

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

- 1. Dr Pramod Deo, Chairperson**
- 2. Shri R. Krishnamoorthy, Member**

Petition No.32/2006

In the matter of

Recovery of energy charges for the energy supplied during the period during the period 1.1.2000 to 30.6.2001-adjudication of disputes.

And in the matter of

NTPC Limited, New Delhi

...Petitioner

Vs

1. Uttar Pradesh Power Corporation Ltd, Lucknow
2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd., Jaipur
3. Delhi Power Company Limited, New Delhi
4. Haryana Vidyut Prasaran Nigam Limited, Panchkula
5. Himachal Pradesh State Electricity Board, Shimla
6. Punjab State Electricity Board, Patiala
7. Power Development Deptt., Govt. of Jammu & Kashmir, Srinagar
8. Power Deptt. Union Territory of Chandigarh, Chandigarh
9. Northern Regional Load Despatch Centre, New Delhi
10. Northern Regional Power Committee, New Delhi

....Respondents

The following were present

- (1) Shri. S.N.Goel, NTPC
- (2) Shri. S.Saran, NTPC
- (3) Shri. S.D.Jha, NTPC
- (4) Shri. Atul Pasrija, NTPC
- (5) Shri. Surendra, NTPC
- (6) Shri Ajay Dua, NTPC
- (7) Shri. B.P.Pant, UPPCL
- (8) Shri Sitesh Mukherjee, Advocate, UPPCL
- (9) Shri Vishal Anand, Advocate, UPPCL
- (10) Shri Pradeep Misra, Advocate, DPCL
- (11) Shri C.N.Rai, RRVPNL
- (12) Shri M.K.Tomar, RRVPNL

ORDER
(Date of Hearing: 17.7.2008)

The petitioner, a generating company owned or controlled by the Central Government has filed this petition for adjudication of the dispute arising between the petitioner and the respondents regarding payment of certain part of energy charges for the energy supplied from various thermal generating stations of the petitioner in the Northern Region to the respondents during the period 1.1.2000 to 30.6.2001.

2. The petitioner has submitted that it has been generating and supplying electricity to the respondents from its generating stations situated in the Northern Region. Prior to introduction of the Availability Based Tariff (ABT) in the Northern Region with effect from 1.12.2002 as per the directions of the Commission, the generation and supply of electricity was governed by the tariff orders in force and on the basis of drawal of electricity. The capacity and energy charges were payable based on the drawal basis, i.e. proportionate to the energy drawn by the respective respondents. Though there were discussions between the generating companies and the State Electricity Boards (SEBs) / their successor entities on matters relating to the backing down of the generating stations at high frequency conditions and some decisions were taken by the Northern Regional Electricity Board (NREB) from time to time, there was no equitable mechanism to deal with the implementation of backing down of the generating stations, particularly lack of proper measurement of electricity generated at various State level generating stations, their inability and/or unwillingness to furnish requisite operating details of their generating stations, leading to improper energy accounting with reference to generation during high

frequency. The issue relating to backing down was discussed and deliberated at various NREB meetings but no proper mechanism was developed till the introduction of ABT on 1.12.2002.

3. The petitioner has further submitted that NREB, respondent No.10 herein had envisaged a scheme of incentive and disincentive for curbing high/low frequency operations and a mock exercise was carried out for the month of July 1996. In the said scheme, the measure for deviation with respect to the operating schedules was deviation with respect to tie lines schedules for SEBs and for generating companies the datum was the generation schedules. The result of mock exercise was discussed during 110th NREB meeting held on 12.10.1996. A working group was constituted to give its recommendations on the methodology for scheduling. The petitioner had expressed its strong reservations to the scheme of respondent No.10 and had pleaded that the scheme should include merit order scheduling of all generators, i.e., for Central as well as State sector and backing down should be strictly as per regional merit order. The petitioner further submitted that in the absence of a comprehensive and clear mechanism to deal with the backing down of generating stations subsequent to the scheduling and in the absence of the State level generators being subjected to backing down based on the Merit Order, it was not open to the respondent No.10 to decide that backing down should be only for the central sector generating stations and such decision to back down central sector generating stations alone without regard to Merit Order principles is arbitrary, inequitable, unjustified and unenforceable. Despite the petitioner's protest, the recommendations of the Working Group were considered by the NREB forum and NRLDC, respondent No. 9 herein was asked to formulate a scheduling procedure.

