

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Coram: Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member**

**Date of Hearing: 29.12.2011
Date of order : 30.12.2011**

Petition No. 177/2011 with IA 25/2011

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009

And in the matter of

BSES Rajdhani Power Limited, New Delhi Petitioner
Vs	
1. NTPC Limited, New Delhi	
2. NHPC Limited, New Delhi	
3. Power Grid Corporation of India Ltd, Gurgoan Respondents

Petition No. 179/2011 with IA 26/2011

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009

And in the matter of

BSES Yamuna Power Limited, New Delhi Petitioner
Vs	
1. NTPC Limited, New Delhi	
2. NHPC Limited, New Delhi	
Power Grid Corporation of India Ltd, Gurgoan	... Respondents

The following were present:

1. Shri Amit Kapur, Advocate, BRPL & BYPL
2. Shri Anupam Verma, Advocate, BRPL & BYPL
3. Shri Dushyant Manocha, Advocate, BRPL & BYPL
4. Shri Aashish Gupta, Advocate, BRPL & BYPL
5. Shri V.P. Singh, Advocate, BRPL & BYPL
6. Ms. Tarunima Vijra, Advocate BRPL & BYPL
7. Ms. Deepeika Kalia, Advocate, BRPL & BYPL
8. Shri Nikhil Sharma, Advocate, BRPL & BYPL
9. Shri Sanjay Srivastav, BRPL
10. Shri Gopal K. Saxena, BRPL
11. Shri Haridas Maity, BYPL
12. Dr. Meenu Mishra, BYPL
13. Shri C.K. Mondol, NTPC,
14. Shri Rohit Chhabra, NTPC,
15. Shri S. Saran, NTPC
16. Shri Rakesh Prasad, PGCIL

ORDER

The petitioners, BSES Rajdhani Power Limited and BSES Yamuna Power Limited, had filed the above petitions praying for the following reliefs:

- (a) *Pass an order granting a moratorium period of six months to the Petitioner before the payment schedule of the Petitioner commences;*
- (b) *Pass an order granting the Petitioner the permission to pay the arrears of the Respondents in six equal monthly instalments along with applicable interest;*
- (c) *Grant ex-parte and interim orders in terms of prayer (a) and (b) above;*
- (d) *Pass an further order(s) which the Hon'ble Commission may deem fit"*

2. During the hearing of the petitions on 13.12.2011, the learned counsel for the petitioners had sought certain additional reliefs in view of the developments including the regulation notice issued by NTPC for regulating

the power supply to BRPL and BYPL. Since, the reliefs sought were outside the scope of the petitions, we had directed the petitioners to amend the petitions to incorporate the additional reliefs. Accordingly, the petitioners have filed the amended petitions on 23.12.2011 vide IA nos. 25/2011 and 26/2011. The IAs are allowed and accordingly, the petitions stand amended as per the amended petitions enclosed with the IAs.

3. The petitioners have made the following prayers in the amended petitions:

"(a) Declare that provisional bills raised by NTPC and PGCIL for supply since 1.4.2009 are not in terms of Regulation 5 (3) & (4) of the 2009 Tariff Regulations, with consequential directions for:-

(i) Withdrawing all supplementary invoices raised by NTPC and PGCIL with retrospective revision for supplies since 1.4.2009 and

(ii) Declare charging of Interest on such arrears since 1.4.2009 as bad in law.

(b) Direct NTPC to set off the amounts already recovered towards interest in excess of the amount permitted under the Electricity Act, 2003 along-with the Interest thereon from the date of illegal recovery till repayment at the rate prescribed under Section 62(6) of the said Act.

(c) In the alternative and without prejudice should this Hon'ble Commission hold that the provisional tariff revised in terms of Provisional Tariff Orders dated July to August 2011 can be applied with retrospective effect since 1.4.2009, the same may be done while exercising its discretion to relax under Regulation 5(3) of the 2009 Tariff Regulations and to put in place a viable amortization schedule factoring in a moratorium period of nine months for recovery of any legitimate claims of the Respondents towards arrears in tariff factoring in the regulated paying capacity of the Petitioner including FPA, PPCA and other measure allowed.

