ORDER

OF

WEST BENGAL ELECTRICITY REGULATORY COMMISSION

IN THE MATTER OF

CASE NO. OA-272/18-19

IN REGARD TO THE APPLICATION SUBMITTED BY INDIAN POWER CORPORATION LIMITED (IPCL) ON 25.04.2018 SEEKING DIRECTION IN ORDER TO RESOLVE THE ISSUE OF ENERGY COST FOR SUPPLY OF ENERGY IN RADIAL MODE BY DVC AT DIFFERENT RADIAL OFF-TAKE POINTS OF WBSEDCL.

PRESENT:
SIR DURGADAS GOSWAMI, MEMBER

DATE: 01.03.2019
Order of the West Bengal Electricity Regulatory Commission in regard to the applications submitted by the India Power Corporation Limited (IPCL) on 25.04.2018 seeking direction in order to resolve the issue of energy cost for supply of energy in radial mode by DVC at different radial off-take points of IPCL.

FACTS IN BRIEF

1.0 In the tariff order dated 25.05.2015 for the years 2014 – 2015 and 2015 – 2016 in respect of Damodar Valley Corporation (DVC), the Commission has determined the tariff for retail sale of energy by DVC to their consumers excluding the sale to distribution licensees within the supply area of DVC in the State of West Bengal. The Commission has also passed the tariff orders for the years 2014 – 2015, 2015 – 2016 and 2016 – 2017 in respect of India Power Corporation Limited (IPCL) on 21.07.2016 determining the price for power purchase from DVC by IPCL. The dispute is stated to have arisen between DVC and IPCL in the context that DVC is billing IPCL at a tariff determined for retail sale to its consumers without giving any cognizance to the status of IPCL as distribution licensees, as a result of which a huge extra amount is becoming liable to be paid to DVC by IPCL.

2.0 In this context, IPCL has filed a petition on 03.11.2015 praying before the Commission to pass an order for not imposing retail tariff determined for the consumers of DVC in the tariff order dated 25.05.2015 on the bulk sale of power to IPCL as a licensee by DVC in respect of different off-take points. They have also prayed before the Commission to pass an order to revise the sale bills of DVC for radial off-take points since June, 2015 as per the power purchase price approved by the Commission in the order dated 21.07.2016 or any power purchase rate determined by the Commission for such drawal of power through radial off-take points by IPCL from DVC.

3.0 Disputes also arose between DVC and West Bengal State Electricity Distribution Company Limited (WBSEDCL) regarding the price of purchase of power by WBSEDCL from DVC at different radial modes and accordingly, DVC also made their application in this regard on 16.11.2015. A decision of the Commission on the petition of DVC was communicated separately to DVC vide letter dated 05.12.2016. Decision of the Commission on the petition filed by IPCL on 03.11.2015 was
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4.0 IPCL, however, filed another petition on 25.04.2018 before the Commission under section 86(1)(f) of the Electricity Act, 2003 regarding adjudication of dispute on account of erroneous billing by DVC at retail supply tariff to IPCL, a distribution licensee in contrary to the provisions of the Electricity Act, 2003. The petition has been admitted and numbered as OA-272/18-19.

5.0 Upon perusal of the above petitions filed by IPCL, and the petitions submitted by DVC and WBSEDCL the Commission called for a hearing upon serving of notice vide reference no. WBERC/OA-272/18-19/2272 dated 8th June, 2018 to WBSEDCL, DVC and IPCL, fixing the date of hearing on 19th June, 2018.

6.0 In the hearing on 19.06.2018, Smt. Sonal Sinha, Ld. Counsel of DVC along with other officers of DVC were present with due authorization. Shri Rajeev Nandan Sinha, SE(E) and Sri Chanchal Biswas, SE(E) were present on behalf of WBSEDCL with due authorization. Shri Sakya Singha Chaudhuri, Ld. Counsel of IPCL along with other officers of IPCL were also present with due authorization.

7.0 During hearing all the representatives of WBSEDCL, DVC and IPCL submitted that they have not received the petitions of others, in absence of which they were unable to make any comments. However, the representatives of all the petitioners briefly submitted their contentions which are noted below seriatim:

a) Smt. Sonal Sinha, Ld. Counsel and Sri D. K. Aich, on behalf of DVC submitted that the tariff should not be unilaterally decided by the licensees. He also submitted that IPCL and WBSEDCL should make payment as claimed by them and the matter relating to payment of bill as per the tariff determined by the Commission vide its order dated 25.05.2015 and 24.08.2015 for retail sale to its consumers should be settled by the Commission. In this context, the representative of DVC cited the reference of APTEL's order dated 10.05.2010. It is also submitted that due to non-payment of the energy bill as per their claim at
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There is huge accumulation of outstanding dues.

