

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

**IA No. 171 of 2012 in Appeal No.82 of 2012
and IA No. 183 of 2012 in Appeal no.90 of 2012**

Dated: 2nd July, 2012

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

In the matter of:

IA No. 171 of 2012 in Appeal No.82 of 2012

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

....Appellant

Versus

**1. Central Electricity Regulatory
Commission**

.....Respondent(s)

3rd and 4th Floor, Chanderlok Building
36, Janpath
New Delhi – 110 001

2. NTPC Limited

NTPC Bhawan, SCOPE Complex
7, Institutional Area, Lodhi Rad
New Delhi – 110 003

3. National Hydro Power Corporation Limited

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

IA No. 183 of 2012 in Appeal no.90 of 2012

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

.... Appellant

Versus

- 1. Central Electricity Regulatory Commission** **.....Respondent(s)**
3rd and 4th Floor, Chanderlok Building
36, Janpath
New Delhi – 110 001
- 2. NTPC Limited**
NTPC Bhawan, SCOPE Complex
7, Institutional Area, Lodhi Rad
New Delhi – 110 003
- 3. National Hydro Power Corporation Limited**
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

ORDER

The IA Nos. 171 of 2012 in Appeal No.82 of 2012 and 183 of 2012 in Appeal no.90 of 2012 have been filed by BSES Rajdhani Power Ld and BSES Yamuna Power Ltd. respectively praying for grant of an interim stay of retrospective levy of tariff by NTPC Ltd., National Hydro Power Corporation Ltd. and Power Grid Corporation of India Ltd., Respondents 2 to 4 herein, pursuant to provisional tariff orders passed by the Central Electricity Regulatory Commission (“Central Commission”) in July/August, 2011 under Regulation 5(4) of the Tariff Regulations, 2009.

2. The Petitioners/Appellants are the distribution licensees operating in NCT of Delhi. The Respondent no.1 is the Central Commission. The Respondent nos.2 and 3 are the Central Sector generating companies. The Respondent no.4 is the transmission licensee.

3. The Appellants have filed these appeals challenging the order dated 26.03.2012 passed by the Central Commission in which it has upheld the retrospective levy of tariff by Respondent nos. 2 to 4 pursuant to provisional tariff order passed by the Central Commission in July/August, 2011 under Regulation 5(4) of the Tariff Regulations, 2009.

4. The brief facts of the case are as under:

4.1 The Tariff Regulations, 2009 notified by the Central Commission came into effect from 01.04.2009. These Regulations were amended on 02.05.2011 and 21.06.2011. The Regulations, as amended, have a provision that the existing projects shall continue to provisionally bill the

beneficiaries with the tariff approved by the Central Commission as applicable on 31.03.2009 for the period starting from 01.04.2009 till the approval of tariff by the Commission in accordance with the 2009 Tariff Regulations. It also provides that where application for determination of tariff of an existing or a new project has been filed before the Commission in accordance with the Regulations, the Commission may consider to grant provisional tariff upto 95% of the annual fixed cost of the project claimed by the applicant, subject to adjustment after the final tariff order has been issued.

4.2 Provisional Tariff orders for NTPC Stations were issued by the Central Commission between 06.07.2011 and 12.08.2011 for different power projects. Pursuant to these orders, the Respondent issued invoices to the Appellants for recovery of dues for the period April, 2009 to July, 2011.

4.3 On 01.09.2011, the Appellants filed petitions before the Central Commission seeking certain reliefs in respect of

- claims of Respondents nos. 2 to 4 including the retrospective recovery of arrears with interest w.e.f. 01.04.2009 for provisional tariff decided by the Central Commission under Regulation 5(4).
- 4.4 The Central Commission passed the impugned order dated 26.03.2012, *inter alia* rejecting the plea of the Appellants regarding claim of arrears from 01.04.2009 based on the provisional tariff determined by the Central Commission.
- 4.5 As against this order, the Appellant have filed these Appeals. In the Interim Applications the Appellants have requested for interim stay of the operation of this order only with regard to the issue of retrospective recovery of provisional tariff w.e.f. 01.04.2009 by Respondents nos. 2 to 4.
5. Ld. Counsel for the Petitioners/Appellants argued at length that the retrospective levy of tariff by the Respondents nos. 2 to 4 pursuant to provisional tariff is contrary to settled

