CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram:
1. Dr. Pramod Deo, Chairperson
2. Shri R.Krishnamoorthy, Member
3. Shri V. S. Verma, Member

Petition No. 54/2008
(Suo-motu)

In the matter of
Default in payment of Unscheduled Interchanges (UI) charges for the energy drawn in excess of the drawal schedule by Bihar State Electricity Board.

And in the matter of
1. Bihar State Electricity Board, Patna
2. Shri Swapan Mukherjee, Chairman,
   Bihar State Electricity Board, Patna **...Respondents**

Following were present

1. Shri R. B. Sharma, Advocate, Respondents
2. Shri P.R. Sinha, Resident Engineer, Bihar SEB

ORDER
(Date of Hearing: 26.2.2009)

Factual Matrix

An amount of Rs. 122 crore, as on 24.3.2008, was reported to be outstanding against the first respondent as UI arrears, whereupon the Commission, by order dated 24.3.2008 issued a notice for recovery of outstanding dues with interest. After careful consideration of the reply of the first respondent, the Commission vide its order dated 4.6.2008 directed the first respondent to liquidate the entire outstanding amount, with interest for delayed payment, by paying not less than Rs. 20 crore per month starting from the month

of June 2008, in addition to timely payment of current UI dues. In view of these directions, the entire outstanding amount was to be settled by 31.12.2008. The current UI dues were payable additionally.

2. ERLDC under its letter dated 7/8.1.2009 informed the status of payment of UI charges by the first respondent as under:

Current dues as on 31.10.2008 (Rs.)	Payment made in October 2008 (Rs.)	Current dues as on 28.11.2008 (Rs.)	Payment made In November 2008 (Rs.)	Current dues as on 2.1.2009 (Rs.)	Payment made during December 2008 (Rs.)	Total amount overdue as on 2.1.2009 (Rs.)
16,16,48,920	Nil	22,26,06,842	Nil	30,63,42,842	Nil	30,63,42,842

3. From the report, it followed that the first respondent did not make payments of the principal amount during October, November and December 2008 or of interest, as directed by the Commission's order dated 4.6.2008. Under these circumstances, the first respondent was *prima facie* found to be guilty of non-compliance with the directions of the Commission. Accordingly, by order dated 21.1.2009, proceeding under section 142 of the Electricity Act, 2003 (the Act) was initiated against the first respondent. Simultaneously, show cause notice under section 149 of the Act was issued to the second respondent.

4. The first respondent has filed its reply-affidavit. However, the second respondent has not shown cause.

Defence of Respondents

5. We heard Shri R. B. Sharma, learned counsel for the respondents. He submitted that in response to the earlier notice, the first respondent had prayed for permission for payment of outstanding UI dues of Rs 122 crore, in 10 monthly installments. However, the Commission, without any opportunity of hearing to the first respondent decided that the arrears be liquidated together with interest in monthly installments of not less than Rs 20 crore each, in addition to the direction for current UI dues, if any. He explained that the first respondent had overdrawn from the grid under directions from the State Government of Bihar in view of shortage of generation in the State or inadequate availability of electricity from the central generating stations during 2007-08. He informed that State Government had agreed to meet the expenditure on that account. Learned counsel submitted that the State Government had not released the amount, which resulted in accumulation of arrears. Consequent to the directions by the Commission, learned counsel stated, the first respondent made payments out of its own resources. He explained that money committed by the State Government had not reached the respondents, as a consequence thereof the first respondent was facing liquidity crunch. Learned counsel stated that during December 2008, NTPC raised bills for an amount of approximately Rs 32 crore towards energy charges on account of Fuel Price Adjustment for Farakka STPS, Talcher STPS, and Kahalgaon STPS Stages I and II, which was unprecedented and caused additional financial burden. As a result of this, according to learned counsel, the

planning done by the first respondent had became topsy turvy. He emphasized that over-drawal by the first respondent did not endanger the grid security since it was ensured that over-drawals were within the limits permitted under the Indian Electricity Grid Code (IEGC). Learned counsel requested that the first respondent be not penalized since it was to pay interest for late payment which in itself was commercial penalty. Lastly, learned counsel prayed that the first respondent be allowed to liquidate the entire amount of arrears, exceeding Rs 30 crore as on 2.1.2009, in ten monthly installments.