The revised scheduling procedure devised by respondent No.9 was agreed in the NREB forum with the exception of the petitioner and respondent No.9 proceeded to implement the decision of NREB with effect from 1.1.2000. Consequently, the respondent beneficiaries of the Northern Region deducted payment of Rs. 31.8 crore relating to the period 1.1.2000 to 30.6.2001 on account of alleged excess generation by the petitioner during high frequency conditions. The break-up of the deducted amount is as under:

Respondents	Amount withheld (in Rs. crore)
RVPN	6.29
DTL	8.01
HVPN	4.03
HPSEB	0.88
UPPCL	6.60
J & K	2.15
PSEB	3.62
UTC	0.22
Total	31.8

4. The above deduction was made on the basis of the revised regional energy accounts for the period 1.1.2000 to 30.6.2001 issued in September 2003. The petitioner disputed the above claims of the respondent beneficiaries. However, the petitioner by its letter dated 21.2.2004 revised its earlier invoices for the disputed period on provisional basis in line with NREB decision without prejudice to its rights and contentions to pursue the matter further to get an equitable order. Despite several efforts made by the petitioner, the disputed claim has not been settled by the respondents so far. Under the circumstances, the petitioner has approached the Commission for adjudication of its claim under clause (f) of sub-Section 1 of Section 79 of the Electricity Act 2003 (hereinafter referred to as 2003 Act).

5. Considering the complexities involved in the dispute, the Commission in its order dated 31.10.2006 referred the matter to the one-Member Bench comprising Shri Bhanu Bhushan, Member to examine the issues and make appropriate recommendations to the Commission after giving proper opportunity for hearing to the parties concerned. The one-Member Bench submitted its recommendations vide order dated 25.7.2007. The said order is treated as part of the present order.

6. After detailed deliberation, the one-Member Bench by its order dated 25.7.2007 has held that for overall optimization in national interest, generating stations having higher variable costs should have backed down and the generating stations of lower variable cost could continue at full load. According to the Bench, the onus to back down was on the respondent beneficiaries whose generating stations generally have higher variable cost and, therefore, it was unreasonable on their part to expect the petitioner to back down its generation, which generally has lower variable cost. The Bench has, to an extent, faulted with the conduct of the petitioner inasmuch as that it has held that its the generating stations should have backed down under high frequency conditions since the respondent beneficiaries were to bear the impact of not backing down their own generating stations with higher variable cost. The Bench has recommended payment of the energy charges by the respondent beneficiaries, to be calculated in accordance with the terms and conditions of tariff applicable during the period, that is, Ministry of Power notification for the period 1.1.2000 to 31.3.2001 and the Commission's regulations for the period 1.4.2001 to 30.6.2001, in four monthly instalments starting from 31.10.2007. While not awarding the interest on the amount withheld, the Bench has recommended payment of

interest by the respondent beneficiaries @ 1.25% per month for the delay in payment beyond 31.10.2007.

7. Copy of the order dated 25.7.2007 was provided to the parties to submit their comments/objections/suggestions thereon. In response, respondents Nos.2, 3, 4, 6 and 10 have filed their comments on the recommendations of one-Member Bench and the petitioner has filed its rejoinders.

8. We have heard the representative of the petitioner and the learned counsels for UPPCL and Delhi Power Companies Ltd. We have also gone through the pleadings of the parties.

9. The petitioner has submitted that respondent No.10 does not have the jurisdiction under sub-section (7) of Section 55 of the Electricity (Supply) Act, 1948 (hereinafter referred to as "1948 Act") to decide the issue of payment of variable charges arising out of supply of electricity during high frequency. Moreover, under the said sub-section, respondent No.10 can take decisions on any such matters only with consent of all its members and not when there is absence of mutual agreement among affected parties. As petitioner was not a party to the decision taken at the NREB meeting, there was no mutual agreement on the issue of backing down. The petitioner further submitted that on merit also, the decision of respondent No.10 was inequitable as out of total 283.86 MU excess generation identified during high frequency period, almost 40% of excess generation were shown against Singrauli and Rihand STPS which were having the least generating cost in the Northern Region and backing down of these stations would have resulted in national wastage.

The petitioner submitted that relief should be granted to it in terms of the recommendations of the one-Member Bench.

