

**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: 5.1.2012  
Date of Order : 26.3.2012**

**Petition No. 177/2011**

**In the matter of**

Petition under Section 79 of the Electricity Act, 2003 read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009

**And**

**In the matter of**

BSES Rajdhani Power Limited, New Delhi

.... **Petitioner**

Vs

1. NTPC Limited, New Delhi

2. NHPC Limited, New Delhi

3. Power Grid Corporation of India Ltd, Gurgoan

..... **Respondents**

**Petition No. 179/2011**

**In the matter of**

Petition under Section 79 of the Electricity Act, 2003 read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009

**And**

**In the matter of**

BSES Yamuna Power Limited, New Delhi

.... **Petitioner**

Vs

1. NTPC Limited, New Delhi

2. NHPC Limited, New Delhi

3. Power Grid Corporation of India Ltd, Gurgoan

... **Respondents**

**The following were present:**

1. Shri Amit Kapur, Advocate, BRPL & BYPL
2. Shri. Anupam Verma, Advocate, BRPL & BYPL
3. Shri Dushyant Manocha, Advocate, BRPL & BYPL
4. Shri Aashish Gupta, Advocate, BRPL & BYPL
5. Shri V.P. Singh, Advocate, BRPL & BYPL
6. Ms. Tarunima Vijra, Advocate BRPL & BYPL
7. Ms. Deepeika Kalia, Advocate, BRPL & BYPL
8. Shri Nikhil Sharma, Advocate, BRPL & BYPL
9. Shri Sanjay Srivastav, BRPL
10. Shri Gopal K. Saxena, BRPL
11. Shri Haridas Maity, BYPL
12. Dr. Meenu Mishra, BYPL
13. Shri MG Ramachandran, Advocate, NTPC & PGCIL
14. Ms Swapna Shesadri, Advocate, NTPC & PGCIL
15. Shri V K Padha, NTPC
16. Shri C.K. Mondol, NTPC,
17. Shri Rohit Chhabra, NTPC,
18. Shri S. Saran, NTPC
19. Shri Rakesh Prasad, PGCIL
20. Shri R.Raina, NHPC

**ORDER**

The petitioners, BSES Rajdhani Power Limited, New Delhi and BSES Yamuna Power Limited, New Delhi (hereinafter referred to as “BRPL” and “BYPL” respectively) have filed these petitions disputing the claims of the Respondents, NTPC Ltd, Power Grid Corporation of India Limited and NHPC Limited towards payment obligations for supply of power and consequent notice of NTPC for regulation of power supply to the petitioners. The petitioners have made the following prayers:

"(a) Declare that provisional bills raised by NTPC and PGCIL for supply since 1.4.2009 are not in terms of Regulation 5 (3) & (4) of the 2009 Tariff Regulations, with consequential directions for:-

(i) Withdrawing all supplementary invoices raised by NTPC and PGCIL with retrospective revision for supplies since 1.4.2009 and (ii) Declare charging of Interest on such arrears since 1.4.2009 as bad in law.

(b) Direct NTPC to set off the amounts already recovered towards interest in excess of the amount permitted under the Electricity Act, 2003 along-with the Interest thereon from the date of illegal recovery till repayment at the rate prescribed under Section 62(6) of the said Act.

(c) In the alternative and without prejudice, should this Hon'ble Commission hold that the provisional tariff revised in terms of Provisional Tariff Orders dated July to August 2011 can be applied with retrospective effect since 1.4.2009, the same may be done while exercising its discretion to relax under Regulation 5(3) of the 2009 Tariff Regulations and to put in place a viable amortization schedule factoring in a moratorium period of nine months for recovery of any legitimate claims of the Respondents towards arrears in tariff factoring in the regulated paying capacity of the Petitioner including FPA, PPCA and other measure allowed.

(d) Exercise its discretion under Regulation 5(3) of the 2009 Tariff Regulations to put in place a viable amortization schedule factoring in a moratorium period

of nine months for recovery of any legitimate claims of NHPC towards arrears in tariff on account of Final Tariff Orders issued by this Hon'ble Commission, factoring in the regulated paying capacity of the Petitioner.”

2. The petitioners have submitted that pursuant to the order dated 31.3.2007 made by the Delhi Electricity Regulatory Commission, all the then existing Power Purchase Agreements of NTPC, PGCIL and NHPC with Delhi Transco Limited were allocated amongst the distribution companies of Delhi and were devolved w.e.f. 1.4.2007. On 5.6.2008, NTPC entered into an umbrella PPA for supply from eleven stations to BRPL and fifteen stations to BYPL at the tariff determined by the Commission. The current control period of tariff for NTPC, NHPC and PGCIL regulated by the Commission is from 1.4.2009 to 31.3.2014. Tariff petitions of some plants of NTPC and transmission systems of PGCIL for the control period are presently pending before the Commission. In the interregnum, the Commission has amended Regulation 5 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter "2009 Tariff Regulations") on 10.6.2009, 2.5.2011 and 21.6.2011. On account of the amendment dated 2.5.2011 and 21.6.2011, Regulation 5 (3) was revised and Regulation 5 (4) was inserted providing for provisional tariff. Between 30.6.2011 and 12.8.2011, individual provisional tariff orders have been issued by the Commission revising the prevalent tariff for individual stations of NTPC as also transmission tariff chargeable by PGCIL. The petitioners have submitted that all supplies have been received by BYPL and BRPL between 1.4.2009 and

the date of the provisional tariff orders based on the PPAs read with the then existing tariff in terms of Regulation 5(3) of 2009 Tariff Regulations.

