

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 82 of 2012 and 90 of 2012**

**Dated: 24<sup>th</sup> January, 2013**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**Appeal No. 82 of 2012**

**In the matter of:**

**BSES Rajdhani Power Ltd.  
BSES Bhawan, Nehru Place  
New Delhi – 110 019**

**...Appellant (s)**

**Versus**

**1. Central Electricity Regulatory Commission  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building  
36, Janpath,  
New Delhi – 110 001**

**...Respondent (s)**

**2. NTPC Limited  
NTPC Bhawan, SCOPE Complex  
7, Institutional Area, Lodhi Road  
New Delhi – 110 003**

**3. National Hydro Power Corporation Limited  
NHPC Office Complex, Sector – 33  
Faridabad – 121 003**

**4. Power Grid Corporation of India Ltd.**  
**B-9, Qutab Institutional Area**  
**Katwaria Sarai**  
**New Delhi – 110 016**

**Counsel for the Appellant (s) :** Mr. Amit Kapur  
Mr. Vishal Anand  
Ms. Deepeika Kalia  
Mr. Nikhil Sharma

**Counsel for the Respondents (s):** Mr. M.G. Ramachandran  
Ms. Swapna Seshadhari  
Mr. Anand K. Ganewan  
Mr. Manu Seshadri  
Mr. Mukesh Gupta (Rep.)  
Ms. Swagatika Sahoo  
Mr. Sachin Datta  
Mr. S.B. Upadhyay, Sr. Adv.  
Mr. Pawan Upadhyay  
Mr. Saravjit Pratap Singh  
Mr. Param Kr. Mishra  
Mr. Sugam Seth

**Appeal no.90 of 2012**

**BSES Yamuna Power Ltd.**  
Shakti Kiran Building,  
Karkardooma, Delhi

**.... Appellant(s)**

**Versus**

**1. Central Electricity Regulatory  
Commission**  
3<sup>rd</sup> and 4<sup>th</sup> Floor, Chanderlok Building  
36, Janpath  
New Delhi – 110 001

**...Respondent(s)**

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NGPC Office Complex, Sector 33  
Faridabad – 121 003
- 4. Power Grid Corporation of India Ltd.,**  
B-9, Qutab Institutional Area, Katwaria Sarai  
New Delhi – 110 016

**Counsel for the Appellant (s) :** Mr. Amit Kapur,  
Mr. Vishal Anand  
Ms. Deepeika Kalia  
Mr. Nikhil Sharma

**Counsel for the Respondent(s):** Mr. Manu Seshadri for CERC  
Mr. M.G. Ramachandran,  
Ms. Swagatika Sahoo for NTPC  
Mr. Sachin Datta for NHPC  
Mr. S.B. Upadhyay, Sr. Adv.  
Mr. Pawan Upadhyay  
Mr. Saravjit Pratap Singh  
Mr. Param Kr. Mishra  
Mr. Sugam Seth

## **JUDGMENT**

### **MR. RAKESH NATH, TECHNICAL MEMBER**

These Appeals have been filed by BSES Rajdhani Power Ltd and BSES Yamuna Power Ltd. against the order dated

26.3.2012 passed by the Central Electricity Regulatory Commission ('Central Commission') upholding the validity of retrospective application of the provisional tariff allowed by the Central Commission and recovery of arrears and interest thereon from the Appellants by the central generating and transmission companies and regarding certain terms and conditions of their Power Purchase Agreements.

2. The Appellants are the Distribution Licensees. The Central Commission is the first Respondent. NTPC and NHPC, the Central Generating Companies, are the Respondent nos. 2 and 3 respectively. Power Grid Corporation of India Ltd., the Transmission Licensee, is the Respondent no.4.

3. The brief facts of the case are as under:-

3.1 The Appellants have entered into Power Purchase Agreements ('PPA') with the Respondents 2 and 3 from their various power plants and Bulk Power Transmission

- Agreement ('BPTA') with the Respondents no. 4. The current control period of tariff for the Respondent nos. 2 to 4 regulated by the Central Commission is from 1.4.2009 to 31.3.2014.
- 3.2 The Central Commission notified the Tariff Regulations, 2009 on 19.1.2009, which came into force from 1.4.2009 for the control period 1.4.2009 to 31.3.2014.
- 3.3 The Tariff Regulations, 2009 provided for the generating company and the transmission licensee to make application for determination of tariff in accordance with these Regulations. The Regulation 5(3) provided that in respect of the existing projects, the generating company or the transmission licensee shall continue to bill the beneficiaries with the tariff approval by the Central Commission and applicable as on 31.3.2009 for the period starting from 1.4.2009 till the approval of the tariff by the Commission in accordance with the 2009 Tariff Regulations.

