

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 119/MP/2012

Coram:

**Dr. Pramod Deo, Chairperson
Shri V.S Verma, Member
Shri M. Deena Dayalan, Member**

**Date of Hearing: 3.5.2012
Date of Order : 11.9.2012**

In the matter of

Petition under the first proviso of Regulation 8(7) of the CERC (Grant of Connectivity, Long Term Access and Medium-Term Open Access in Inter-State Transmission and Related Matters), Regulations 2009 'as amended vide CERC Notification No. L-1/(3)/2009-CERC dated 21st March, 2012.

And

in the matter of

Everest Power Private Limited, Shimla
Vs

..... Petitioner

Northern Regional Load Despatch Centre, New Delhi

.....Respondent

Following were present:

Shri Tarun Johri, Advocate for the petitioner
Shri V.V.Sharma, NRLDC
Ms. Joyti Prasad, NRLDC

ORDER

The petitioner, M/s Everest Power Private Limited (EPPL), a hydroelectric generating company, has filed the present petition seeking clarification regarding the applicability of first proviso of Regulation 8(7) of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium-Term Open Access in Inter-State Transmission and Related Matters), Regulations 2009 as

amended vide notification dated 21.3.2012 to the case of the petitioner and for permission to be allowed to inject infirm power into the regional grid from its generating station for a period of 4 months from the date of second synchronization on 14.4.2012.

2. The facts of the case in brief are that the petitioner has set up a 100 MW hydro electric generating station (hereinafter refer as "Project") in Kullu district of Himachal Pradesh on Build, Own, Operate and Transfer basis. For evacuation of power from the project, the petitioner has obtained connectivity to 400/200 kV Nalagarh sub-station of the Central Transmission Utility(CTU) and has entered into an Agreement with the CTU on 2.6.2011. The petitioner has submitted that after two units of the generating station were synchronized to the grid on 3.8.2011 and 12.8.2011 respectively, the petitioner started injecting infirm power into the grid as Unscheduled Interchange, in accordance with the provisions of Regulation 8(7) of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access) Regulations, 2009 (hereinafter "Connectivity Regulations"). The petitioner has injected a total of 73.03 MUs of infirm power from 3.8.2011 to 1.10.2011 at Chhore sub station, which is the inter connection point on 200 kV ADHPL Nalagarh transmission line. The petitioner has further submitted that various tests required to be carried out for commercial operation of the project, could not be completed due to problems encountered in the civil structures and consequently, the project had to be completely under shut down from 2.10.2011. The petitioner has informed NRLDC about the interruption in testing vide its letter dated 12.9.2011, wherein it has been explained that due to problem of leakage in surge shaft, the rated head required for turbine could not

be achieved and as a result, the required tests could not be completed. The petitioner has submitted that the repair and rectification works are likely to be completed by April 2012 and after carrying out the specified activities prior to the commissioning and the additional tests as required under the terms and conditions of the PPA, the project would be declared under commercial operation by mid-September 2012.

3. The petitioner has submitted that the Connectivity Regulations were amended on 21.3.2012. As per the amended provisions, Regulation 8(7) of the Connectivity Regulations provides that a generating company which has been granted connectivity to the grid shall be allowed to inject infirm power into the grid during testing including full load testing before the COD for a period not exceeding 6 months from the date of first synchronization after obtaining the prior approval of the concerned RLDC. The petitioner has submitted that since the first synchronization of the generating station took place on 3.8.2011, and the generating station remained under testing for about 2 months, as against 6 months specified in the Regulations, the petitioner has sought clarification as to whether amended Regulation 8(7) would retrospectively apply to the case of the petitioner. The petitioner has submitted that in case the Commission decides that the amended Regulation 8(7) has retrospective operation, the petitioner may be granted under second proviso to Regulation 8(7) an extended period of 4 months from the fourth week of April, 2012 to inject of infirm power into the grid and to receive UI charges for the same. The petitioner has submitted that delay in completion of the testing is due to reasons beyond its control and has prayed for permission to

inject infirm power for 4 months starting from April 2012, which would help the petitioner to complete the project successfully.

4. The petitioner has also submitted that in terms of first proviso to amended Regulation 8(7), a person is required to approach the Commission two months before the completion of the period of six months for extension of the period of testing and injection of infirm power beyond 6 months. The same requirement cannot be complied with as the period of six months had already expired before the notification of the second amendment on 21.3.2012.

5. After hearing petitioner and respondent on 17.4.2012, we had directed the petitioner to submit the following information on affidavit:-

- (a) Details establishing that the existing defects are due to geological surprise failure;
- (b) A copy of the PPA; and
- (c) Details of activities/test to be carried out and the time required for completion of tests/action justifying the time of four months from the fourth week of April, 2012 for the date of commercial to occur.

