

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Coram:Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member**

**Date of Hearing: 5.5.2011
Date of order: 25.10.2011**

Petition No. 21/2011

In the matter of:

Miscellaneous petition under Regulation 24 read with Regulation 111 of CERC (Conduct of Business) Regulations 1999 and Regulations 44, "Power to Relax" CERC (Terms and Conditions of Tariff) Regulations, 2009 for Relaxation of Regulation-19(g) i.e. Operation and Maintenance Expenses of CERC (terms and Conditions of Tariff) Regulations, 2009 to allow billing and reimbursement of Licence Fee.

Petition No. 22/2011

And

In the matter of:

Miscellaneous petition under Regulation 24 read with Regulation 111 of CERC(Conduct of Business) Regulations 1999 and Regulations 12 & 13, "Power to Relax" CERC (Terms and Conditions of Tariff) Regulations, 2004 for Relaxation of Regulation-56 (iv) i.e. Operation and Maintenance Expenses of CERC (Terms and Conditions of Tariff) Regulations, 2004 to allow billing and reimbursement of Licence Fee for the year (partly) 2008-09.

And

In the matter of

Power Grid Corporation of India Limited, Gurgaon Petitioner
Vs

1. Bihar State Electricity Board, Patna
2. West Bengal State Electricity Board, Calcutta
3. Grid Corporation of Orissa Ltd., Bhubaneshwar
4. Damodar Valley Corporation, Kolkata
5. Power Deptt., Govt. of Sikkim, Gangtok
6. Jharkhand State Electricity Board, Ranchi
7. Assam State Electricity Board, Guwahati
8. Meghalaya State Electricity Board, Shillong
9. Government of Arunachal Pradesh, Itanagar

10. Power & Electricity Deptt., Aizwal
11. Electricity Department, Imphal
12. Department of Power, Nagaland
13. Tripura State Electricity Corporation Limited, Agartala
14. Rajasthan Rajya Vidyut Prasaran Nigam Limited
15. Ajmer Vidyut Vitran Nigam Limited
16. Jaipur Vidyut Vitran Nigam Limited
17. Jodhpur Vidyut Vitran Nigam Limited
18. Himachal Pradesh State Electricity Board
19. Punjab State Electricity Board, Patiala
20. Haryana Power Purchase Centre, Panchkula
21. Power Development Deptt., Jammu & Kashmir
22. Uttar Pradesh Power Corporation Ltd., Lucknow
23. Delhi Transco Ltd., New Delhi
24. Chandigarh Administration
25. Uttarakhand Power Corporation Ltd., Dehradun
26. BSEB Yamuna Power Ltd., New Delhi
27. BSEB Rajdhani Power Ltd., New Delhi
28. North Delhi Power Ltd., New Delhi
29. NDMC, New Delhi
30. North Central Railway, Allahabad
31. Karnataka Power Transmission Corporation Ltd., Bangalore
32. Bangalore Electricity Supply Company Limited, Karnataka
33. Gulbarga Electricity Supply Company Limited (HESCOM), Karnataka
34. Mangalore Electricity Supply Company Limited (MESCOM), Karnataka
35. Chamundeshwari Electricity Supply Company Limited (CESC), Karnataka
36. Transmission Corporation of Andhra Pradesh Ltd, Hyderabad
37. Eastern Power Distribution Co. of Andhra Pradesh Ltd (APEPDCL)
38. Southern Power Distribution Co. of Andhra Pradesh Ltd (APSPDCL)
39. Central Power Distribution Co. of Andhra Pradesh Ltd (APCPDCL)
40. Central Power Distribution Co. of Andhra Pradesh Ltd (APCPDCL)
41. Northern Power Distribution Co. of Andhra Pradesh Ltd (APNPDCL)
42. Kerala State Electricity Board, Thiruvananthapuram
43. Tamilnadu Electricity Board, Chennai
44. Electricity Department, Pondicherry
45. Electricity Department, Goa
46. Madhya Pradesh Tradeco, Jabalpur
47. Madhya Pradesh Audyogik Kandra Vikas Nigam (Indore) Ltd.
48. Maharashtra State Electricity Distribution Co Limited, Indore
49. Gujarat Urja Vikas Nigam Ltd, Baroda
50. Electricity Department, Daman & Diu
51. Electricity Department, Dadra Nagar Haveli
52. Chattisgarh State Electricity Board, Raipur.

