

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 374 OF 2017

Dated : 14th August, 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

NLC India Ltd.

First Floor, No. 8, Mayor Sathyamurthy Road,
FSD, Egmore Complex of Food Corporation of India,
Chetpet, Chennai – 600031
Tamil Nadu, India

...Appellant

Versus

1. Tamil Nadu Electricity Regulatory Commission

Through its Secretary
No. 19-A, Rukmini LakshmiPathySalai
(Marshalls road), Egmore,
Chennai – 600 008

2. Tamil Nadu Generation and Distribution Company Ltd.

Through its Managing Director
NPKRR Maaligai, 144, Anna Salai,
Chennai – 600 002

...Respondents

Counsel for the Appellant(s)

: Shri Venkatesh
Bharath Gangadharan
Ashutosh Kumar Srivastava
Nihal Bhardwaj
Siddharth Nigotia
Shivam Kumar
Kartikay Trivedi
Aashwyn Singh
PunyamBhutani

SuhaelButtan
Siddharth Joshi
Himangi Kapoor
Vineet Kumar
Nikunj Bhatnagar
Aayush Sinha
Harsh Vardhan
Aditya Vardhan Sharma
Anant Singh
Abhishek Nangia
Kunal Veer Chopra
Nehal Jain
Vedant Choudhary
Mohit Gupta for App. 1

Counsel for the Respondent(s) : Sethu Ramalingam for R.1
Anusha Nagarajan for R.2

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Appellant, a Solar Power Generator in the State of Tamil Nadu has come up in appeal against the Comprehensive Tariff Order No. 2 of 2016 passed by the 1st Respondent – Tamil Nadu Electricity Regulatory Commission (referred as “Commission”) on 28th March, 2016 with regards to the solar power.

2. The Appellant M/s NLC India Limited (hereinafter referred as “NLC”) is a Govt. of India undertaking and is engaged in generation and sale of electricity in the State of Tamil Nadu. It has established a 130 MW solar power project at Neyveli in the State. The power project comprises of two units of 65 MW each. It signed the Energy Purchase Agreement (EPA)

dated 15th July, 2016 with the 2nd Respondent – Tamil Nadu Generation and Distribution Company Ltd. (hereinafter “TANGEDCO”) for sale of solar power at the levelized tariff of Rs.5.10 per unit which was applicable for the control period from 1st April, 2016 to 31st March, 2017 as per the impugned comprehensive tariff order dated 28th March, 2016 issued by the Commission.

3. It appears that before the completion of the project, the Appellant approached the Commission on 9th February, 2017 by way of Review Petition No. 2 of 2017 seeking extension of validity of the solar power tariff rate of Rs.5.10 per unit fixed vide the impugned tariff order dated 28th March, 2016 beyond 31st March, 2017. The Commission heard the Review Petition on 24th February, 2017 and ultimately dismissed it vide order dated 25th April, 2017 holding that the Appellant has failed to show that the tariff order dated 28th March, 2016 was made under mistake of fact or under ignorance of material fact or suffers from any error apparent on the face of record.

4. Accordingly, the Appellant has now assailed the said Comprehensive Tariff Order on solar power dated 28th March, 2016 before this Tribunal.

5. Before advertent to the rival contentions of the parties, we find it pertinent to quote Clause 11.6 of the impugned tariff order which refers to the Control Period and Tariff Period. The same is hereunder :-

“11.6. Control Period and Tariff Period.

11.6.1 Regulation 6 of the Power Procurement from New and Renewable Sources of Energy Regulations, 2008 of the Commission specifies,

“The tariff as determined by the Commission shall remain in force for such period as specified by the Commission in such tariff orders and the control period may ordinarily be two years.”

11.6.2 As the Capital cost is volatile in respect of Solar Power Plants, the Commission proposed one year control period in its consultative paper. One stakeholder has requested the Commission to consider the analogy adopted by CERC on applicability of control period for solar PV by allowing the tariff determined for the control period in the order to projects commissioned in the subsequent financial year subject to the condition that PPAs are signed on or before the last day of the year for which generic tariff is determined and the entire capacity covered by the PPAs are commissioned on or before 31st March of the next year. Yet another stakeholder has suggested to adopt a control period of two years. CERC’s approved capital cost for solar PV for the year 2015-16 was Rs.6.0585 Crores per MW and the cost as per the draft order for benchmark capital cost for solar PV is Rs. 5.0132 Crores per MW that accounts for the drop in module prices over the years 2014-15. Market reports suggest that while earlier reduction in prices were due to competitive pricing, the prices are set to reduce further due to adoption of advanced technology and automations in manufacturing. Therefore, the Commission decides to retain the one year control period in this order as proposed in the consultative paper and in consonance with the Commission’s regulations on Power Procurement from New and Renewable Sources of Energy.”