3. The petitioners have submitted that the present petitions have been filed on account of the conduct and actions of the Respondents whereby the Respondents have claimed payments of arrears stated to have accumulated for supply of power since 1.4.2009 by retrospectively applying the provisional tariff orders issued by the Commission between July and August 2011 with interest. The petitioners have submitted that the said actions of the Respondents are unlawful on account of the following:

(a) The demand raised by NTPC and PGCIL is not in consonance with the 2009 Tariff Regulations since Regulation 5(3) requires that for the past period (since 1.4.2009), the billing must be based on the past tariff till the approval of tariff under 2009 Tariff Regulations which has not happened so far.

(b) With effect from the date of the respective provisional tariff orders, NTPC, NHPC and PGCIL are entitled to start billing prospectively on the revised rates on a provisional basis. This provisional billing is of the same status/standing as the provisional bills revised since 1.4.2009. Such bills will be subject to adjustment after final tariff is determined by the Commission under 2009 Tariff Regulations.

(c) The Electricity Act, 2003, 2009 Tariff Regulations and the provisional tariff orders do not envisage/permit retrospective revision of the bills with effect from 1.4.2009.

(d) The unilateral retrospective revision of tariff by NTPC, NHPC and PGCIL is unjust and unreasonable and contrary to the settled position of law. This position has been settled by the Hon'ble Supreme Court and Hon'ble Appellate Tribunal for Electricity in the following judgements:

(i) Binani Zinc Limited v Kerala SEB {(2009) 11 SCC}

(ii) U.P. Power Corporation Ltd. V. NTPC Ltd. {(2009) 6 SCC 235}

(iii) Kusumam Hotels Private Limited v. Kerala SEB and Ors {(2008) 13 SCC 213}

(iv) Meghalaya SEB vs. Meghalaya SERC & Byrnihat Industries Association {ELR(APTEL)0940}

(e) In the event it is held that NTPC and PGCIL can implement the provisionally revised tariffs with retrospective effect since 1.4.2009, the same must be implemented with bearable amortisation schedule in view of the petitioner's undeserved financial crises and cash flow problems arising out of absence of cost reflective tariff having not been given effect to by

the learned State Commission. This would be in consonance with the 2009 Tariff Regulations, particularly Regulation 5(3) and (4) thereof.

4. The Petitioners have also submitted that NTPC had by its invoices dated 5.8.2011 raised supplementary bills for supplies from 1.4.2009 till the respective provisional tariff orders (6.7.2011 or 12.8.2011) for its various generating stations comprising (a) ad hoc claims for additional capacity charges included in the bills raised by NTPC for 2009-10(since February/June 2010) being beyond the tariff applicable in terms of Regulation 5(3) and violative of sections 62, 64 and 45(1) of the Act; and (b) after issuance of the provisional tariff orders for NTPC stations on 6.7.2011 and 12.8.2011, NTPC has claimed by Supplementary Invoices forthwith payments for the supply during 1.4.2009 and the date of respective provisional tariff order (July/August 2011) with retrospectively applied enhanced rate of interest. The above disputed amounts have resulted in wrongful and inflated claims of NTPC as dues with interest aggregating ₹ 491.04 crore.

5. The Petitioners have submitted that NTPC has been threatening the Petitioners with regulation and disconnection of power supply which would throw the entire South and West circles (BRPL) and Central and East circles (BYPL) of the National Capital Territory of Delhi into darkness during onset and peak of winter season if the demanded amount was not paid forthwith. NTPC in its letter dated 24.12.2011 sought for immediate payment from the Petitioners of the outstanding dues of ₹ 428 Crore as on 31.12.2011 and to establish the Letter of

Credit for ₹ 226.61 Crore failing which regulation of power supply will commence from the midnight of 31.12.2011. Even though the Petitioners requested NTPC to withdraw and hold in abeyance the Regulation Notice to enable the petitioners to resolve the financial crisis with the help of its promoters and the lenders, NTPC in its letter dated 27.12.2011 had reverted back stating that they would regulate and disconnect the power supply to the Petitioner from the midnight of 31.12.2011.

6. On the request of the Petitioners, the petitions were listed for hearing on 29.11.2011. During the hearing, the representative of NTPC submitted that the generating company has been claiming the tariff strictly in accordance with Regulation 5(4) of the 2009 Regulations and the orders of the Commission including the order dated 26.8.2011 in Petition No. 175/2011 (Suo motu) and therefore, petitions are not maintainable. After hearing the learned counsel for the petitioners and the representative of NTPC, we had directed NTPC in our order dated 30.12.2011 to defer regulation of power supply till 7.1.2012 and further directed the Petitioners and the Respondents viz. NTPC, PGCIL and NHPC to file certain information regarding the amounts paid and amounts remaining outstanding by 3.1.2012.

7. NTPC has filed its replies to the petitions vide affidavits dated 30.12.2011 and 3.1.2012 and the required information vide a separate affidavit dated 3.1.2012. PGCIL has also filed its reply and the required information vide affidavit



dated 3.1.2012. NHPC has filed the required information in its affidavit dated 3.1.2012. The Petitioners have filed the required information vide their affidavit dated 3.1.2012 in respect of NTPC and vide their affidavits dated 3.1.2012 and 5.1.2012 in respect of NHPC and PGCIL.