10. Shri Sitiesh Mukherjee, Advocate appearing for UPPCL, respondent No.1 herein has made the following submissions:

(a) The petition is barred by limitation as the decision for backing down was taken in the NREB meeting in 1998, to be effective from 1.1.2000 whereas it has been challenged by the petitioner in 2006.

(b) Para 2.2 of the Indian Electricity Grid Code (1999 Issue) (hereinafter referred to as IEGC) vested the powers on RLDCs for scheduling and rescheduling of generation. The petitioner had violated the schedules given by NRLDC by not backing down during the period of high frequency. If the petitioner was not satisfied with the directions of NREB, it should have approached the CEA in accordance with sub-section (9) of Section 55 of Electricity Supply Act, 1948. Therefore, the petitioner can not be allowed to take advantage of its own wrong.

(c) The findings of the learned single-Member Bench in para 16 of the order dated 25.7.2007 is not tenable as the term "may mutually agree" appearing in Section 55(7) of the 1948 Act means decision through mutual agreement as far as possible. In a forum like Regional Electricity Board, it is not always possible to achieve unanimity of decision and a decision by a majority should be construed as satisfying the requirements of the Act. It could not be the intention of the Parliament to require unanimous decision of the REB under Section 55(7) of the 1948 Act.

(d) The Commission in its order dated 15.1.2001 in Petition No.1/2001 while dealing with the grid disturbance in the Northern Region had censured Singrauli and

Rihand STPS of the petitioner for generating in excess of the schedules given by NRLDC and had, in its order dated 31.7.2001, disallowed incentives to the petitioner's stations for excess generation under high frequency conditions. Hence the petitioner could not be allowed payment of energy charges for excess generation during the said period.

11. Shri Pradeep Mishra, Advocate appearing for Delhi Power Companies Limited (DPCL) has submitted the following:

(a) In accordance with Delhi Electricity Reforms (Transfer Scheme) Rules 2001, Delhi Power Company Limited (DPCL) was incorporated as the holding company of generating companies and transmission licensees and all liabilities including contingent liabilities of erstwhile DVB were transferred to DPCL. Accordingly, DPCL, which is a necessary party, may be substituted in place of DTL in the present petition.

(b) The petition filed under Section 79(f) of the 2003 Act is not maintainable as the dispute relates to the period 1.1.2000 to 30.6.2001 when the 2003 Act was not in force and as a result, the Commission has no jurisdiction to adjudicate upon the said dispute.

(c) As per sub-section (3) of Section 55 of the 1948 Act, the directions of RLDCs are binding on the parties without any rider. In case the petitioner had any problem with such directions, it should have approached CEA under sub-Section (9) of the said section or the Central Commission under Section 79(1)(c) of the 2003 Act. Even though tariffs had been determined by the Commission for two tariff periods (2001-04 and 2004-09), the petitioner did not raise this issue earlier and approached the

Commission only in 2006. Hence the petition suffers from delay and laches and is not maintainable.

(d) Delhi has suffered a loss of Rs.251 crore for the period September 1991 to March 1999 on account of underdrawal under high frequency conditions by honouring the decisions of the NREB and it would be grossly unfair and inequitable if the same yardstick is not applied in case of the petitioner for injection during high frequency.

12. After perusal of the recommendations of the one-Member Bench, pleadings of the parties and their oral submissions during the hearings, the following issues have emerged for our consideration:

1. Whether the Commission has jurisdiction to adjudicate the dispute?
2. Whether the petition suffers from delay and laches?
3. What is the scope of sub-Section (7) of Section 55 of the 1948 Act?
4. Whether the decision of NREB taken on 3.12.99 to disallow payment of energy charges to NTPC under high frequency condition w.e.f. 1.1.2000 was legally tenable and equitable?
5. Whether denial of energy charges to the petitioner for injection under high frequency conditions was in line with the tariff notification of Government of India or the tariff regulations of the Commission?

13. The above issues have been discussed in the succeeding paragraphs.

Issue No. 1

14. The Central Commission was established in July 1998 under the Section 3 of the Electricity Regulatory Commissions Act, 1998(hereinafter referred to as 1998 Act). Under clauses (a), (b) and (c) of the Section 13 of the 1998 Act, the Commission was vested with the powers to regulate the tariff of generating companies owned or controlled by the Central Government, of the generating companies other than those owned or controlled by the Central Government if such generating companies have a composite scheme for generation and sale of electricity in more than one State, and to regulate the inter-State transmission of energy including tariff of the transmission utilities. Under clause (h) of the said Section, the Commission had the power to arbitrate or adjudicate upon the disputes involving the generating companies or transmission utilities in regard to matters connected with clauses (a) to (c) thereof.