- 3.4 Accordingly, the Respondent nos. 2 to 4 filed applications for their projects for determination of tariff as per the 2009 Regulations.
- 3.5 The Central Commission amended Regulations 5 of the Tariff Regulations, 2009 on 10.6.2009, 2.5.2011 and 21.6.2011. On account of the amendments dated 2.5.2011 and 21.6.2011, Regulation 5(3) was revised and Regulation 5(4) was inserted providing for grant of provisional tariff by the Central Commission.
- 3.6 The Central Commission issued orders for provisional tariff for different power stations of the Respondents nos. 2 & 3 as also for the transmission tariff of the Respondent no.4 between 30.6.2011 and 12.8.2011.
- 3.7 Subsequent to the issuance of the provisional tariff orders, the Respondents generating and transmission

companies raised bills claiming arrears w.e.f. 1.4.2009 with interest.

3.8 The Appellants filed a petition before the Central Commission challenging the retrospective application of the provisional tariff w.e.f. 1.4.2009 and recovery of arrears and interest by the Respondents 2 to 4 and claiming that the same was not in consonance with the 2009 Tariff Regulations. The Appellants also raised some issues relating to credit period and nature of Letter of Credit ('LC').

3.9 The Central Commission passed the order dated 26.3.2012 dismissing the petition of the Appellants. Aggrieved by the impugned order dated 26.3.2012 of the Central Commission, the Appellants have filed these Appeals.

4. Shri Amit Kapur, Ld. Counsel for the Appellants has made the following submissions.

- 4.1 The Regulation 5 of the 2009 Tariff Regulations as originally specified had no provision for determination of provisional tariff. However, the existing generating and transmission companies were permitted to provisionally bill the beneficiaries the tariff as applicable on 31.3.2009.
- 4.2 Amendment dated 2.5.2011 inserting Regulation 5(4) has conferred the power upon the Central Commission to grant provisional tariff. However, adjustment is permitted only after determination of final tariff in six monthly instalments.
- 4.3 Regulation 5(4) provides that in addition to the existing projects, if an application for determination of tariff for a project is filed, the Central Commission may consider to grant provisional tariff upto 95% of the annual fixed cost of the project claimed by the Applicant.



4.4 Regulation 5(4) includes the process of adjustment of tariff gap as per Regulation 5(3). Further, Regulation 5(4) does not distinguish between existing or new projects and provides adjustment only after the final tariff is determined by the Central Commission.

4.5 The Amendments of Regulation 5 permit adjustment of tariff, both for existing or new projects, only after determination of final tariff by the Central Commission vis-à-vis provisional tariff granted by the Central Commission by way of six monthly instalments along with interest and at the stage of truing up. This is also reflected in the Statement of Reasons to the Second Amendment to the Tariff Regulations, 2009 dated 21.6.2011.

4.6 The Central Commission has also exceeded its jurisdiction to decide on the disputes regarding commercial terms i.e. credit period and consolidated LC which is under the jurisdiction of the State Commission.

On these issues, the Ld. Counsel for the Appellants has made elaborate submissions.

5. Shri M.G. Ramachandran, Ld. Counsel for NTPC (R-2) made detailed submissions interpreting various clauses of the Regulation 5 to support the Central Commission's findings that the provisional tariff is to be approved from 1.4.2009 onwards and not from the period when the provisional tariff is actually decided. He also submitted that the Central Commission has correctly determined the provisional tariff pending determination of final tariff from 1.4.2009 onwards and the Regulation as interpreted by the Central Commission and applied is consistent with the objective and purpose of the Tariff Regulations, 2009. He also further made detailed submissions alleging that the conduct of the Appellants was improper as they have abused the process of the court. It was also pointed out that the various orders of the Central Commission deciding the provisional tariff with effect from 1.4.2009

have not been challenged by the Appellants and as such, they attained finality binding on the Appellants.

6. Ld. Senior Counsel Mr. S. B. Upadhyay appearing for the Respondent no.4 also made similar submissions regarding interpretation of the Regulations 5(3) and 5(4) and supporting the Central Commission's order. According to him, the Central Commission while framing the Regulation 5(4) intended to allow provisional billing for both existing as well as new projects in order to address the cash flow problem of the utility and to relieve the beneficiary from the extra liability on account of arrears and interest. Thus, the purpose of introducing the provisional tariff would be defeated, if the provisional tariff is not allowed from 1.4.2009 in respect of existing and new projects as per Regulation 5(4), particularly when the assets are being used by the beneficiaries.
7. In the light of the above contentions urged by the parties, the following questions would arise for our consideration:

- i) Whether consequent to amendment of the Tariff Regulations, the generating companies and transmission licensee are entitled to charge the provisional tariff granted by the Central Commission retrospectively from 1.4.2009 and recover the arrears with interest thereon from the beneficiaries?
- ii) Whether the Central Commission has jurisdiction to adjudicate upon in matters relating to credit period and Letter of Credit in respect of the respondent generating companies and transmission licensee?
- iii) Whether the Respondent generating companies and transmission licensee can invoke the Letter of Credit after one month of billing when they are allowed 2 months receivables as part of working capital in the tariff?
- iv) Whether the Respondent generating company and transmission licensee can insist on consolidated Letter of

Credit, when the tariff is determined by the Commission station-wise and billing is also done station-wise?