8. NTPC in its reply has submitted that BRPL and BYPL are bound by the terms and conditions contained in the umbrella PPA dated 5.6.2008 for supply of power from its eleven stations to BRPL and from fifteen stations to BYPL at tariff determined by the Commission. The Electricity Act, 2003 and the Regulations notified by the Commission do not deal with the aspects of payment mechanism including the due date of payment, nature of Letter of Credit, other securities in the escrow, hypothecation of receivables goods which are left to be agreed contractually between the parties. The Power Supply Regulation, 2010 enforces the payment security mechanism provided in the PPA. As regards, the station wise LC, NTPC has submitted that LC has to be on a consolidated form as per the terms of the PPA and also as per the practice of all purchasing entities. The power supply regulations and other covenants have been enforced precisely to avoid non-performance of obligations by the purchasing entities including and in particular inability to pay. It has been submitted that the status of PPA and the provisions regulating the power purchased has been settled by the Supreme Court in India in Thermal Power Limited Vs. State of Madhya Pradesh & Ors. [(2000) 3 SCC 379]. So long as, the terms of the PPA are not contrary to or inconsistent with the statutory provisions, such terms are binding and enforceable.

NTPC has submitted that the revised tariff payable for the period from 1.4.2009 as per Regulations 5(3) and (4) of the 2009 Tariff Regulations is not a retrospective levy prohibited in law. The said revision has been made as per the Regulations pending determination of the final tariff. The Petitioner is required to pay the applicable tariff for the period from 1.4.2009 onwards. In any event, the determination of tariff for the period from 1.4.2009 at a date subsequent is not a retrospective levy so long as it relates back to the commencement of the relevant control period or tariff period. The interest has been claimed by NTPC based on the 2009 Tariff Regulations read with the orders passed by the Commission. It has been specified in the 2009 Tariff Regulations that the tariff applicable from 1.4.2009 onwards shall be provisional and shall be subject to adjustment as and when the final tariff is decided. The application of the tariff determined by a subsequent order from the beginning of the tariff period i.e. 1.4.2009 is clearly envisaged in the Tariff Regulations itself. The parties had proceeded on the above basis. It is not open to the Petitioners to raise any issue on the basis of alleged retrospective levy at this stage. NTPC has denied that the amount recovered as per the amended Regulations 5(3) and (4) is unjust or unreasonable.

9. PGCIL in its affidavit dated 3.1.2012 has submitted that in terms of the 2009 Tariff Regulations, the petitioners are required to pay the transmission charges both in respect of the assets existing as on 31.3.2009 and the new assets commissioned on or after 1.4.2009 for the period upto 30.6.2011. With

effect from 1.7.2011, Sharing Regulations became effective and the petitioners are liable to pay the transmission charges for use of the inter-State transmission network as per the Sharing regulations. In terms of the Bulk Power Transmission Agreement (BPTA) entered into by the Petitioners with PGCIL, the petitioners are required to comply with the payment mechanism including the payment security specified which includes maintenance of the requisite amount of letter of credit. The petitioners have failed to comply with the payment security mechanism namely the Letter of Credit in respect of the period from 1.4.2011 onwards. Despite requests and reminders by PGCIL, the petitioners have failed to renew the LC as per the BPTA. On account of the above failure, PGCIL is entitled to regulate the power supply for non-payment of transmission charges as well as non-maintenance of LCs. It has been further submitted that PGCIL should not be subjected to any disadvantage on account of the petitioners not acting in accordance with the applicable regulations, terms of the BPTA and orders of the Commission issued from time to time.

10. During the hearing of the petition on 5.1.2012, the Learned Counsel for the Petitioners submitted that in terms of the data filed by BRPL and BYPL on 3.1.2012, as also the quarterly accounts reconciliation statement submitted during the hearing on 29.12.2011, the payment position as on 3.1.2012 is as under:-

- a) BRPL owes no amounts due for supplies received since 1.4.2009 worked out on the basis of:

(i) The applicable CERC determined tariff in terms of Regulation 5 of the CERC Tariff Regulations, 2009.

(ii) After paying ₹ 29 crore on 2.1.2012 and 3.1.2012.

(iii) Deducting ₹ 255 crore of excess inflated billing including interest shown by NTPC as arrears for supplies since 1.4.2009 by wrongly retrospectively applying the station-wise provisional tariffs notified by CERC on 6.7.2011 and 12.8.2011 contrary to Regulation 5 of the CERC Tariff Regulations, 2009.

(iv) Deducting ₹ 44 crore of instalments of adjustment amounts based on final tariff not yet due for supplies from one (Dadri II) Station and as per the MP Cess matter.

b) NTPC owes to BYPL ₹ 4 crore for supplies since 1.4.2009 on the basis of:

(i) The applicable CERC determined tariff in terms of Regulation 5 of the CERC Tariff Regulations, 2009.

(ii) After paying ₹ 20 crore on 2.1.2012.

(iii) Deducting ₹ 163 crore of excess inflated billing including interest shown by NTPC as arrears for supplies since 1.4.2009 by wrongly retrospectively applying the station-wise provisional tariffs notified by CERC on

6.7.2011 and 12.8.2011 contrary to Regulation 5 of the CERC Tariff Regulations, 2009.

(iv) Deducting ₹ 28 crore of instalments of adjustment amounts based on final tariff not yet due for supplies from one (Dadri II) Station and as per the MP Cess matter.