15. The Electricity Act, 2003 (the 2003 Act) came into force with effect from 10.6.2003. Under the provisions of Section 76 of the 2003 Act, the Central Commission established under the 1998 Act shall be deemed to be the Central Commission for the purposes of the 2003 Act. Section 79 of the 2003 Act defines the functions of the Commission as under:

- “(a) to regulate the tariff of generating companies owned or controlled by the Central Government;
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in Clauses(a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one state;
- (c) to regulate the inter-State transmission of electricity;
- (d) to determine the tariff for inter-State transmission of electricity;

- (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any disputes to arbitration;
- (g) to (k)... .. ”

16. The provisions of clauses (a) to (d) and (f) of sub-section 1 of Section 79 of the 2003 Act are in pari materia with the provisions of clauses (a) to (c) and (h) of Section 13 of the 1998 Act. Thus, the Commission since its inception has the powers to adjudicate the disputes involving the generating companies and transmission licensees.

17. The period of dispute pertains to curtailment of tariff during the period from 1.1.2000 to 30.6.2001. The petitioner has submitted that during the period under dispute, it had always acted consistent with the scheduling for electricity and the charges claimed by it from the respondents were in accordance with the schedules given by respondent No.9. The petitioner has submitted that the respondent beneficiaries have deducted an amount of Rs.31.80 crore after the revised regional energy account for the relevant period was issued by respondent No. 10 in September 2003, in pursuant to the decision taken at the 199th meeting of NERB held on 3.1.1999 wherein it was decided against the consent of the petitioner that the excess energy generated by the petitioner under high frequency would not be counted towards payment and incentive. Thus, we notice that the cause of action arose in September 2003 when a part of the tariff was withheld by the respondent beneficiaries. The petitioner in its letter dated 21.2.2004 revised the invoices in line

with the NREB decision provisionally without prejudice to its right to pursue the matter further for an equitable decision. After the petitioner failed in its efforts to persuade the respondent beneficiaries to release the deducted amount, it has approached the Commission under clause (f) of sub-section (1) of Section 79 of the 2003 Act. In our considered view, the Commission has the jurisdiction to adjudicate the matter as the dispute involves tariff of the generating stations of the petitioner, a generating company owned and controlled by the Central Government.

Issue No.2

18. Some of the respondents have raised objection with regard to the maintainability of the petition on the ground of delay and laches. It has been argued that the dispute relating to curtailment of payment for the energy supplied during 1.1.2000 to 30.6.2001 can not be raised in a petition filed in 2006. The petitioner has countered that the respondent beneficiaries have deducted the amount of Rs.31.8 crore after the revised energy account pertaining to the relevant period was issued by respondent No.10 in September, 2003. The petitioner in its letter dated 21.2.2004 addressed to respondent No. 6 has stated that it has not accepted the decision taken at NREB meetings regarding curtailment of payment for generation during high frequency conditions. It has only provisionally revised the bills in line with the NREB decision and without prejudice to its rights to pursue the issue further and revise bills again suitably as per the revised decision of NREB/any other authority. Therefore, there is no delay in filing the present petition.

19. The 2003 Act does not lay down any period of limitation for adjudication of disputes under clause (f) of sub-section (1) of Section 79 thereof. In the absence of

provision with regard to limitation in the special Acts, the courts usually rely on the provisions of the Limitation Act to decide the question of limitation. However, the Supreme Court in a number of cases has held that the Limitation Act does not apply to the proceedings before the quasi judicial bodies. The issue was considered in Nityananda M. Joshi Vs LIC [(1969) 2 SCC 199] wherein the question was examined with reference to applicability of Article 137 of the Limitation Act, 1963. The observations of the Supreme Court are extracted below:

“3. In our view Article 137 only contemplates applications to Courts. In the Third Division of the Schedule to the Limitation Act, 1963 all the other applications mentioned in the various articles are applications filed in a court. Further Section 4 of the Limitation Act, 1963, provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is “when the court is closed.” Again under Section 5 it is only a court which is enabled to admit an application after the prescribed period has expired if the court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act, 1963.”