8. On the first issue relating to the applicability of provisional tariff, let us examine the Tariff Regulations, 2009. The relevant Regulation is Regulation 5 which as notified originally on 19.1.2009 is as under:

**“5. Application for determination of tariff**

*(1) The generating company or the transmission licensee, as the case may be, may make an application for determination of tariff in accordance with Central Electricity Regulatory Commission (Procedure for making of application for determination of tariff, publication of the application and other related matters) Regulations, 2004, as amended from time to time or any statutory re-enactment thereof, in respect of the units of the generating station or the transmission lines or sub-stations of the transmission system, completed or projected to be completed within six months from the date of application.*

*(2) The generating company or the transmission licensee, as the case may be, shall make an application a per Appendix I to these regulations, for determination of tariff based on capital expenditure incurred duly certified by the auditors or projected to be incurred up to the date of commercial operation and additional capital expenditure incurred duly certified by the auditors or projected to be incurred during the tariff period of the generating station or the transmission system:*

*Provided that in case of an existing project, the application shall be based on admitted capital cost including any additional capitalization already admitted up to 31.3.2009 and estimated additional capital expenditure for the respective years of the tariff period 2009-14:*

*Provided further that application shall contain details of underlying assumptions for projected capital cost and additional capital expenditure, where applicable.*

*(3) In case of the existing projects, the generating company or the transmission licensee, as the case may be, shall continue to provisionally bill the beneficiaries or the long-term customers with the tariff approved by the Commission and applicable as on 31.3.2009 for the period starting from 1.4.2009 till approval of tariff by the Commission in accordance these regulations:*

*Provided that where the tariff provisionally billed exceeds or falls short of the final tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall refund to or recover from the beneficiaries or the transmission customers, as the case may be, within six months along with simple interest at the rate equal to short-term Prime Lending Rate of State Bank of India on the 1<sup>st</sup> April of the concerned/respective year.”*

The above Regulations indicate that the generating company or transmission licensee has to make an application for determination of tariff in respect of existing projects or new projects expected to be completed within six months from the date of application. However, in the case of the existing projects, the

generating or transmission company shall continue to provisionally bill the beneficiaries with the tariff as prevailing on 31.3.2009 till the approval of the tariff by the Commission in accordance with the 2009 Tariff Regulations. On determination of final tariff by the Commission the generating company or transmission licensee shall be entitled to recover the difference between the final tariff and the tariff billed provisionally along with the interest at the specified rates from the beneficiaries. However, there was no provision for provisional billing for a new project.

9. Difficulty was experienced for provisional billing of new projects for which tariff petitions were under consideration by the Central Commission. Similarly petitions were also pending before the Central Commission for additional capitalization and increase in tariff during 2009-14 on account of increase in Return on Equity (ROE) and Operation and Maintenance (O&M) expenses for the existing projects resulting in cash flow

problem for the generating companies and transmission licensee. There were also directions issued by the Reserve Bank of India due to which, the lending rates of the banks were required to be linked to Base Rate instead of Prime Lending Rate of the bank with effect from 1.7.2010. This has led to amendments revising Regulation 5(3) and inserting Regulation 5(4). The amended Regulations are reproduced as under:-

**“Regulation 5(3):**

*In case of the existing projects, the generating company or the transmission licensee, as the case may be, shall continue to provisionally bill the beneficiaries or the long-term customers with the tariff approved by the Commission and applicable as on 31.3.2009 for the period starting from 1.4.2009 till approval of tariff by the Commission in accordance with these regulations.*

*Provided that where the tariff provisional billed exceeds or falls short of the final tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall refund to or recover from the beneficiaries or the transmission customers, as the case may be, within six months along with simple interest at the following rates for the period from the date of provisional billing to the date of issue of the final tariff order of the Commission:*



- (i) *SBI short-term Prime Lending Rate as on 01.04.2009 for the year 2009-10.*
- (ii) *SBI Rate as on 01.07.2010 plus 350 basis points for the Base year 2010-11.*
- (iii) *Monthly average SBI Base Rate from 01.07.2010 to 31.3.2011 plus 350 basis points for the year 2011-12.*
- (iv) *Monthly average SBI Base Rate during previous year plus 350 basis points for the year 2012-13 and 2013-14.*

*Provided that in cases where tariff has already been determined on the date of issue of this notification, the above provisions, to the extent of change in interest rate, shall be given effect to by the parties themselves and discrepancy, if any, shall be corrected at the time of truing up.”*