11. The learned counsel for the Petitioners further submitted that the petitioners are in the process of working out the financial and rehabilitation package of ₹ 5100 crore by taking the promoters contribution of ₹ 1020 crore and lenders financing of ₹ 4080 crore. The learned Delhi Electricity Regulatory Commission (DERC) is seized of the proceedings. The learned counsel further submitted that the sequence of discharging the payment obligations of the petitioners would be as follows:

- (a) Statutory payments and Salaries Wages.
- (b) Minimum Operating expenses
- (c) Bank Obligations: interest Payments and Principal repayments
- (d) Power purchase obligations comprising:
  - (i) Current Month payments (January 2012 to March 2012), and
  - (ii) Adjustment of arrears based on CERC final tariff orders and overdue payments with interest. Amounts overdue as on 31<sup>st</sup> December 2011 will be paid on a proportionate basis to each supplier in the ratio of 'particular supplier's overdue to total overdue'.

12. The learned counsel has submitted that the entire overdue amount is expected to be liquidated phase-wise over a period of one year based on the cost reflective tariff given by DERC. He has further submitted that after disbursal, plant-wise LCs for all the suppliers will be opened to the extent their current billing and subject to opening of plant-wise LCs. The learned counsel further submitted that NTPC, PGCIL and NHPC are parties to the proceedings before the DERC and are aware of the developments. The learned DERC has assured for effective and timely implementation of the directions contained in the judgment dated 11.1.2011 of the Hon'ble Appellate Tribunal for Electricity, to secure cost reflective tariff which include:-

- (a) Aligning the frequency of the Fuel Price Adjustment (FPA) formula to that of Ld. CERC, i.e., monthly.
- (b) Introduction of Power Purchase Cost Adjustment.
- (c) Allowance of carrying cost on past Revenue Gaps @ SBI PLR rate of provide adequate cash flows.
- (d) Recognizing all past revenue gaps (including ATE Judgments) and providing for time bound liquidation of the same along with carrying costs in a time bound manner.

13. The learned counsel further submitted that the cash flow would start from 1<sup>st</sup> week of February 2012 and till then, no measures for regulation of power supply be taken. The learned counsel further prayed for direction of the

Commission to (a) constitute a committee to reconcile the outstanding payment due to NTPC, NHPC and PGCIL; (b) to pass clear directions and finding on the interpretation of Regulations 5(3) and (4) of 2009 Regulations; (c) to pass an order regarding wrongful invocation of LC by NTPC.

14. The learned counsel for NTPC submitted that as per the payment plan given by the petitioners, the payment of NTPC, PGCIL and NHPC shall be made after discharging all liabilities which means that these utilities come as the last priority for discharge of the liability by the petitioners. As per the PPA dated 5.6.2008, the billing for every month shall be done by 5<sup>th</sup> of the succeeding month and payment has to be made by 30<sup>th</sup> of the succeeding month. He further submitted that the petitioners have never raised the issue of working capital receivable regarding 60 days at the time of signing the PPA or thereafter. He submitted that receivable for 60 days and invocation of LC after one month as per the terms of the PPA are two different things and should not be confused with each other. The Learned Counsel further submitted that the petitioners have not challenged the PPA and the argument that PPA is contrary to the Regulations and therefore non-enforceable is not correct. Since, the Power Supply Regulation refers to the regulation of power supply in terms of the PPA, a legal obligation is cast on the petitioner to make payment on the last day of the month as per the PPA failing which they are liable for regulation of power. The learned counsel further submitted that contrary to the submission of the learned counsel for the petitioners, an amount of ₹ 580.82 crore and ₹ 360.23 crore are outstanding

against BRPL and BYPL respectively including the current billing upto the month of December 2011. As regards the submission regarding preferential treatment by NTPC towards other distribution companies like New Delhi Municipal Council (NDMC) and Military Engineering Service (MES), the learned counsel submitted that the payment security mechanism is different in the case of NDMC and MES from that of the petitioners and in fact they have more stringent payment security mechanism than the petitioners. The learned counsel for PGCIL further submitted that the petitioners have not opened any LC in favour of PGCIL since 1.4.2011. The representative of NHPC has submitted that the petitioners are abusing the process of the court by filing the present petitions and the petitioners have not submitted the payment security mechanism documents to NHPC in accordance with the Power Purchase Agreement between the petitioners and NHPC.

15. We have heard the learned counsels for the parties and the representatives of NTPC and NHPC and perused documents on record. Based on the submission of the parties, the following issues have arisen for consideration:-

- (a) Issue No.1: Whether the respondents are permitted under law to claim the arrears from 1.4.2009 based on the provisional tariff orders issued by the Commission under Regulation 5(4) of the 2009 Tariff Regulations? If so, how to effect adjustments taking into account the



difference between the tariffs that were applicable prior to 1.4.2009 and the provisional tariffs?

(b) Issue No.2: Whether the respondents are permitted under law to invoke the LCs after one month of the billing, when they are granted 60 days of receivable as part of working capital?

(c) Issue No.3: Whether the respondents can insist on consolidated LC whereas the tariff is determined station-wise and billing is done accordingly?