(d) Exercise its discretion under Regulation 5(3) of the 2009 Tariff Regulations to put in place a viable amortization schedule factoring in a moratorium period of nine months for recovery of any legitimate claims of NHPC towards arrears in tariff on account of Final Tariff Orders issued by this Hon'ble Commission, factoring in the regulated paying capacity of the Petitioner.

(e) Pass any other order(s) which this Hon'ble Commission deems fit in the fact and circumstances of the present case."

4. During the hearing of the petitions, the learned counsel for the petitioners submitted that respondent NTPC has now held out an imminent threat of regulation of power supply as indicated in its communication dated 24.12.2011 seeking immediate payment of outstanding dues as on 31.12.2011 amounting to ₹428 crore and establishing of consolidated Letter of Credit (LC) with a validity of one year failing which the regulation of power supply would commence from the midnight of 31.12.2011. The learned counsel further submitted that the actions of NTPC are unlawful for the following reasons:

(a) NTPC and PGCIL are entitled to start billing prospectively on the revised rates from the date of the respective provisional tariff orders and such bills will be subject to adjustment after the final tariff is determined by the Commission under the 2009 Regulations.

(b) The Act does not permit retrospective revision of tariff. This position has been settled by the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal for Electricity in a number of judgements.

(c) The demand raised by NTPC and PGCIL is not in consonance with Regulation 5(3) of the 2009 Regulations which requires that the provisional billing for the past period must be based on the past tariff till approval of final tariff under 2009 Regulations in such manner that the

refund of over recovery or recovery of shortfall shall be made after final tariff has been approved.

(d) In the event it is held that NTPC and PGCIL can implement the provisionally revised tariff with retrospective effect since 1.4.2009, the same must be implemented with bearable amortization schedule in view of the financial crisis and cash flow problems faced by the petitioners arising out of the absence of cost reflective tariff having not been given effect to by the learned State Commission.

(e) Even prior to issue of the provisional tariff orders, NTPC had claimed additional capacity charges beyond the CERC approved tariff in its bills for 2009-10. The petitioners have disputed the claims for additional capacity charges being beyond the tariff applicable in terms of Regulation 5(3) of 2009 Regulations and have deducted the additional capacity charges from the bills under intimation to NTPC.

5. The learned counsel further submitted that NTPC has recently sought immediate payment from the petitioner of the outstanding dues and to establish a consolidated Letter of Credit with a validity of one year by 31.12.2011 failing which the regulation of power will commence from the midnight of 31.12.2011. The petitioners responded to the notice of NTPC by stating that the learned counsel appearing for and on behalf of NTPC had submitted on 12.12.2011 before the DERC to defer the implementation of the

regulation of power supply for a month w.e.f. 7.12.2011. The petitioners also requested NTPC to withdraw and keep in abeyance the regulation notice to enable the petitioner to resolve the financial crisis with the help of its promoters and lenders. However, NTPC in its reply dated 27.12.2011 has categorically stated that the power supply to the areas of the petitioners would be regulated from the midnight of 31.12.2011. The learned counsel further submitted that NTPC by its letter dated 28.12.2011 had written to the Eastern Regional Load Despatch Centre and the Northern Regional Load Despatch Centre to prepare an implementation plan so as to initiate regulation of power supply to BRPL and BYPL.

6. The representative of NTPC submitted that the generating company has been claiming the tariff strictly in accordance with Regulation 5(4) of the 2009 Regulations and the orders of the Commission including the order dated 26.8.2011 in Petition No. 175/2011 (*Suo motu*). He submitted that the petitions are not maintainable. The representative of NTPC further clarified that the additional capacity charges were being charged in lieu of the income tax recovery as the provisional billing of tariff as on 31.3.2009 was being done in accordance with the 2004 Tariff Regulations prior to issue of provisional tariff orders. After the issue of provisional tariff orders in accordance with Regulation 5(4) of the 2009 Regulations, the additional capacity charges have been reconciled and presently, no billing has been done on this account. He further submitted that the petitioners are neither making payment of current

dues nor maintaining the LCs which has forced NTPC to resort to regulation of power supply.