6. In defence of the second respondent learned counsel argued that whatever be nature of offence under the Act, cognizable or non-cognizable, committed by the second respondent, the Commission can be a complainant, but cannot proceed on its own against the second respondent under section 149 of the Act. In support of his contention, learned counsel placed strong reliance on section 151 of the Act. He explained that no reply was filed by the second respondent because his defence raised purely a legal question in regard to interpretation of the provisions of the Act which could be argued without filing a reply.

Issues

7. In the light of above narrated facts and contentions raised, the following issues arise for our consideration, namely-

(a) Whether the circumstances relied upon by the first respondent justify its exoneration of the charge of contravention of and non-compliance with the Commission's directions dated 4.6.2008?

(b) If not, penalty is imposable on the first respondent?

(c) Whether proceeding can be taken against the second respondent under section 149 of the Act in the face of the objection raised by learned counsel?

(d) In case answer to the preceding question is in the affirmative, whether the second respondent is guilty of contravention of and non-compliance with the Commission's order dated 4.6.2008?

(e) If so, penalty imposable on the second respondent?

(f) Settlement of arrears of UI charges.

Re: Issue (a)

8. There is no denial of the fact that the Commission by its order dated 4.6.2008 had directed the first respondent to liquidate the entire amount of Rs 122 crore outstanding as on 24.3.2008 on account of arrears of UI charges as also the interest for late payment, by paying not less than Rs 20 crore per month, starting from June 2008. There is no doubt that in accordance with above directions, the entire amount of UI arrears was payable by 31.12.2008.There is no denial of the further fact that the first respondent was directed to make timely payment of the current dues. Also, there is no dispute that the first respondent has not made any payment of dues during the months of October, November and

December 2008, which resulted in further accumulation of arrears of more than Rs 30 crore. In addition, the first respondent has not yet settled the interest payable because of its failure to make timely payment of UI charges.

9. IEGC lays down that payment of UI charges deserves highest priority and payments need to be settled within 10 days after release of the statement by the Secretariat of the Regional Power Committee. Interest becomes payable from the 12th day after the issue of such statement. Therefore, the first respondent was clearly violating the provisions of IEGC when notice was initially issued in March 2008. However, on pleadings of the first respondent it was permitted to make payment in installments, even though IEGC does not provide for payment of UI dues in installments. The permission was granted only to relieve the first respondent of the hardship which might have been caused on account of lump sum payment of the entire amount.

10. We are not convinced by the first respondent's argument that delay in settlement of dues for reasons of non-release of the amount promised by the State Government should not be attributed to the former, on the specious ground that electricity was over-drawn from the regional grid under the directions of that Government. Under the IEGC and other regulations, it is only the first respondent who has the responsibility to pay for the electricity drawn, whether as UI or otherwise. There is no provision under the Act under which the State Government can issue directions to the State Electricity Boards or other local

entities to draw in excess of the legitimate allocation. UI cannot be used as a substitute for any of the recognized modes for purchase of power. UI, in fact, is grid discipline mechanism. Over-drawal of electricity cannot be justified for the reason that over-drawing utility is liable to pay UI charges. The first respondent when directed to over-draw from the grid, ought to have advised the State Government appropriately. In our considered view delay in release or non-release of the funds by the State Government cannot be a ground for denial of dues to the entities to whom they lawfully belong. The matters of release of funds by the State Government need to be mutually settled by the first respondent with the State Government. Third parties cannot be made suffer for these reasons. Similarly, the additional energy charges paid by the first respondent to NTPC on account of Fuel Price Adjustment also cannot be the ground for withholding others' dues. The dues for excess drawal of energy by the first respondent pertain to the year 2007-08. The excess energy drawn has already been supplied by the first respondent to the consumers in the State. The first has recovered its charges from the consumers through the tariff approved by the State Electricity Regulatory Commission. For this reason also, there cannot be any justification for detaining the dues of other entities and not paying them despite the specific directions of the Commission. The first respondent ought to have settled UI dues when so directed by the Commission. It has not been done.

