

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 32/RP/2023

Subject : Petition under Section 94 of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of this Commission's order dated 1.8.2023 in Petition No. 258/MP/2019.

Date of Hearing : **8.11.2023**

Coram : Shri I.S.Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Petitioner : Jhajjar Power Limited (JPL)

Respondents : Tata Power Trading Company Limited and Anr.

Parties Present : Shri Aniket Prason, Advocate, JPL
Ms. Priya Dhankar, Advocate, JPL
Shri Sanjeev S. Thakur, Advocate, JPL
Shri Adityavardhan Sharma, Advocate, TPTCL
Shri Vedant Choudhary, Advocate, TPTCL

Record of Proceedings

Learned counsel for the Review Petitioner submitted the present Petition has been filed seeking review of the Commission's order dated 1.8.2023 in Petition No. 258/MP/2019. Learned counsel mainly submitted as under:

(a) Petition No. 258/MP/2019 was filed by the Petitioner, *inter alia*, seeking adjudication of the dispute with respect to the reimbursement, in terms of Article 1.2.8 of Schedule 7 of the Power Purchase Agreement dated 20.1.2009 (Tata PPA), of the amount paid by the Petitioner towards level of lifting penalty to coal suppliers for the contract year 2016-17.

(b) The Commission by order dated 1.8.2023, *inter alia*, held that the availability of the Plant was greater than the Minimum Off-take Guarantee during the contract year 2016-17 and that the energy scheduled by the Respondents was less than Minimum Off-take Guarantee during the said contract year. The Commission, accordingly, held that the Petitioner is entitled for reimbursement of penalty as per Article 1.2.8 of the Schedule 7 of the Tata PPA, but reduced the quantum of penalty from Rs. 43.01 crore to Rs. 38.73 crore to be adjusted between Haryana Discoms and the Respondents considering (i) the imported coal received by the Petitioner during the months of April to May, 2016 and (ii) the quantum of energy requisitioned by the Respondents and Haryana Discoms.



(c) In the said order, the Commission has also directed the Respondents to make payment of the aforesaid quantum along with interest for the delayed period at the actual rate of interest paid by the Petitioner for arranging working capital funds or the rate of interest on working capital as per the Commission's 2019 Tariff Regulations or the late payment surcharge rate as per the PPA, whichever is lowest.

(d) In the above context, the present Review Petition has been filed on the issues, namely, (i) reduction of quantum of penalty payable by the Haryana Discoms and the Respondent No.1, both towards the low level of lifting under Article 1.2.8 of Schedule 7 of the respective PPAs by taking into consideration 65, 599 tonnes of imported coal received by the Petitioner during the contract year 2016-17, (ii) computation of low level of lifting penalty under Article 1.2.8 of Schedule 7 of the respective PPAs by taking into consideration the quantum of energy requisitioned by Respondents as opposed to the quantum of energy scheduled to them, and (iii) award of interest at a rate other than the rate of late payment surcharge stipulated in Article 11 of the Tata PPA.

(e) In paragraph 40 of the order dated 1.8.2023, the Commission has reduced the quantum of penalty payable by Haryana Discoms and TPTCL towards low level of lifting under Article 1.2.8 of the Schedule 7 of the respective PPAs by considering the fact that the Petitioner had procured 65,599 tonnes of imported coal during the contract year 2016-17 and had the Petitioner not procured such imported coal during the contract year 2016-17, the Petitioner would have utilized corresponding quantum of domestic linkage coal and thus, low level of lifting penalty levied upon the Petitioner under FSAs would have been lower.

(f) However, the said findings of the Commission is in direct contravention of the Commission's own findings in paragraph 36 of the order, wherein the Commission has upheld the Petitioner's contention that penalty leviable in the present case is under Section 74 of the Indian Contract Act, 1872 and the principle of mitigation of losses which is applicable in cases where damages are claimed under Section 73 of the Contract Act is not applicable under Section 74 of the Contract Act.

(g) In any case, the presumption in paragraph 40 of the order dated 1.8.2023 that the Petitioner procured 65,599 tonnes of imported coal during the contract year 2016-17 is itself erroneous. The quantum of imported coal received by the Petitioner during the contract year 2016-17 i.e. 65,599 tonnes was actually procured by the Petitioner during the contract year 2015-16 with due approval from the procurers as per the PPAs. The same was meant to be consumed in the same contract year. However, in terms of the delivery, certain quantum out of the total allowed alternate imported coal was spilled over to the contract year 2016-17 due to lower scheduling of power between January to March, 2016 which was not attributable to the Petitioner.

(h) While awarding the interest for the delayed payment, the Commission in the said order, has failed to consider the various judgments of APTEL as well as the Hon'ble Supreme Court wherein even in cases of dispute of

supplementary bills pertaining to Change in Law events, interest has been awarded at the rate of late payment surcharge. In the present case also, the rate prescribed for late payment surcharge in Article 11 of the Tata PPA ought to have been granted by the Commission.

2. Learned counsel for the Respondent, TPTCL accepted the notice and sought time to file reply to the Petition.
3. After hearing the learned counsel for the Petitioner, the Commission ordered as under:
 - (a) Admit the Review Petition and issue notice to the Respondents; and
 - (b) The Respondents to file their replies to the Review Petition, if any, within two weeks with a copy to the Petitioner, who may file its rejoinder, within a week.
4. The Review Petition will be listed for hearing **29.11.2023**.

By order of the Commission
Sd/-
(T.D. Pant)
Joint Chief (Law)