ORDER

OF

WEST BENGAL ELECTRICITY REGULATORY COMMISSION

IN THE MATTER OF

(CASE NO. B-11/23)

SHOW CAUSE NOTICE DATED 11TH FEBRUARY, 2021 ISSUED BY THE COMMISSION ON INDIA POWER CORPORATION LIMITED (IPCL) SEEKING REASONS AS TO WHY APPROPRIATE PROCEEDINGS WILL NOT BE TAKEN AGAINST IPCL UNDER THE ELECTRICITY ACT, 2003 FOR CHARGING HIGHER OFF-PEAK TARIFF THAN THOSE DETERMINED BY THE COMMISSION.

PRESENT:
SRI SUTIRTHA BHATTACHARYA, CHAIRPERSON
SRI PULAK KUMAR TEWARI, MEMBER

DATE: 22.07.2022

FACTS IN BRIEF

1.0 The Commission, during the month of November, 2020, noticed that India Power Corporation Limited (IPCL), a distribution licensee operating in the area of Asansol-Raniganj belt in the district of Paschim Barddhaman, has been charging different tariff from different consumers falling under the same category (viz., Industries (50 KVA & above), Industries (below 50 KVA), Industries (33 KV), Industries (132 KVA & above), as determined in the tariff schedule by the Commission in MYT order dated 21st July, 2016 read with the review order dated 17th February, 2017 in respect of IPCL. Different tariffs for different consumers (within same category) have been charged by way of allowing differential discount / rebate arbitrarily on the respective tariff schedule, against which no sanction was obtained by IPCL from the Commission.

2.0 The Commission observed that the practice, as aforesaid, adopted by IPCL is in contravention to section 45 (4) of the Electricity Act, 2003. Accordingly, the Commission vide letter dated 1st December 2020, asked IPCL to furnish electricity tariff charged by them from the consumers in their licensed area, indicating deviations, if any, from the relevant Tariff Order / Regulations, with explanations.

3.0 IPCL, vide their letter dated 5th December 2020 submitted, inter alia, that the tariff being charged by IPCL from its consumers do not exceed the tariff determined under the Retail Supply Tariff ("RST") Orders issued by Hon'ble Commission. However, it has also been mentioned in the said letter that they have been charging tariff for the off-peak period for HT Industrial consumers having contract demand above 500 kVA, at a rate higher than those specified in the Tariff Order for IPCL for 2016 – 17.

4.0 Being dissatisfied with the reply, a Show Cause Notice, dated 11th February 2021 was issued on IPCL, as to why appropriate proceedings would not be taken against the

licensee under the Electricity Act, 2003, for charging higher off-peak tariff than that was determined by the Commission in the Tariff Order.

5.0 In reply to Show Cause Notice, IPCL, vide letter dated 2nd March 2021, stated that they have not charged any tariff from its consumers exceeding the consolidated retail supply tariff for respective consumer categories as determined in the respective Tariff Order. IPCL has also submitted that tariff lesser than that of ceiling tariff scheduled for FY 2016 – 17 was charged.

6.0 An opportunity of personal hearing was given to IPCL following the principle of natural justice before proceeding further with the Show Cause Notice.

7.0 IPCL was heard on 26th July, 2021 at 14:30 hour, following which the Commission directed IPCL to submit a written argument along the all relevant data / documents vide Order dated 17.08.2021.

8.0 Accordingly, IPCL submitted their written note of arguments on 31st August 2021. Upon receipt of the written note of argument, a letter dated 22nd September 2021 was sent from this Commission to IPCL for substantiating as to why proceedings under Section 142 of the Electricity Act 2003 shall not be drawn up against them.

9.0 IPCL, vide a letter dated 19th October 2021, denied any wilful contravention to the tariff schedule, on their part so as to attract the provisions of Section 142 of the Act. It has been stated that the competitive pricing has been offered by IPCL to the consumers following the spirit of Section 62 (3) of the Act read with regulation 2.1.1 (v) & 3rd proviso to regulation 2.2.2 of Tariff Regulations 2011. In their letter, IPCL has requested that the Commission to condone such contravention, if any.

