

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

RECORD OF PROCEEDINGS

Petition No.151/2010

Subject: Clarification Petition seeking clarification in regard to reimbursement of the liability on account of FERV and the cost of hedging.

Date of hearing: 28.9.2010

Coram: Shri S.Jayaraman, Member
Shri V.S.Verma, Member

Petitioner: NTPC Ltd

Respondents: UPPCL & 35 ors.

Parties present: 1. Shri A.V.Rajware, Consultant, NTPC
2. Shri K.Sreekant, NTPC
3. Shri Ajay Dua, NTPC
4. Shri R.B.Sharma, Advocate, BSEB
5. Shri Manish Garg, UPPCL
6. Shri Gopal Prasad, Advocate, JSEB

This petition has been filed by the petitioner, NTPC, seeking clarification with regard to the reimbursement of the liability on account of FERV and the cost of hedging.

2. The representative of the petitioner submitted as under:
- (a) There was no clarity in the provisions of Regulation 40 (3) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009, in view of the words “not able to hedge the foreign loan.....”
 - (b) In normal market conditions, hedging was always possible at a price, and therefore the word ‘not able to’ in Regulation 40 (3) does not seem to be in consonance with Regulation 40(1).
 - (c) Normative repayment of loans should be first adjusted with actual loan repayment of foreign debt and the balance from domestic loan
 - (d) Regulation 40 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009, provides discretion to the petitioner as regards hedging against FERV and there are various instruments available in the market for hedging the foreign exchange exposure, to reduce the risk or uncertainties in foreign currency market. In respect of non-USD foreign currencies, hedging has two parts viz. a non-USD to USD part and a USD to INR part. In view of this, permission needs

to be granted for recovering the hedge cost for non-USD foreign part eg to USD part, as well as FERV.

2. The representative of the respondent, UPPCL submitted as under:
 - (a) The ambiguity in the usage of the words “not able to’ in Regulation 40(3) needs to be resolved.
 - (b) The adjustment of normative repayment loans first with actual loans repayment and balance from domestic loans would not be economically beneficial to the beneficiaries as the foreign currency loans carries lesser rate of interest than INR loan.
 - (c) The hedging cost may be passed on to the beneficiaries only on accrual basis corresponding to cash outflows pertaining to repayments and interest repayments due in the relevant year.
 - (d) The costs associated with swapping of foreign floating interest rate loan to Indian fixed rate loan loans should be borne by the beneficiaries’ only if it resulted in net saving to the beneficiaries, as specified under Regulation 16 (7) of 2009 regulations.
 - (e) A methodology of sharing the net savings between the beneficiaries and generating companies, as specified under Regulation 16 (7) may be explained and also communicated to the beneficiaries.
 - (f) The Commission may consider to issue a consultation paper on the said subject, in order to take a holistic view.
3. The learned counsel for the respondents, BSEB submitted its arguments on the merits and the legality of the prayer of the petitioner, as under:
 - (a) There was no ambiguity in the provisions of Regulations 40(1) and 40(3) as submitted by the petitioner, since, in terms of Regulation 40(1), hedging in respect of interest on foreign currency and repayment of foreign loan (in part or in full) was in the full discretion of the petitioner company. Even as per Regulation 40(3), if the petitioner was not able to hedge FERV, then the extra rupee liability was recoverable.
 - (b) The statement of the petitioner that hedging was possible at a price, pre-supposes the exercise of discretion in an arbitrary manner. The discretion allowed by the Commission in Regulation 40(1) was to be exercised in a reasonable manner and the onus to show that hedging was reasonable rested with the petitioner.
 - (c) The recovery of the cost of hedging and FERV was required to be made directly to the beneficiaries and hence it was necessary for the petitioner to convince the beneficiaries of the reasonability of hedging.
 - (d) The principle that discretionary powers given to governmental/quasi – governmental authorities must be hedged by policy, standards, procedural safeguards or guidelines, failing which the exercise of discretion and delegation would be quashed by courts, have been reiterated in many cases by the Hon’ble Supreme Court.

- (e) In case of hedging where actual loan is higher than normative loan, the petitioner should bear the hedging costs of the balance foreign loan. In case actual loan was less than normative loan, then hedging could be on actual foreign loan and there would be no issue if actual loan was equal to normative loan.
- (f) The cost of hedging corresponding to the normative foreign debt in the relevant year, on year to year basis could only be recovered from the beneficiaries. Recovery of upfront premium should not be allowed.
- (g) There was no provision in the said regulations for two part hedging and for hedging the interest rate risk, by swapping of foreign floating rate loan with the Indian fixed rate loan.
- (h) The provision under which the petition has been filed has not been mentioned by the petitioner. Even otherwise, on the question related to the interpretation of the statute (ie, regulations in this case) no clarification was required to be made.
- (i) Recovery of hedging cost was available against FERV and not against floating loan.
- (j) The question of the Commission issuing a consultative paper on the said subject would arise only when the provisions of the said regulations are required to be amended. Hence, the prayer of the petitioner deserves no merit for consideration.

4. In response, the representative of the petitioner clarified as under:

- (a) The discretion provided by the Commission under the regulations for hedging, would be exercised in a reasonable manner by the Board of the petitioner company and the discretion exercised should not be judged by the outcome/result of the said exercise, as the objective of hedging was to reduce the risk /uncertainty.
- (b) The petitioner has prepared a detailed policy framework on hedging which has been duly approved by its Board and according to the said policy, the decisions on hedging would be taken by the petitioner company.
- (c) As time is an essence for all decisions on hedging, consultation with the beneficiaries in such event would not be practically possible as certain decisions need to be taken through oral communication.
- (d) The prayer of the petitioner should be considered in the light of the submissions made by the petitioner.

5. The Commission directed the petitioner to submit a copy of approved policy on Hedging, latest by 11.10.2010.

6. Subject to the above, order in the petition was reserved.

Sd/-
(Dr. N.C.Mahapatra)
Chief Advisor (Law)