

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. Shri D.P. Sinha, Member
2. Shri G.S. Rajamani, Member
3. Shri K.N. Sinha, Member

Petition No. 28/2000

In the matter of

Payment of outstanding dues and payment of future monthly bills on time (Eastern Region)

And in the matter of

National Thermal Power Corporation Ltd.	....	Petitioner
Vs		
Bihar State Electricity Board and others	.....	Respondents

Petition No.53/2000

In the matter of

Payment of outstanding dues and recovery of fixed charges in the event of regulation of power supply (Northern Region).

And in the matter of

National Thermal Power Corporation Ltd.	....	Petitioner
Vs		
Uttar Pradesh Power Corporation Ltd and others	....	Respondents

Petition No. 54/2000

In the matter of

Payment of outstanding dues and payment of future monthly bills on time (Western Region)

And in the matter of

National Thermal Power Corporation Ltd.	....	Petitioner
Vs		
Madhya Pradesh Electricity Board and others	....	Respondents

In the matter of

Payment of outstanding dues and payment of future monthly bills on time (Southern Region)

And in the matter of

National Thermal Power Corporation Ltd. -Petitioner
Vs Transmission Corporation of Andhra Pradesh
and others -Respondents

The following were present:

1. Shri | M.G. Ramachandran, Advocate for NTPC K.K.
2. Shri | Garg, GM (Comm.), NTPC M.S. Chawla,
3. Shri | DGM, NTPC Rajeshwar Datt, NTPC T.R.
4. Shri | Sohal, NTPC R. Singhal, NTPC
5. Shri | S.K. Sharma, Sr. Mgr. (Comml.), NTPC Satish
6. Shri | Agnihotri, Advocate for MPEB Rohit K. Singh,
7. Shri | Advocate for MPEB S.P. Degwekar, CO,
8. Shri | MPEB Ashwini Kumar, Sr. Advocate for DVB
9. Shri | Ms. Ruchi Narula, Advocate for DVB M.K.
10. Shri | Choudhary, DVB F.K. Khan, F.O., DVB V.K.
11. Shri | Choudhary, AFO (PP), DVB M.H. Parviz,
12. Ms. | KPTCL Gurcharan Singh, HVPNL S. Atiq
13. Shri | Ullah, SE (IS), BSEB, Patna
14. Shri |
15. Shri |
16. Shri | **ORDER (DATE OF HEARING : 19.11.2001)**
17. Shr | *********
18. Shr |

These petitions have been filed by the petitioner, NTPC with the

following prayers:

- "(a) Pass appropriate directions in regard to payment of the amounts due to the applicant as mentioned in the application from the

defaulting respondents and further direct the respondents to make full future payment of monthly bills on time based on the Commission's order dated 12.5.1999 and such further orders as the Commission may issue from time to time.

- (b) Pass appropriate orders in line with the proposal contained in para 15 of this petition to change the methodology for apportionment of fixed charges in the event that the applicant enforces regulation of power supply to respondents who default in making payments.
- (c) Direct that the respondents should create a First Charge against all their revenues to secure the amounts due to the applicant and such First Charge should have precedence over the escrow arrangements for power purchases contracted by the respondents subsequent to the commencement of power purchase from the applicant.
- (d) Pass any such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case in favour of the applicant."

2. The petitioner is a generating company owned by the Central Government and is supplying power to the respondents located in different regions. The tariff, terms and conditions for supply of power were earlier notified by the Central Government from time to time by virtue of powers conferred under Section 43A(2) of the Electricity (Supply) Act, 1948. The details of the notifications issued by the Central Government from time to time have been furnished by the

petitioner. The copies of the Power Purchase Agreements signed between the petitioner and the respondents have also been placed on record. It is alleged that the respondents have been defaulting in making payments of the amounts due to the petitioner for the energy supplied to them. The consolidated outstanding amounts due against each of the respondents have been furnished. Accordingly, the petitioner has sought appropriate directions to the respondents for making payments of the outstanding amounts and to make all future payment of monthly bills on time.

3. Section 43A(2) of the Electricity (Supply) Act was omitted w.e.f. 15.5.1999 and from that date power to regulate tariff of the generating companies owned or controlled by the Central Government, among others, is vested in the Commission. The Commission in its notification dated 12-5-1999 read with order dated 21.12.2000 in Petition No.4/2000 and other related petitions had continued up to 31.3.2001 the tariff and terms and conditions determined by the Central Government prior to vesting of function of power regulation of tariff in the Commission.

4. It is stated that the petitioner, as per the provisions of Bulk Power Agreement entered into between the petitioner and the respondents, has a right to regulate power supply of the state utilities defaulting in making payment. It is further stated that presently, fixed charges for supply of electricity from the stations belonging to the petitioner are recovered based on actual drawal of

electricity. The petitioner has stated that regulation or discontinuance of power supply to a defaulting state utility on account of non-payment of dues would add to the burden of the other utilities since the total fixed charges would then be apportioned amongst other state utilities, whose power supply would not be regulated and thus add to their burden, without any fault. This method of recovery of fixed charges in the event of regulation of power supply to a defaulting utility would be inequitable and, therefore, the petitioner seeks to change the methodology for apportionment of fixed charges in the event of the petitioner enforcing regulation of power supply to the respondents defaulting in making payments of the dues.