16. These issues have been dealt with in succeeding paragraphs.

### **Issue No.1**

17. The petitioners have argued that the Electricity Act, 2003, the 2009 Tariff Regulations and the provisional tariff orders do not envisage/permit retrospective revision of the bills with effect from April, 2009. Therefore, the demands raised by NTPC and PGCIL are not in consonance with the 2009 Tariff Regulations since Regulation 5 (3) requires that for the past period (since 1.4.2009) the billing must be based on the past tariff till approval of final tariff under 2009 Tariff Regulations which has not happened so far. It has been contended that with effect from the date of the respective provisional tariff orders, NTPC and PGCIL are entitled to start billing prospectively on the revised rates issued in the

provisional tariff orders. As such bills will be subject to adjustment after final tariff is determined by the Commission under 2009 Tariff Regulations and any interest/carrying cost leviable/recoverable shall be determined by the Commission bearing in mind that delay is not attributable to the petitioners or its consumers. The petitioners have further submitted that the demand for retrospective revision of the tariff by NHPC and NTPC for the plants for which final tariff have been determined is unjust and unreasonable since there is no fault of the petitioners or its consumers in the delay of determination of tariff and it will not prejudice NHPC and NTPC as their entitlement will be trued up at the end of the tariff period.

18. NTPC in its reply has submitted that the revised tariff payable for the period from 1.4.2009 as per Regulations 5(3) and (4) of 2009 Tariff Regulations is not a retrospective levy of tariff so long as it relates back to the commencement of the relevant control period or tariff period. The Commission has specified in the 2009 Tariff Regulations that tariff applicable from 1.4.2009 onwards shall be provisional and shall be subject to adjustment as and when the final tariff is decided. NTPC in its additional submission has submitted that Regulation 5(4) of 2009 Tariff Regulation was amended specifically to enable the passing of the provisional tariff orders upto 95% of what is claimed in the petition in place of the provisional tariff made applicable earlier in regard to the period from 1.4.2009. It has been argued that therefore, the contention of the petitioners challenging payment of tariff from 1.4.2009 is without merit for a

number of reasons. The Respondents contend that firstly, the proviso to Regulation 5(4) as amended was for the very purpose of providing recovery from 1.4.2009. Secondly, the proviso to Regulation 5(4) as amended should be read as substituting one provisional order with another and giving effect to the same mutatis mutandis to Regulation 5(3) from 1.4.2009. Thirdly, the order of the Commission dated 26.8.2011 in Petition No.176/2011 clarifies the position. Fourthly, the various tariff orders of the Commission implements the above by determining the tariff for the period 1.4.2009 onwards. Fifthly, the petitioners have also acted upon and sought time from NTPC to pay the amount in installments. In the circumstances, the attempt by the petitioners to challenge the arrear payment or term the order dated 26.8.2011 as erroneous and having been passed by two members only as not binding and therefore not required to be followed, is without merit.

19. We have considered the submission of the parties. Regulation 5(3) and 5(4) of 2009 Tariff Regulations provide for the following:-

*“(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 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 Base Rate as on 01.07.2010 plus 350 basis points for the 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.”*

*“(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 up to 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.”*

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).

21. Section 64(6) of the Electricity Act, 2003 (the Act) provides that “a tariff order shall, unless amended or revoked, shall continue to be in force for such period as may be specified in the tariff order”. The Commission has been vested with the power under section 64(6) of the Act to specify the period for which tariff order will remain in force.

Regulation 1(2) of the 2009 Tariff Regulations provides that the regulations shall come into force with effect from 1.4.2009 and unless reviewed earlier or extended by the Commission shall remain in force for a period of 5 years. Further last proviso to Regulation 7(2) provides for determination of capital cost of the existing projects as under:

*“Provided also that in case of the existing projects, the capital cost admitted by the Commission prior to 1.4.2009 duly trued up by excluding un-discharged liability, if any, as on 1.4.2009 and the additional capital expenditure projected to be incurred for the respective year of the tariff period 2009-14, as may be admitted by the Commission, shall form the basis for determination of tariff.”*

It is clearly evident from the above provisions that the tariffs of the existing projects (which were commissioned prior to 1.4.2009) are required to be determined for the tariff block 2009-14. Accordingly, the Commission has issued the provisional tariff orders in respect of the existing projects for the entire tariff period 2009-14 starting from 1.4.2009 subject to adjustment with the final tariff orders as and when issued. The Commission has clearly stated in the provisional tariff orders that the said orders are for the period from 1.4.2009 to 31.3.2014. For those projects which came into operation after 1.4.2009 provisional tariff has been granted with effect from the date of commercial operation. Moreover, the Commission has notified the 2009 Tariff Regulations on 20.1.2009, that is, more than two months prior to the operation of the tariff period 2009-14 and all the beneficiaries are aware about their tariff liabilities under the 2009 Tariff Regulations. The Respondents have filed their tariff petitions for the existing stations in 2009 and 2010 and as per regulations have served copies on the beneficiaries. The beneficiaries have also filed their responses to many of the tariff petitions. Thus, the beneficiaries are aware that liability to pay the tariff as per the 2009 Tariff Regulations

has accrued to them with effect from 1.4.2009 for availing the supply of power and transmission services. Only the said liability has been crystallized through determination of provisional tariff through the provisional tariff orders issued during June/July 2011 during the control period. Therefore, the tariff shall be paid by the beneficiaries in accordance with the provisional tariff orders with effect from 1.4.2009 without waiting for the final orders. Since the beneficiaries have paid a part of the tariff as per the provisional billing pending determination of tariff as per 2009 Tariff Regulations, the same shall be adjusted while making payment in accordance with the provisional tariff orders.

22. The above view finds support from the history of introduction of provisional tariff in 2009 Tariff Regulations. The genesis of introduction of Regulation 5(4) is that the determination of final tariff was getting delayed for variety of reasons and Commission was of the view that it would lead to piling up of the arrears due to difference in the provisional billing and the final tariff and would lead to undue tariff shock to the beneficiaries. The relevant extract from the explanatory memorandum to the draft amendment regulation is as under:

“In order to take care of the eventuality of marginal delays in issuing the tariff orders in respect of the existing projects, Regulation 5(3) of the 2009 regulations provides as under:

“(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 transmission 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.

