

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 35/MP/2014

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri M. Deena Dayalan, Member

Shri A. K. Singhal, Member

Ms. Neerja Mathur, Member

Date of Hearing: 25.2.2014

Date of order: 13.3.2014

In the matter of

The notice of demand under Section 156 of the Income Tax Act, 1961 received from the Deputy Commissioner of Income Tax, New Delhi and Regulation 21 of the CERC (Power System Development Fund) Regulations, 2010 and Regulations 64 of the CERC (Power Market) Regulations, 2010, for removal of difficulties and under Regulation 14 of the CERC (Measures to relieve Congestion in real time operations) Regulations 2009, Regulation 12 of the CERC (Unscheduled Interchange Charges and related matters) Regulations, 2009 and under Part 7 regulation 4 of CERC (Indian Electricity Grid Code) Regulations 2010 power to relax

And

In the matter of

Power System Operation Corporation Ltd.
B-9, Qutab Institutional Area, Katwaria Sarai
New Delhi-110 016

....Petitioner

Vs.

1. Northern Regional Power Committee
18-A, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110 016

2. Eastern Regional Power Committee
14 Golf Club Road,
Tollygunge, Kolkata-700 033

3. Western Regional Power Committee
F-3, MIDC Area, Marol,
Opp. SEEPZ, Central Road, Andheri (East)
Mumbai-400 093

4. Southern Regional Power Committee
No.29, Race Course Cross Road
Bangalore-560 009

5. North Eastern Regional Power Committee
Meghalaya State Housing Finance
Co-operative Society Ltd. Building,
Nongrim Hils, Shillong-793 003.

6. Secretary, Central Electricity Authority
Sewa Bhawan, R.K.Puram,
New Delhi-110 066

The following were present:

Shri S.K.Sonee, POSOCO
Shri V.K.Agarwal, POSOCO
Ms. Joyti Prasad, POSOCO

ORDER

The representative of the petitioner, Power System Operation Corporation Limited, submitted that in compliance with the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009, Central Electricity Regulatory Commission (Measures to relieve congestion in real Time operation) Regulations, 2009, Central Electricity Regulatory Commission (Power Market) Regulations, 2010 and the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010, NLDC/RLDCs have been maintaining and operating the Regulatory Pool Accounts under the respective regulations and the surpluses from these accounts are transferred to Power System Development Fund account in accordance with the Central Electricity Regulatory Commission (Power System Development Fund) Regulations, 2010 (PSDF Regulations). The representative of the petitioner further submitted that necessary exemptions

have been obtained for PSDF account under Section 12A of the Income Tax Act, 1961.

2. The representative of the petitioner further submitted that on 31.1.2014, the petitioner has been served with a demand notice of about ₹ 879.29 crore by the Income Tax Department (IT Department) for the assessment year 2011-12. In the demand notice, IT Department has considered the surplus in the regulatory pool accounts as income of POSOCO for the six month period from 1.10.2010 to 31.3.2011 and has directed to deposit the same within thirty days from the date of the notice. IT department has further stated in the said notice that if the amount is not paid within the specified period, a simple interest at the rate of 1% for every month or part of a month from the date commencing after end of aforesaid period would be payable in accordance with Section 220 (2) of the Income Tax Act, 1961 failing which POSOCO will be liable to pay penalty.

3. The representative of the petitioner submitted that POSOCO (NLDC/RLDCs) have a limited role in the management and operation of the regulatory pool accounts as the same is governed as per the provisions of the various Regulations and even the utilization of funds from these accounts is also subject to approval by the Central Commission. Since PSDF has been created as a consolidation of the surpluses obtained from the various regulatory pool accounts and PSDF has been exempted from Income Tax under section 12A of the Income Tax Act, 1961, the same exemption also applies to the surpluses arising out of the various regulatory accounts.