5. It has been further stated that the State Governments/respondents are negotiating escrow arrangements with Independent Power Producers (IPPs) for securing the amount that would become due to such power producers in future. The State Governments/respondents, it is averred, propose to earmark the specific consumers and/or specific areas, the revenue from which would be dedicated for payment to such IPPs. According to the petitioner, since it is supplying power to the respondents before the IPPs enter into the fray, it has a superior right to secure its payments over the IPPs, who would be entering the field subsequent to the petitioner. It is alleged that the arrangement being negotiated by the respondents with IPPs would adversely affect the interests of the petitioner since the dues of the petitioner would remain unpaid and outstanding. Against this background, a direction has been sought to the

respondents to create a First Charge against their revenue to secure the amount due to the petitioner and such First Charge should have precedence over the escrow arrangements being negotiated by the respondents with the IPPs. According to the petitioner, the direction sought is covered under the (unction of formulation of tariff policy assigned to the Commission under clause (e) of Section 13 of the Electricity Regulatory Commissions Act, 1998 (for short, the 1998 Act).

6. It has been argued on behalf of the respondents that the directions sought by the petitioner fall within the jurisdiction of a civil court. The jurisdiction of the Commission cannot be extended to that vested in a civil court. It is further argued that the Commission is following a summary procedure in the proceedings before it. In case the Commission gives the direction for payment of dues, the respondents would be deprived of the opportunity of trial available before the normal courts as also the courses of appeal under the general law. It is stated that an application for recovery of dues by-passing the regulatory procedure cannot be contemplated within the provisions of clause (h) of Section 13 of the 1998 Act. It has been further stated that the Central Government, being alive to the problem of accumulating arrears, constituted a committee under the chairmanship of Shri M.S. Ahluwalia, Member, Planning Commission, to take stock of the situation and make appropriate recommendations. The Committee has already submitted its report to the Central Government and, therefore, the Commission should await the decision of the Central Government on these recommendations before taking any action in the present petitions.

7. Shri Ashwini Kumar, Sr. Advocate, assisted by Ms. Ruchi Narula, Advocate had made arguments on behalf of Delhi Vidyut Board, a respondent in Petition No. 53/2000. On behalf of Madhya Pradesh Electricity Board, the submissions were made by Shri S.K. Agnihotri, Advocate. We have carefully considered the issues raised on behalf of the parties in their pleadings as also at the time of hearing of the petitions.

8. The directions have been sought to the respondents for payment of all outstanding dues and for making payment of the future monthly bills in a time-bound manner. The direction sought, according to the petitioner, is covered under clause (h) of Section 13 of the 1998 Act, according to which the Commission is assigned the function "to arbitrate or adjudicate upon disputes involving generating companies or transmission utilities in regard to matters connected with clauses (a) to (c) above". It is contended by the petitioner that in view of clause (h) of Section 13 of the 1998 Act, the Commission has the power to give necessary direction to the defaulting state utilities.

9. We have very carefully considered the submission made. Under clauses (a) to (c) of Section 13 of the 1998 Act, the Commission is assigned the power to regulate tariff of the utilities specified therein. Clause (h) of Section 13 of the 1998 Act can be invoked in case of differences or disputes arising out of determination of tariff by the Commission and the related issues. In essence there is no dispute or difference between the parties which is required to be

arbitrated or adjudicated by the Commission. In these circumstances, the question arises whether a direction for payment of dues, as sought by the petitioner can be given by the respondents. In our view, the issue raised falls within the realm of enforcement of its order by the Commission. Section 12 of the 1998 Act confers same powers on the Commission as are vested in a civil court under the Code of Civil Procedure in respect of the matters specified therein. The power of execution of its orders by the Commission is not specified under Section 12. It has been argued by learned counsel for the petitioner that power of enforcement of its orders by the Commission is implied in the function of regulation of tariff assigned to the Commission under clauses (a) to (c) of Section 13 of the 1998 Act. We leave this question open to be considered in some other appropriate proceedings. We find that the petitioner has not even submitted the details of the outstanding dues which might have enabled the Commission to look into the matter in proper perspective. Therefore, we do not find ourselves in a position to give any directions as prayed for in sub-para (a) of the "prayer clause" reproduced in para 1 above. We also find that the Bulk Power Purchase Agreements signed between NTPC and the respondents provide for regulation of power supply by the petitioner in the event of the bills remaining unpaid for a period exceeding 2 months from the date of their issue. In case the petitioner had acted prudently and strictly enforced the provisions of the Power Purchase Agreements, the arrears for payment of which directions have been sought would not have acquired the alarming proportion.

