ORDER
OF
WEST BENGAL ELECTRICITY REGULATORY COMMISSION
IN THE MATTER OF
CASE NO. OA-273/18-19

IN REGARD TO THE APPLICATION SUBMITTED BY THE WEST BENGAL ELECTRICITY DISTRIBUTION COMPANY LIMITED (WBSEDCL) ON 14.05.2018 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 West Bengal Electricity Distribution Company Limited (WBSEDCL) on 15.05.2018 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.

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 and 2015 – 2016 in respect of West Bengal Electricity Distribution Company Limited (WBSEDCL) on 04.03.2015 determining the price for power purchase from DVC by WBSEDCL. The dispute is stated to have arisen between DVC and WBSEDCL in the context that DVC is billing WBSEDCL at a tariff determined for retail sale to its consumers without giving any cognizance to the status of WBSEDCL as distribution licensees, as a result of which a huge extra amount is becoming liable to be paid to DVC by WBSEDCL.

2.0 In this context, WBSEDCL has filed this petition on 14.05.2018 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 WBSEDCL as a licensee by DVC in respect of 11 off-take points. They have also prayed before the Commission to pass an order to revise the sale bills of DVC for 11 number of radial off-take points since June, 2015 as per the power purchase price approved by the Commission in the order dated 28.09.2015 or any power purchase rate determined by the Commission for such drawal of power through radial off-take points by WBSEDCL from DVC. The petition has been admitted by the Commission and numbered as OA-273/18-19.

3.0 Disputes also arose between DVC and India Power Corporation Limited (IPCL) regarding the price of purchase of power by IPCL from DVC at different radial modes and accordingly, DVC and IPCL made their applications in this regard on 16.11.2015 and 3.11.2015 respectively. A decision of the Commission on their respective petitions was communicated separately to DVC and IPCL vide letters dated...
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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.

5.0 Upon perusal of the above petitions filed by WBSEDCL, and the petitions submitted by DVC and IPCL 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 consumer’s tariff both by WBSEDCL and IPCL, there is huge accumulation of outstanding dues.
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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. of 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, WBSEDCL and IPCL the Commission passed the following directions:

a) DVC, WBSEDCL and IPCL each shall send copies of their petition to other
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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 also vide their submission dated 27.08.2018 referring provisions of Rule 3 of the 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 WBSEDCL, 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., WBSEDCL and IPCL
rescheduling the hearings separately on 21.02.2019 at 14.30 hours and 15.00 hours respectively. Accordingly, the hearing in case no. OA/273/18-19 between WBSEDCL and DVC took place on scheduled date and time when both the parties were present.

13.0 During hearing WBSEDCL submitted that DVC has been raising bill for supply of power to WBSEDCL at the rate of retail tariff determined by the Commission due to the reasons that as per the opinion of DVC, WBSEDCL is a HT consumer to them and not a distribution licensee. According to WBSEDCL, WBSEDCL is a distribution licensee and not a consumer as per the provision specified under paragraph 2(15) of the Electricity Act, 2003 and therefore, WBSEDCL 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, as far as DVC is concerned, WBSEDCL is a consumer and not a distribution licensee since WBSEDCL 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 WBSEDCL long back.

14.0 Sri V. Mukherjee, Ld. Advocate of WBSEDCL stated that –

a) DVC had been raising bills for power drawn by WBSEDCL through 11 off-take points on radial mode, as per generation tariff determined by the CERC till the DVC’s retail tariff for 2014-15 to 2016-17 was determined by this Commission;

b) When this Commission determined tariff for WBSEDCL and the issue of purchasing power from DVC was dealt with, no objection was raised by DVC. That part of the order is clear and it is applicable for DVC as well and para 3.23 of order dated 01.12.2012 is pertinent;

c) WBSEDCL is not a consumer as it does not use such power for its own consumption, and therefore did not raise any issue while WBERC was dealing with retail tariff of DVC;

d) DVC did not file any prayer in his tariff petition as to what should be the tariff for sale of power to WBSEDCL;
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e) WBSEDCL meets USO while DVC does not do it. Even then DVC is trying to charge higher rate upon WBSEDCL only to make things more difficult for WBSEDCL.

15.0 Sri P. K. Tarafdar, Ld. Advocate of DVC emphasized on the arguments put forward by him in the previous day's hearing i.e., i) definition of consumer (2\textsuperscript{nd} part) under section 2(15), ii) why not WBSEDCL raised any objection while their tariff petition was placed on public domain seeking objection, etc. and therefore he argued that WBSEDCL is liable to pay tariff as per retail tariff determined by WBERC.

16.0 Smt. Anushree Bardhan, Ld. Advocate supplemented him while pointing out that – i) supply of power is associated with scheduling on day-ahead basis plus source i.e., from which power station it is to be supplied has to be earmarked when such sale is accomplished between a generating company and a license. But WBSEDCL does not have any reference to those important parameters, rather they get power from DVC's pool of power and therefore they are not entitled to pay for power purchased from DVC as per generation tariff determined by the CERC. She referred to an order dated 10.05.2010 of Hon'ble APTEL in Appeal No. 146 of 2009 & IA Nos. 332, 333, 334, 340, 341, 342, 349, 350, 351, 352, 355, 359, 360 of 2009 & 264 of 2009.