b) Sri Rajib Nandan Sinha, on behalf of WBSEDCL submitted that the power purchase price admitted by the Commission in their tariff order at a pooled power station cost for supply of energy by DVC through radial mode at eleven different off-take points of WBSEDCL should be accepted by DVC. It was also submitted that after June, 2015, DVC claimed at consumers' tariff which is not acceptable to WBSEDCL. On 14.08.2015, the Commission approved the PPA for new two off-take points where it is mentioned that the tariff will be as per power purchase price approved by the Commission. The representative of WBSEDCL also mentioned that in order to resolve the dispute in billing of other 11 nos. radial off-take points by DVC, a meeting was held on 03.01.2017 in the chamber of Principal Secretary, Department of Power & Non-Conventional Energy Sources, Government of West Bengal where the Chairman of DVC and CMD of WBSEDCL were present and it was decided that “as an interim measure, WBSEDCL may provisionally consider the cost of power purchase from DVC in the radial mode of supply as allowed by WBERC in the tariff order of WBSEDCL dated 04.03.2015 for the period 2014 – 2015 to 2016 – 2017 till settlement of the tariff dispute”.

c) Sri Sakya Singha Chaudhury, Ld. Counsel, on behalf of IPCL submitted that the definition of licensee is different from the definition of consumer as per the Electricity Act, 2003. The PPA between IPCL (erstwhile DPSC Limited) and DVC was executed in terms of provisions of the Electricity Act, 1910 and the consumer tariff was applicable to them. But, as per the provisions of the Electricity Act, 2003, the distribution licensee cannot be considered as consumer. The tariff for sale of energy between the licensees should be determined in terms of section 62(1)(a) and not 62(1)(d). It is also stated that the sale of energy between the licensees should be treated as intra-state trading and trader's margin should be allowed.
8.0 Upon hearing the contentions of DVC, IPCL and WBSEDCL the Commission passed the following directions:

a) DVC, WBSEDCL and IPCL each shall send copies of their petition to other parties within 7 (seven) days.

b) Affidavit in reply by each party on the petition of other parties shall be submitted to the Commission within 7 (seven) days from the date of receipt of the copies of the petitions with a copy to other parties.

c) Written arguments, if any, shall be submitted to the Commission within one month from the date of receipt of the reply with a copy to other parties.

d) The petitioners are also directed to submit copies of valid PPA between them, if any.

e) Next hearing will be held on receipt of the complete submission by the parties as mentioned in (b), (c) and (d) above.

9.0 Having noticed that the direction had not been complied with by all the parties within the time limit, the Commission called for another hearing on 21.08.2018 upon serving notice to DVC, IPCL and WBSEDCL. During hearing representatives from all the parties were present and made their submissions. WBSEDCL, inter-alia, submitted that the petitions submitted by IPCL and DVC in this regard cannot be clubbed together with WBSEDCL's petition, as the cause of action is different. Upon hearing, the Commission inter-alia gave direction to all the parties that the next hearing would be held on 29.08.2018 and accordingly notice was served.

10.0 WBSEDCL vide their submission dated 27.08.2018 referring provisions of the Rule 3 of Civil Procedure Code 1908 has stated that the petitions submitted by IPCL and DVC in this regard cannot be clubbed together as the cause of action is different.
11.0 Upon hearing all the parties on 29.08.2018 and subsequent written submission by IPCL, the Commission scheduled separate hearings on 09.10.2018 for disposal of the petition submitted by IPCL and WBSEDCL. No hearing on the petition submitted by DVC was, however, decided by the Commission. Notices were served accordingly. The hearings scheduled on 9.10.2018 were, however, postponed.

12.0 Subsequently, notices were served to the petitioners i.e., IPCL and WBSEDCL rescheduling the hearings separately on 21.02.2019 at 14.30 hours and 15.00 hours respectively. Accordingly, the hearing in case no. OA-272/18-19 between IPCL and DVC took place on scheduled date and time when both the parties were present.

13.0 During hearing IPCL submitted that DVC has been raising bill for supply of power to IPCL at the rate of retail tariff determined by the Commission due to the reasons that as per the opinion of DVC, IPCL is a HT consumer to them and not a distribution licensee. According to IPCL, IPCL is a distribution licensee as per the provision specified under paragraph 2(17) of the Electricity Act, 2003 and therefore, IPCL should be billed at the tariff applicable to a distribution licensee. DVC says that as per the second part of the provisions specified under paragraph 2(15) of the Electricity Act, 2003, IPCL is a consumer and not a distribution licensee since IPCL is drawing power from DVC in radial mode as a consumer on the basis of the arrangements settled in bilateral agreements entered into between DVC and IPCL long ago.

