

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 26 of 2018 &
IA NO. 131 OF 2018

Dated: 28th February, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

Tata Power Delhi Distribution Limited

Through its authorized signatory
NDPL House, Hudson Lines,
Kingsway Camp
New Delhi-110 009

.... Appellant

Versus

1. NTPC Limited

Through its Chairman
NTPC Bhawan, SCOPE Complex,
Institutional Area, Lodhi Road,
New Delhi-110 003

.... Respondent No.1

2. Central Electricity Regulatory Commission

Through its Secretary
3rd& 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi- 110001

.... Respondent No.2

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
Mr. Rahul Kinra
Mr. Aditya Singh

Counsel for the Respondent(s) : Mr. M.G. Ramachandran, Sr. Adv.
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Arvind Kumar Dubey for R-1

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. The relevant Tariff Regulations – Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2014 (hereinafter referred to as “*Tariff Regulations 2014*”) – in so far as they govern the obligation of the procurer of electricity to pay to the generating company for the supply received do not define or specify the “*due date*” for such payment. The Regulations do make provision for incentive for timely payment, the rebate admissible being subject to gradual decrease over the period specified also specifying surcharge leviable for late payment. As is the usual practice in the power industry, the Power Purchase Agreements (PPAs) contain stipulation, *inter-alia*, for Letter of Credit (LC), the terms and conditions settled by the parties indicating the event on which such LC can be encashed. It is the contention of the Appellant (*Distribution Licensee - Procurer*) that the period specified in the Regulations for rebate to be availed by payment of the bill for supply of electricity should also be treated as the period within which such payment can be legitimately insisted upon, the end of the said period being “*due date*” prior to which the LC cannot be invoked. The PPA which was entered upon between the parties herein carries a stipulation that the payment of the periodic bill (raised on

month-to-month basis) is to be made by the last bank working day of the month in which it is raised, described as the “*due date*”. It is also the contention of the Appellant that this stipulation (as to *due date*) runs contrary to the Tariff Regulations providing for the incentive (rebate) for timely payment (within 30 days), and the liability for late payment surcharge (*LPSC*) and, consequently, the PPA will have to be enforced only after being aligned and brought in line with letter and spirit of the Regulations.

2. The Central Electricity Regulatory Commission (hereinafter referred to variously as “*CERC*” or “*Central Commission*” or “*Commission*”) has rejected the above noted contentions of the appellant holding to the contrary by its decision dated 27.11.2017 in Petition No. 132/MP/2017, it being the order under challenge by this appeal.

3. The appellant is a joint venture between Tata Power Company Limited (*TPCL*) and Delhi Power Company Limited (*DPCL*), the latter, holding 49% equity, being a company wholly owned by the Government of NCT of Delhi (*NCT of Delhi*). It is a distribution Licensee (*DISCOM*) in terms of the Delhi Electricity Reforms Act, 2000 read with Section 14 of the Electricity Act, 2003 and undertakes distribution and retail supply of electricity in the North and North-West Circles of the NCT of Delhi, such business having been taken over from the successor(s) of erstwhile

Delhi Vidyut Board (*DVB*). The first respondent, on the other hand, is a generating company within the meaning of Section 2(28) and 79(1)(a) of the Electricity Act, 2003. The responsibility of bulk procurement and bulk supply of power in the NCT of Delhi was initially entrusted to Delhi Transco Limited (*DTL*) with effect from 01.07.2002 and it continued to discharge the responsibility in such behalf till 31.03.2007 from which date the Delhi Electricity Regulatory Commission (hereinafter referred to as "*DERC*") re-assigned the existing PPAs from DTL to the Discoms operating in NCT of Delhi as per their respective load profile. Pursuant to Order dated 31.03.2007 of the DERC, a consolidated PPA was executed on 08.05.2008 between the predecessor-in-interest of the Appellant – North Delhi Power Limited (*NDPL*) – and the respondent Generating Company (*GENCO*). It is common case of both sides that the contractual relationship between the parties herein is governed by the said PPA, the Appellant having taken over from NDPL.