7. The representative of PGCIL submitted that it is billing the petitioners and other DICs in accordance with the regulations and orders of the Commission. He submitted that though the Commission has allowed payment of arrears in six monthly instalments, even a single instalment has not been received from the petitioners. He further submitted that PGCIL would also resort to regulation of power supply to the petitioners.

8. The learned counsel for the petitioners reiterated that Clauses 3 and 4 of Regulation 5 of the 2009 Regulations provides for adjustment of arrears after the determination of final tariff and therefore, the respondents do not have a case in law to claim the arrears based on the provisional tariff orders. In reply to query of the Commission as to what measure should be in the best interest of the consumers, the learned counsel for the petitioners submitted that section 61(d) of the Act provides for balancing the interests of the consumers with recovery of the cost of electricity in a reasonable manner. Since the petitioners are in serious financial crisis, appropriate relief is required to be granted by the Commission to save the petitioner companies from sinking. In reply to another query of the Commission as to whether the petitioners are paying their current bills in accordance with the provisional tariff orders, the learned counsel for the petitioners replied in the affirmative

and further clarified that the petitioners have paid more than what is due from them if the bills are raised strictly as per the regulations. The learned counsel also submitted that NTPC requires the petitioners to open consolidated LCs for all the generating stations, which is not permissible under the CERC (Regulation of power supply) Regulations, 2010. The learned counsel submitted that the petitioners are prepared to open the plant-wise LCs as required under the regulations if acceptable to NTPC.

9. The learned counsel for the petitioner further submitted that the petitioners are in the process of arranging the finances and are required to file before DERC on 2.1.2012 their financing plan for liquidation of the arrears. NTPC is a party to the proceedings before DERC and the learned counsel for NTPC has given assurance not to resort to regulation of power supply till 7.1.2012. The learned counsel further submitted that under the circumstances, the petitioners have a prima facie case for grant of interim relief in the form of deferment of regulation of power supply. He further submitted that apart from affecting the consumers of Delhi, regulation of power supply would create impediments for the petitioners to raise finances from financial institutions, which will not be in the interest of the respondents.

10. We have heard the submissions of the parties. Keeping in view the complexities involved in the matter, we direct that the petitions be listed for

further hearing on 5.1.2012. In the meanwhile, the parties are directed to submit the following information, on affidavit, by 3.1.2012:

(A) NTPC to furnish:

- (i) Tariff i.e. Capacity Charge and the Income tax as on 31.3.2009 of each of the stations in which BSES Yamuna and/or BSES Rajdhani are the beneficiaries.
- (ii) Details of tariff (station-wise) billed from 1.4.2009 to November,2011 under following heads:-
 - (a) Tariff as on 31.3.2009 from 1.4.2009 up to the date of provisional tariff order;
 - (b) Arrears billed from 1.4.2009 up to the date of provisional tariff order ;
 - (c) Interest billed on amount of arrears billed from 1.4.2009 up to the date of provisional tariff order;
 - (d) Provisional tariff billed from the date of provisional tariff order up to November,2011

(B) Both NTPC and the Petitioners to submit:

- (i) Amounts paid by BRPL and BYPL separately
- (ii) Amounts recovered through Letter of Credit from BRPL and BYPL.
- (iii) Amounts outstanding as on 31.12.2011 with month-wise dues and amounts paid and the arrears outstanding.

(C) Information as per (A) and (B) above, shall be submitted by PGCIL and NHPC and by the petitioner in respect of PGCIL and NHPC.

11. As regards the prayer for interim relief made by the petitioners, we are of the view that till the matter is heard and a view on the issues raised in the

petition is taken by us, there is a requirement to maintain status quo with regard to supply of power to the petitioners. Accordingly, we direct the respondents not to resort to the regulation of power supply till 7.1.2012. We also make it clear that the petitioners shall pay the current charges as per Regulation 5(4) of the 2009 Regulations and the provisional tariff orders issued thereunder.

12. The matter shall be listed for hearing on 5.1.2012. A copy of this order shall be endorsed to concerned Regional Load Despatch Centres.

Sd/-
(M. DEENA DAYALAN)
MEMBER

Sd/-
(V.S.VERMA)
MEMBER

Sd/-
(S.JAYARAMAN)
MEMBER

Sd/-
(DR.PRAMOD DEO)
CHAIRPERSON