14.0 Smt. Shreya Mukherjee, Ld. Legal Counsel of IPCL, while making arguments, stated that—

- a) Para 3.7 of this Commission’s tariff order for IPCL for 2014-15 where the rate and amount meant for purchasing power from DVC by IPCL have been spelt out clearly and it is binding both on the DVC and the IPCL;

- b) Tariff of such power purchased from DVC has got to be determined by WBERC as per section 62(1) of the Act because IPCL is a licensee and not a consumer.
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c) Contracts executed between IPCL (then DPSCL) and DVC prior to coming into effect of the Electricity Act, 2003 is no longer valid and the same has got to be aligned with the provisions of the Electricity Act, 2003 and on this issue she cited – a) Supreme Court order in Appeal No. 155 of 2010 (para 21) and b) no. 34 of 2013 (para 9), c) Case no. 323 (para 14), d) case no. 511 (para 36);

d) She also raised an issue regarding trading of power by DVC.

15.0 Sri Pradip Tarafdar, Ld. Advocate for DVC argued, inter-alia, that –

a) As per definition of consumer under section 2(15), IPCL is not barred from purchasing power from DVC in consumer mode although IPCL may be a licensee;

b) IPCL did not raise any objection when such objections were invited from the stakeholders while dealing with this tariff petition by the WBERC and therefore, once it is decided, such objection at a much later stage is not maintainable;

c) DVC offered IPCL several options in July, 2012 to choose a mode through which they liked to draw power but IPCL did not respond;

d) Smt. Anushree Bardhan, Ld. Legal Counsel of DVC stated that –

i) Railways draws power both as a consumer and as a licensee and therefore IPCL has no bar to follow the same practice;

ii) IPCL does not adhere to any scheduling of power; nor do they pay for UI charges as are required when a licensee draws power from a generating company and therefore, IPCL has to pay retail tariff as a consumer;

iii) She referred to para 103 and 104 of the judgement of Hon’ble APTEL (1677) and para 33 of Supreme Court decision (281) which entail that such determination of tariff will have to be done by CERC and not by WBERC if
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IPCL is to be treated as a licensee and not a consumer.

16.0 Upon hearing both the sides, the Commission directed DVC to hand over a copy of their submission to IPCL who in turn will submit written arguments to the Commission by 25th February, 2019 with a copy to DVC. DVC will separately furnish a) total generation of DVC, b) state wise apportionment of generation, c) state wise availability of power for sale to - i) consumers and ii) others and d) quantum of power for which WBERC determined retail tariff. The next and final hearing will be held on 28th February, 2019 at 12.00 noon.

17.0 IPCL submitted their written notes on their oral submission on 21.02.2019 within the stipulated date i.e., 25.02.2019 as directed by the Commission with a copy to other party, whereas DVC submitted their written submission on 26.02.2019 with a copy to other party and the final hearing was held on 28th February, 2019 as directed by the Commission.

18.0 DVC is their written submission dated 01.03.2019 reiterated their oral arguments and on the specific direction of this Commission given in course of hearing on 21.02.2019 furnished the statement of sale of power of their total generation capacity and submitted data which is in complete variance with the same as was furnished in their tariff petition dated 15.01.2014 for the period 2014 – 2015, 2015 – 2016 and 2016 – 2017 vide Forms 1.9, 1.9(c), 2.1, 3.1 and 3.3 For example, for the year 2014 – 2015, sale to consumers of West Bengal was shown in the tariff petition as 8638.98 MU and sale to different licensees including WBSEDCL was shown separately as 23361 MU. Whereas in the submission dated 01.03.2019, they have shown 8638.98 MU as “power sale to consumers of DVC in the state of West Bengal” with remarks “includes sales to WBSEDCL & IPCL in radial / consumer mode”. This amounts to submission of statement which is quite different from statement submitted in a different occasion. DVC did not furnish any data specifically for IPCL inspite of specific direction given during hearing on 21.02.2019. In their tariff petition also DVC did not mention anything about IPCL.

West Bengal Electricity Regulatory Commission

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OBSERVATIONS OF THE COMMISSION

19.0 The Commission has observed that –

a) The bilateral power purchase agreements between DVC and IPCL for drawal of power by IPCL at different off-take points at radial mode were executed on 30.10.90 and 12.09.95 i.e., prior to enactment of the Electricity Act, 2003 and were not submitted to the Commission for approval.

b) The power purchase arrangement and pricing of such power were made in the agreements in accordance with the provisions of the repealed electricity laws of 1910 and 1948 and also as per the provisions of the DVC Act, 1948.

c) DVC and IPCL made some sets of correspondence in sporadic manner in this regard after a lapse of considerable time, both DVC and IPCL did not act according to the mandate of the Electricity Act, 2003.

d) Neither DVC nor IPCL approached this Commission any time for determination of tariff for supply of power by DVC to IPCL in a radial mode.