11. In the light of above discussion, we hold the first respondent guilty of contravention of and non-compliance with the directions of the Commission as per order dated 4.6.2008.

Re: Issue (b)

12. Section 142 of the Act prescribes the punishment for non-compliance with the directions of the Appropriate Commission. The penalty not exceeding one lakh may be imposed by the Appropriate Commission for contravention of any of its directions, based on a complaint filed before it by any person or by the Appropriate Commission on its own, on being satisfied of such contravention. In case the failure to comply with the directions continues, an additional penalty extending to Rs six thousand is leviable for every day during which the failure continues after contravention of the first such direction.

13. It was strenuously argued by learned counsel that since the first respondent was ready to pay interest on account of delay in making payment; this in itself amounted to penalty. He, therefore, pleaded that penalty could not be imposed on the first respondent. We do not find any force in this argument too. In our view, levy of interest for late payment cannot be termed as penalty for the reason that interest is levied since the other person has been deprived of use of the money which legitimately belongs to him. It cannot partake the character of penalty by any imagination or thought.

14. We have already found that the first respondent has contravened the Commission's directions of the order dated 4.6.2008 inasmuch that the direction was to be complied with by 31.12.2008, but has not been complied. Therefore, the first contravention occurred on 1.1.2009. The failure of the first respondent continues thereafter. Accordingly, the first respondent is liable to pay penalty up to Rs six thousand for each day's failure during subsequent period. Taking into account the totality of circumstances, we levy penalty of Rs one lakh on the first respondent for the substantive contravention of the direction given in the order dated 4.6.2008, dispensing with penalty for the continuous failure after the substantive contravention. The amount of penalty shall be deposited by the first respondent through Demand Draft/Bank Draft drawn in favour of Assistant Secretary, CERC, latest by 31.3.2009.

Re: Issue (c)

15. Learned counsel for the respondents contended that the second respondent could not be proceeded against under section 149 of the Act by virtue of section 151 thereof, which provides that the court shall not take cognizance of an offence punishable under the Act, except upon a complaint made by the Appropriate Commission, among others. According to learned counsel, the Commission cannot itself initiate proceedings under section 149 of the Act against any person. Learned counsel argued that the Commission, on finding that the offence had been committed by a company, could make a complaint before the court against the person referred to in section 149 and

thereafter it was to be left to the court to take cognizance of the offence. Thus, as per learned counsel, the Commission can be in the position of a complainant for the purpose of section 149.

16. In our opinion the argument is too naïve to be accepted. Section 151 appears in Part XIV of the Act, comprising sections 135 to 152 and is titled "Offences and Penalties". It defines various offences and lays down penalties for the offences in sections 135 to 146. Majority of the offences mentioned in this chapter are triable by courts. However, one of the offences in the chapter is the offence of contravention of the directions of the Appropriate Commission. This offence is made punishable under section 142 by the Appropriate Commission itself, that is, by the Commission whose directions have not been complied with. The offence is also punishable under section 146 on trial by the court of criminal jurisdiction. Section 149 is relatable to all offences under Part XIV that precede the section, that is, those listed in sections 135 to 146, section 142 included. Therefore, when a company has been found guilty of contravention of or non-compliance with the directions of the Appropriate Commission and punished under section 142 of the Act, in relation to such company the persons referred to section 149 can be proceeded against by the Appropriate Commission. For this purpose, it is not necessary for the Appropriate Commission to make a complaint before the court having jurisdiction to try offence of non-compliance of its directions. Therefore, we hold that the second respondent can be proceeded

against by the Commission under section 149 of the Act read with section 142 thereof.

