CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 27/RP/2020
in
Petition No. 57/AT/2020

Coram:

Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member

Date of Order: 28th June, 2021

In the matter of:

Petition under Section 94(1) (f) of the Electricity Act, 2003 read with Regulation 17 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of the order dated 24.2.2020 passed in Petition No. 57/AT/2020.

And
In the matter of

Punjab State Power Corporation Limited
The Mall, Patiala,
Punjab – 147 001

.....Review Petitioner

Vs

1. NTPC Limited,
Scope Complex,
Core-7, Institutional Area, Lodhi Road, New Delhi – 110 003.

2. Ministry of New and Renewable Energy,
Block 14, CGO Complex,
Lodhi Road, New Delhi – 110 003.

3. SB Energy Six Private Limited,
5th Floor, World Mark- 2,
Asset Area – 8, Hospitality District,
Aerocity, New Delhi – 110 037.

4. North Bihar Power Distribution Company Limited,
3rd Floor and 2nd Floor, Vidyut Bhawan, Bailey Road,
Patna – 800 001.

5. South Bihar Power Distribution Company Limited,
3rd Floor and 2nd Floor, Vidyut Bhawan,
Bailey Road, Patna – 800 001. **.....Respondents**

Parties present:
Shri Anand Ganesan, Advocate, PSPCL
Ms. Swapna Seshadri, Advocate, PSPCL
Shri Amal Nair, Advocate, PSPCL
Ms. Poorva Saigal, Advocate, NTPC
Ms. Tanya Sareen, Advocate, NTPC
Shri Ishpaul Uppal, NTPC
Shri Ayush Prasad, SB Energy

ORDER

The Review Petitioner, Punjab State Power Corporation Limited (PSPCL), has filed the present petition under Section 94(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking review of the Commission's order dated 24.2.2020 in Petition No. 57/AT/2020 (hereinafter referred to as 'impugned order'). The Review Petitioner has prayed for as under:

> *"(a) admit the present review petition;*
>
> *(b) review the order dated 24/02/2020 passed by this Commission on the limited issue of fixing of trading margin and fix the trading margin at Rs. 1 paise per unit;*
>
> *(c) Pass such other further order(s) as the Commission may deem just in the facts of the present case"*

Background

2. The Respondent No. 1, NTPC Limited (in short, 'NTPC') had filed Petition No. 57/AT/2020 under Section 63 of the Act for adoption of tariff for 600 MW solar PV power projects connected to inter-State transmission system and selected through competitive bidding process as per the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power

Projects' dated 3.8.2017 issued by the Ministry of Power, Government of India. The said Petition No. 57/AT/2020 was heard on 12.2.2020 after notice to the Respondents therein, including the Review Petitioner, PSPCL, which had entered into Power Supply Agreement (PSA) dated 25.3.2019 (300 MW) with NTPC on the basis of Power Purchase Agreement (PPA) dated 8.4.2019 entered into by NTPC with the successful Solar Power Developer, namely, SB Energy Six Private Limited. However, during the course of hearing, none was present on behalf of PSPCL and after hearing the learned counsels for NTPC and Bihar Utilities, the matter was reserved for order. The Petition No. 57/AT/2020 came to be decided vide order dated 24.2.2020, whereby the Commission adopted the tariff discovered in the competitive bid process for 600 MW solar power projects to be established by SB Energy Six Private Limited (600 MW @ Rs.2.60/kWh) under Section 63 of the Act throughout the period covered in the PPA and PSA.

3. Being aggrieved by the impugned order, PSPCL has filed the present Review Petition on the two grounds, namely, (a) applicable trading margin, and (b) inability of PSPCL to appear and represent itself before the Commission.

<u>Submissions of the Review Petitioner</u>

4. In support of its plea for review, Review Petitioner has mainly submitted as under:

(a) PSPCL had filed Petition No. 23/2019 before the Punjab State Electricity Regulatory Commission (PSERC) for approval of procurement of contracted capacity. Vide order dated 13.1.2019, PSERC observed that the trading margin was indeed unjustified and noting the submissions of NTPC that the Petition for determination of tariff for 600 MW solar projects including 300 MW solar power for supply of PSPCL is pending before this Commission, PSERC observed that the said Petition should be taken up subsequent to the decision of this Commission in Petition No. 57/AT/2020.