20. In Sakuru Vs Tanaji [(1985) 3 SCC 590] the Supreme Court held that Limitation Act, 1963 does not apply to the appeals or applications before quasi judicial Tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under Code of Civil Procedure or Criminal Procedure Code, as per the observations extracted below:

“.....the provisions of the Limitation Act, 1963 apply only to proceedings in “courts” and not to appeals or applications before bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a court, the Limitation Act, as such, had no applicability to the proceedings before him.”

22. In our view, the cause of action arose when the regional energy account for the period 1.1.2000 to 30.6.2001 was revised by respondent No.9 in September 2003.

The petitioner in its letter dated 21.2.2004 while provisionally revising the bills has conveyed its non-acceptance to respondent No. 6 without prejudice to its right to pursue the issue further and revise the bills suitably as per the revised decisions of NREB/any other authority. The petition has been filed by the petitioner on 11.5.2006, i.e. within 3 years of the date of revision of regional energy account. As per the Limitation Act, 1963, the period of limitation for filing of suit relating to accounts, contracts, declaration etc. is three years. The present petition pertains to the dispute arising out of the revised energy accounts issued by respondent No. 10 and has been filed within three years of the date of issue of revised energy accounts, the petition is not barred by limitation. Even otherwise, in the absence of any period of limitation prescribed in the 2003 Act and in view of the law laid down by the Supreme Court that the Limitation Act is not applicable in case of quasi judicial bodies, we do not find any merit in the submission of the respondents. In our view, the petition does not suffer from delay and laches.

Issue No. 3

23. Respondents No.1, 6 and 10 have submitted that non-compliance of the backing down instructions of NRLDC by the petitioner was in clear violation of the provisions of the 1948 Act as well as the IEGC (1999 Issue). It has also been submitted that under sub-section (7) of Section 55 of the 1948 Act, the decisions of the NREB were to be complied with by the constituents of the Northern region and as such were binding on the petitioner.

24. On the scope of Section 55(7) of the Electricity (Supply) Act, 1948, the one-Member Bench of this Commission in its report dated 25.7.2007, has observed as follows:

“16. It can be seen that under the amended Electricity (Supply) Act, 1948 (which was the ruling Act during the period of dispute), the REBs could “mutually agree” on matters concerning the smooth operation, etc. leading to decisions which had to be complied with by “every licensee, transmission licensee and others involved in the operation of the power system”. Further, RLDCs and SLDCs were required to enforce the (mutually agreed) decisions of the REB. The direct implication of this is that a decision of the REB was enforceable only if it was based on mutual agreement. That does not seem to be the case in the present matter, as it is clear from the minutes of NREB meetings that the petitioner never agreed to join in the “incentive/ disincentive scheme”. This last fact was also confirmed by NRPC Secretariat during the hearing on 8.12.2006.”

25. In response, the respondent No.6 vide its affidavit dated 31.8.2007 has submitted as under:

“1.1 The first operative word is”.....may mutually agree.....”. This cannot be interpreted to mean that all decisions have necessarily to be unanimous. It is nowhere hinted or implied that every constituent has a veto power. If such was the case, the very functioning of NREB would have become paralyzed because it is impossible to achieve unanimity on issues where various players have conflicting interests.

The operative part of the second part of section 57(2) is.....shall comply with the decision.....

It is not correct to interpret this as “unanimous decision’ because a ‘decision’ can be made by majority.

The words “shall” and “decision” lend a positive and unambiguous meaning to the operative Para of section 55(7) as contrasted with the earlier position “may mutually agree.” Since the section 55(7) has not qualified the word “decision with any rider such as “unanimous” or mutually agreed”, the purpose and intent is clear that NREB decision shall be complied with without any ifs and buts or rider that the decision has to be unanimous.

1.2 During the course of implementation of ECC Report one major issue which comes up before every REB was whether to opt for Market Mechanism “A” or “C”. NTPC and others were in clear favour of market mechanism “A” which provides for centralized scheduling while majority of states were in favour of “C” which provides for decentralized scheduling and giving States the autonomy/freedom to schedule their own (State) generation. This was a mega issue on which the lines were sharply divided and there was no scope of unanimity or mutual agreement. This mega issue (on which ultimately the IEGC was formulated) was decided in the NREB (and other REBs) by majority vote-where in NREB the option ‘C’ was decided by a 7-6 majority.