4. The representative of the petitioner submitted that in the above background, the present petition has been filed with the following prayers:

"(i) The Hon`ble Commission may declare that the surplus in the Regulatory Pool Accounts is not the income of POSOCO (POWERGRID for the period up to 30.9.2010) and further declare that NLDC/RLDCs are only nodal agency operating and maintaining the Regulatory Pool Account as an agent on behalf of the Hon`ble Commission. The money collected under these functions be considered as a part of income exempted under Section 10 (46) of the Income Tax Act, 1961;

(ii) Without prejudice to the relief prayed above in the event that the petitioner is required to make the payment of ₹ 879.29 crore or any other sum as levied by the Revenue Department on the money collected under regulatory function, the same may be paid from the PSDF;

(iii) The Hon`ble Commission may also consider evolving a comprehensive framework for the removal of the difficulty, by formation of a separate entity with a new PAN number to deal with all the Regulatory Funds already created and to be created in future and settlement thereof, or any other such mechanism as may be considered appropriate in the opinion of the Hon`ble Commission;

(iv) Pass any such order/s that the Hon`ble Commission may deem fit in the circumstances of the case."

5. We have heard the representative of the petitioner. In Prayer (iii) as quoted above, the petitioner has requested for formation of a separate entity with new PAN number to deal with the existing regulatory funds and the regulatory fund that may be created in future. The prayer involves policy issues and needs to be decided in consultation with the concerned entities. Accordingly, we direct issue of notice to the respondents. We also direct issue of notice to the Ministry of Power which has been vested with the responsibility of maintenance and operation of the PSDF funds as part of public account pursuant to the decision of the Union Cabinet. We have dealt with the prayers (i) and (ii) above in order to enable the petitioner to take up

the matter at the appropriate forum for relief from the demand notice received by it from the IT Department.

6. National Load Despatch Centre has been created by the Central Government under section 25 of the Electricity Act, 2003 (the 2003 Act) and is discharging the functions under the 2003 Act, National Load Despatch Centre Rules, 2005 as notified by the Central government and various regulations specified by this Commission in exercise of powers under section 178 of the 2003 Act. Similarly, Regional Load Despatch Centres for the five regions in the country have been created by the Central Government under section 27 of the 2003 Act and have been discharging their functions under section 28 of the 2003 Act and various regulations specified by this Commission. Section 28(4) of the 2003 Act provides that “the Regional Load Despatch Centre may levy and collect such fees and charges from the generating companies or licensees engaged in inter-State transmission of electricity as may be specified by the Central Commission”. The Central Commission in exercise of its power under section 178 read with section 28(4) of the 2003 Act has specified the Central Electricity Regulatory Commission (Fees and Charges of Regional Load Despatch Centres and other related matters) Regulations, 2009 which governs income and expenditure of the National Load Despatch Centre and Regional Load Despatch Centres.

7. NLDC and RLDCs have been assigned the responsibilities to implement the various regulations in discharge of their functions under 2003

Act. Some of the regulations provide for regulatory funds which are generated during the course of enforcement of these regulations. The provisions of these regulations are discussed as under:

(a) Central Electricity Regulatory Commission (Unscheduled Interchange Charges and Related Matters), Regulation, 2009 provides for commercial mechanism in the form of Unscheduled Interchange Charges to maintain grid discipline. Regulation 9(2) provides for the Regional Unscheduled Interchange Pool Account Fund as under:

"(2) All payments on account of Unscheduled Interchange charges including Additional Unscheduled Interchange charges levied under these regulations and interest, if any, received for late payment shall be credited to the Funds called the "Regional Unscheduled Interchange Pool Account Fund" which shall be maintained and operated by the concerned Regional Load Despatch Centers in each Region in accordance with the provisions of these regulations.

Provided that the Commission may by order direct any other entity to operate and maintain the respective Regional Unscheduled Interchange Pool Account Funds."

(b) Central Electricity Regulatory Commission (Unscheduled Interchange Charges and Related Matters), Regulation, 2009 has been repealed by the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2014 and Regional Unscheduled Interchange Pool Account Fund has been rechristened as Regional Deviation Pool Account Fund. Regulation 9 (2) of the said regulations provides as under:

"(2) All payments on account of Charges for Deviation including Additional Charges for Deviation levied under these regulations and interest, if any, received for late payment shall be credited to the funds called the "Regional Deviation Pool Account Fund", which shall be

maintained and operated by the concerned Regional Load Despatch Centre in each region in accordance with provisions of these regulations.