6. Learned Counsel for the Appellant argued that while passing the impugned tariff order, the Commission has failed to appreciate and acknowledge that the gestation period for establishing a solar power project is ordinarily not less than one year, and therefore, the Commission has fallen into grave error in prescribing the control period of the impugned

tariff order as one year only. He would submit that in fact the Commission has, while doing so, dis-regarded Regulation 6 of its own Regulations of 2008 i.e. TNERC (Power Procurement from New and Renewable Sources of Energy) Regulations, 2008 (hereinafter referred to as “**TNERC RE Regulations, 2008**”) which prescribes a control period of two years. He argued that the Commission, in departure from the Regulations of 2008, has retained the control period of only one year in the impugned tariff order on the basis of consultative paper without giving cogent or justifiable reasons for the same. In support of his submissions, he has cited the judgement of Hon’ble Supreme Court in *PTC India v. CERC & Ors. (2010) 4 SCC 603*, to canvass that a tariff order should be in conformity with the Tariff Regulations.

7. It is further pointed out by the Learned Counsel that Clause 11.5 of the impugned tariff order itself provides that the Energy Purchase Agreement (EPA) shall be executed within the reasonable time in line with the order. It is his submission that in case of the Appellant, EPA was executed by the 2nd Respondent- TANGEDCO from 15th July, 2016 i.e. after a period of about 4 months from the date of the impugned tariff order and the delay in execution of the same was solely on account of the 2nd Respondent. He would argue that in case the EPA was executed by the 2nd

Respondent immediately after passing of impugned tariff order by the Commission, the Appellant would have completed the project well before the expiry of the control period on 31st March, 2017 and since the execution of the EPA got delayed for the reasons beyond the control of the Appellant, it was left with the time period of much less than one year for completion of the project.

8. On these submissions, the Appellant is seeking setting aside of the impugned tariff order dated 28th March, 2016 in so far as it retains the control period of one year only in Clause 11.6.2.

9. Learned Counsel for 1st Respondent-Commission submitted that impugned tariff order is a well reasoned order and does not call for any interference of this Tribunal. He argued that the discretion exercised by the Commission in fixing control period as one year is perfectly legal in terms of Regulation 6 of the TNERC-RE-Regulations, 2008. According to the Learned Counsel, there is no justification for extending the control period beyond one year as specified in impugned tariff order. He would further point out that for the control period commencing on 1st April, 2017 another tariff order No. 2 of 2017 dated 28th March, 2017 was issued and, therefore, the Appellant's prayer for extension of the control period of impugned tariff order dated 28th March, 2016 is not practically sustainable. Learned

Counsel further argued that as anticipated by the Commission, the cost of installation of solar power plants came down specifically in the year 2016-17 which is evident from the following table given in the written submissions:-

S. No.	As per Tariff Order of 2016		As per Tariff Order of 2017	
	Capital Cost	Tariff	Capital Cost	Tariff
(i)	Rs. 5.05 Cr/MW	Rs. 5.10 / Unit	Rs. 4.70 Cr/MW	Rs. 4.50/Unit

10. It is further argued by the Learned Counsel that the Appellant has not indicated any legal provision under which the Commission is empowered to extend the control period of tariff order and thus expects the Commission to invoke such powers in the absence of any specific legal provision.

11. We have considered the rival submission of the Learned Counsels and have perused impugned tariff order dated 28th March, 2016 as well as the entire record. We have also gone through the written submissions filed by the Learned Counsels.

12. At the outset, we may note that the Commission has issued Power Procurement from New and Renewable Sources of Energy Regulations, 2008 vide notification dated 8th February, 2008 which contain Clause 6

relating to agreement and control period. Same is relevant for the disposal of the present appeal and is quoted herein below :-

“6. Agreement and Control period

The tariff determined by the commission in the tariff order shall be applicable for the power purchase agreement period of twenty years. The control period may be three years. When the Commission revisits the tariff and allied issues, the revision shall be applicable only to the generator of new and renewable energy sources commissioned after the date of such revised order.”