The option ‘C’ ultimately was endorsed by other REBs on majority vote-and now is the underlying principle contained in the IEGC (CERC order dt. 21.12.99) and in each subsequent revision this principle of option ‘C’ has been retained in IEGC.

1.3 It is established that the REBs do indeed have the power and jurisdiction to take majority decision (as in case of market mechanism option ‘C’). If a mega issue like market mechanism could be decided on majority basis and implemented, then the NREB decision on

non payment of generation in excess of schedule on high frequency equally deserves to be implemented”.

26. Subsequently, the respondent No. 6 vide its affidavit dated 7.12.2007 has submitted that sub-section (7) of Section 55 of the 1948 Act does not contain the word “mutual agreement”. Quoting extracts of clause 27 (iv) of draft Electricity Bill 2001 which provided for unanimous agreement, it has been contended that the agreement reached at RPC (formerly REB) forum cannot be construed as the agreement reached unanimously. It has been submitted that in terms of Section 55 (2) of the 1948 Act, RLDCs were designated as the apex body to ensure integrated operation of the power system in the concerned region and hence the petitioner was under obligation to follow the instructions of respondent No. 9.

27. Section 55 of 1948 Act is reproduced below:

“55. Compliance of directions of the Regional Electricity Board, etc., by licensees or generating companies. – (1) Until otherwise specified by the Central Government, the Central Transmission Utility shall operate the Regional Load Despatch Centers and the State Transmission Utility shall operate the State Load Despatch Centers.

(2) The Regional Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in the concerned region.

(3) The Regional Load Despatch Centre may give such directions and exercise such supervision and control as may be required for ensuring integrated grid operations and for achieving the maximum economy and efficiency in the operation of the power system in the region under its control.

(4) Subject to the provisions of sub-section (3), the State Load Despatch Centre in a State may give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of the power system in that State.

(5) Every licensee, transmission licensee, Board, generating company, generating stations, sub-stations and any other person connected with the operation of the power system shall comply with the directions issued by the Load Despatch Centers under sub-sections (3) and (4).

(6) All directions issued by the Regional Load Despatch Centers to any transmission licensee of State transmission lines or any other licensee of the State or generating company (other than those connected to inter-State transmission system) or sub-station in the State shall be issued through the State Load Despatch Centre and the State Load Despatch Centers shall ensure that such directions are duly complied by the transmission licensee or licensee or generating company or sub-station.

(7) Subject to the above provisions of this section, the Regional Electricity Board in the region from time to time may mutually agree on matters concerning the smooth operation of the integrated grid and economy and efficiency in the operation of the power system in that region and every licensee, transmission licensee and others involved in the operation of the power system shall comply with the decision of the Regional Electricity Board.

(8) The Regional Load Despatch Centre or the State Load Despatch Centre, as the case may be, shall enforce the decision of the Regional Electricity Boards.

(9) Subject to regulations made under the Electricity Regulatory Commissions Act, 1998 (14 of 1998) by the Central Commission, in the case of Regional Load Despatch Centers or the State Commission in the case of State Load Despatch Centers, any dispute with reference to the operation of the power system including grid operation and as to whether any directions issued under sub-section (3) or sub-section (4) is reasonable or not, shall be referred to the Authority for decision:

Provided that pending the decision of the Authority, the directions of the Regional Load Despatch Centers or the State Load Despatch Centers, as the case may be, shall be complied with.

(10) Until the Central Commission is established, the Central Government and thereafter the Central Commission in the case of Regional Load Despatch Centre and until the State Commission is established, the State Government and thereafter the State Commission in the case of the State Load Despatch Centre of that State, may, by notification, specify the fees and charges to be paid to the Regional Load Despatch Centers and the State Load Despatch Centers, as the case may be, for undertaking the load dispatch functions entrusted by the Central Government or by the State Government, as the case may be.

(11) The provision of sub-section (3) of section 4B shall apply in relation to any notification issued by the Central Government or the Central Commission as the case may be under sub-section (10), as they apply in relation to the rules made by that Government under Chapter II."