4. Some of the terms and conditions of the PPA dated 08.05.2008 need to be noted at this stage and they are:

"5. TARIFF

5.1 Terms and Conditions:

5.1.1 The Tariff for the electricity supplied from the Stations would be as determined by CERC from time to time.

5.1.2 NTPC shall file a petition before CERC for provisional tariff determination at least four months before the scheduled COD respective unit of the Stations (for all Stations which are yet to be declared on commercial operation). However, in case the tariff is not

determined by CERC prior to the commencement of commercial operation of the respective unit of the Station, the parties agree that NTPC shall charge the adhoc tariff based on petition filed before CERC on provisional basis, subject to appropriate adjustment along with interest @ 15% per annum as and when the provisional tariff is determined by CERC.

5.2 *Sale of Infirm Power:*

Sale of Infirm power, i.e., electricity prior to commercial operation of the unit, will be as per guidelines of CERC applicable from time to time.

5.3 *Taxes, Levies, Duties, Royalty, Cess etc.:*

5.3.1 *Tax on Income:*

Tax on the income derived from generation of electricity by the NTPC shall be computed as an expense and shall be recovered from the Beneficiary(ies). Billing and recovery of income tax shall be as per regulations of CERC.

5.3.2 *Other Taxes, Levies, Duties, Royalty, Cess, etc.:*

Statutory taxes, levies, duties, royalty, cess or any other kind of imposition(s) imposed/charged by any Government (Central/State) and/or any other local bodies/authorities on generation of electricity including auxiliary consumption or any other type of consumption including water, environment protection, sale or on supply of power/electricity and/or in respect of any of its installations associated with the Station payable by NTPC to the authorities concerned shall be borne and additionally paid by the Beneficiary(ies) to NTPC as per CERC Regulations/Orders.

5.3.3 *Any expenses on account of change in law as approved by CERC would be recovered through tariff.*

6.0 PAYMENT MECHANISM:

6.1 *Payment Method and Due Date of Payment etc.*

6.1.1 *NTPC would normally raise bills for the monthly power supplies by the 5th day of the following month as per the Regional Energy Accounts (REA) issued by the Northern Regional Power Committee (NRPC) or any other competent authority in accordance with tariff orders issued by CERC, NDPL shall make payment against the bills so raised by the last bank working day of the calendar month in which the bill is raised (hereinafter referred as to the "Due Date").*

6.1.2 *In case NDPL fails to make the payment by the Due Date, NTPC shall have the right to realize payment through the Letter of Credit, as described in this Agreement.*

6.2 *Letter of Credit:*

6.2.1 *NDPL shall provide to NTPC, unconditional, revolving and irrevocable letter(s) of credit ("LC"), which shall be drawn in favour of NTPC in accordance with this Agreement. The LC shall be provided*

from Scheduled Bank(s) in a format acceptable to NTPC. Notwithstanding, anything to the contrary stated above, the LC would revolve every month and the amount negotiated under the LC would be reinstated to its original value upon funding of the prior withdrawal under LC, either directly by NDPL or through the Escrow arrangement.

6.2.2 The Letter of Credit should be made operative within forty five (45) days from the Effective Date.

6.2.3 NDPL shall cause the Bank(s) issuing the LC to initiate to NTPC in writing, regarding establishing of such LC. All expenses including opening, maintenance, and negotiation etc., related to LC shall be borne by NDPL.

6.2.4 The Letter(s) of Credit shall have a minimum term of twelve (12) months and shall cover 105% of one month's average bill amount based on the preceding twelve months' billing. The amount for the LC requirement would be reviewed once every six (6) months at the beginning of January and July based on 105% of the average monthly bill amount for the preceding 12 months. The LC amount shall be accordingly increased or decreased with effect from not later than 1st of April and 1st of October of the year.