position of law, and the 2003 Act and that the Regulations framed there under which do not permit retrospective revision of tariff. It is further contended that the explicit language of the Regulations envisages that any shortfall or excess recovery of tariff shall be determined and adjusted only after the final tariff is determined by the Central Commission; thus, according to the Regulations, the provisional tariff could be applied prospectively and that the arrears, if any with interest, could be collected only after determination of the final tariff.

6. Ld. Counsel for the Respondents no.2 and 3 submitted that since the Appellants are required to pay the tariff as applicable under the Tariff Regulation, 2009 from 01.04.2009 onwards, the revised tariff payable with effect from 01.04.2009 as per the Regulations is not a retrospective levy and that the application for tariff determined on a date later than 01.04.2009 is clearly envisaged in the Tariff Regulations, 2009. He made further submissions regarding proceedings before the Delhi

Commission and Central Commission in petitions filed by the Appellants regarding payment of dues to the Respondents generating companies/transmission licensee, stating that the Appellants' attempt was to avoid and defer payment of dues in view of their financial position.

7. After hearing the detailed submissions of the Ld. Counsel for the parties, we feel that we have to restrict ourselves to the limited issue of retrospective recovery of arrears with interest by the generating companies/transmission licensee w.e.f. 01.04.2009 against the provisional tariff orders issued by the Central Commission.

8. The relevant Regulation 5(3) and 5(4) are reproduced below:

“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 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 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.”

9. We do not want to finally interpret the Regulation at this stage and want to restrict ourselves to prima facie observations to the extent necessary to dispose of the interim application. We notice that the Regulation 5(4) provides for grant of provisional tariff upto 95% of the annual fixed cost of the project claimed in the application filed by the generating company/transmission licensee subject to adjustment as per proviso to clauses (3) of the Regulation after the final tariff order has been issued.

10. We also notice that Regulation 5(3) clearly lays down the adjustment of excess/shortfall of tariff on the determination of final tariff with respect to provisional billing with interest. However, there appears to be no provision for adjustment of shortfall/excess with interest for provisional tariff determined under Regulation 5(4) with respect to tariff

- provisionally billed as per Regulation 5(3) w.e.f. 01.04.2009. However, Regulation 5(4) would permit the Central Commission to determine provisional tariff and generating company/transmission licensee to charge for a new project commissioned after 01.04.2009 or a project commissioned before 01.04.2009, whose tariff was not determined prior to 01.04.2009 as per the 2009 Tariff Regulations w.e.f. 01.04.2009.
11. Thus, we find prima facie case in the submissions of the Appellant in so as far as recovery of arrears with interest w.e.f. 01.04.2009 in respect of projects where provisional bills were earlier raised by the generating company/transmission licensee as per Regulations 5(3), against the order of the Central Commission for provisional tariff under Regulations 5(4).
12. The balance of convenience also lies in favour of the Appellants as the final tariff is yet to be determined by the Central Commission.

13. In view of the above, we allow the IAs only to the extent of retrospective application of provisional tariff determined under Regulation 5(4) in respect of the projects for which provisional bills were raised by the generating company/transmission licensee w.e.f. 01.04.2009 as per Regulation 5(3). However, our prima facie observations on the Regulations are confined to the limited issue for disposal of these IAs and should not be considered as our final interpretation of the Regulation, which we shall do at the time of disposal of the main Appeals. With these observations the IAs are allowed to the extent indicated above.

Post the Appeals on 1st August, 2012 *

Pronounced in open court on 2nd day of July, 2012.

**(Rakesh Nath)
Technical Member**

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

REPORTABLE/NON-REPORTABLE

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*** The words shown in italics and bold above are as per orders of the Hon'ble Tribunal**