Provided that – (i) the Commission may by order direct any other entity to operate and maintain the respective “Regional Deviation Pool Account Fund”

(c) Regulation 8 of the Central Electricity Regulatory Commission (Measures to Relieve Congestion in Real Time Operation), Regulations, 2009 provides as under:

"8. (1) Each Regional Load Despatch Center shall maintain a separate bank account called “congestion charge account” wherein all money received on account of congestion charge shall be credited. The amount standing to the credit of Congestion Charge Account, if any, shall be transferred to a Fund at Regular Intervals as per the methodology notified by the commission.

(2) Congestion Charge account shall presently be maintained and operated by the Regional Load Despatch Center in the same manner as the account for Unscheduled Charges:

Provided that Congestion Charge account may be maintained by any other entity as the commission may direct by notification from time to time.”

(d) Regulations 33 of the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 provides as under:

"33. Power Exchange Congestion Amount management:

The Power Exchange may be vested with Congestion Amounts arising from the difference in market prices of different regions as a consequence of market splitting.

The Congestion Amount shall be maintained in a separate account by the Power Exchange to be transferred on the next working day to a regulatory fund as may be directed by the Commission.

Provided that until the time the aforesaid fund is created congestion amount shall be transferred to National Load Despatch Centre account and once such a fund is created the NLDC shall transfer the congestion amount in favour of such fund."

(e) Para 11 of Annexure-I of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 provides as under:

“11. RPC Secretariats shall also issue the weekly statement for VAR charges, to all regional entities who have a net drawal/ injection of reactive energy under low/high voltage conditions. These payments shall also have a high priority and the concerned regional entities and other regional entities shall pay the indicated amounts into regional reactive pool account operated by the RLDC within 10 (ten) days of statement issue, provided that the Commission may direct any entity other than RLDC to operate the regional reactive pool account. The regional entities who have to receive the money on account of VAR charges would then be paid out from the regional reactive pool account, within two (2) working days from the receipt of payment in the Reactive pool account.”

8. It is apparent from the above that NLDC/RLDCs have been assigned the functions to maintain various regulatory funds accounts under the authority of the respective regulations. It has been provided in these regulations that the Commission may also designate some other entity to maintain these funds which means that NLDC/RLDCs are managing as the custodian of these funds till some other entity is identified. From the beginning, it has been the intention of the Commission that the funds accruing into the various regulatory accounts shall not form part of the income of NLDC/RLDCs. Subsequently, the surpluses from these funds were transferred to Power System Development Fund created under Central Electricity Regulatory Commission (Power System Development Funds) Regulations, 2010 (PSDF Regulations). Regulation 3 of the PSDF Regulations provides as under:

"3. Constitution of the Fund:

(1) There shall be constituted a fund to be called the "Power System Development Fund" and there shall be credited thereto.-

(a) Congestion charges standing to the credit of the "Congestion Charge Account" after release of amounts payable to Regional Entities

entitled to receive congestion charge along with interest, if any, in accordance with the Central Electricity Regulatory Commission (Measures to relieve congestion in real time operation), Regulations, 2009 as amended from time to time;

- (b) Congestion amount arising from the difference in the market prices of different regions as a consequence of market splitting in power exchanges in accordance with Central Electricity Regulatory Commission (Power Market) Regulations, 2010.
- (c) Unscheduled Interchange charges standing to the credit of the "Unscheduled Interchange Pool Account Fund" after final settlement of claims of Unscheduled Interchange Charges in accordance with the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 as amended from time to time;
- (d) RLDC reactive energy charges standing to the credit of Reactive Energy Charges Accounts;
- (e) such other charges as may be notified by the Commission from time to time:

Provided that amounts representing the sources as specified in sub-clauses (a) to (d) of clause (1) of this regulation and lying in the custody of Central Transmission Utility together with interest earned thereon upto 30th of April, 2010 shall be credited to the Fund.