28. The point for consideration is whether the term "may mutually agree" appearing in sub-section (7) of Section 55 of the 1948 Act is to be read as synonymous with unanimous decision. The decision through mutual agreement and unanimous decision cannot be read as synonymous as they have different connotations and meanings. The Law Lexicon defines the word "mutual" as "reciprocally acting or related", "reciprocally receiving", "reciprocally giving and receiving", a word which denotes common interest. The Bombay High Court in *Ganesh vs Gyanu* (22 Bom 607) has elaborated the term "mutual" as under:

“Dealings to be mutual must be transaction on each side creating independent obligations on the other, and not merely creating obligations on one side and the other side being merely discharges of these obligations”

29. Thus mutual agreement presupposes agreement between two parties, who are in dispute over an issue or a matter, and each party creating independent obligations on other and the other party reciprocally acting on such obligations. In the instant case, there are two parties for mutual agreement on scheduling in the NERB forum i.e. generators and beneficiaries. Though the beneficiaries have created an obligation on the petitioner for scheduling of power, the obligation has not been reciprocated by the petitioner. The beneficiaries who are all on one side entering into a mutual agreement, has no relevance as their interests are same. What is relevant to that the mutual agreement should be between the parties to the dispute, viz., the petitioner on one side and the beneficiaries on the other side. The petitioner is on record consistently voicing its reservation to the decision on scheduling taken by the beneficiaries in the NREB forum. Thus the decision taken at the NREB forum in its 119th meeting dated 3.12.1999 is unilateral and can not be said to have been taken in accordance with the provision of the Act and cannot bind a member of the NREB who is not party to the agreement. Decisions taken in accordance with the provisions of sub-section (7) are enforceable by RLDCs under sub-Section 8 of Section 55 of the 1948 Act. Since the decision taken at the NREB in its 119th meeting is not in compliance with sub-section (7) in the absence of agreement of the petitioner to such decision, it cannot be enforced by respondent No. 9 under sub-section (8) of the Act.

30. We also do not subscribe to the arguments of the parties that the term “may mutually agree” in sub-section (7) of Section 57 should be construed as “decision by majority”. Had it been the intention of the Legislature, the same would have been provided for in the Act itself. In *Union of India vs. Philip Tiago De Gama* {(1990) 1 SCC 277}, the Supreme Court has held as under:

“It is a well settled principle of law that the court cannot read anything into the statutory provision which is plain and unambiguous. The court has to find out legislative intent only from the language employed in the statutes. Surmises and conjectures can not be resorted to for interpretation of statutes.”

31. In order to comprehend the connotation of the term “may mutually agree” in Section 55(7) of the 1948 Act, it is necessary to understand the role of Regional Electricity Board under the scheme of the Act. Sub-Section 9-A of 1948 Act defines “Regional Electricity Board” as “any of the Boards as constituted immediately before the commencement of the Electricity Laws (Amendment) Act, 1991(50 of 1991), by resolution of the Central Government for ensuring integrated operation of the constituent system in the region”. Under sub-section (3) of Section 55, “the Regional Load Despatch Centre may give such directions and exercise such supervision and control as may be required for ensuring integrated grid operations and for achieving the maximum economy and efficiency in the operation of the power system in the region under its control.” Under sub-section (7), the REB is required from time to time to mutually agree on matters concerning the smooth operation of the integrated grid and economy and efficiency in the power system in that region. The said sub-section begins with the words “subject to the above provisions of this section”, which means that the role of REB is supplemental to the role of RLDC and REB forum provides for an alternative mechanism in the matter of smooth operation of the grid and economy and efficiency of the power system in the region. The REB

is required to mutually agree on matters of smooth operation of the integrated grid which means that the parties to the decision have entered into an agreement. As in the case of contract which is enforceable against the parties thereto in the court of law, the Act provides for enforcement of the decision through mutual agreement by RLDC under sub-section (9). In our view, the terms “may mutually agree” cannot be anything other than agreement through consensus. If REB is allowed to decide by majority in the matter of smooth operation of the grid and economy and efficiency in the region, then it would mean vesting the power of RLDC in the REB which is not contemplated under the Act.

Issue No. 4

32. As regards the legal tenability of the decision of the NREB taken on 3.12.1999, we have already held in our discussion on Issue 3 that the said decision being in violation of Section 55(7) of the 1948 Act cannot be legally sustained. The one-Member Bench in his order has also discussed the Commission’s order on incentive to hold that the decision of NREB is not tenable. In the petitions filed by the petitioner for incentives (petition No.5/1999, 96/2000 and 112 to 117/2000), the respondent beneficiaries had raised the question of over-generation during high frequency. The Commission in its order dated 31.7.2001 had directed that while considering liability of the respondent beneficiaries to pay incentives, the excess generation at high frequency should be excluded for the purpose of calculation. The one-Member Bench in para 21 of his order has observed that the Commission did not allow any incentives to the petitioner’s generating stations on the understanding that the beneficiaries were paying variable charges for such energy. The parties at that time had reconciled to variable charges being paid for the excess generation

and only incentive being disallowed. The Commission might have taken a different view at that time had it been brought to its notice that beneficiaries did not intend to pay the variable charges for such excess generation.