... .. Respondents

Parties present:

1. Shri Swapna Sushadri, Advocate, BSEB & JSEB
2. Shri Manoj Dubey, MPTCL
3. Shri U.K. Tyagi, GM (Commercial), Power grid
4. Shri M.M. Mandal, Power grid
5. Shri H.M. Sharma, BSEB

ORDER

The petitioner, Powergrid Corporation of India Ltd, has filed these petitions for billing and reimbursement of the licence fees from the respondents for the period from 17.10.2008 till 31.3.2009 in relaxation of the provisions of Regulation 56(iv) of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (hereinafter referred to as "2004 Regulations") and for the period 2009-10 and 2010-11 in relaxation of Regulation 19(g) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as "2009 Regulations").

2. The petitioner has submitted that the Commission has notified the Central Electricity Regulatory Commission (Payment of Fees) Regulations, 2008 (hereinafter "Payment of Fees Regulations") on 17.10.2008 which was amended on 12.5.2009. Regulation 4(1) of the Payment of Fees Regulations as amended provides as under:

"4(1). The transmission Licencee for inter-State transmission, including a person deemed to be a transmission Licencee referred to under any of

the provisos to Section 14 of the Electricity Act, 2003, shall pay licence fee at the rate of 0.05% per annum of the annual transmission charges applicable for that year rounded off to the nearest one hundred rupees.]

Provided that the licence fee for the year 2008-09 shall be paid within 30 days of commencement of these regulations.

(2) The transmission Licencee granted a licence for the inter-State transmission of electricity shall pay licence fee at the rate of Rs, two lakh (Rs. 2,00,000/-) per annum from the date of grant of licence and up to the date preceding the date of commercial operation of the inter-State transmission system or an element thereof."

3. The petitioner has submitted that since licence fee is required to be paid annually by 30th April of each year, the petitioner has paid the licence fees for Financial Year 2008-09 (in part), 2009-10 and 2010-11 under protest as per the following details:

YEAR	AMOUNT (in Rupees)	Reference
2008-09 (partly)	9921700*	Letter dated 26.11.2008
2009-10	29752570*	Letter dated 30.4.2009, 19.11.2010 & 23.11.2010
2010-11	30926000*	Letter dated 30.4.2010
TOTAL	60678570*	

Note: * subject to adjustment after final tariff orders for the relevant years.

4. The petitioner has submitted that the Commission has notified the 2004 Regulations for determination of tariff based on the capital cost of the transmission projects for the period from 1.4.2004 to 31.3.2009. Regulation 56(iv) of 2004 Regulations provides for O & M expenses per circuit km and per bay which have been arrived at based on the actual O & M expenses during the years 1998-99, 1999-2000, 2000-01, 2001-02 and 2002-03 of the various projects of the petitioner. Similarly, the Commission has notified the

2009 regulations for determination of tariff based on the capital cost of the transmission projects for the period 1.4.2009 to 31.3.2014. O&M expenditure as specified under Regulation 19(g) of 2009 regulations has been arrived by the Commission after considering (i) normalized actual O&M expenses of the petitioner on its various projects in various regions during the years 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, (ii) the base norms so arrived is escalated at 5.72% per annum to arrive at norms in 2009 regulations, and (iii) the wage hike of 50% on account of pay revision of the employees of Public Sector Undertakings. The petitioner has submitted that the licence fee has been a new component of cost to the transmission licence under O&M stage of the project and has become incidental to the petitioner/CTU only from 2008-09. The petitioner has submitted that since no such cost component was incidental during 1998-99 to 2003-04 and during 2003-04 to 2007-08, the normative O&M rates in the 2004 regulations and 2009 regulations respectively have not captured the costs associated with the licence fees. License fee has thus been a new and additional cost component incident since 2008-09 on the petitioner and shall be incurred during the life of the project and therefore, should be categorized as an expense under O&M expenditure.