**“Regulation 5(4):**

*“Where application for determination of tariff of an existing or a new project has been filed before the Commission in accordance with clauses (1) and (2) of this regulation, the Commission may consider in its discretion to grant provisional tariff upto 95% of the annual fixed cost of the project claimed in the application subject to adjustment as per proviso to clause (3) of this regulation after the final tariff order has been issued:*

*Provided that recovery of capacity charge and energy charge or transmission charge, as the case may be, in respect of the existing or new project for which provisional tariff has been granted shall be made in accordance with the relevant provisions of these regulations.”*

10. Regulation 5(3) has been provided for continuity of billing for existing projects on provisional basis with effect from 1.4.2009 on the last tariff determined by the Central Commission under the 2004 Regulations. However, the adjustment on account of tariff provisionally billed and the final tariff along with interest has to be made on issuance of final tariff order by the Commission as per the proviso to the Regulation 5(3).
  
11. Regulation 5(4) has given a discretion to the Central Commission to grant provisional tariff upto 95% of the annual fixed cost of the project claimed in the application by the generating company or transmission licensee in respect of an existing or a new project. However, adjustment is to be made as per proviso to Regulation 5(3), **after the final tariff order has been issued.**
  
12. The contention of the Respondents 2 to 4 has been that the provisional tariff granted by the Central Commission under Regulation 5(4) has to be made applicable with

effect from 1.4.2009 and the arrears with interest on difference between provisional tariff and the tariff billed by the generating or transmission company till the grant of the provisional tariff at rates prevailing on 31.3.2009 as per Regulation 5(3) can be recovered. On determination of final tariff by the Central Commission, the difference between the final tariff and the provisional tariff by the Commission as per Regulation 5(4), along with interest can be recovered from the beneficiaries within six months. This will involve two step adjustment with interest, once at the time of determination of the provisional tariff and then finally at the time of determination of final tariff. However, we find on reading of the Regulation 5(3) and 5(4) that such two stage adjustment has not been envisaged in the Regulations. The Regulations provide for adjustment for difference between the provisional tariff and final tariff only after the final tariff order has been issued.

13. According to the Regulation 5(3), the generating company or transmission licensee for an existing power project shall provisionally bill the beneficiaries at the tariff as applicable on 31.3.2009 for the period beginning from 1.4.2009, till approval of tariff as per 2009 Regulations. However, if the Commission subsequently grants provisional tariff based on the claim of the generating company or transmission licensee in the application according to Regulation 5(4), the generating company can bill the beneficiaries at such provisional tariff till the determination of the final tariff. After the final tariff is determined by the Commission, the generating company can adjust the amount with interest on account of difference between the final tariff and the provisionally billed tariff. There is no provision in the Regulation 5 for recovery of amount with interest on grant of provisional tariff on account of difference in the provisional tariff and tariff as prevailing on 31.3.2009 which was charged with effect from 1.4.2009 prior to grant of the provisional tariff as per Regulation 5(3).

14. For a new project the Commission can determine the provisional tariff as per Regulation 5(4) and the same could be recovered by the generating company or transmission licensee with effect from its commercial operation date subject to adjustment on determination of final tariff, as for the new project no provisional billing has been done as per Regulation 5(3). However, there is no provision for charging interest on the provisional billing from the date of commercial operation to the date of billing of provisional tariff. The interest can be charged only after determination of the final tariff.
15. Let us now examine the findings of the Central Commission interpreting the Regulation 5(3) and 5(4).

*“20. A plain reading of the Clause 5(3) of 2009 Tariff Regulations would reveal that the existing generating stations or transmission systems are allowed to provisionally bill at the rate of the tariff applicable as on 31.3.2009 till approval of the tariff by the Commission in accordance with the regulations. The excess and shortfall between the provisionally billed*

*tariff and final tariff has to be settled as per proviso to clause (3) after the final tariff order was issued. The settlement with final tariff was provided since there was no concept of provisional tariff prior to 2.5.2011. After Regulation 5(4) was introduced through an amendment with effect from 2.5.2011, provisional tariff of the generating stations and transmission licensees were determined for the first time under the 2009 Tariff Regulations. Regulation 5(3) provides that provisional billing as per the tariff determined in accordance with 2004 Tariff Regulations and applicable as on 31.3.2009 shall continue to be billed to the beneficiaries till approval of the tariff in accordance with the regulations. After the provisional tariff has been determined by the Commission in accordance with the regulations, the provisional billing ceases to operate and tariff shall be paid as per provisional tariff determined by the Commission. In other words, the following actions will be taken after the provisional tariff orders are issued:-*