6.2.5 Further, the LC amount so renewed every six months shall also include charges at 105% of one month's average billing for anticipated power supplies to NDPL from NTPC's new unit(s)/stations expected to commence during the next six months, at normative operational levels as per CERC and for any additional allocations made or being made to NDPL from NTPC's existing units/stations.

6.2.6 NDPL shall ensure that LC remains valid for all times during the entire validity of this Agreement and shall renew the same at least 30 (thirty) days before the expiry of its term, each time.

6.2.7 On each negotiation of Letter of Credit, the LC would be replenished by NDPL to the level required as per this Agreement by not later than seven days of such drawal and NDPL shall confirm the same to NTPC duly supported by the Banker's certificate to this effect.

6.2.8 If the Letter of Credit is not maintained or the same is not replenished after drawal made there from by NDPL within a period of seven days from the date of such drawal, the Escrow arrangement shall come into operation in the manner specified in the Default Escrow Agreement signed separately between the parties.

6.3 Payment Security Mechanism

6.3.1 NDPL shall secure the payment obligations of NDPL with respect to the electricity supplied by NTPC by entering into an Agreement to Hypothecate cum Deed of Hypothecation with NTPC and thereby hypothecate the Receivables equivalent to the LC amount in favour of NTPC to create a first floating charge on the Receivables ranking pari-passu only with (i) other electricity generators and transmitters under agreements or memorandum of understandings

executed by them with NDPL/DTL/GoNCTD for supply/transmission of electricity to NDPL before the Effective Date, and (ii) working capital and term lenders extending fund and non fund based facilities to NDPL . The list of such generators of electricity along with the names and installed capacity of stations is at Annexure-II hereto. The charges aforesaid shall, however, be subservient to the charge in favour of the bank(s) issuing letter(s) of credit in favour of NTPC and other suppliers/transmitters of energy listed at said Annexure-II hereto.

6.3.2 NTPC agrees that so long as the amounts becoming due from NDPL to NTPC under this Agreement are paid as described above and LC remains valid, NDPL shall be entitled to utilize the Receivables in such manner as NDPL may consider appropriate and NTPC agrees to maintain its first pari-passu charge over the receivables as a floating charge as set forth in Clause 6.3.1 hereinabove.

6.3.3 In the event of default on the part of NDPL to pay the amounts due to NTPC by the Due Date or non availability/non-re-instatement of LC within 7 days of the drawal of LC, the aforesaid floating charge shall crystallize into a fixed charge automatically, without any further act, deed or thing to be done by NDPL or the bank or NTPC or any other person.

...

6.7 Payment Rebate and Surcharge

Rebate and Surcharge applicable on the payment of bills as per CERC regulations, as amended from time to time, or any other rebate scheme as may be offered by NTPC and agreed to by NDPL shall be applicable to NDPL.

..."

[Emphasis supplied]

5. The issues raised by the Appellant necessitate reference to be made to the Tariff Regulations. It will be of some advantage to see the changes in the Tariff Regulations over the period in as much as the PPA between the parties herein was entered upon in May, 2008.

6. The Tariff Regulations which were in position at the time of coming into force of the PPA were those issued by CERC in 2004. The relevant clauses on the subject of rebate and late payment surcharge in 2004

Regulations would read thus:

“25. Rebate: For payment of bills of capacity charges and energy charges through a letter of credit on presentation a rebate of 2% shall be allowed. If the payments are made by a mode other than through a letter of credit but within a period of one month of presentation of bills by the generating company, a rebate of 1% shall be allowed.

26. Late Payment Surcharge: In case the payment of any bill (other than UI and VAR charges) is delayed by the beneficiary(ies) beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company”

[Emphasis supplied]

7. The Tariff Regulations, 2004 were replaced by Tariff Regulations, 2009 which came into effect from 01.04.2009. The corresponding provisions on the subjects of interest here were slightly modified and read as under:

“34. Rebate: (1) For payment of bills of the generating company and the transmission licensee through letter of credit on presentation, a rebate of 2% shall be allowed.