5. The petitioner has submitted that as per para 7.1.6 of the Tariff Policy notified by the Central Government on 6.1.2006, the tariff of the transmission systems shall be determined in future on the basis of competitive bidding and in that event, the transmission licensee while

bidding for the project may be in a position to include all the cost towards transmission system including license fee. However, in case of the projects for which tariff is to be decided under the provisions of 2004 Regulations and 2009 Regulations which do not specifically capture the cost associated with the license fee, there is a requirement to categorize license fee as an expense under O&M and allow reimbursement to the transmission licensees. The petitioner has accordingly filed the above petitions under Regulations 12 and 13 of 2004 Regulations and Regulation 44 of 2009 Regulations for relaxation of the relevant provisions pertaining to O&M expenses and to allow billing and reimbursement of license fee from the beneficiaries.

6. Replies to Petition No. 21/2011 have been filed by Bihar State Electricity Board (BSEB), Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), Uttar Pradesh Power Company Limited (UPPCL), NP Power Trading Company Limited (NPPTCL), North Delhi Power Limited (NDPC). Replies to Petition No. 22/2011 has been filed by TANGEDCO, UPPCL and NPPTCL. The petitioner has also filed rejoinders to the replies of some of the respondents.

7. The gist of objections of the respondents are discussed as under:-
(a) BSEB has submitted that the petitioner's request for relaxation of Regulation 19(g) of 2009 regulations is solely guided by commercial considerations with the aim to get the expenses on account of

license fee which is otherwise not allowed under 2009 Regulations. Moreover, relaxation of Regulation 19(g) of 2009 Regulations would disturb the delicate balance between safeguarding the consumers' interest and ensuring recovery of the cost of electricity in a reasonable manner which is an important consideration while framing the regulations.

(b) TANGEDCO has submitted that O&M expenses have been awarded on normative basis and there will always be savings in any one or more heads and when such savings are not passed on to the beneficiaries, making claims for any additional expenditure incurred, it is not equitable. Moreover, licence fee is an expenditure incurred by the petitioner to be in business of transmission and hence, the expenditure has to be met only from the profits of the company. Therefore, it has been requested that the Commission may consider not to burden the beneficiaries and ultimately the end consumers by allowing billing and reimbursement of license fee which is not contemplated in the 2004 and 2009 Regulations.

(c) UPPCL has submitted that the licence fee has been levied on the beneficiaries with effect from 2008-2009. It is the onus of the licensee to pay the license fee and it will be totally irrational, illegal and unjustified to pass on the burden of licence fee on the consumers. UPPCL has further submitted that licensing is

conferment of right to do an authorized activity in a specific area and therefore, the fee charged for conferment of the said right should be borne by the person who is conferred with the right of licence i.e. the licensee.

(d) MPPTCL has submitted that without having a valid licence, the petitioner cannot undertake the transmission business and therefore, it is obligatory on the part of the petitioner to bear the cost of licence fee from its own profits. It has been further submitted that in the past, recovery on O&M cost by the petitioner has exceeded the actual O&M expenses incurred. Since there was no provision for truing up in the last tariff period, the additional revenue recovered by the petitioner was retained by it. If the Commission considers to allow recovery of licence fee from the beneficiaries, the same can be adjusted at the end of the tariff period during the truing up exercise.

(d) NDPL has submitted that since the petitioner is already claiming O&M expenses on normative basis for its projects, claiming such expenses again in the form of licence fee means double burden on the consumers for the same head of expenses.

8. The petitioner in its rejoinders has submitted that section 61 of the Act provides for determination of tariff on commercial principle; therefore, the commercial consideration in a cost plus system of determination of tariff

has to factor in the reimbursement of all legitimate expenses and provide a reasonable return to the petitioner. Moreover, the O&M expenses are allowed on normative basis to cover up the expenses which were envisaged at the time of fixing the norms for such expenses. Since, license fee was not included in the O&M expenses, the petitioner is entitled to reimbursement of the license fee.