10.0 The Commission, being dissatisfied with the reply of IPCL drew proceedings u/s 142 of the Electricity Act, 2003. On initiation of the proceedings under Section 142 of the Electricity Act, 2003, an e-hearing was held at 15:15 hour on 5th May 2022 and upon hearing IPCL, the Commission directed vide order dated 30.05.2022 that IPCL shall submit a written note of arguments along the all relevant data / documents within 10

days from the date of receipt of this order upon receipt of which the Commission shall pass the necessary order.

11.0 In view of the direction given by the Commission in order dated 30.05.2022, IPCL has submitted the written note on arguments vide letter dated 10.06.2022, which, inter-alia, stated as follows:

a) The Respondent has not violated any of the provisions of law, much less the Electricity Act 2003 or rules made there-under in offering rebate to its customers. There is no provision in the 2003 Act to show that grant of rebate is barred or prohibited or made punishable. Section 3(38) of The General Clauses Act, 1897 defines the expression "offence" thus:

> "Offence" shall mean any act or omission made punishable by any law forthe time being in force;".

b) No provision in the Electricity Act, 2003 takes away the right of giving remission or suggests punishment for any such act. What is not prohibited or barred under the Act is permissible and it cannot be said that the Respondent has contravened any of the provisions.

c) The tariff notification also provides that the licensee is entitled to collect the charges in terms of the tariff notifications. No provision of the Electricity code has been pointed out barring grant of rebate.

d) The Standards of Weights and Measures (Packaged Commodities) Rules, 1977 at Rule 3, provides for notifying the maximum price for a commodity in packaged form to be charged to the consumers. The maximum retail price (MRP) has been set out in the package. What is punishable is excess collection of retail price. But there is no bar for a retailer to sell at a price less than the maximum retail price.

e) Drugs (Prices Control) Order, 1979 prescribes that sale for an amount in excess of maximum retail price fixed is punishable under para 21 read with para 18 of the order. In Mohd. Rajab Gujari v. State of J&K reported in 1974 2 sec 190, in respect of a case arising out of Essential Commodities Act 1956 and The Hoarding and Profiteering Prevention Ordinance, the Supreme Court held thus:

"There can be no doubt that when Government regulates the price of a commodity, it begets a tendency in the market to raise the price of the commodity at least to the level of the price fixed by the Government. No person would normally agree, after the notification, to sell or supply milk at a price lower than the one fixed by the Government even though there is no bar to his selling the same at a lower price.

Fixation of the maximum price at which an article shall be sold is the controlled rate for the supply of that article within the meaning of the agreement. The fact that sellers are free to sell the article at the price lower than the maximum fixed by the Government would not show that there was no control of the commodity. Control of any of the articles contemplated by the parties under the agreement was a control of the price of the articles. An article cannot be controlled under Section 3 of the Hoarding and Profiteering Prevention Ordinance, except by a notification fixing the maximum price for the sale of the articles."

f) The tariff has been followed by IPCL but it has given a rebate to consumers, which will not mean that IPCL has violated the tariff notification or modified the tariff. Giving rebate in commercial parlance is a business promotion activity.

g) Had there been collection of charges, in excess of the tariff, by IPCL, it would have been different and it is per se actionable. However, with respect to converse case, nothing follows as a consequence of such rebate, excepting the financial implications on IPCL the DISCOM.

h) In Ghatge and Patil Concerns' Employees' Union v. Ghatge and Patil (Transport) (P) Ltd., AIR 1968 SC 503(1968) 1 SCR 300, it has been held that a citizen is free to so arrange his business so long as he does not break any regulatory enactment or any other law.

i) It is well settled that in law what is not barred or prohibited is permissible and there can be no action at all for carrying out which is not prohibited by the statutory provisions. On a conspectus reading of the provisions of the Act and precedents it is submitted that there is no illegality or violation or contravention of the provisions in grant of rebate by IPCL.

j) A three Judges Bench of Supreme Court is relied upon in Workmen v. Management of Sijua (Jherriah) Electric Supply Co. Ltd. reported in (1974) 3 sec 473. Though this pronouncement arose out of The Payment of Bonus Act 1965, three judges' bench of Supreme Court had considered not only Schedule III of the Bonus Act but also considered the Sixth Schedule to The Electricity (Supply) Act, 1948 and it has been held that the rebate disbursed has to be deducted before profits could be computed. With reference to Sixth Schedule of Electricity (Supply) Act, there were detailed consideration and it was held that there could be a valid appropriation of such amount and it could be appropriated as a development reserve.