(2) Where payments are made other than through letter of credit within a period of one month of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed.

35. Late Payment Surcharge: In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary beyond a period of 60 days from the date of billing a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company or the transmission licensee, as the case may be.”

[Emphasis supplied]

8. The above provisions underwent some further change in Tariff Regulations, 2014 which came into effect from 01.04.2014. The

subjects of rebate and late payment surcharge under these latest Regulations were covered thus:

“44. Rebate: (1) For payment of bills of the generating company and the transmission licensee through letter of credit on presentation or through NEFT/RTGS within a period of 2 days of presentation of bills by the generating company or the transmission licensee, a rebate of 2% shall be allowed.

(2) Where payments are made on any day after 2 days and within a period of 30 days of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed.

45. Late Payment Surcharge: In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary of long term transmission customer/DICs as the case may be, beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be.”

[Emphasis supplied]

9. It is clear even from the plain reading of the Tariff Regulations framed by CERC from time-to-time that a procurer of electricity supply is entitled to rebate for prompt payment and is liable to be subjected to surcharge for late payment. The liability to pay LPSC would kick-in after the elapse of 60 days of the billing. The entitlement to rebate, under CERC Regulations, ends with the elapse of 30 days period (referred to in earlier Tariff Regulations as the period of “one month”). Crucially, however, the entitlement to rebate is linked not only to the period within which payment is made but also, and more importantly, the mode of payment. As can be seen from Regulation 25 of 2004 Tariff Regulations

the rebate of 2% was allowed if payment was made through Letter of Credit. Rebate at 1% would still be available if the payment was made through any mode other than that of letter of credit provided it came within one month of presentation of the bill. The changes made in 2009 Regulations in the language of the provision for Rebate (Regulation 34) are of no consequence for the present discussion, previous arrangement having continued.

10. In Tariff Regulations, 2014, however, there was further modification vis-a-vis the rebate of 2% by introduction of other modes of payment, it being “*NEFT/RTGS*.” Noticeably, for rebate of 2% upon payment through LC it continues to be “*on presentation (of the bill)*” but for payment through “*NEFT/RTGS*”, payment “*within a period of two days of presentation of bills*” would also bring in similar rebate. The reduced rate of rebate at 1% continues after elapse of two days but within 30 days of the presentation of bills. As is clear, the mode of payment – through LC or NEFT/RTGS or any other – is irrelevant for the claim to rebate at 1%, the only test to be applied being, under 2014 dispensation, that the payment has been made “*within 30 days*” of the bill being raised and presented.

11. In the context of the controversy which has been brought before us by this appeal, it is also pertinent to refer to the Central Electricity

Regulatory Commission (Regulation of Power Supply) Regulations, 2010 framed by the Central Commission in exercise of its powers under Section 178 of Electricity Act, 2003, the said Regulations (hereafter referred to as “*Power Supply Regulations*”) were notified and came into effect from 28.09.2010. Regulation 3 sets out the scope and applicability of *Power Supply Regulations* as under:

“3. Scope and Applicability : These Regulations shall be applicable to the generating station and the transmission system where there is a specific provision in the Agreement between the Beneficiaries and Generating Company or the Transmission Licensee as the case may be, for regulation of power supply in case of non-payment of outstanding dues or, non-maintenance of Letter of Credit or any other agreed Payment Security Mechanism.”

[Emphasis supplied]

12. A broad reading of the *Power Supply Regulations* makes it clear that Letter of Credit is subject matter of agreement between the parties.

13. The expression “*outstanding dues*” is defined in the above Regulations as under:

“2. Definitions

(1).....

