of 66 petitions, has directed that Discoms to make the payment to all the Petitioners within three (3) months.

(xiii) Therefore by deferring the adjustment against the Petitioner, the Discoms would be subjected to LPS for delayed payment to large number of other parties.

(xiv) In the light of the above submissions, the present petition deserves to be dismissed, as it is totally frivolous and devoid of any legal force. Review order cannot be reviewed once again and the Commission may not like to modify the order, once an appeal has been filed before the Hon'ble APTEL.

5. The matter was taken up for hearing on 16.01.2018. Sh. P.N. Bhandari Advocate on behalf of Respondents requested to allow some time to reconcile the issue keeping in view the judgment of Hon'ble Supreme Court cited and relied upon by Petitioner. Accordingly, time was granted to Respondents. However, no reconciliation was made.

6. Therefore, the matter was taken up for hearing on 09.02.2018. Sh. Aman Anand, Advocate who appeared for RWPL in the hearing submitted that the deduction of interest has been affected contrary to the law laid down by

the Hon'ble Supreme Court in the case of NTPC v MP Electricity Board (reported in (2011) 15 SCC 580. He further submitted that the deduction towards prompt payment rebate is not in accordance with the terms of PPA and such rebate has already been recovered when bills were paid earlier.

7. Per contra Sh. P.N. Bhandari, Advocate appearing for Respondents defended the action taken by the Respondents of recovering the LPS paid earlier.
8. After concluding the arguments and in line with the submission made, Sh. P.N. Bhandari filed an additional statement on 09.02.2018, In the said additional statement it is submitted as follows:
 - (i) In the above matter during the last hearing, there appeared some force in the contention of the Petitioner that interest should not have been recovered in the context of this case. However, the matter was discussed at length with the officers of the Accounts wing of Discoms and it appears that in fact no interest had been charged while adjusting the excess amount.
 - (ii) The fact of the matter is that for the three year period from FY 2014-15 to 2016-17, Late Payment Surcharge (LPS) of Rs. 107.32 crores had been paid by Discoms to Petitioner as per the then computed due amount. However, in the light of the latest order dated 19.06.2017 since the amount paid to the Petitioner towards LPS was higher than the finally determined amount, the excess amount had to be recovered. Once the excess amount was reduced as per the order of the Commission, necessarily the LPS paid on the excess amount had also to be recovered. Hence there is no recovery of interest as alleged by the Petitioner.

(iii) In light of the above, this document may kindly be treated as part of the preliminary objections submitted by the undersigned.

9. Petitioner in reply to Respondents' additional submission has also filed rejoinder on 16.02.2018. In this rejoinder Petitioner has submitted as follows:

- (i) The said submission is not even supported by an affidavit of the concerned officer who can be taken to task for making false submissions, therefore, it deserves to be rejected on this short preliminary ground alone.
- (ii) In view of the ratio laid down in case of NTPC v. MPSEB even the recovery of the excess LPS paid, corresponding to the difference in fixed charges, cannot be recovered by the Respondent Discoms.

Commission's Analysis

10. Commission has considered the submissions made in writing and orally during the hearing.

11. It is submitted by the Petitioner that Commission vide its order dated 19.06.2017 had determined the final fixed charges for FY 2014-15, FY 2015-16 and FY 2016-17 and directed Respondents for adjustment of the differential amount made. Further, Commission vide its order dated 04.09.2017, passed in the review of order dated 19.06.2017, directed that the differential amount may be adjusted by the Respondents in future bills of the Petitioner, after giving due deduction for the amount payable by the Respondents. Commission further allowed adjustment of this amount in 12 equal monthly installments along with interest as per law.

12. Petitioner further contended that Respondents, thereafter while adjusting the differential of fixed charges have illegally adjusted much more amount and thus disputes arises between Petitioner and Respondents.

13. Per contra Respondents submitted that Commission while determining the tariff for RWPL's power station for the year 2014-15 to 2016-17 vide its order dated 19.06.2017 had directed RWPL to adjust the difference of final tariff and provisionally tariff for the period FY 2014-15 to FY 2016-17. Subsequently, Petitioner filed a review petition against the order dated 19.06.2017. Commission while rejecting the review petition in toto vide its order dated 04.09.2017 has sympathetically considered the Petitioner's situation, and allowed certain instalments for payment of difference amount. Petitioner has also filed appeals against the orders dt. 19.6.2017 and 04.09.2017 before the Hon'ble APTEL.
14. Respondents further contended that in the present petition, RWPL is indirectly seeking review of the review order dated 04.09.2017 which is just not permissible under the law. It is also submitted that once the review petition is disposed of, this Commission cannot issue any further direction on the said order more so when the said order is pending in appeal.
15. Commission observes that vide order dated 19.06.2017 Commission had determined the final fixed charges for Petitioner's plant for FY 2014-15, FY 2015-16 and FY 2016-17 and directed Petitioner to bill/adjust the difference in tariff approved in the order and the provisional tariff charged by RWPL for the period FY 2014-15 to FY 2016-17. Further, Commission vide its order dated 04.09.2017 has also disposed of the review petition of order dt. 19.06.2017.
16. Commission further observes that Petitioner through present petition has raised the dispute that Respondents have illegally adjusted much more amount while adjusting the difference of fixed charges against the directions issued in orders dt. 19.06.2017 and 04.09.2017. It is also observed that Petitioner has filed appeal before the Hon'ble APTEL against both these orders.

17. As the present dispute is related to the directions issued by Commission in orders dt. 19.06.2017 and 04.09.2017 and these orders are pending in appeal therefore, Commission deems it appropriate not to pass any fresh directions.

18. Accordingly, petition stands disposed of with no order as to cost.

(S. C. Dinkar)
Member

(R. P. Barwar)
Member

(Vishvanath Hiremath)
Chairman