- a) Adjustment between the provisional tariff and the provisional bill already issued will be made within six months along with simple interest as provided in proviso to Regulation 5(3) of 2009 tariff regulations, from the date of provisional billing to the date of provisional tariff billing. As the tariff period is from 1.4.2009 to 31.3.2014, the intermediary increase/decrease as per provisional tariff will automatically be applicable from 1.4.2009.*
- b) As and when the Commission issues the final tariff order, adjustments will again be made as above between the provisional tariff and the final tariff with reference to the dates of effect in accordance with the Regulation 5(4).”*

Thus according to the impugned order, the adjustment has to be done at the intermediate stage after grant of provisional tariff by the Commission for difference between the provisional tariff and the provisional bills already made for the period from 1.4.2009 to the date of grant of provisional tariff within six months along with simple interest. The second adjustment is to be made on determination of final tariff for the difference between the final tariff and the provisional tariff. We find that such explanation is not found in the Regulations. Both the Regulations 5(3) and 5(4) clearly provide for adjustment for difference between tariff provisionally billed and the final tariff with interest only after the final tariff order has been issued. If the amended Regulations specifically provide for adjustment of amount with interest on account of difference between tariff provisionally billed and final tariff only after determination of final tariff, the adjustment at intermediate stage for difference between the provisional tariff and the provisional billing as per

tariff prevailing on 31.3.2009 can not be made in contravention to the Regulations.

16. Ld. Counsel for the Respondents have raised issues regarding conduct of the Appellants stating that they have abused the process of the court. We do not want to go into these issues as the Central Commission has not dealt with the same and we confine ourselves with our findings on the interpretation of the Regulations as has been done by the Central Commission in the impugned order. We also make it clear that we do not go into the validity of various orders earlier passed by the Central Commission granting the provisional tariff as per Regulation 5(4) especially when these orders have not been challenged by the Appellants in the Appellate forum.
17. The second issue is regarding jurisdiction of the Central Commission for adjudication of matters relating to billing and payment.



18. On this issue, the Ld. Counsel for the Appellants has made the following submission:

“Under Section 79(1)(a) and (b) of the Electricity Act, 2003, the power of the Central Commission is limited to regulate tariff of generating stations owned and controlled by Central Government or generating stations which enters into or otherwise have composite scheme for generation and sale of electricity in more than one state. The power of the Central Commission to adjudicate under Section 79(1)(f) of the Act is limited to dispute between generating company and transmission licensees in regard to matters connected with Section 79(1)(a) to (d) of the Act. According to Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005, the State Commission has power to regulate/approve electricity purchase and procurement process of distribution licensees. The power to regulate PPA would involve approval of PPAs which contain the commercial terms and arrangements. In view of above the disputes

regarding commercial terms i.e. credit period and payment security contained in the PPA falls within the jurisdiction of the State Commission under Section 86(1)(f) read with 86(1)(b) of the Act.”

19. We are not able to agree with the contentions of the Ld. Counsel for the Appellants. The Regulation of tariff is not just the determination of tariff rate at which the electricity is to be supplied or transmitted but also terms and conditions of tariff. The Central Commission has notified the Regulations called the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 on 19.1.2009. These Regulations not only provide for norms of determination of tariff but also scheduling, metering and accounting, billing and payment of charges, rebate and late payment surcharge.
  
20. This issue has already been decided by this Tribunal in judgment dated 4.9.2012 in Appeal nos. 94 and 95 of 2012 in the matter of BSES Rajdhani Power Ltd. Vs.

Delhi Electricity Regulatory Commission & Ors. The finding of the Tribunal in these cases is as under.

- “i) The State Commission does not have jurisdiction under section 86(1)(f) of the 2003 Act to adjudicate upon the dispute between a licensee and generating company in the matter of terms and conditions of tariff of a generating section owned and controlled by the Central Government, including the Regulation of supply by the generating company in the event of default in payment.**
- ii) Only Central Commission has jurisdiction under section 79(1) (f) of the 2003 Act to adjudicate upon the dispute involving generating companies owned and controlled by Central Government in the matter of terms and conditions of tariff and Regulation of supply. The jurisdiction of State Commission under Section 86(1)(f) is subject to Section 79(1)(f) of the Act.**
- iii) The terms and conditions of Tariff and Regulation of supply will be covered by Central**

***Commission's Tariff Regulation and Regulation  
of Power Supply Regulations."***

21. Therefore this issue is decided against the Appellants in line with the above findings of the Tribunal in the Appeal nos. 94 and 95 of 2012.
22. The third issue is regarding credit period.
23. According to Ld. Counsel for the Appellants, the 2009 Tariff Regulations provide for 60 days of receivable as working capital. The Regulations also mandate for 60 day credit period before levy of late payment surcharge. NTPC's tariff for all plants is determined by the Central Commission on a 60 day credit period under the Tariff Regulations. Therefore, the stance of NTPC to limit the credit period of the Appellants to 24 days and invoke the LC any time is discrimination against them and their consumers as compared to the 60 day period extended to other similarly placed Distribution Licensees.