*(h) ‘**Outstanding Dues**’ means the dues of a generating company or of a transmission licensee, which remains unpaid beyond a period of 60 days from the date of service of the bill on the beneficiaries;*

...”

[Emphasis supplied]

14. The period of 60 days, it needs to be recalled, coincides with the maximum period of 60 days under the *Tariff Regulations* where after the

liability to pay late payment surcharge arises. The appellant, being the procurer and beneficiary would subscribe, if it incurs any liability on account of non-payment, to the definition of “*Defaulting Entity*” in terms of Regulation which reads thus:

“2. *Definitions*

(1)

(e) ‘**Defaulting Entity**’ means a beneficiary having outstanding dues or a generating company or a transmission licensee or not maintaining the required Letter of Credit or any other agreed Payment Security Mechanism in terms of the Agreement;

...”

[Emphasis supplied]

15. What is, however, of utmost interest here is the definition of the expression “*Default Trigger Date*”, reading thus:

“2. *Definitions*

(1)

(f) ‘**Default Trigger Date**’ means the date from which the default in payment or default in maintaining Letter of Credit or any other agreed Payment Security Mechanism has been established;

Explanation I:- In case of non payment of dues, this date shall be the next working day after completion of the 60 days period from the date of service of the bill by the generating company or the transmission licensee as the case may be.

Explanation II:- In case of non maintenance of the required Letter of Credit or any other agreed Payment Security Mechanism, the Default Trigger Date shall be third working day after the payment security mechanism, as per the Agreement, ceases to exist.

...”

[Emphasis supplied]

16. The consequences arising out of non-payment by a beneficiary (procurer) till the “*default trigger date*” are what are set out in the detailed provisions of *Power Supply Regulations*, such consequences including reduction in the “*drawal schedule*” after, of course, following the procedure prescribed, coupled with sale of the power rendered surplus to any other person.

17. There is no dispute as to the fact that ever since the supply (sale) and purchase of electricity under the PPA in question began, the procurer – the Appellant (and its predecessors) – has been maintaining a Letter of Credit drawn in favour of the GENCO, secured from a scheduled bank for the requisite minimum term covering 105% of monthly average bill amount calculated and revised periodically. It is also not in dispute that the bills issued for monthly supply are normally raised by the fifth of the following month, calculated in terms of original energy accounts, there being always a possibility of some delay in the event of lack of promptitude in furnishing of the energy accounts. The amount equivalent to the monthly bill would be realized by the GENCO through the LC and the procurer would replenish the LC in due course, the entitlement to rebate being taken care of at the time of realization through LC. The payments in the past concededly have been made by the last bank working day of the calendar month in which the bill is

raised, this being in accord with Clause 6.1.1 of the PPA as quoted earlier. In this context, we may also take note of the fact that the invoices which have been issued from time to time (on monthly basis) would invariably show the "*last date of payment*" as the date of the 30th day following the date of issuance of the invoice (i.e. 08.06.2016 being shown as the "*last date of payment*" in the invoice dated 09.05.2016).

18. The dispute, however, arose with the energy bills for the various units raised for the month of May, 2017. The payments against the invoices separately issued on 08.05.2017 (last date of payment reflected as 07.06.2017) for different units of NTPC for supply of electricity to the procurer in the month of April, 2017 were not tendered by the last banking day of the month of May, 2017. This led to default notices being issued by the GENCO on 31.05.2017 requesting the payment to be made "*within 24 hours*" of the receipt of the default notice with caution that in case of default, GENCO "*shall be entitled to obtain payment through invocation of LC*". The Appellant (Discom/Beneficiary) responded by identical replies dated 01.06.2017 in answer to the said default notices taking the position that there was no default, the default notices being in violation of Regulations 44 and 45 of Tariff Regulations, 2014 and contrary to the invoices which reflected the last date of payment as the date at the end of the 30 days period referring at the

same time to the entitlement to rebate if the payments were made within 30 days and the liability towards late payment surcharge occurring only after 60 days. Relying upon the decision of the Hon'ble Supreme Court in *PTC India Limited vs Central Electricity Regulatory Commission: 2010 (4) SCC 603* holding that “a regulation overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation”, the Appellant called upon the GENCO to withdraw the default notices asserting that the same were “pre-mature and illegal”, it (the procurer) being entitled to make payment within 60 days under the Regulations.