However, in case of new projects, there is no provision for provisional tariff as the generating companies or the transmission licensee are required to make applications for determination of tariff in respect of the units of generating station or the transmission lines or substation of the transmission system completed or projected to be completed within six months from the date of application.

Two years of the tariff period 2009-14 are almost over. Till date orders in all the petitions for additional capital expenditure have not been issued. The generating companies and transmission licensees are raising the bills on the basis of the tariff as on 31.3.2009 without accounting for the impact of additional capital expenditure. Moreover, there is increase in tariff during 2009-14 on account of increase in ROE and O&M expenses on account of pay revision of employees of public sector undertakings. In other words, there is a gap between the tariff being provisionally billed by the generating companies and transmission licensees and the tariff to be determined under 2009 regulations. This results in cash flow problem for the generating companies and transmission licensees and extra liabilities on the beneficiaries in the form of interest. In case of new projects, the delay in determination of tariff has occurred due to delay in finalization of capital cost on completion of the projects and submission of the Auditor's certificate. This has resulted in cash flow problem apart from creating extra liability on the beneficiaries.

Central Electricity Regulatory Commission (Sharing of Transmission Charges and losses) regulations, 2010 provides that overall charges to be shared among the nodes shall be computed based on the yearly transmission charge apportioned to the each of the line of ISTS licensees. A number of petitions for determination of transmission charges filed by the CTU are under process leading to delay in computation of the yearly transmission charges.

In view of the above, there is a need to introduce appropriate provision for provisional tariff in the 2009 regulations so that billing and payments are not hampered on account of delay in issue of the tariff orders by the Commission.....”

Thus, the concept of provisional tariff was introduced in the 2009 Tariff Regulations in order to address the cash flow problems of the utilities and to relieve the beneficiaries from the extra liability on account of arrears and interest thereon. The whole purpose of introducing provisional tariff would be defeated if the provisional tariff is not allowed from 1.4.2009 in respect of the existing stations/transmission systems.



23. As regards, the question of issue of the order dated 26.8.2011 by two members of the Commission, it is clarified that the coram specified in the conduct of business regulations is two and the passed by two members of the Commission is valid and has the force of law. The said order has not been challenged by any of the parties including the petitioners before the Appellate Authority or any other court of competent jurisdiction. Hence, the order dated 26.8.2011 has attained finality and is binding on the petitioners. It is pertinent to mention that all the distribution licensees in the country have been paying to the Central Sector Generating Companies and inter-State Transmission Licensees, the differences between the provisionally billed tariff with effect from 1.4.2009 and the provisional tariff issued in June/July 2011 in six monthly instalments. Even the petitioner has acted upon the said order of the Commission and sought time from NTPC to make payment in instalments vide their letter dated 5.9.2011

24. The Appellate Tribunal for Electricity in its judgment dated 8.2.2011 in Appeal No. 164 of 2010 (Chhattisgarh Power Distribution Company Ltd Versus Chhattisgarh Biomass Energy Developers Association) has dealt with the power of the Commission to specify commencement and expiry of the orders as under:

*"22. The question of retrospectively came up for consideration before The Supreme Court in the Kannodia Chemicals & Anr. V/s State of UP & Ors. Reported in (1992) 2 SCC 124. While upholding the retrospectively of tariff order, the Hon'ble Court observed as follows;*

*"A retrospective effect to the revision also seems to be clearly envisaged by the section. One can easily conceive a weighty reason for saying so. If the section were interpreted as conferring a power of revision only prospectively, a consumer affected can easily frustrate the effect of the provision by initiating proceedings seeking an injunction restraining the Board and State from revising the rates, on one ground or other, and thus getting the revision deferred indefinitely. Or, again, the revision of rates, even if effected promptly by the Board and State, may prove infructuous for one reason or another.*

*Indeed, even in the present case, the Board and State were fairly prompt in taking steps. Even in January 1984, they warned the appellant that they were proposing to revise the rates and they did this too as early as in 1985. For reasons for which they cannot be blamed this proved ineffective. They revised the rates again in March 1988 and August 1991 and, till today, the validity of their action is under challenge. In this State of affairs, it would be a very impractical interpretation of the section to say that the revision of rates can only be prospective”.*

*23. This Tribunal in a batch of appeals namely SEIL India, New Delhi V/s PSERC reported in 2007 (APTEL) 931 considered the question of retrospectively and maintained it. In this decision also the tariff order though made some time after commencement of the financial year was made effective from 1.4.2005 and this Tribunal upheld the order of the Commission. It observed: the cost prudently incurred is to be recovered, therefore, in the event of a tariff order being delayed, it can be made effective from the date tariff order commences or by annualisation of the tariff so that deficit is made good for the remaining part of the year or it can be recovered after truing up exercise by loading it in the tariff of the next year. Thus law empowers the Commission to specify the date from which the tariff is to commence or the date when it will expire.*

*24. It is neither Section 62 nor Section 64 that constitutes bar to retrospectively of a tariff order.”*

25. In view of the above legal position, the Commission is within its power to specify the date of commencement and expiry of the tariff. The period of tariff has been clearly mentioned in the provisional tariff orders issued in accordance with the 2009 Tariff Regulations and the beneficiaries are liable to make payment as per the provisional tariff orders in six monthly installments as clarified in the order dated 26.8.2011 in Petition No. 175/ 2011 (Suo Motu), as follows:-