The petitioner has placed the required documents on record, vide its affidavit dated 24.4.2012.

6. The petitioner in IA No.22/2012 filed on 2.5.2012 had sought a direction to the respondent to allow the petitioner to inject the infirm power into the regional grid for the purpose of testing as the project was ready to inject infirm power into the grid after completion of synchronization activities. The respondent was directed through the ROP dated 3.5.2012 to allow the petitioner to inject the infirm power from the generating station into the regional grid for the purpose of testing, subject to the condition that the power injected would be accounted for as UI, but the actual payment would abide by the final outcome of the present petition.

7. The petitioner in its affidavit dated 17.7.2012 has submitted that in consultation with the long-term beneficiary/PTC India Ltd., the project has achieved commercial operation at 00.00 hrs on 12.7.2012 and has started scheduling of power to the long term beneficiary of the project through PTC India Ltd. The petitioner has prayed that ex-facto permission be granted to the petitioner to inject power into the grid and directions be issued to NRLDC to release the UI amount for injection of infirm power.

8. We have considered the submissions of the petitioner. The main issues for consideration are as under:-

(a) Whether Regulation 8(7) of the Connectivity Regulations as amended on 21.3.2012 has retrospective application in that the period of 6 months would count from the date of first synchronization which took place prior to the notification of the amended Connectivity Regulations?

- (b) If so, whether the petitioner can be granted time by the Commission in exercise of special power under the first proviso to Regulation 8(7) of the Connectivity Regulations to inject infirm power.

9. As regards the first issue, we shall consider the provisions of the Connectivity Regulations prior to and after the amendment on 21.3.2012. Clause (7) of Regulation 8 of the Connectivity Regulations, prior to the amendment of 21.3.2012, provides as under:-

“A generating station, including captive generating plant which has been granted connectivity to the grid shall be allowed to undertake testing including full load testing by injecting its infirm power into the grid before being put into commercial operation, even before availing any type of open access, after obtaining permission of the concerned Regional Load Despatch Centre, which shall keep grid security in view while granting such permission. This infirm power from a generating station or a unit thereof, other than those based on non-conventional energy sources, the tariff of which is determined by the Commission, will be governed by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. The power injected into the grid from other generating stations as a result of this testing shall also be charged at UI rates.”

It is observed that the above provision allows a generating station to undertake testing including full load testing by injecting its infirm power into the grid before being put into commercial operation. This clause does not provide any time limit for injection of infirm power into the grid for the purpose of testing. In the absence of any time limit, a generator has the propensity to prolong declaration of its commercial operation as long as it can and inject power into the grid as UI. In order to curb this possibility and to ensure that the generators sell powers by availing any form of access after declaring commercial operation at the earliest, a maximum period of six

months has been introduced through Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access, Medium Term Open Access and related matters)(Second Amendment) Regulations, 2012 (hereinafter "Amendment Regulations") Clause (7) of Regulation 8 of Amendment Regulations is extracted as under :-

"(7) Notwithstanding anything contained in clause(6) of this regulation and any provision with regard to sale of infirm power in the PPA, a unit of a generating station, including a captive generating plant which has been granted connectivity to the grid shall be allowed to inject infirm power into the grid during testing including full load testing before its COD for a period not exceeding six months from the date of first synchronization after obtaining prior permission of the concerned Regional Load Despatch Centre:

Provided that the Commission may allow extension of the period of testing including full load testing, and consequent injection of infirm power by the unit, beyond six months, in exceptional circumstances on an application made by the generating company at least two months in advance of completion of six month period:

Provided further that the concerned Regional Load Despatch Centre while granting such permission shall keep the grid security in view:

Provided also that the onus of proving that the injection of infirm power from the unit(s) of the generating station is for the purpose of testing and commissioning shall lie with the generating company and the respective RLDC shall seek such information on each occasion of injection of power before COD. For this, the generator shall provide RLDC sufficient details of the specific testing and commissioning activity, its duration and intended injection etc."

Provided also that the infirm power so injected shall be treated as Unscheduled Interchange of the unit(s) of the generating station and the generator shall be paid for such injection of infirm power in accordance with the provisions of the Central Electricity Regulatory Commission (Unscheduled Regulations, 2009, as amended from time to time."