17.0 Upon hearing both WBSEDCL and DVC, the Commission directed both the DVC and the WBSEDCL to submit written arguments to the Commission by 27\textsuperscript{th} February, 2019 with a copy to other side. DVC will have to 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. Based on these the Commission will pass order. No further hearing will be held in this regard, unless it is extremely required.

18.0 WBSEDCL and DVC submitted their written notes on their oral submission on 21.02.2019 within the stipulated date i.e., 27\textsuperscript{th} February, 2019 as directed by the Commission with a copy to other party.

19.0 DVC made further submission on 01.03.2019 in respect of other similar case no. OA-272/18-19 and most of the arguments are found to have already been submitted...
OBSERVATIONS OF THE COMMISSION

20.0 The Commission has observed that –

a) The bilateral power purchase agreements executed between DVC and WBSEDCL for drawal of power by WBSEDCL at different off-take points at radial mode were mostly executed in 1993, 1997 and 2001 i.e., prior to enactment of the Electricity Act, 2003 and such agreements executed prior to enactment of the Electricity Act, 2003, however, 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 WBSEDCL made some sets of correspondence in a sporadic manner in this regard after a lapse of considerable time, but both DVC and WBSEDCL did not act according to the mandate of the Electricity Act, 2003.

d) Neither DVC nor WBSEDCL approached this Commission any time for determination of tariff for supply of power by DVC to WBSEDCL 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 WBSEDCL under section 62(1)(d) as well. Not only that, in the data formats submitted with that tariff petition, no separate break up of sale of power to WBSEDCL under different dispensation (i.e., 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 has been claimed to have been defined in the agreement between WBSEDCL and DVC. As
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such the arguments made by DVC in their submission dated 26.02.2019 at para 6 and para 33 is completely in accordance with Rule 8 of the Electricity Rules, 2005 and therefore WBERC did not have any cause of action to redetermine 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 26.02.2019 at para 34. 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 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. Therefore, the Commission is constrained to observe that by no extension of logic the status of WBSEDCL as a distribution licensee can be converted into a consumer.

g) DVC stated in their submission dated 26.02.2019 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 WBSEDCL 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 WBSEDCL should be treated as a consumer and not as a distribution licensee. On this issue, the Commission observes that the status of WBSEDCL 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 WBSEDCL 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 fresh power purchase agreement between them with the components outlined above and submit the same to this Commission without any further loss of time.
h) DVC stated at para 22 and 23 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 WBSEDCL was being dealt with by this Commission and objections were invited in the public domain or even after this Commission passed tariff order for WBSEDCL for the relevant periods and decided the tariff at which WBSEDCL 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 WBSEDCL which was receiving power from DVC on radial mode on the strength of several bilateral agreements done earlier. And this gap can be addressed, inter-alia, through execution of PPA between the two parties and to be subsequently submitted to this Commission for approval; and 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 WBSEDCL’s response to DVC’s letter dated 14.07.2015 asking for revising the agreements should have been acted upon timely and in keeping with the current laws and regulations.

j) DVC has tried to draw reference of CERC’s order on SAIL-BSL with WBSEDCL without mentioning the issues as to how both are comparable on the same platform, and hence it has remotest possible relation with the present issue.

k) DVC sought option from WBSEDCL in their letter dated 1.6.2015 regarding TOD and Non-TOD tariff. The Commission observes, DVC on the one hand says, the tariff has been determined by the Commission, on the other hand asks option from the distribution licensee, which suffers from incongruity.

l) The last but not the least, the averments made by the DVC at para 38 of its submission dated 01.03.2019 in respect of OA-272/18-19 is in complete
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contradiction to the tariff petition submitted on 15.01.2014. This will be evident from an example, say for tariff petition for the year 2014 – 2015. DVC submitted vide forms 1.9, 1.9(c), 2.1, 3.1 and 3.3 –

i) Total generation : 44765 MU

ii) Power earmarked for sale to other licensees : 23361 MU

iii) Power earmarked for sale to consumers of West Bengal: 8638.98 MU

iv) Break-up of sale to other licensees shows sale of Power to WBSEDCL [It stands included as at (ii) above but not included in (iii) above vide form 1.9(c)]

So, WBERC determined retail tariff for DVC for 8638.98 MU for consumer sale in West Bengal only. In other words for the quantum of power as consumed by WBSEDCL as shown at (iv) above, neither DVC submitted prayer for determination of tariff, nor WBERC determined it. Therefore, it is clear that the retail tariff that this Commission determined on the petition of DVC was not applicable for licensees including WBSEDCL. Thus this Commission has no scope to interfere with the price of power being supplied by DVC at radial mode to WBSEDCL at this stage.

m) WBSEDCL in their submission dated 27.02.2019 filed copies of agreement executed with DVC and referred to Hon’ble Supreme Court’s decision reported as 2018 (8) SCC 281. They also submitted written arguments as to why they should be treated by DVC as a distribution licensee and not as a consumer. They also stated the position of non-compliance by DVC as far as obligation under section 43 to supply power is concerned and covered the points mentioned in the oral arguments.

ORDER

21.0 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 WBSEDCL and that tariff

West Bengal Electricity Regulatory Commission

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cannot be charged upon them.

b) DVC's sale of power to WBSEDCL 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;

22.0 Thus, the petition of WBSEDCL is disposed of.

23.0 Let a copy of the order be served upon WBSEDCL and DVC.

Sd/-
(DURGADAS GOSWAMI)
MEMBER

DATED : 01.03.2019

(T. K. MUKHERJEE)
SECRETARY

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