Accordingly, the existing PPAs between the Appellants and the Respondents have to be aligned and amended consistent with the applicable tariff Regulations.

24. According to Ld. Counsel for the Respondent no.2, the Appellants have been attempting to approach the Delhi Commission and the Central Commission alternatively for seeking orders so as not to pay the legitimate dues accruing to them.

25. Let us now examine the findings of the Central Commission regarding the credit period. The relevant extracts of the impugned order are as under.

*“31. We have considered the submissions of the petitioners and NTPC. Regulation 34 and 35 of 2009 Tariff Regulations provide as under:*

*“34. **Rebate***

*For payment of bills of the generating company and the transmission licensee through letter of credit on presentation, a rebate of 2% shall be allowed. Where payments are made other than through letter of credit within a period of one month of presentation of*

*bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed.*

### **35. Late Payment Surcharge**

*In case of the payment of any bill for charges payable under these regulations is delayed by a beneficiary beyond a period of 60 days from the date of billing a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company or the transmission licensee as the case may be.”*

*The above provisions of the regulations clearly provide that payment through LC has been allowed in the 2009 Tariff Regulations as a matter of incentive for early payment and not as a payment security mechanism. However, in order to protect their commercial interests, the parties have mutually agreed and provided for a payment security mechanism in the PPA/BPTA.”*

### **32. The PPAs entered into between the petitioners and NTPC provides as under:**

*"6.1.1... NTPC would normally raise bills for the monthly power supplies by the 5th day of the following month as per the Regional Energy Accounts (REA) issued by the Northern Regional Power Committee (NRPC) or any other competent authority in accordance with tariff orders issued by CERC. BRPL shall make payment against the bills so raised by the last bank working day of the calendar month in which the bill is raised (hereinafter referred to as the "Due Date").*

*6.1.2... In case BRPL fails to make the payment by the Due Date, NTPC shall have the right to realize*

*payment through the Letter of Credit, as described in this Agreement."*

33. *In accordance with the PPA, the petitioners are liable to pay the bills by the last bank working day of the calendar month in which bill is raised and if the payment is not made by the petitioners by the due date, then right accrues to NTPC to realize the payment through LC. Thus the payment security mechanisms between the petitioners and NTPC are governed as per the mutually agreed PPA.*
34. *As regards the receivable for 60 days provided under Interest on Working Capital in the 2009 Tariff Regulations, this provision has been provided to enable the generating company or transmission licensee carry on its activities without being affected by the cash flow problem. Para 17.4 of the 2009 Tariff Regulations explains the reason for specifying 60 days receivables as under:*

*"17.4 The Commission has considered the concerns of the utilities. Draft Regulations 34 and 35 dealing with rebate and surcharge provide that a rebate of 1% will be admissible if the payment is made within one month and a surcharge of 1.25% will be levied in case the payment is delayed beyond 60 days. As payments are to be made by the beneficiaries without surcharge within a period of 60 days, it is imperative that the generating companies and transmission licensees are made available with working capital at least for a period of sixty days. In order to bring parity with the provision on rebate and late payment surcharge corresponding to the provision of receivables in the calculation of normative working capital requirement, is the Commission decided to restore 60 days of receivables in calculation interest on working capital."*

*Thus period of receivables specified in the 2009 Tariff Regulations was never linked to the period for encashment of the LCs as maintenance of LC is not a mandatory requirement under the Commission's Tariff Regulations.*

35. *Next we consider whether the provision in the PPA for encashment of LCs on the last banking day of the month is contrary to Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010 (hereinafter "Power Supply Regulations"). Regulation 2(g) of the Power Supply Regulations defines 'outstanding dues' as under:*

*"(g) "Outstanding dues" means the dues of a generating company or of a transmission licensee, which remains unpaid beyond a period of 60 days from the date of service of the bill on the beneficiaries;"*

*Further 'default trigger date' has been defined as under:*

*"(e) "Default Trigger Date" means the date from which the default in payment or default in maintaining Letter of Credit or any other agreed Payment Security Mechanism has been established.*

***Explanation I:-*** *In case of non payment of dues, this date shall be the next working day after completion of the 60 days period from the date of service of the bill by the generating company or the transmission licensee as the case may be.*

***Explanation II:-*** *In case of non maintenance of the required Letter of Credit or any other agreed Payment Security Mechanism, the Default Trigger Date shall*



*be third working day after the payment security mechanism, as per the Agreement, ceases to exist.;*”

*Regulation 3 and 4 of Power Supply Regulations provide for the scope and applicability of Power Supply Regulations as under:*