9. During the hearing of the petition on 5.5.2011, the petitioner has placed on record the copies of the following:

(a) Tamil Nadu Electricity Regulatory Commission (Licensing) Regulations, 2005 as amended upto 31.12.2009;

(b) Bihar Electricity Regulatory Commission (Licensing for Transmission of Electricity) Regulations, 2007;

(c) Maharashtra Electricity Regulatory Commission (Fees and Charges) Regulations, 2004;

(d) Chhattisgarh State Electricity Regulatory Commission (Licence) Regulations, 2004;

(d) Meghalaya State Electricity Regulatory Commission (Terms and Conditions for determination of Tariff) Regulations, 2011.

The representative of the petitioner submitted that the licence fee has been allowed by the State Commissions to be reimbursed as an expense and the Commission may also consider to allow reimbursement of licence fee from the beneficiaries.

10. We have considered the submission of the petitioner and the respondents. Section 79(1) (g) of the Act empowers the Commission to levy fees for the purposes of the Act. The Commission notified on 17.10.2008 the Central Electricity Regulatory Commission (Payment of Fees) Regulations, 2008 (hereinafter "fee regulations"). Regulation 4(1) of the fees regulations provides as under:

"(1) The transmission licensee for inter-State transmission, including a person deemed to be a transmission licensee referred to in the first, second, third, fourth and fifth provisos to Section 14 of the Electricity Act, 2003 for such purpose, shall pay licence fee at the rate of 0.05% per annum of the annual transmission charges applicable for that year:

Provided that the licence fee for the year 2008-09 shall be paid within 30 days of commencement of these regulations."

The petitioner being the Central Transmission Utility is a deemed licensee under section 14 of the Act and became liable for payment of licence fee with effect from 17.10.2008.

11. The petitioner has approached the Commission for reimbursement of the licence fee for the year 2008-09 by relaxation of provisions of Regulation 56 (iv) of 2009 regulations and for the years 2009-10 and 2010-11 by relaxation of Regulation 19(g) of 2009 regulations. The main ground for seeking reimbursement is that it is new cost to the company and has not been captured in the O & M norms in 2004 regulations and 2009 regulations. The beneficiaries have argued that licence fee is an expenditure incurred by the licensee to be in the business of transmission and therefore, the onus of paying the licence fee is that of the licensee. It

has been further argued that the expenditure should be borne by the petitioner out of its savings under O & M expenses which it is claiming on the basis of the norms in the 2004 and 2009 regulations.

12. The Hon'ble Supreme Court has in a number of judgments distinguished taxes from fees and has held that in fees, there is some element of quid pro quo which is absent in a tax. Fees are payments for some special service rendered or some work done, for the benefit of those from whom payments are demanded. However, in some of the judgments, distinction has been made between compensatory fee and regulatory fee. In the matter of State of Tripura vs Sudhir Ranjan Nath {(1997) 3 SCC 665}, the Supreme Court has held as under:

"14. We next take up the validity of the levy of application fee and license fee of Rupees one thousand and Rupees two thousand respectively. In our opinion, the High Court was not right in holding that the said fee amounts to tax on the ground that it has not been proved to be compensatory in nature. In our opinion, the fee imposed by Sub-rules (3) and (4) is a fee within the meaning of Clause (c) of Sub-section (2) of Section 41. It is regulatory fee and not compensatory fee. The distinction between compensatory fee and regulatory fee is well established by several decisions of this Court. Reference may be made to the decision of the Constitution Bench in Corporation of Calcutta v. Liberty Cinema [1965]2SCR477. It has been held in the said decision that the expression "license fee" does not necessarily mean a fee in lieu of services and that in the case of regulatory fees, no quid pro quo need be established."

13. The Supreme Court has considered the concept of regulatory/compensatory fees in the case of BSE Brokers Forum Vs SEBI {(2001) 3 SCC 482}. Security and Exchange Board of India is a regulatory body and is charged with the function of regulating the business in stock

exchanges and in other security markets. Under the relevant provisions of SEBI Act, SEBI is authorized to levy for carrying out the purposes of the SEBI Act. On the question of regulatory fee, the Supreme Court has held as under:

“.....so far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of fee provided the fee charged is not so excessive. It is also not necessary that the services to be rendered by the collecting authority should be confined to the contributories alone...if the levy is for the benefit of the entire industry, there is sufficient quid pro quo between the levy recovered and the services rendered to the industry as a whole.”