*“8. It is observed from the above that the difference between the tariff provisionally charged and the provisional / final tariff determined by the Commission shall be recoverable / refunded within six months with simple interest at the rate equal to SBI PLR from 1.4.2009 to 30.6.2010 and at a rate equal to SBI AR with effect from 1.7.2010. Though the said regulations are silent about the number of instalments, they do lay down the period of six months within which the arrears are to be recoverable / refundable with interest.*

*9. In consideration of the prayer of PSPCL and keeping in view the difficulties faced by the beneficiaries of the central generating stations / transmission licensee, we direct that the arrears arising out of the differences between the tariff provisionally billed and the provisional / final tariff be liquidated by the*

*beneficiaries in six monthly instalments within a period of six months, subject to the payment of interest as per regulations.”*

The main plank of arguments of the petitioners is that the difference amount is payable after final tariff is determined. In our view, any further delay in payment will be against the interest of the consumers as the petitioners would be liable to pay interest as per the 2009 Tariff Regulations. Accordingly we decide that the Petitioners shall pay to the Respondents the difference amount between the provisional tariff and provisionally billed tariff in six monthly installments along with interest in terms of the order dated 26.8.2011 in Petition No.175/2011.

26. The petitioner has prayed that in the alternative and without prejudice, should this Commission hold that the provisional tariff revised in terms of Provisional Tariff Orders dated July to August 2011 can be applied with retrospective effect since 1.4.2009, the same may be done while exercising its discretion to relax under Regulation 5(3) of the 2009 Tariff Regulations and to put in place a viable amortization schedule factoring in a moratorium period of nine months for recovery of any legitimate claims of the Respondents towards arrears in tariff factoring in the regulated paying capacity of the Petitioner including FPA, PPCA and other measure allowed. It has also been prayed that the Commission exercise its discretion under Regulation 5(3) of the 2009 Tariff Regulations to put in place a viable amortization schedule factoring in a moratorium period of nine months for recovery of any legitimate claims of NHPC towards arrears in tariff on account of Final Tariff Orders issued by this Commission, factoring in the regulated paying capacity of the Petitioner.

27. The Commission is not inclined to grant the prayers (c) and (d) quoted in para 1 of this order because the Commission had already granted an amortisation schedule vide its order dated 26.08.2011 for payment of the bills in six instalments over a period of six months. Moreover, moratorium period or further amortisation is not possible because it will severely affect the cash flow position of the generating companies and transmission licensees and their liability to service the cost of generation and transmission and consequently their ability to generate and transmit electricity to the public. In view of our finding on this issue, we do not consider it necessary to address the prayer of the learned counsel for the petitioner to constitute a committee to reconcile the outstanding payments to the respondents.

## **Issue No.2**

28. The petitioners have submitted that NTPC has been arbitrarily choosing to limit the credit period extended to the petitioners to 24 days and invoke the LCs any time thereafter discriminating against them and their consumers as compared to the 60 days period extended to other similarly placed distribution companies. The petitioners have submitted that the tariff of NTPC is based on 60 days' working capital in terms of Regulation 15(2)(e), 21(1)(v)(a)(v), and 44 of 2004 Tariff Regulations, Regulations 14(d), 18(1)(a)(iv), 18(1)(b)(iv), 34 and 35 of 2009 Tariff Regulations and the Statement of Reasons to 2009 Tariff Regulations. It has been further submitted that NTPC has been extending 60 days credit period to the Government owned discoms like NDMC and MES while denying the same to the joint sector distribution companies like BRPL, BYPL and NDPL. Moreover as per the provisions of the PPA, in case more favorable

terms and conditions as applicable for supply of power from the said stations are agreed with any other beneficiary, the same shall be made applicable to the petitioners. Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010 provides that the 'default trigger date' for non-payment of dues is at least 60 days after service of bill for payment. The petitioners have further submitted that NTPC has invoked the consolidated LCs furnished by the petitioners and appropriated the amounts which were not due and payable on the dates of encashment. As a result, such invocation of LCs has gravely affected the credit worthiness of the petitioners who had also to incur the drawal charges, replenishment charges. The petitioners have also suffered on account of credit rating impact, reputational impact apart from the impact on their ability to raise finance from the banks and financial institutions.

29. NTPC has submitted that there is no merit in the contention of the petitioners that payment should be made only after 60 days as the PPA provides for payment for supply of electricity in the preceding month latest by the end of the succeeding month. It has been submitted that the Electricity Act, 2003 and the regulations notified by the Commission do not deal with the aspects of payment mechanism including due date for payment, nature of LC, other securities in the form of escrow, hypothecation of receivables etc. These aspects are left to be agreed to contractually between the parties. Therefore the sale of electricity by a generating company to a distribution licensee is basically a contractual agreement though regulated under the Act. The petitioners have entered into PPAs on 5.6.2008 with NTPC agreeing to the terms and conditions of the purchase of electricity and have been purchasing electricity based on

the said PPAs. The execution of the PPA is clearly envisaged in terms of sections 61, 62, 63, 79 and 86(1) of the Act, the allocation of power done by the Central Government, 2009 Tariff Regulations and Power Supply Regulations, 2010. So long as the PPAs are not contrary to or inconsistent with the statutory provisions, such terms are binding and enforceable. There is no inconsistency or conflict between the PPAs entered by the petitioners and the provisions of the 2009 Tariff Regulations dealing with rebate or delayed payment surcharge.