- “3. **Scope and Applicability:** These Regulations shall be applicable to the generating station and the transmission system where there is a specific provision in the Agreement between the Beneficiaries and Generating Company or the Transmission Licensee as the case may be, for regulation of power supply in case of non-payment of outstanding dues or non-maintenance of Letter of Credit or any other agreed Payment Security Mechanism.*
- 4. In case of the outstanding dues or in case the required Letter of Credit or any other agreed Payment Security Mechanism is not maintained as per the Agreement, the generating company or the transmission licensee, as the case may be, may serve a notice for regulation of power supply, on the Defaulting Entity, for reducing the drawl schedule in the case of the generating company or with-drawl of open access/access to Inter State Transmission System in the case of the transmission licensee. Such notice may be served on or after the default trigger date and shall include the following details:"*
- 36. A combined reading of above provisions reveals that dues of generating companies and transmission licensees which remain unpaid for a period of 60 days are termed as “outstanding dues”. Moreover, default trigger date for non-payment of dues is the next working day after 60 days of the service of the bills and for non-maintenance of the LCs is three days after the payment security mechanism as per*

*the agreement ceases to exist. Regulation 4 provides that notice for regulation of power can be served on or after the default trigger date. Thus as per the Power Supply Regulations, notice for regulation of power supply can be made after a period of 60 days. In so far as non maintenance of required payment security mechanism is concerned, the default trigger date is the third working day after the payment security mechanism ceases to exist as per the agreement. As per para 6.2.8 of the PPA, if the LC is not maintained within 7 days from the date of drawal, the Escrow arrangement shall come into operation. Para 6.4.1 says that in case of non-availability or reinstatement of LC within seven days of its operation, NTPC shall have the option to sell whole or any part of the power allocated to the petitioners. Thus in case of default for non-payment, NTPC is entitled to encash the LC after 25 days of receipt of the bill and go for regulation of power 10 days thereafter (7 days period for recoupment of LC+ 3 days period for default trigger date as per the Power Supply Regulations). The petitioner is aggrieved about the short period of Due Date for payment of bills allowed as 24 days under the PPA and linked thereto is the time allowed for encashment of the LCs by NTPC. 2009 Tariff Regulations do not have provisions dealing with maintenance and operation of LC as a payment security mechanism. We are of the view that the Petitioners and NTPC may negotiate and agree on the terms and conditions of LCs including the Due Date, maintenance and operation of LC etc. and include the same in the PPA.”*

26. The findings of the Central Commission are summarized as under:-

- i) Letter of Credit has been allowed in the 2009 Tariff Regulations as a matter of incentive for early payment and not as a payment security mechanism. However, the parties have mutually agreed and provided for a payment security mechanism in the PPA in order to protect their commercial interest.
  
- ii) PPA entered into between the Petitioners and NTPC provides for payment by the Petitioners by the last working day of the calendar month in which the bill is raised which is termed as the “Due Date”. In case the petitioners failed to make payment by the Due Date, NTPC shall have right to realize payment through LC.
  
- iii) The Tariff Regulations have a provision for rebate if payment is made through LC on presentation and within one month and levy of surcharge in case the payment is delayed beyond a period of 60 days from the date of billing. In order to bring parity with the provision of

rebate and late payment surcharge, the Regulations provide for including 60 days of receivable in calculation of interest on working capital.

iv) According to the Power Supply Regulations, the default is triggered on the date from which default for payment or default in maintaining LC or any other agreed Payment Security Mechanism occurs. The default for payment is triggered on non-payment after completion of 60 days period from the date of service of bill and the default for LC or any other Payment Security Mechanism ('PSM') is triggered on third working day after the PSM ceases to exist.

v) 2009 Tariff Regulations do not have provision dealing with maintenance and operation of Letter of Credit as Payment Security Mechanism. Therefore, the Petitioners and NTPC may negotiate and agree on the terms and conditions of LC, maintenance and operation of LC, etc., and include the same in the PPA.

27. In view of the detailed discussion made by the Central Commission, we agree with the findings of the Central Commission. The Regulations do not have a provision dealing with maintenance and operation of Letter of Credit as payment of Security Mechanism. The parties have mutually agreed and a provided terms and conditions of maintaining Payment Security Mechanism in the PPA in order to protect their commercial interest. The Appellants have entered into the PPA and have been maintaining Letter of Credit according to the provision of the PPA. It is now not open for the Appellants to question the provision regarding invoking of Letter of Credit by NTPC as per the PPA having pursued the same since entering into the PPA on 5.6.2008 with NTPC. Therefore, we do not incline to interfere with the findings of the Central Commission.
28. The fourth issue is regarding consolidated LC vis-a-vis station-wise LC.