k) In Poona Electric Supply Co. Ltd. v. Commissioner of Income Tax, Bombay, 1 this Court, while dealing with the Income Tax Act, considered the effect of Paragraph II (i) of the Sixth Schedule to the Electricity (Supply) Act and held that the amounts set apart for rebate and for which deduction was claimed were a part of the excess amount paid to the assessee company and reserved for being returned to the consumers. They did not form part of the assessee's real profits and, therefore, to arrive at the taxable income of the assessee from the business under Section 10(1) of the Income Tax Act, the said amounts had to be deducted from its total income. Even though, this case was decided under

the Income Tax Act, the provision of the Electricity (Supply) Act which we have interpreted was also interpreted by this Court in that case.

l) In the case in Appeal No.32 of 2005 before the Appellate Tribunal, Reliance Energy Ltd., was alleged to have granted rebate in bills to select consumers. In the said judgment, the Appellate Tribunal held that clause II of Sixth Schedule of the Electricity (Supply) Act, 1948, provides that a licensee could give rebate.

m) Section 62(1)(d) of the Electricity Act, 2003 ("2003 Act") specifies that the State Commission may fix only maximum ceiling of tariff for retail sale of electricity in case of distribution of electricity in the same area by two or more distribution licensees. In the state of West Bengal the Hon'ble Commission has, in fact, fixed the retail supply tariff as the maximum ceiling of tariff for the distribution licensees operating in parallel in the same area of supply, permitting them to charge lesser price than the maximum ceiling of tariff.

n) The Hon'ble WBERC has in its order dated 8-11-2019 in Case No. OA- 309/19-20 expressly allowed the WBSEDCL, at its option, to charge any tariff to any class of consumers in the area of erstwhile DPL within the maximum ceiling in tariff. It can be seen from the said order that "any tariff' can be charged by Discom "to any class of consumers" within the maximum ceiling in tariff. The Hon'ble WBERC has not given any conditionality based on which such lower tariff could be charged by the Discom.

o) From the above, it is clear that under the statute as well as in terms of the judgments of the higher forums, the Discom is entitled in law and regulations of the Commission to charge tariff lower than the tariff as determined by the Commission in the tariff order for the different category of consumers of that Discom. It is subject to the condition that any loss that the Discom may suffer as a result of charging a price lesser than the determined tariff, the Discom will

not be entitled to pass through such loss to the other consumers/larger base of consumers.

p) For the reasons afore-stated and as permitted by the 2011 Regulations, IPCL has agreed to supply electricity at a lesser price than the ceiling tariff to consumers whose contract demand are above 500 kVA. Consumers having contract demand above 500 kVA are connected at different voltage levels, namely 11 kV; 33 kV and 132 kV. IPCL has charged lesser price,as the ceiling price differential amongst consumers on the basis of a) total consumption of electricity during any specified period and b) voltage.

q) Hence, IPCL has - (1) not charged to any consumer, above the ceiling price; and (2) charged a price lesser than the ceiling tariff on the basis of differentiating factors to be applied to different consumers, as expressly permitted under the principles contained in section 62(3) of the 2003 Act.

r) There is no question of creation of any tariff category not authorized by the Hon'ble Commission nor is there any question of change in the tariff determined by the Hon'ble Commission.

s) No consumer, till date, has neither complained of levy of tariff by IPCL in excess of that determined by WBERC, nor has claimed excess recovery. In view thereof, there was no need to issue the present Show Cause Notice which may be discharged solely on this ground alone.

t) Following the law laid down in the judgement of the Hon'ble Supreme Court in the case of MERC vs Reliance Energy Ltd. (2007) 8 SCC 381 *(excerpts reproduced at para 6 of the written argument),* WBERC cannot adjudicate upon issues relating to individual consumers. In case WBERC feels, IPCL is ready to issue a general public notice stating that whoever feels aggrieved by the tariff charged by IPCL, can approach them for redressal of their grievances.