10. The petitioner has sought change in the methodology for apportionment of fixed charges. We have separately issued an order on 11.1.2002 titled "Regulation of Power Supply to the beneficiaries in case of non-payment of dues of Central Power Utilities" which elaborately deals with the method of apportionment of fixed charges in the event of regulation of power supply by the central utilities. The relevant portion of order is extracted below:

"Regulation by Generating utility:

- (a) The regulating utility shall in the first instance determine the quantum and duration of regulation.*
- (b) The regulating utility shall carry out negotiations with other utilities, within or outside the region for purchase of regulated power*
- (c) The request for regulation of power supply made to RLDC shall indicate
 - (i) The quantum of power supply to be regulated,*
 - (ii) Duration of regulation,*
 - (iii) Utilities willing to purchase the regulated power*
 - (iv) Rate(s) at which the regulated power shall be sold.**
- (d) In case the regulating utility is unable to organise sale of regulated power, this fact shall be clearly stated in the request for regulation made to RLDC. In such a situation, the regulated utility, within a period of 15 days from the date of receipt of request for regulation of power supply, shall have a right to organise sale of regulated power to a utility within or outside the region in consultation with the RLDC with a view to examining the feasibility of delivering the regulated power to the concerned utility.*
- (e) If regulation of power supply to the regulated utility results in reduction in generation of power, the fixed charges of Central Generating Station corresponding to the reduction in generation owing to regulation shall be borne by the regulated utility, subject to condition that no diversion of power is possible.*
- (f) In case regulation is effected by diversion of power by a generating utility to other beneficiaries within the same region or to the utilities outside the region at a rate higher than the tariff fixed for the Central Generating Station, the profits*

accruing to the generating utility i.e. difference between the sale proceeds a fid notified tariff after making adjustments for the transmission charges, shall be distributed in the following manner:

(i) From the profits accruing to the generating utility, reasonable trading charges, if incurred on account of involvement of a trader such as PTC, shall be allowed.

(ii) From the remaining profits, 2JT^s shall be adjusted against the outstanding dues of the regulated utility and the balance 1/3rd shall be retained by the generating utility.

(g) In case the regulation of power is done by diversion of power to other beneficiaries at a rate lower than the tariff fixed for the Central Generating Station, the regulated utility shall compensate the generating utility of the loss suffered, which shall be equal to the difference between notified tariff and sale proceeds of regulated energy.

(h) The generating utility enforcing regulation of power supply shall have no claim for incentive corresponding to the quantum of generation reduced in the process of regulation.

(i) If regulation by generating utility is effected by opening of lines/ICTs of the transmission utility, the outage time of such elements shall be treated as not attributable to the transmission utility and such elements shall be deemed to be available for calculation of overall "availability" of transmission system and for payment of incentive to the transmission utility.

(j) The RLDC/REB/regulated entity shall have a right to ascertain the availability of generators during the period of regulation."

In view of this, no further directions in the present petitions are considered necessary.

11. The petitioner has next sought a direction to the respondents to create First Charge against all their revenue to secure the amount due to it, which should have precedence over escrow arrangements for power purchases contracted by the respondents with IPPs. The petitioner has not impleaded any of the IPPs with

whom the respondents are stated to be continuing negotiations for establishment of the escrow accounts, as party before us in these petitions. The direction sought may adversely affect the interests of such IPPs and, therefore, they have to be given opportunity of hearing before any direction is given. As these IPPs are not before us, we are not in a position to give any specific direction to the respondents on this matter. Even otherwise, we feel that the issue raised fall within the ambit of commercial arrangements which should be negotiated between the petitioner and the respondents to arrive at a settlement on the issue.

12. Before parting with this case, we consider it appropriate to make some observations in regard to the Commission's powers on enforcement of its order. The Commission is a quasi-judicial authority constituted under an Act of Parliament. In discharge of its functions, it passes orders and gives directions. It is necessary that the Commission is expressly vested with power of enforcement of its orders and directions so as to avoid any complication regarding interpretation of the statutory provisions. The Central Government introduced the Electricity Bill, 200¹ in the Parliament which is stated to be under consideration of the Standing Committee of Parliament on Ministry of Power. In the Electricity Bill, 2001, an Appellate Tribunal is proposed to be constituted for hearing of appeals against the orders passed by different Commissions. Such an Appellate Tribunal is proposed to be assigned the power of execution of its orders as vested in a civil court, though no such power has been proposed so far as the Regulatory Commissions are concerned. This is considered to be a significant deficiency.

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We implore on the authorities to take notice of the deficiency and take appropriate steps to rectify the situation. In view of this, we direct that a copy of this order be sent to Secretary, Ministry of Power for consideration of the above suggestion by that Ministry.

13. With the above observations, these petitions stand disposed of.

Sd/-
(K.N. Sinha)
Member

Sd/-
(G.S. Rajamani)
Member

Sd/-
(D.P. Sinha)
Member

New Delhi dated the 23rd January, 2002.