(Emphasis supplied)

13. Subsequently, these Regulations were amended vide notification dated 24th December, 2008 by way of Power Procurement from New and Renewable Sources of Energy (2nd Amendment) Regulations, 2008. The amendment was specifically with regards to Clause 6 stating that in the 2nd sentence, for the expression “may be three years” the expression “may ordinarily be two years” shall be substituted. Thus the amended clause 6 of these Regulations reads as under :-

“The tariff as determined by the Commission shall remain in force for such period as specified by the Commission in such tariff orders and the control period may ordinarily be two years.”

(Emphasis supplied)

14. A bare reading of the amended Regulations 6 would indicate that the control period of the tariff order was never intended to be two years in all circumstances and for all times to come. It, manifestly, leaves room for discretion to be exercised by the Commission in fixing the control period for a tariff order. It merely specifies that the control period of the tariff order may ordinarily be two years which implies that the control period may in certain cases be less than two years or more than two years as the Commission may deem fit and necessary having regard to the interests of both the power generators as well as consumers. We are unable to accept the submissions of the Appellant's counsels that the word "may" which precedes the expression "ordinarily be two years" in the amended Regulations 6 should be construed as a command and should be taken to really mean "shall" or "must". We are of the opinion that since the Commission was conscious about the fact that several factors including the prevailing cost of setting up a solar power project are to be considered while specifying the control period of a tariff order, it has in its wisdom avoided to use word "shall" in the amended Regulations 6 of 2008 Regulations and instead has used the word "may". Further, the use of another word "ordinarily" after the word may also denotes that it left scope for itself for prescribing a control period of less than or more than two years in a tariff order. Reliance in this regard, placed by the Appellant's counsel

on the judgement of the Hon'ble Supreme Court in *State of U.P. v. Jogendra Singh, 1963 SCC OnLine SC 96* is totally mis-placed for the reason that it does not deal with Regulations or Tariff Orders issued by a Regulatory Commission under the regulatory powers conferred upon it under the Electricity Act, 2003.

15. Hence, we do not find any merit in the arguments put forward on behalf of the Appellant that the impugned tariff order specifying the control period of one year only has been passed by the Commission in dis-regard of Regulations, 2008.

16. It is also fallacious to say that the Commission has not given any cogent and justifiable reasons for specifying the control period of one year only in the impugned tariff order. On this aspect, we may refer to Clause 11.6.2 of the impugned tariff order which has already been quoted in paragraph No. 5 hereinabove. Perusal of this clause would reveal that the Commission has taken note of the suggestions of various stake-holders in this regard and there-upon after discussing the market reports suggesting reduction of module prices due to adoption of advance technology and automations in manufacturing, it decided to retain one year control period only as was proposed in consultative paper. Therefore, it does not lie in the

month of the Appellant contend that the impugned tariff order is bereft of justified reasons.

17. A table related to the capital cost for setting up of a solar power project given by the Commission in the written submissions filed before this Tribunal, which has been quoted in paragraph No. 9 hereinabove, clearly indicates substantial reduction in the cost of installation of solar power projects in the year 2017. This lends credence to the decision of the Commission in reducing control period of one year only in the impugned tariff order.

18. We may also note that as per the contentions of the Appellant, the completion of its project at Neyveli got delayed only for the reason that the EPA was executed by the 2nd Respondent on 15th July, 2016 (not immediately after issuance of the impugned tariff order as provided in Clause 11.5 thereof) which did not provide a complete one year to Appellant for completion of the project. On this aspect, we may note that Unit I of the Appellant's power project in question was commissioned on 24th August, 2017 and its Unit II was commissioned on 31st August, 2017. Even if one year is reckoned from the date of execution of the PPA i.e. 15th July, 2016, then also the Appellant did not achieve the commissioning of the project within that year. It is evident that the Appellant was not in a

position to complete both the units of the project within one year for reasons attributable to it and this appeal is only a desperate attempt on its behalf to avoid the consequences of not commissioning the project before 31st March, 2017 i.e. within the control period of the impugned tariff order.

19. As pointed out by the Learned Counsel for the Commission, the period w.e.f. 1st April, 2017 is covered by subsequent tariff order No. 2 of 2017 dated 21st March, 2017 and, therefore, the extension of the control period of the impugned tariff order beyond 31st March, 2017 would be practically impossible and would create unnecessary confusion.

20. In view of the above discussion, we do not find any legal infirmity in the impugned tariff order. The Appeal is devoid of any merit and is hereby dismissed.

Pronounced in the open court on this 14th day of August, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

Js