30. NTPC has further submitted that in terms of the PPAs, the petitioners are bound by the following:

- (a) Payment of the amount billed for supply of electricity in the preceding month by the last calendar day of the month in which bill is raised;
- (b) Letter of Credit to be maintained for 105% of average monthly billing during the preceding 12 months; and
- (c) Escrow Mechanism and hypothecation of receivables.

NTPC has submitted that the above payment security mechanism in the PPAs are in substitution of an important payment security in the form of tripartite agreement with Reserve Bank of India more fully protecting the payment of amounts from Delhi Transco Limited in existence before. NTPC has been induced to agree to the substitution with the Payment Mechanism provided in clause 6 of the PPAs and there cannot be any further dilution of the Payment Mechanism sought by

the petitioners. NTPC has clarified that there is no differentiation between public sector purchasing entity and private sector purchasing entity. In case of those where payment is to be secured through RBI, the due date has been specified as part of the payment mechanism under the Tripartite/Bipartite Agreement to be 60 days. In other cases, whether public sector or private sector purchasing entities, the payment due date is not 60 days but as provided in the PPA. NTPC has submitted that recovery through RBI is a superior payment security and mitigation of risk to financial exposure to NTPC.

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.

### **Issue No.3**

37. The third issue is NTPC's insistence for consolidated vis a vis the petitioners' demand for unit-wise LCs. The petitioners have submitted that the insistence of NTPC for consolidated LC is contrary to the applicable regulatory and contractual framework since each power plant of NTPC is treated as a separate unit or division for all purposes to secure effective implementation of tariff principles enshrined in the Act and 2009 Tariff Regulations. The petitioners have referred to the station-wise/unit-wise computation of payment security mechanism in the PPA, filing of tariff petitions separately before the Commission, hearing of the petition and issue of tariff orders by the Commission, scheduling, despatch and energy accounting etc in support of its contention for station-wise/unit-wise LC. The petitioners have submitted that by insisting

on consolidated LCs, NTPC is maintaining an unfair bargaining advantage and stranglehold over all off takers to maximize its returns at the cost of consumers of electricity.

38. NTPC has submitted that Letter of Credit is to be established commonly for all generating stations as per para 6.2 of the Power Purchase Agreement with the Petitioners. The petitioners have established and maintained the LCs based on the total one month billing for electricity supply from all generating stations and not based on the supply from the individual generating station during the period from 5.6.2008 till 30.9.2011 without raising the issue on the LCs to be established station-wise and not as a whole. Moreover, other purchasing beneficiaries in the National Capital Territory of Delhi, namely, North Delhi Power Limited, New Delhi Municipal Council, and Military Engineering Services have also established the Letter of Credit for the aggregate capacities and not station-wise. All other purchasing beneficiaries of NTPC in other States have also maintained the Letter of Credit for the aggregate capacity and not station-wise.

39. We have considered the submissions of the petitioners and NTPC on the issue. Regulation 2 of 2009 Tariff Regulations provides that the regulations shall apply to cases where tariff of the generating station or a unit thereof and the transmission system is to be determined by the Commission under section 62 read with section 79 of the Act. Further Regulation 4(1) provides that the tariff of a generating station may be determined for the whole of the generating station or a stage or unit or block of the

generating station, and tariff for the transmission system may be determined for the whole of the transmission system or the transmission line or sub-station. Regulation 21 of 2009 Tariff Regulations provides that the fixed cost of a thermal generating station shall be computed on annual basis, based on norms specified under these regulations and recovered on monthly basis as capacity charge. The total capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share/allocation in the capacity of the generating station. The regulation further provides that the energy charge shall cover the primary fuel cost and shall be payable by every beneficiary for the total energy scheduled to be supplied to such beneficiary during the calendar month, on ex-power plant basis, at the energy rate of the month. Similar provisions exist in case of hydro generating station under Regulation 22 and transmission system under Regulation 33 of the 2009 Tariff Regulations. Regulation 33(1) provides that bills shall be raised for capacity charge, energy charge and transmission charge on monthly basis by the generating company and the transmission licensee in accordance with the regulations and payments shall be made by the beneficiaries or the transmission customers directly to the generating company or the transmission licensee, as the case may be. Therefore, 2009 Tariff Regulations provide for determination, billing and payment of capacity charges, energy charges and transmission charges on the basis of the generating station and transmission system.

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.

41. In terms of the foregoing, we direct that keeping in view the provisions of the Act, 2009 Tariff Regulations and the interest of the consumers, the petitioners shall pay the provisional tariff with effect from 1.4.2009 after adjusting the payments made in response to the provisional billings in terms of Regulation 5(3) of the 2009 Tariff Regulations and the amount shall be paid in six monthly instalments in accordance with order dated 26.8.2011 in Petition No.176/2011(Suo Motu). The petitioners are directed to settle the outstanding dues of NTPC, NHPC and PGCIL expeditiously. The issues

pertaining to encashment of LCs on the last working day of the month and maintenance of station-wise LCs are decided in terms of paras 36 and 40 of this order.

42. The petitions are disposed of in terms of the above.

sd/-  
**(M. DEENA DAYALAN)**  
**MEMBER**

sd/-  
**(V.S.VERMA)**  
**MEMBER**

sd/-  
**(S.JAYARAMAN)**  
**MEMBER**

sd/-  
**(DR.PRAMOD DEO)**  
**CHAIRPERSON**