29. The Ld. Counsel for the Appellants has argued that since the tariff is determined and billed station-wise the LC should also be maintained station-wise and not consolidated LC as insisted by NTPC.
30. According to Ld. Counsel for the Respondents, the consolidated LC is being maintained as per the PPA. Appellants have been maintaining consolidated LC for all the projects other beneficiaries have also been maintaining consolidated LC and not station-wise.
31. Let us now examine the findings of the Central Commission. The relevant findings are as under:-

*“40. On perusal of the Power Purchase Agreements between the petitioners and NTPC, we notice that the parties have agreed for a single consolidated PPA for all the generating stations of NTPC from which power is supplied to the petitioners. Para 6.2.1 of the PPA with BRPL is extracted as under:*

*"6.2.1 BRPL shall provide to NTPC, unconditional, revolving and irrevocable letter(s) of credit*

*("LC") which shall be drawn in favour of NTPC in accordance with this Agreement. The LC shall be provided from the Scheduled Bank(s) in a format acceptable to NTPC. Notwithstanding anything to the contrary stated above, the LC would revolve every month and the amount so negotiated under the LC would be reinstated to its original value upon funding of prior withdrawal under LC either by BRPL or through the Escrow arrangement."*

*The PPA of BYPL with NTPC also has a similar provision. Thus under the PPAs, the petitioners have committed themselves to open and maintain unconditional, revolving and irrevocable LCs in favour of NTPC. As per the understanding of the parties, consolidated LCs covering all stations of NTPC are being provided by the Petitioners since the date of execution of the PPA with effect from 5.6.2008. Tariff Regulations, 2009 neither mandate nor prohibit maintenance of station wise LC, Both NTPC and the petitioners may, therefore, mutually decide regarding the opening of station-wise LCs and incorporate the same into the PPAs."*

32. We are in agreement with the findings of the Commission. It is true that the generation tariff is determined by the Central Commission station-wise and the Respondents 2 and 3 have accordingly been billing the fixed and variable charges station-wise as per the supplies made from the respective power stations. However, the Appellants have signed a single

consolidated PPA for all the generating stations and have agreed to provide consolidated LC and the same is being followed up since the date of execution of PPA i.e. 5.6.2008 with NTPC. After having followed the provision of the PPA mutually agreed by them relating to LC since 5.6.2008, it is not now open for the Appellants to challenge the same.

33. Further, there is also no provision in the Regulations which prohibits consolidated LC as payment security mechanism. The payment security mechanism has been agreed between the parties and the Appellants have been maintaining consolidated LC since entering into the PPA dated 5.6.2008 with NTPC. The Appellants have entered into PPA for procurement of power from all the power plants of the generating companies and, therefore, there should not be any issue relating to maintaining LC corresponding to allocation of power from all the power projects. Thus, we do not find any infirmity in the findings of the Central Commission.



**34. Summary of findings.**

- i) According to the Regulation 5(3), the generating company or transmission licensee for an existing power project shall provisionally bill the beneficiaries at the tariff as applicable on 31.3.2009 for the period beginning from 1.4.2009, till approval of tariff as per 2009 Regulations. However, if the Commission subsequently grants provisional tariff based on the claim of the generating company or transmission licensee in the application according to Regulation 5(4), the generating company can bill the beneficiaries at such provisional tariff till the determination of the final tariff. After the final tariff is determined by the Commission, the generating company can adjust the amount with interest on account of difference between the final tariff and the provisionally billed tariff. There is no provision**

**in the Regulation 5 for recovery of amount with interest on grant of provisional tariff on account of difference in the provisional tariff and tariff as prevailing on 31.3.2009 which was charged with effect from 1.4.2009 prior to grant of the provisional tariff as per Regulation 5(3).**

- ii) For a new project the Commission can determine the provisional tariff as per Regulation 5(4) and the same could be recovered by the generating company or transmission licensee with effect from its commercial operation date subject to adjustment on determination of final tariff, as for the new project no provisional billing has been done as per Regulation 5(3). However, there is no provision for charging interest on the provisional billing from the date of commercial operation to the date of billing of provisional**

**tariff. The interest can be charged only after determination of the final tariff.**

- iii) We have restricted ourselves to the interpretation of the Tariff Regulations 5(3) and 5(4) and have not gone into the validity of the various orders earlier passed by the Central Commission granting the provisional tariff as per Regulations 5(4) as these orders have not been challenged by the Appellants.**
  
- iv) Central Commission has jurisdiction to adjudicate upon the dispute in question between the Appellants and the Respondents 2 to 4 in the matter of terms and conditions of tariff including billing and payment.**
  
- v) We do not find any infirmity in the findings of the Central Commission regarding credit period**

**and accordingly we reject the contentions of the Appellants.**

**vi) We do not find any infirmity in the findings of the Central Commission regarding maintenance of consolidated LC and reject the contentions of the Appellants.**

35. The Appeals are allowed in part relating to interpretation of Regulations 5(3) and 5(4) only. On other issues, the order impugned is confirmed. No order as to costs.

36. Pronounced in the open court on this **24<sup>th</sup> day of January, 2013.**

**( Rakesh Nath)  
Technical Member**

**(Justice M. Karpaga Vinayagam)  
Chairperson**

√  
**REPORTABLE/~~NON-REPORTABLE~~**  
**mk**