(b) In the impugned order, the Commission has recognized that in terms of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 (hereinafter referred to as 'the 2020 Trading Licence Regulations'), the trading margin cannot exceed 2 paise per unit for back-to-back contracts. These are the cases where Letter of Credit or Escrow Mechanism is not provided by trading licensee.

(c) In present case, there is no independent obligation of NTPC to provide any payment security mechanism to the seller, but the obligation is purely on back-to-back basis and subject to the payment security mechanism provided by PSPCL. Therefore, the said provision is squarely applicable which caps the trading margin at 2 paise/unit.

(d) It is the case of NTPC itself that the PPA and PSA are back-to-back contracts. All aspects, even including payment security mechanism, late payment surcharge and liquidated damages etc. are on back to back basis and there are no independent obligations of NTPC. It is in this background that the Commission had capped the trading margin to 1 paise per unit in when draft of the 2020 Trading Licence Regulations was issued for comments and thereafter increased it to 2 paise per unit while notifying the 2020 Trading Licence Regulations, where there is no independent obligation of the trading licensee to provide payment security mechanism. Even the levy of 2 paise per unit is not justified in the facts of the present case as there is no obligation whatsoever of NTPC in the entire transaction and all aspects are back-to-back.

(e) NTPC is only an intermediary company and is merely facilitating the purchase of sale of electricity generated from solar projects and has no independent obligation, either financial or otherwise, either to solar power developer or to PSPCL. All obligations are on back-to-back basis, namely that whatever obligation is enforced by SPD under the PPAs against NTPC, PSPCL is bound to fulfill the obligation on a back-to-back basis towards NTPC and similarly, whatever rights that PSPCL may claim under the agreements against NTPC, shall be subject to due enforcement of the corresponding rights on a back-to-back basis by NTPC against Solar Power Developer (SPD), without an independent obligation on part of NTPC. Thus, the very nature and scope of work of NTPC is quite limited.

(f) It is PSPCL which shall be responsible for directly coordinating and dealing with SPD, State Load Despatch Centres, Regional Power Committee, and other authorities in all respects in regard to declaration of availability, scheduling and dispatch of solar power and due compliance with deviation and settlement mechanism and the applicable Grid Code Regulations, acknowledging that the SPDs and PSPCL are the grid connected entities and NTPC is an Intermediary Procurer/ Trading Licensee is not a grid connected entity in respect of solar power contracted under the PSA.

(g) Trading margin as per Regulation 8(f) of the 2020 Trading Licence Regulations is capped for situations as in the present case, where NTPC has passed on all risks on back-to-back basis while charging a significant trading margin. There is no independent obligation of NTPC to provide a payment security mechanism. Even default risks and late payment risks have not been subsumed by NTPC as all liabilities are back-to-back and all payments made by NTPC to SPD are upon receipt of funds from PSPCL.

(h) The relevant office of PSPCL for handling the present matter was the Chief Engineer/ Thermal Design and NTPC was fully aware of this fact as NTPC had been exchanging various communications with this office for period over past one year. However, NTPC did not forward the notice to the said office. NTPC also mapped an incorrect office of PSPCL. Since no notice was served to the relevant office of PSPCL, it could not represent before the Commission.

(i) PSPCL was taken by surprise to learn of the order dated 12.2.2020 by which this Commission had concluded the hearing in the matter and had reserved it for order. More so, since PSPCL was never given a chance to make its submissions regarding the quantum of trading margin. Upon coming to know of the same once the e-mail of NTPC was forwarded to the relevant office, PSPCL vide its letter dated 19.2.2020 wrote to this Commission clarifying that no intimation was received by PSPCL regarding Petition No. 57/AT/2020 and also requested for a hearing in the matter in view of the fact that PSPCL was not given an effective opportunity to appear in the matter.