19. The GENCO, however, would not agree and responded accordingly by its communication dated 03.06.2017 reserving the right to take appropriate action in case of continued default.

20. It may be added here that the GENCO invoked the LC after expiry of the period indicated in the thirteen default notices and realized the payment, concededly at the same time affording to the procurer (the Appellant) 1% rebate in terms of Regulation 44. The proposal of the procurer by communication for amendment of the PPA along lines of its contentions was also not agreed to by the GENCO.

21. The Appellant took the dispute to the Central Commission (by Petition No. 132/MP/2017) challenging the legality, validity and propriety of the thirteen default notices and rejection of the proposal for amendment of the PPA. It failed to convince the Central Commission as to merits of its contentions and consequently the petition was dismissed. The Commission declined any relief by its final Order dated 27.11.2017 which is impugned before us by the appeal at hand.

22. Simply put, the argument of the Appellant is that the payment mechanism contained in Clause 6.0 of the PPA contravenes Regulations 44 and 45 of Tariff Regulations, 2014 since rebate can be legitimately claimed even if the payment were made on the 30th day of the raising of the energy bill. It is the submission of the Appellant that the amendment to the provision for rebate by the modified provision of the Tariff Regulations, 2014 reflects the intent to treat the 30th day of the issuance of the bill to be the “*due date*”, prior to which the seller of electricity cannot invoke the LC. It is also the submission of the Appellant that this is also how the parties understood the arrangement, the 30th day having been reflected in the invoices to be the “*due date*” showing the payment could not be insisted upon anterior thereto, not the least through LC. It is argued that merely because payments have been made by the last bank working day of the month cannot be treated as a past conduct

which binds the parties or changes the understanding under the PPA. The Appellant submits that the Central Commission has not appreciated the contention appropriately and the decision is erroneous.

23. Though, the first Respondent (GENCO) has invoked the doctrine of past practice referring in the context to the decision of the Hon'ble Supreme Court in the case of *N. Suresh Nathan and Anr vs Union of India and Ors (1992) Supp (1) SCC 584*, we need not labour on the applicability of the said doctrine to the present dispute in view of the opinion that we express on the prime contentions vis-a-vis the letter and spirit of Tariff Regulations in the discussion that follows hereinafter.

24. At the same time, however, we must observe that mention of the 30th day after raising of the invoice as the “*due date*” is bound to create confusion. If the PPA refers to the last banking day of the month in which invoice is issued as the “*due date*”, there is no reason why the monthly invoice should reflect something else. The invoices issued by the GENCO do need suitable modification in such regard.

25. We have undertaken a comparison of the Tariff Regulations, 2014 with corresponding Regulations prevalent during relevant period, with particular focus on the provision for “*rebate*”. As has been observed by us in that context, and we reiterate the same here, the admissibility of rebate at the higher rate of 2% is dependent not only on the period

within which the payment is tendered and made but also, and equally importantly, on the mode of such payment. For such higher rate of rebate, the payment has to be through LC or NEFT or RTGS. No doubt, rebate to the extent of 1% is still available if the payment is made two days after presentation of the bill but before elapse of 30 days. But then, that is an incentive given for timely payment.

26. In above context, we must bear in mind that LC is an arrangement under PPA, obligation of the beneficiary (procurer) in such behalf being limited to 105% of the average monthly bill on the basis of data of preceding six months. In this scenario, the question as to whether LC was conceived in the PPA as payment security mechanism or payment mechanism assumes significance.