10. Thus the Amendment Regulations provides that a generator which has been granted connectivity can inject infirm power into the grid during testing including full load testing for a period of six months from the first date of synchronization with the approval

of the concerned Regional Load Despatch Centre. There is no difficulty if the first date of synchronization falls on a date after the notification of the Amendment Regulations on 21.3.2012. However, in cases where the first date of synchronization has taken place prior to the notification of the Amendment Regulations, the generating station would get less than six months time for injection of power into the grid as UI for the purpose testing including full load testing. If the generating company has not declared the commercial operation and the period of six months has already expired prior to the notification of the Amendment Regulations, then it would be ineligible for injection of infirm power into the grid. Therefore, the question arises whether Amendment Regulations would operate retrospectively. The Hon'ble Supreme Court in *State of M.P. versus Tikamdas* [(1975) 2 SCC 100] has held that the subordinate legislation cannot be given retrospective effect unless specifically so authorized under the parent statute. The relevant observation of the Hon'ble Supreme Court is as under:-

“There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule-making power in the concerned statute expressly or by necessary implication confers power in this behalf.”

The Electricity Act, 2003 does not expressly confer power on the Central Commission to make regulations with retrospective effect. The Amendment Regulations provide that it would come into effect from the date of notification in the Official Gazette. Therefore, the Amendment Regulations would operate prospectively.

11. The case of the petitioner is that the units of the generating station were synchronized with effect from 3.8.2011 and 12.8.2011 respectively. The units injected infirm power during testing for two months i.e. till 1.10.2011. However due to problems

encountered in the civil structure, the project remained completely under shut down. After completion of the rectification and restoration works, the units of the generating station were synchronized to the grid on 5.5.2012 and 9.5.2012 respectively and the infirm power from the units were injected into the grid. After completion of the testing, the petitioner has declared the commercial operation of the project w.e.f. 12.7.2012 in consultation with the PTC India Ltd/Long term beneficiary of the project. The petitioner has placed on record a report on restoration work carried out in the project. On perusal of the documents in record, it is evident that the testing was abandoned w.e.f 2.10.2011 due to problems in the civil structure and testing again started from the first week of May 2012 after rectification and restoration works were complete. If the period of six months is counted from the first synchronization in accordance with the provisions of Clause 8 (7) of the Connectivity Regulations as amended w.e.f. 21.3.2012, the petitioner becomes ineligible for injection of infirm power for the purpose of testing from both units of the project w.e.f. 3.2.2012 and 12.2.2012 respectively. This is not the purpose of the Amendment Regulations to retrospectively take away the rights of the generators to inject infirm power during testing by counting the period of six months from a date prior to the notification of the regulations. Since it is a settled principle of law that the delegated legislation would have prospective application only, there is a requirement to adopt purposive interpretation of the words "six months from the first synchronization" so that the purpose of the regulation is served. It is pertinent to mention that the purpose of specifying a time limit of six months for injection of infirm power was to discourage the generators from delaying declaration of commercial operation of their projects and to encourage sale of power through the different forms of access. The

purpose of the Amendment Regulations would be defeated if a generator is deprived of the facility to inject infirm power during testing because the period of six months from the first synchronization has expired before the notification of Amendment Regulations. In our view, the words "six months from the first synchronization" should be counted from the date of first synchronization or from the date of notification of the Amendment Regulation whichever is later. This will protect the interests of the generators in whose cases first synchronization took place prior to the notification of Amendment Regulations but who could not declare the commercial operation of their projects. In case of the petitioner, the first synchronization took place on 3.8.2011/12.8.2011 and in view of our interpretation above, the petitioner is eligible to inject infirm power into the grid for a period of 6 months from 21.3.2012 i.e. till 21.9.2012. The generating station of the petitioner achieved its commercial operation w.e.f 12.7.2012 which is within the period of 6 months counted from 21.3.2012 and accordingly the petitioner is permitted under Regulation 8 (7) to inject infirm power into the grid for testing till the date of its commercial operation.

12. In view of our decision that the case of the petitioner is covered under Regulation 8 (7) of the Connectivity Regulation as amended, the other prayer of the petitioner for allowing it to inject infirm power for a period of 4 months from the second synchronization has become infructuous.

13. We had directed NRLDC in the Record of Proceeding dated 3.5.2012 to account for the power injected during testing as UI but the actual payment to the petitioner would

be made in terms of the order in the main petition. In view of our decision in the preceding para, we direct NRLDC to release the payment to the petitioner for injection of infirm power under UI from its project, in accordance with the UI rate specified under Clause 2 (f) of the Schedule to the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) (Second Amendment) Regulations, 2012.

Sd/-
(M Deena Dayalan)
Member

sd/-
(V.S. Verma)
Member

sd/-
(Dr. Pramod Deo)
Chairperson