14. It emerges from the above that the idea underlying regulation is more of public interest rather than an individual benefit. Most of the present day state activities are regulatory in nature and for this reason, licensing is regarded as an effective administrative technique. Therefore, licence fee is levied to meet the cost of regulation. In such cases, services are rendered to the industry as a whole, not to the licensees alone. We do not agree with the contention of the respondents that licence fee is in the nature of eligibility fee to carry on the business of transmission and accordingly, the licensees should bear the licence fee from their own profits.

15. The Commission has been vested with the function to regulate inter-State transmission in electricity, to grant licence for inter-State transmission, to specify the grid code having regard to grid standard, to adjudicate upon the dispute pertaining regulation of inter-State transmission, to specify

and enforce the standards with respect to quality, continuity and reliability of service by the transmission licensees and to promote non-discriminatory open access in inter-State transmission. The Commission has specified various regulations to discharge its statutory functions and to achieve the purposes of the Act. Reference may be made to Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010, Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009, Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, Central Electricity Regulatory Commission(Procedure for grant of transmission licence and other related matters) Regulations, 2009, Central Electricity Regulatory Commission (Grant of Connectivity, Long term Access and Medium term Open Access in inter-State Transmission) Regulations, 2009, Central Electricity Regulatory Commission(Measures to relieve congestion in real time operation) Regulations, 2009, Central Electricity Regulatory Commission (Power Market) Regulations, 2010 and Central Electricity Regulatory Commission (Sharing of revenue derived from utilization of transmission assets for other business) Regulations, 2007 etc. The Commission is implementing these regulations in order to regulate inter-State transmission of electricity, to ensure non-discriminatory open access, to promote competition and protect consumer interests. These activities are aimed at benefitting the distribution companies and the end consumers. Thus, the electricity sector and the ultimate beneficiaries, the consumers, are benefited by the regulatory functions of the Commission

with regard to inter-State transmission of electricity. We therefore consider it appropriate to pass on the incidence of the licence fee to the consumers through the distribution companies.

16. Licence fee never constituted a part of O & M expenses in the past periods and therefore, it has not been captured in the norms specified by the Commission in 2004 and 2009 regulations. The respondents have suggested that the licence fee should be borne by the petitioner from the savings under O & M expenses. We are of the view that since licence fee has not been considered while fixing the norms for O & M expenses, it would not be appropriate to ask the petitioner to bear the expenditure from O & M expenses. The petitioner has placed on record the copies of the regulations issued by some of the State Commissions which deal with the issue of bearing the cost of licence fee. We notice that the State Commissions have allowed the reimbursement of licence fee of intra-State transmission licensees as part of the ARR of the distribution companies. That being the case, the licence fee paid by the petitioner should be allowed as a pass through in tariff.

17. The petitioner has sought relaxation of the relevant provisions of 2004 and 2009 regulations pertaining to O & M expenses in order to allow the licence fee as a pass through. We are not inclined to relax the O & M norms to allow reimbursement of licence on actual basis. The Commission has provided for a separate provision for reimbursement of application

fees and publication expenses in Regulation 42 of 2009 regulations. We are of the view that Regulation 42 needs to be suitably amended to provide for reimbursement of licence fee during 2009-14. As regards reimbursement of licence fee for the period 2008-09, we allow reimbursement of the license fee by the beneficiaries by exercising our power to remove difficulties under Regulation 12 of 2004 Regulations.

18. We direct the staff of the Commission to take necessary action for suitable amendment to 2009 regulations to provide for reimbursement of licence fee.

Sd/-

(M. DEENA DAYALAN)
MEMBER

sd/-

(V.S.VERMA)
MEMBER

sd/-

(S. JAYARAMAN)
MEMBER

sd/-

(DR. PRAMOD DEO)
CHAIRPERSON