u) The billing issue is covered by the remedy under section 62(6) of the Electricity Act, 2003 which specifies that – "if any licensee recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee." In fact, no consumer, till date, has complained of levy of tariff by IPCL in excess of that determined by the Commission nor has any consumer claimed excess recovery from the IPCL. Simply because the Off-peak rate charged by IPCL is higher than the regulated tariff, that by itself does not constitutes a cause of action justifying the show cause notice.

v) In this context, IPCL has referred a case between MERC and Reliance Energy Ltd. (2007) 8 SCC 381 of Hon'ble Supreme Court wherein the Court, inter-alia, held that "a complete machinery has been provided in Section 42(5) and 42(6) for redressal of grievances of individual consumers". Therefore, the Commission cannot adjudicate upon issues relating to individual consumers. The adjudicatory function of the Commission is limited to the matters prescribed in section 86(1)(f) of the Electricity Act, 2003, as has been held by the Hon'ble Supreme Court in their judgment in the above referred case. However, if the Commission desires, IPCL is ready to issue a general public notice stating that "whoever feels aggrieved by the tariff charged by IIPCL can approach the IPCL for redressal of their grievances and/or approach the Consumer Redressal Forum, Electricity Ombudsman."

w) As per the judgement of the Hon'ble Supreme Court, the dispute, in question, is a billing dispute and the matter should be dealt with by CGRF and not the Commission. Secondly, as per the interpretation of the word 'tariff' by the Hon'ble Supreme Court, there has been no violation on the part of IPCL, since they have recovered charge lesser than the tariff fixed by the Commission and that the said under recovery has not been passed on to any consumer and licensee.

x) In terms of section 62(1)(a) proviso, the Commission does not have any residuary jurisdiction on matters of tariff once ceiling tariff is determined. This is not to mean that as a sector regulator, the Commission will not have an oversight over the activities of distribution licensees. The jurisdiction is now available with the Commission is either under section 60 to present abuse of dominant position or section 142 when there is a case of violation of any provision of the Act, Regulation or directions issued by the Commissions.

y) The under recovery has been entirely absorbed by IPCL and has not been passed on to any licensee or any consumer.

z) IPCL has levied differential tariff on industrial consumers whose contract demand is above 500 KVA. Therefore, IPCL was within the legal remit of section 45(4) read with section 62(3) of the Act.

aa) IPCL believes that the discounting policy, in fact, promotes competition. There are no guidelines or regulations on standard operating procedure issued by the Commission or CERC on how to conduct competition amongst the distribution licensees in the area of supply, in question, in the State of West Bengal.

bb) Viewing this from another angle, even section 62(1)(d) Third Proviso does not contemplate any prior approval or prior intimation to the Commission before a Discom could charge lesser than the maximum ceiling of tariff for retail sale where distribution in the same area is undertaken by multiple distribution licensee. Contra-distinguishing section 62(1)(d) Third Proviso with other sections that contemplate "with prior intimation to the Appropriate Commission" [Ref. Section 51]; or "without prior approval of the Appropriate Commission" [Ref. section 17] and so on and so forth, there is nothing in section 62(1)(d) requiring prior approval of the Hon'ble WBERC.

cc) In fact, such competitive pricing was fixed in consultation with the respective consumer groups. IPCL has received appreciation from various consumers on

reliable supply, quality service and competitive pricing and how such consumers have benefitted from such pricing.

dd) There is no ground for imposition of unfair or discriminatory tariff, which has been determined by the Hon'ble WBERC under section 62(1)(d), solely for the reason that all consumers are mandated in law to pay the tariff determined under section 62(1)(d). The question of discriminatory or unfair price or charge would arise only where a consumer alleges that he has been charged more than the tariff determined under section 62(1)(d). However, IPCL has shown that the tariffs levied in FY 2016-17 for the above categories of consumers resulted in a negative revenue differential. So, the question of discriminatory or unfair pricing or for that matter overcharging does not arise.

ee) If the enterprise grants discounts or rebate enmasse, then the business will itself become unviable especially when it is from RoE and such additional charges in terms of revenue gaps due to discounts given does not get pass through to the consumers in any manner whatsoever.

ff) Notwithstanding the above, section 45 of the 2003 Act states "4. Subject to the provisions of section 62 in fixing charges under this section, a distribution licensee shall not give undue preference to any person or class of persons or discrimination against any person or class of persons".