33. We note that the beneficiaries during the proceedings of the Commission should have brought to the notice of the Commission the decision in NERB forum not to pay the energy charges and sought the direction of the Commission thereon. Instead the beneficiaries implemented the decision in the NERB forum knowing fully well that the said decision has been disputed by the petitioner and the legal recourse available to the respondents particularly, respondent No.9, was to approach the Commission under Section 13 (h) of the Act for adjudication of dispute. Moreover we do not find any provision of Act or regulation which entitles the respondent No. 10 to curtail payment for the energy supplied by the petitioner. Hence we hold the order of respondent No. 10 as illegal and arbitrary.

Issue No.5

34. The petitioner has submitted that the period of dispute spans over two tariff periods and the tariff orders and notifications issued by the GOI and the regulations framed and orders issued by the Commission do not confer any authority or the jurisdiction on the respondent No. 10 to curtail payments for energy injected during high-frequency.

35. The one-Member Bench of this Commission in its order dated 25.7.2007 has observed as under:

“19. It was pointed out by the petitioner that the period of dispute (1.1.2000 to 30.6.2001) spans over two tariff periods, one up to 31.3.2001 and the other starting from 1.4.2001. During the first tariff period, the tariff for the petitioner’s generating stations had to be according to the tariff notifications and orders issued by the Govt. of India, their validity having been extended up to 31.3.2001 by the Commission vide its order dated 21.12.2000 in Petition No. 4/2000 and other related petitions. In the second tariff period, it was governed by the regulations and orders issued by the Commission. During both of these periods (prior to ABT), variable charges were to be paid based on actual energy sold on ex-bus bar basis. Neither the Govt. of India notifications / orders, nor the Commission’s regulations / orders made any mention about curtailment of payments under high-frequency conditions. The petitioner has, therefore, contended that the NREB decisions in the matter were without any authority, and were illegal because NREB had no jurisdiction. There is a considerable merit in the above contention of the petitioner. NRPC Secretariat has sought to establish NREB’s jurisdiction quoting some provisions in the Electricity (Supply) Act 1948 and the Indian Electricity Grid Code. I have already dealt with the former, and the latter has been dealt with in this order later on. Based on my analysis, I am unable to accept the contentions of NRPC Secretariat”.

36. The respondent No. 6, relying on the provisions under Clause 7.4 of the IEGC (1999 Issue) submitted that the petitioner had not acted in terms of the IEGC. The one-Member Bench in para 25 of its order has observed that the entire chapter was premised on the commercial mechanism as contemplated under para 1.7 being in place. Such a commercial mechanism in the form of ABT was implemented in the Northern Region with effect from 1.12.2002. Prior to that, the provisions of clause 7.4 of IEGC were unworkable and the petitioner cannot be said to have violated the IEGC.

37. We agree with the conclusion of one-Member Bench as discussed in para 35 and 36 above and are convinced that the decision of respondent No. 10 to curtail payments of energy charges under high frequency conditions to the petitioner is *de hors* the GOI notifications / orders and the IEGC / orders of the Commission. There is no denial of the fact that the respondents have consumed the power generated by the petitioner. Accordingly, we direct that the petitioner shall be entitled to the payment of energy charges supplied during the period 1.1.2000 to 30.6.2001 in four monthly installments from the date of issue of this order. We have modified the date

of payment from 31.10.2007 to the date of this order keeping in view the interest of consumers who would ultimately bear the burden of wrong decision by respondent No.10. The petitioner shall also be entitled to interest @ Rs1.50 per month on the outstanding amount if payment is not made within the stipulated date.

40. With the above, the Petition No. 32/2006 is disposed of.

Sd/-
(R.KRISHNAMOORTHY)
MEMBER

Sd/-
(Dr PRAMOD DEO)
CHAIRPERSON

New Delhi dated the 31st day of July, 2008.