Re: Issue (d)

17. Under sub-section (1) of section 149 of the Act, where an offence has been committed by a company, as defined in the explanation under that section, the person who at the time the offence was in charge of the business of the company and was responsible to the company for the conduct of its business, as well as the company, are deemed to be guilty of having committed the offence. Therefore, the person in charge of and responsible for conduct of business of the company, is also liable to be proceeded against and punished accordingly. Proviso to sub-section (1), however, provides that nothing contained in the sub-section shall render the person concerned liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of the offence. Thus, by fiction of law, the person referred to in sub-section (1) of section 149 is guilty in case the company has been found guilty, unless it is proved by such person to the satisfaction of the authority concerned (the court or the Appropriate Commission) that his case falls within the exceptions carved out in the proviso.

18. We have already found the first respondent, a company within the meaning of the term defined in the explanation under section 149, guilty of the offence of contravention of and non-compliance with the Commission's directions

of 4.6.2008. The second respondent has not filed any reply to show that the offence was committed either without his knowledge or he made efforts to prevent commission of offence. Learned counsel who argued the matter from the point of view of jurisdiction of the Commission to proceed against the second respondent by virtue of section 151 of the Act, did not even make a suggestion to that effect. Therefore, we have no hesitation to hold the second respondent guilty of the offence of contravention of and non-compliance with the Commission's specific directions, along with the first respondent.

Re: Issue (e)

19. Having found the second respondent guilty, we feel that penalty of Rs five thousand will be sufficient to meet the ends of justice. Accordingly, we impose that penalty. The amount of penalty shall be collected from the second respondent by the first respondent and deposited latest by 31.3.2009 in the manner already specified in para 11 above.

Re Issue (f)

20. The only question that remains to be decided is regarding the recovery of the outstanding dues. The first respondent has urged that it be permitted to pay the amount in ten monthly installments for the reasons explained by it and taken note of above.

21. UI dues payable by the first respondent are on account of appropriation of share of other constituents of Eastern Region. Therefore, the money payable by the first respondent belongs to them. The constituents whose share was appropriated by the first respondent have already paid the charges to the generating companies which supplied electricity to them. They justifiably expect timely payment of such dues to alleviate the hardship being caused to them. The respondents themselves did not approach the Commission of their own to defer payment of outstanding dues. It is only in response to the Commission's notice that such a request has been made. Against this background, we are not convinced by the suggestion made by learned counsel. Therefore, the question of prolonging payment does not arise. Also, imposition of penalty for the past offence does not absolve the respondents of their liability to comply with the directions in future. Therefore, we direct that the principal amount of arrears shall be paid by the respondents latest by 15.4.2009. Thereafter, Member-Secretary, Eastern Regional Power Committee shall, by 25.4.2009, intimate the respondents of the amount of interest payable by them. The respondent shall pay the amount so intimated by the Member-Secretary latest by 15.5.2009.

Conclusion

22. To conclude, we hold the respondents guilty of the offence of contravention of and non-compliance with the directions of the Commission and impose penalty of Rs one lakh on the first respondent and penalty of Rs five thousand on the second respondent, payable by 31.3.2009, through Demand

Draft/Bank Draft in the name of Assistant Secretary of the Commission. The principal amount of UI arrears shall be paid by 15.4.2009 and interest thereafter by 15.5.2009.

23. We direct the officer-in-charge, Eastern Regional Load Despatch Centre to keep the Commission apprised of the progress of payments made by the respondents.

24. We also direct that a copy of this order be sent to the Principal Secretary, Energy Department, Government of Bihar for his information and for appropriate action.

Sd/-	**Sd/-**	**Sd/-**
(V. S. VERMA)	**(R.KRISHNAMOORTHY)**	**(DR. PRAMOD DEO)**
MEMBER	**MEMBER**	**CHAIRPERSON**

New Delhi dated the 15th March 2009