gg) Accordingly, IPCL has levied differential tariff on industrial consumers whose contract demand is above 500 kVA. Therefore, India power is within the legal remit of section 45(4) read with section 62(3) of the 2003 Act.

hh) In IPCL's understanding, the discounting policy in fact promotes competition in line with - (a) a factor stated in the preamble of the 2003 Act i.e. "promoting competition"; (b) section 23 - "promoting competition"; (c) section 61(c) "factors which would encourage competition", Section 62(d) Proviso "for promoting

competition among distribution licensees, fix only maximum ceiling of tariff for retail supply of electricity", etc.

ii) Moreover, the above quoted Regulations of the Hon'ble WBERC neither provides for - (a) interference into the internal business policy/discounting policy,and (b) granting discounts en masse and not selectively. There is no such provision in the Regulations and hence, no such allegations can be made against IPCL.

jj) The Show-cause Notice does not allege that no rebate or discount on tariff could have been granted by India Power without the prior approval of Hon'ble WBERC. Even if such allegations were made, clause 5.11 of the License Regulations (viz. Activities Prohibited without Prior Approval) do not provide for such a matter.

kk) Further, the Tariff Regulations do not provide that prior approval is required to be obtained by the distribution licensee for granting of rebates or discounts. From another angle, such prior approval if at all required, would be an ante-thesis to the sensitive business policies and discounting policies of an enterprise, in light of the competition in the area of supply where two other licensees also operate viz. Damodar Valley Corporation and WBSEDCL.

ll) IPCL denies any contravention, willful, deliberate or contumacious or otherwise on their part so as to attract the provisions of section 142 of the Act. The competitive pricing has been offered by IPCL to the consumers following the spirit of section 62(3) of the Act read with regulation 2.1.1(v) and 3rd proviso to regulation 2.2.2 of the Tariff Regulations, 2011.

mm) In view of above, IPCL prayed that the show cause notice in case no. B-11/23 dated 11.02.2021 may kindly be discharged.

12.0 In the meantime, IPCL submitted an additional submission dated 11th July, 2022 from which it is revealed that the breach of off-peak ceiling rates for 11 kV & 33 kV

consumers were purely unintentional & despite such deviation, the electricity charges under competitive prices was much lower than overall ceiling rate as approved in the Tariff Order for 2016 – 17. It has also been stated that post issuance of Tariff Orders for 2017 – 18 & 2018 – 19 & 2019 – 20, all consumers have been regularized under the approved Tariff Schedule as applicable. IPCL has prayed before the Hon'ble Commission to acknowledge & consider their submission with the assurance that proper care shall be taken to avoid any deviation in future.

OBSERVATIONS OF THE COMMISSION

13.0 IPCL has been charging tariff for the off-peak period for HT Industrial consumers having contract demand above 500 kVA, at a rate higher than that specified in the Tariff Order for 2016 – 17 in respect of IPCL, although tariff charged for peak & normal period are less than that specified in the Tariff Order for 2016 – 17. The Commission observes that IPCL could not satisfy the Commission on the point that they did not deviate from the order of the Commission. The deviation made by IPCL attracts the provision under section 142 of the Electricity Act. However, in light of the submission dated 11th July 2022 from IPCL, the Commission feels that since the non-compliance, as has been done by IPCL, is a first time violation of its kind, IPCL may be let off with a caution.

ORDER

14.0 The Commission after careful consideration of the foregoing and particularly the submission made by the licensee vide their letter dated 11th July 2022 containing mitigating circumstances, takes a lenient view of the matter but noting fully that there had been violation of the related Tariff Order of the Commission and orders the licensee to scrupulously comply with the terms and conditions of Tariff Order(s) of the

Commission in future. No other penalty is thus inflicted other than caution to avoid recurrence of deviation from the order of the Commission.

15.0 The case is thus disposed off.

16.0 Let a copy of the order be served upon IPCL.

Sd/-
(PULAK KUMAR TEWARI)
MEMBER

Sd/-
(SUTIRTHA BHATTACHARYA)
CHAIRPERSON

DATED: 22.07.2022

Sd/-
SECRETARY