- (2) The agencies which are authorized to collect Congestion charges, Congestion amount, Unscheduled Interchange charges, Reactive energy charges under the respective regulations and such other charges as may be notified by the Commission from time to time, shall transfer to the credit of the Fund the balance amounts in the charges under sub-clauses (a) to (e) of clause (1) of this regulation on monthly basis or such other basis as deemed fit by the Managing Committee in accordance with Regulation 5.
- (3) Separate account shall be maintained for each fund represented in sub-clauses (a) to (e) of clause (1) of this regulation subject to other terms and conditions as specified in the relevant regulations.

9. Under the regulatory scheme, surplus available in the regulatory accounts maintained in accordance with the provisions of the various regulations mentioned in para 7 above are to be transferred into the PSDF account which shall be operated by the Managing Committee which is an entity distinct from NLDC/RLDCs. The Commission had also intended that

PSDF funds would be operated as a distinct funds and necessary exemptions under the Income Tax for the collection of the funds and interest thereon should be obtained. In this connection, para 1.2 of the Statement of Reasons to the PSDF Regulations is relevant which is extracted as under:

“1.2 The surplus amounts available in various regulatory accounts are meant for utilisation for the purpose as stipulated in the relevant regulations. Presently, accounts are maintained by the RLDCs and shown in their books of accounts. Strictly speaking, these are regulatory funds and as such, do not belong to the RLDCs. In order to deal with such funds independently, maintain proper books of accounts, process the applications for approval of various schemes by the Commission for sanction of grant out of these funds and for keeping track of the progress of the on-going projects financed out of such funds, the Commission considered it necessary to specify separate regulations so that surplus funds available under various account could be brought under the Power System Regulatory Fund and necessary exemptions on the collection of fund and interest earned thereon may be sought under the Income Tax Act, 1961.”

10. After constitution of the Managing Committee and PSDF funds in accordance with PSDF Regulations, Managing Committee has taken necessary steps and obtained exemption from the Income Tax authorities for the PSDF funds under section 12A of the Income Tax Act, 1961. Since PSDF has been exempted under section 12A of the Income Tax Act, 1961, we direct the petitioner to take up the matter with the Income Tax authorities to treat the sources of the PSDF as exempted from Income Tax.

11. The demand notice has been issued by IT Department treating the funds in the regulatory accounts maintained by NLDC/RLDCs before their transfer to the PSDF as income of NLDC/RLDCs. In this connection, it is clarified in the light of the discussion in the preceding paras that the funds accruing in the different regulatory accounts are never intended to be income

of NLDC/RLDCs and the expenditures from these funds are to be made strictly for the purpose specified in the respective regulations after regulatory approval by this Commission. NLDC/RLDCs are mere custodian of these funds till the balance amounts are transferred to the PSDF which has been exempted under section 12A of the Income Tax act, 1961. The petitioner is directed to take up the matter with the competent authorities under the Income Tax Act, 1961 including any legal remedy available for withdrawal or setting aside of the demand notice from IT Department.

12. The petitioner has prayed for a direction that in the event it is required to make payment of Rs.879.29 crore as per the demand notice of the IT Department, it may be allowed to pay the same from PSDF. We are of the view that since as per the decision of Ministry of Finance, monies available in PSDF will be transferred to the Public Account of India and will be maintained and operated by the Monitoring Committee constituted in accordance with the Ministry of Power, Government of India OM 29/9/2010-R&R (Vol. II) dated 10.1.2014, the petitioner is advised to take up the matter with the Monitoring Committee.

13. On the prayer (iii) of the petition, the Commission would like to take a decision after hearing all parties. Accordingly, notices are issued to all respondents and Ministry of Power to file their responses by 25.3.2014. The petitioner is directed to serve copy of the petition on the respondents and Ministry of Power immediately, if not already served.

14. The petition shall be listed for hearing on 17.4.2014.

sd/- (Neerja Mathur) Member	sd/- (A.K.Singhal) Member	sd/- (M Deena Dayalan) Member	sd/- (Gireesh B. Pradhan) Chairperson
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