27. We agree with the learned counsel for the respondent GENCO that the expression "*due date*" has been consciously omitted from being defined in the Regulations for the reason it is essentially a matter of contract between the parties. It has been pointed out that a suggestion for defining "*due date of payment*" in the Tariff Regulations was rejected by the Central Commission, this being expressed in para 5.35.2 of the Statement of Objects and Reasons (SOR) of Tariff Regulations, 2014 which read thus:-

“5.35.2 Some stakeholders suggested that the definition of “Controllable factors” and “Un controllable factors” may be added. One beneficiary suggested that “Due date of Payment” should be defined in the Regulations because the generating companies sometimes consider due date as two days from the bill date and some time as 30 days from the bill date. The Commission clarifies that the term “controllable” and “un-controllable are self-explanatory and the factors covered under these terms have been enumerated in Regulation 12 and hence there is no need to specifically include a definition for the same. As regards definition of “Due date of payment”, it is clarified that “Due date of payment” has not been used in Regulation 44 and Regulation 45 which deals with the mechanism for the rebate and late payment surcharge and therefore specific definition for “Due date of payment” is not required.”

28. In our view, the reasons could have been more explicit and clear. Be that it may, in the present proceedings we do not wish to express any opinion either way on the justification given by the Commission for declining to specify by Regulations “*due date of payment*”.

29. The Power Supply Regulations, 2010, which we have noted earlier, reflect the consequences that follow in the event of default in payment even after the elapse of 60 days of the presentation of the bill to the beneficiary. The said Regulations prescribe the 60th day to be the “*default trigger date*”. Till such default occurs, it leading to consequences such as disruption of supply or denial of the drawal, penal consequences do not follow. This is the reason why even the Tariff Regulations stipulate late payment surcharge to be levied only after elapse of 60 days.

30. Rebate, by the very nature of the concept, is granted for early payment. It is a matter of incentive that is offered. Under the Tariff Regulations, such rebate is regulated so as to be admissible up to a maximum period of 30 days of the presentation of the bill. The Regulations, however, do not restrict the provision for rebate, as a matter of incentive, to what is stipulated therein. This is the reason why Clause 6.7 of the PPA, which we have quoted earlier, speaks not only of the CERC Regulations being applicable to rebate and surcharge but also rebate scheme that may be offered by the generator and as may be agreed to by the procurer.

31. Upon perusal of the various terms of the PPA, relevant ones of which have been quoted earlier, we are of the firm view that the arrangement of LC was conceived not as a payment security mechanism but essentially as a payment mechanism. The LC, it bears repetition to say, is for an amount equivalent to 105% of one month's average bill amount. It is to be unconditional and revolving. Its invocation is dependent on the expiry of the "*due date*" (Clause 6.1.1). It has no connection whatsoever with the entitlement to rebate and, for that matter, liability to pay surcharge.

32. The payment security mechanism may be brought about by the parties, in the Power Purchase contract, in several possible ways

including hypothecation of receivables, escrow account, mortgage of collaterals, corporate guarantee of the holding company, through Reserve Bank of India in case of Government Company, etc. As can be seen from Clause 6.3 of the PPA, quoted earlier, some of these modes have been incorporated and specifically captioned as the “*payment security mechanism*”. As is also clear from the sequence, the provision for payment security mechanism follows the arrangement for payment in context of which LC has been provided for.

33. There is no conflict between the provisions in PPA regarding due date or invocation of the LC by GENCO, on one hand, and the Tariff Regulations on the subject of rebate or levy of surcharge for late payment, on the other. Therefore, reliance on the decision of Hon’ble Supreme Court in *PTC* (supra) is misplaced. As said before, the provision for rebate is to incentivise early payment. In contrast, the levy of late payment surcharge is to discourage neglect on the part of the procurer. But, such surcharge comes in only after 60 days’ period has lapsed which coincides with other consequences on account of default trigger date kicking in under the *Power Supply Regulations*.