5. Review Petition was called out for virtual hearing on 18.6.2021. During the course of hearing, learned counsel for the Review Petitioner, PSPCL reiterated the submissions made in the pleadings. Thereafter, the Commission reserved order in the matter.

6. Learned counsel for the Respondent, NTPC submitted that PSPCL was mapped on e-filing portal of the Commission on the basis of the e-mail id provided/ registered by PSPCL itself. Learned counsel further submitted that in the impugned order, the Commission has clearly recognized that the Regulation 8(d) of 2020 Trading Licence Regulations gives choice to the contracting parties to mutually agree on trading margin for long-term transactions and that 7 paise/kWh trading margin has been agreed to by PSPCL in terms of signed PSA. It was also submitted that the contention that there are no independent obligations of NTPC is contrary to the provisions of the PPA and various orders issued by the Commission.

Analysis and Decision

7. We have considered the submissions of the parties and perused the documents on record. As per the provisions of Order 47 Rule 1 of Code of Civil

Procedure, 1908, an application of review would be maintainable on account of (i) discovery of a new and important piece of evidence, which after the exercise of due diligence was not within knowledge or could not be produced at the time when the order was passed, (ii) there exists an error apparent on the face of record, (iii) any other sufficient reason. Accordingly, we proceed to examine as to whether the Review Petitioner, PSPCL has made out any of the above grounds for review.

8. In the first ground, the Review Petitioner has submitted that NTPC is only an intermediary company facilitating the transaction and the PPA and PSA being back-to-back contracts, NTPC has no independent obligations either financial or otherwise either to Solar Power Developers or to PSPCL. All the aspects including payment security mechanism, late payment surcharge and liquidated damages etc. are on back-to-back basis and there are no independent obligations of NTPC. Accordingly, the Review Petitioner has prayed to fix the trading margin at the rate of 1 paise/unit.

9. *Per contra*, learned counsel for NTPC during the course of hearing submitted that in the impugned order the Commission has clearly recognized that the Regulation 8(d) of Trading Licence Regulations gives choice to the contracting parties to mutually agree on trading margin for long-term transactions and that 7 paise/kWh trading margin has been agreed to by PSPCL in terms of signed PSA. It was also submitted that the contention that there are no independent obligations of NTPC is contrary to the provisions of the PPA and various orders issued by the Commission.

10. We have considered the submissions made by the Review Petitioner, PSPCL and the Respondent, NTPC. The relevant portion of the impugned order dated 24.2.2020 is reproduced as under:

> *"27. The Petitioner has submitted that it has agreed to sell entire 600 MW of solar power to the Buying Utilities/Distribution Licensees at the rate of Rs. 2.60/kWh plus trading margin of Rs.0.07/kWh upon the commissioning of the above capacity. Regulation 8(d) of the Trading Licence Regulations dealing with trading margin provides as under:*
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> > *"8(d) for the transaction under long-term contracts, the trading margin shall be as mutually decided between the Trading licensee and the seller:"*
>
> *The above provision gives choice to the contracting parties to mutually agree on Trading Margin for long-term transaction. Accordingly, the Petitioner shall be governed by the above provisions of the Trading Licence Regulations.*
>
> *28. However, Proviso under Regulation 8(d) of the Trading Licence Regulations provides as under:*
>
> > *"8.(d) * * * * **
> >
> > *Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh."*
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> *In addition, Regulation 8 (f) of the Trading Licence Regulations provides as under:*
>
> > *"8(f). For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh."*
>
> *The Petitioner, NTPC, shall also be governed by the above provisions of the Trading Licence Regulations."*

11. In the above order, the Commission has clearly recognized that the Regulation 8(1)(d) of the 2020 Trading Licence Regulations gives choice to the contracting parties to mutually agree on trading margin for long-term transaction. We also observe that 7 paise/kWh trading margin has been agreed to by PSPCL in terms of signed PSA.