e) DVC in their tariff petition submitted on 15.01.2014 at para 4 admitted sale of power to WBSEDCL as a distribution licensee under section 62(1)(a) but did not clearly mention that it sells power to IPCL under section 62(1)(a) or 62(1)(d). Not only that, in the data formats submitted with that tariff petition, no separate break up of sale of power to IPCL as a licensee or as a consumer through radial mode was mentioned. In their petition in annexures 2.1, 3.1 and 3.3 DVC furnished details of annual sales to consumers in West Bengal, sale revenue and proposed tariff structure, but they never mentioned the sale to "bulk consumers" like WBSEDCL and IPCL at high voltage. This Commission accordingly determined tariff for those categories and other consumers as per Tariff Regulations and not for any bulk supply as claimed to have been defined in the agreement between IPCL and DVC. As such the arguments made by DVC in their submission dated 01.03.2019 at para 6 and para 32 is completely in accordance with Rule 8 of the Electricity Rules, 2005 and therefore WBERC did not have any cause of action to
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re-determine the tariff so determined by the CERC as this Commission’s responsibility lies in looking into the matter relating to power purchase agreement to be executed between the generating companies and the distribution licensees and confined its tariff order to retail tariff only as pointed out in their submission dated 01.03.2019 at para 33. But how retail tariff is applicable to a distribution licensee, DVC could not cite any law that enables both DVC and the Commission to enforce.

f) Although the definition of consumer under section 2(15) of the Act and does not exclude inclusion of a long range of receivers of power, it hardly can include a distribution licensee as defined under section 2(17) of the Act. Had it been so, this specific phrase of “distribution licensee” would have occurred under section 2(15) of the Act as well. Therefore, the Commission is constrained to observe that by no extension of logic the status of IPCL as a distribution licensee can be converted into a consumer.

g) DVC stated in their submission dated 01.03.2019 at para – 20 that, as per requirements of ABT mechanism, there is no provisions to enforce i) scheduling of power, ii) applying UI / DSM mechanism and iii) fixing any specific plant from which IPCL would have to draw power instead of drawing power from the pool because such drawal of power is guided by the agreements and therefore the status of IPCL should be treated as a consumer and not a distribution licensee. On this issue, the Commission observes that the status of IPCL as a distribution licensee as conferred by the Electricity Act, 2003 cannot be taken away by virtue of certain other sub-ordinate legislations that too for inaction on the part of the parties. Rather it is the responsibility of both the DVC and the IPCL to align the previous agreements with the provisions of the Electricity Act, 2003 and for that purpose, one of the possible solutions is to execute power purchase agreement between them with the components outlined above and submit the same to this Commission for approval without any further loss of time.

h) DVC stated at para 22 of their above mentioned submission that while WBERC was dealing with their tariff petitions, objections were invited in the public domain.
and neither WBSEDCL nor IPCL raised any objection to that. On the same issue, it is also a fact that when tariff petition of IPCL was being dealt with by this Commission and objections were invited in public domain or even after this Commission passed tariff order for IPCL for the relevant periods and decided the tariff at which IPCL should purchase power from DVC, no objection was received from DVC either. On this issue the Commission observes that the tariff petition filed by DVC did not categorically ask for the tariff to be determined for bulk supply of power to distribution licensees like IPCL which was receiving power from DVC on the strength of several bilateral agreements done earlier. And this gap can be addressed through execution of PPA between the two parties and to be subsequently submitted to this Commission for approval. As per section 64(1) of the Electricity Act, 2003 read with WBERC Regulations, it is the responsibility of the generating company or the distribution licensee to submit petition for determination of tariff and not otherwise.

i) It is noticed that IPCL’s response vide their letter dated 26.07.12 in response to DVC’s letter dated 20.01.2012 asking for revising the agreements was not acted upon rightly and timely by the IPCL in keeping with the current laws and regulations.

j) This Commission did not determine tariff for supply of power in radial mode by the DVC to IPCL as it was not specifically asked for by DVC in their tariff petition. The sale of power to distribution licensees including WBSEDCL was separately shown by DVC over and above what was shown as sale of power to consumers of West Bengal.

ORDER

20.0 On the basis of the observations as elucidated above, the Commission orders that –

a) The retail tariff that this Commission determined on the basis of tariff petitions submitted by DVC for the years 2014 – 2015, 2015 – 2016 and 2016 – 2017 was not determined for the licensees including IPCL and that tariff cannot be charged
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1. Upon them;

b) DVC's sale of power to IPCL on radial mode cannot be treated as sale of power by a generating company to a consumer and both the parties are at liberty to settle the issues as per the provisions of law now in force.

21.0 Thus, the petition of IPCL is disposed of.

22.0 Let a copy of the order be served upon IPCL and DVC.

Sd/-
(DURGADAS GOSWAMI)
MEMBER

DATED: 01.03.2019

(T. K. MUKHERJEE)
SECRETARY

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