34. Similar contentions as urged by the Appellant in the present proceedings had been raised by another distribution licensee operating in Delhi viz BSES Rajdhani Power Limited. The said dispute had come

up to this Tribunal in Appeal Nos. 82 and 90 of 2012 titled *BSES Rajdhani Power Limited vs Central Electricity Regulatory Commission & Anr.* which was decided by judgment dated 24.01.2013. We agree with the submissions of the learned counsel for the respondent GENCO that the following observations in the said judgment dated 24.01.2013 also answer the contentions of the appellant:-

"22. The third issue is regarding credit period.

23. According to Ld. Counsel for the Appellants, the 2009 Tariff Regulations provide for 60 days of receivable as working capital. The Regulations also mandate for 60 day credit period before levy of late payment surcharge. NTPC's tariff for all plants is determined by the Central Commission on a 60 day credit period under the Tariff Regulations. Therefore, the stance of NTPC to limit the credit period of the Appellants to 24 days and invoke the LC any time is discrimination against them and their consumers as compared to the 60 day period extended to other similarly placed Distribution Licensees. Accordingly, the existing PPAs between the Appellants and the Respondents have to be aligned and amended consistent with the applicable tariff Regulations.

24. According to Ld. Counsel for the Respondent no.2, the Appellants have been attempting to approach the Delhi Commission and the Central Commission alternatively for seeking orders so as not to pay the legitimate dues accruing to them.

...

26. The findings of the Central Commission are summarized as under:--

- i) Letter of Credit has been allowed in the 2009 Tariff Regulations as a matter of incentive for early payment and not as a payment security mechanism. However, the parties have mutually agreed and provided for a payment security mechanism in the PPA in order to protect their commercial interest.*
- ii) PPA entered into between the Petitioners and NTPC provides for payment by the Petitioners by the last working day of the calendar month in which the bill is*

raised which is termed as the “Due Date”. In case the petitioners failed to make payment by the Due Date, NTPC shall have right to realize payment through LC.

- iii) The Tariff Regulations have a provision for rebate if payment is made through LC on presentation and within one month and levy of surcharge in case the payment is delayed beyond a period of 60 days from the date of billing. In order to bring parity with the provision of rebate and late payment surcharge, the Regulations provide for including 60 days of receivable in calculation of interest on working capital.*
- iv) According to the Power Supply Regulations, the default is triggered on the date from which default for payment or default in maintaining LC or any other agreed Payment Security Mechanism occurs. The default for payment is triggered on non-payment after completion of 60 days period from the date of service of bill and the default for LC or any other Payment Security Mechanism (‘PSM’) is triggered on third working day after the PSM ceases to exist.*
- v) 2009 Tariff Regulations do not have provision dealing with maintenance and operation of Letter of Credit as Payment Security Mechanism. Therefore, the Petitioners and NTPC may negotiate and agree on the terms and conditions of LC, maintenance and operation of LC, etc., and include the same in the PPA.*

27. In view of the detailed discussion made by the Central Commission, we agree with the findings of the Central Commission. The Regulations do not have a provision dealing with maintenance and operation of Letter of Credit as payment of Security Mechanism. The parties have mutually agreed and provided terms and conditions of maintaining Payment Security Mechanism in the PPA in order to protect their commercial interest. The Appellants have entered into the PPA and have been maintaining Letter of Credit according to the provision of the PPA. It is now not open for the Appellants to question the provision regarding invoking of Letter of Credit by NTPC as per the PPA having pursued the same since entering into the PPA on 5.6.2008 with NTPC. Therefore, we do not incline to interfere with the findings of the Central Commission.”

35. For the foregoing reasons, on the facts and in the circumstances, we find no merit in the appeal. Hence, the instant appeal, being Appeal No. 26 of 2018, and pending applications, if any, are dismissed

PRONOUNCED IN THE OPEN COURT ON THIS 28TH DAY OF FEBRUARY, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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