12. Further, in the impugned order, the Commission has referred to the proviso to Regulation 8(1)(d) and Regulation 8(1)(f) of the 2020 Trading Licence Regulations which provide that the trading licensee shall not charge trading margin exceeding 2 paise/unit for transactions under long-term contracts and back-to-back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in Regulation 9(10) is not provided by the trading licensee. The Review Petitioner has relied upon Regulation 8(1)(f) of the 2020 Trading Licence Regulations in praying that in the instant case trading margin may be fixed at 2 paise/unit since there are no independent payment security mechanism obligation of NTPC and that the said obligation is only on back-to-back basis. Admittedly, it is not the case of the Review Petitioner that NTPC has not provided the payment security mechanism/ letter of credit in favour of the Solar Power Developer and has continued to charge the trading margin of 7 pasie/kWh. Besides, in the impugned order, the Commission has already observed that NTPC shall also be governed by the proviso to Regulation 8(1)(d) and 8(1)(f), if such provisions are triggered in terms of conditions specified therein. Moreover, in the impugned order, apart from the provisions of the Article 10.3 (Payment of Monthly Bills) and Article 10.4 (Payment Security Mechanism) of the PPA, all the parties therein have also been directed to abide by the Regulation 9(10) of the 2020 Trading Licence Regulations. Hence, we do not find any ground for the review of the impugned order in the submissions of the Review Petitioner, PSPCL on the issue of fixing of trading margin at 2 paise/unit in terms of Regulation 8(1)(f) of the 2020 Trading Licence Regulations. Accordingly, review on this ground is rejected.

13. In the second ground**,** the Review Petitioner, PSPCL has submitted that PSPCL was not given a reasonable opportunity to represent before the Commission. It has been submitted that the relevant office of PSPCL for handling the instant matters is Chief Engineer/Thermal Design, which was fully known to NTPC with whom various communications have been exchanged by NTPC. However, NTPC did not forward the notice to the said office and also mapped incorrect office of PSPCL. Therefore, PSPCL was taken by surprise by the Record of Proceedings for hearing dated 12.2.2020 in the Petition No. 57/AT/2020 by which the hearing in the matter was concluded and the matter was reserved for order. Therefore, PSPCL was not granted a reasonable opportunity to represent its case before the Commission. Per contra, NTPC has submitted that PSPCL was mapped on e-filing portal of the Commission on the basis of the e-mail id provided/ registered by PSPCL itself.

14. We have considered the submissions made by the Review Petitioner and NTPC. The above ground as raised by the Review Petitioner is not tenable for seeking a review of the impugned order simply for the reason that the notice of listing of the said petition on 12.2.2020 was also issued by registry of the Commission to parties therein including the Review Petitioner well in advance on 5.2.2020 through the Commission's e-filing portal. Thus, the Review Petitioner had ample opportunity and time to remain present during the course of hearing on 12.2.2020 either through counsel or its officials. However, having failed to do so, the Review Petitioner cannot argue that it was not given a reasonable opportunity to represent before the Commission. The Review Petitioner has further argued that NTPC had mapped the wrong office of the Review Petitioner in e-filing portal. In response, learned counsel

for NTPC during the course of hearing submitted that PSPCL was mapped on e-filing portal of the Commission on the basis of e-mail id provided/ registered by PSPCL itself. In our view, the mapping of the appropriate office or conveying the filing/ listing of petition to the appropriate office by another office are entirely internal issues of the Review Petitioner and cannot be a basis for seeking a review of the order. It is noted that the Review Petitioner is well aware about the e-filing of the Petition, etc. and cause list being uploaded on the website of Commission in advance so as to bring into the notice of the concerned party about listing of the Petition and accordingly, to appear and argue its case. Therefore, the contention of that Review Petitioner that it was not granted opportunity to appear before the Commission is rejected.

15. In the light of the discussion hereinabove, we do not find any substance in the present review Petition.

16. In terms of the above, the Review Petition No. 27/RP/2020 is disposed of.

Sd/-	sd/-
(I.S. Jha)	**(P.K. Pujari)**
Member	**Chairperson**