

**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 : 31.1.2012

Petition No. 101/2010

Sub: Miscellaneous petition under Regulation 12, "Power to remove difficulties" and Regulation 13 "Power to Relax" of the CERC (Terms and Conditions of Tariff) Regulations, 2004, on account of additional cost incurred owing to revision of scale of pay for Executives from 1.1.2007 to 31.3.2009 consequent to implementation of the revision w.e.f. 1.1.2007 as detailed in the petition.

Petition No. 35/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidyalaya (KV) staff for Farakka Super Thermal Power Station (1600 MW) during 1.1.2006 to 31.03.2009.

Petition No. 36/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidyalaya (KV) staff for Talcher Super Thermal Power Station II (2 x 500 MW) Stage-I during 1.1.2006 to 31.03.2009.

Petition No. 38/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Vindhyachal Super Thermal Power Station Stage-I (1260 MW) during 1.1.2006 to 31.03.2009.

Petition No. 39/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to apply revision of Employees and Central Industrial Security Force (CISF) for Vindhyachal Super Thermal Power Station, Stage - II (1000 MW) during 1.1.2006 to 31.03.2009.

Petition No. 40/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidyalaya (KV) staff for Korba Super Thermal Power Station II (4 x 2100 MW) during 1.1.2006 to 31.03.2009.

Petition No. 41/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for Rajiv Gandhi Combined Cycle Power Project, Kayamkulam Stage-I (359.58 MW) during 1.1.2006 to 31.03.2009.

Petition No. 42/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidyalaya (KV) staff for Talcher Super Thermal Power Station Stage-II (4 x 500 MW) during 1.1.2006 to 31.03.2009.

Petition No. 43/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for Ramagundam Super Thermal Power Station Stage I & II (2100 MW) during 1.1.2006 to 31.03.2009.

Petition No. 44/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidyalaya (KV) staff for Ramagundam Super Thermal Power Station Stage-III (1 x 500 MW) during 1.1.2006 to 31.03.2009.

Petition No. 45/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Simhadri Super Thermal Power Station Stage-I (2 X 500 MW) during 1.1.2006 to 31.03.2009.

Petition No. 48/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Talcher Thermal Power Station (460 MW) during 1.1.2006 to 31.03.2009.

Petition No. 49/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for Kahalgaon Super Thermal Power Station, Stage-I (840 MW) during 1.1.2006 to 31.03.2009.

Petition No. 50/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Kahalgaon Super Thermal Power Station, Stage-II (2 x 500 MW) during 1.1.2006 to 31.03.2009.

Petition No. 51/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Jhanor-Gandhar GPS (657.39 MW) during 1.1.2006 to 31.03.2009.

Petition No. 52/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) for Vindhyachal Super Thermal Power Station Stage-III (1000 MW) from the date of COD of unit-I i.e. during 1.12.2006 to 31.03.2009.

Petition No. 53/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) for Kawas GPS (656.20 MW) during 1.1.2006 to 31.03.2009.

Petition No. 54/MP/2011

Sub: Petition for recovery of additional cost incurred consequent to pay revision for Sipat STPS Stage - II (1000 MW) from the date of COD of 1st unit i.e. 20.06.2008 to 31.03.2009.

Petition No. 59/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for Rihand Super Thermal Power Station, Stage-I (1000 MW) during 1.1.2006 to 31.03.2009.

Petition No. 60/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Singrauli Super Thermal Power Station (2000 MW) during 1.1.2006 to 31.03.2009.

Petition No. 61/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Faridabad Gas Power Station (431.59 MW) during 1.1.2006 to 31.03.2009.

Petition No. 62/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidyalaya (KV) staff for Auraiya Gas Power Station (663.36 MW) during 1.1.2006 to 31.03.2009.

Petition No. 63/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for National Capital Thermal Power Station, Dadri Stage-I (840 MW) during 1.1.2006 to 31.03.2009.

Petition No. 64/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for Rihand Super Thermal Power Station Stage-II (1000 MW) during 1.1.2006 to 31.03.2009

Petition No. 65/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for Anta Gas Power Station (419.33 MW) during 1.1.2006 to 31.03.2009.

Petition No. 66/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Feroze Gandhi Unchahar Thermal Power Station Stage-I (420 MW) during 1.1.2006 to 31.03.2009.

Petition No. 67/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for Dadri Gas Power Station (829.78 MW) during 1.1.2006 to 31.03.2009.

Petition No. 74/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) Feroze Gandhi Unchahar Thermal Power Station Stage-III (210 MW) during 1.1.2007 to 31.03.2009.

Petition No. 75/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) staff for Tanda Thermal Power Station (440 MW) during 1.1.2006 to 31.03.2009.

Petition No. 77/MP/2011

Sub: Petition under Regulation 12 & 13 of the CERC (Terms and Conditions of Tariff) Regulations, 2004 for recovery of additional cost incurred consequent to pay revision of Employees and Central Industrial Security Force (CISF) and Kendriya Vidhyalaya (KV) staff for Badarpur Thermal Power Station (705 MW) during 1.1.2006 to 31.03.2009.

Petition No. 121/MP/2011

Sub: Petition under regulation 44 of the CERC (Terms and Conditions of Tariff) Regulations, 2009 read with regulation 111 and other related regulations of CERC (Conduct of Business Regulations, 1999 for recovery of additional cost incurred due to abnormal increase in water charges at NTPC stations.

Petitioners : NTPC Limited and PGCIL.

Respondents: West Bengal State Electricity Distribution Co. Ltd. and others

Parties present : Shri M.G.Ramachandran, Advocate for the petitioners
Ms Swapna Seshadri, Advocate for the petitioners
Shri C.K.Mondol, NTPC
Shri Ajay Dua, NTPC
Shri Rohit Chhabra, NTPC
Shri S.S.Raju
Shri R.B.Sharma, Advocate for BSEB, JSEB, GRIDCO and BRPL
Shri Sanjay Srivastav, BRPL
Shri Satpal Tomar, BRPL
Shri Deepak Shankar, BRPL
Shri Prashant Dua, BRPL
Shri S.Vallinayagam, TANGEDCO
Shri S.Balaguru, TANGEDCO
Shri Manoj Dubey, Advocate, MPPTCL (Jodhpur)
Dr. Meenu Mishra, BYPL
Shri Dushyant Hanolha, BYPL
Shri C.A.Manish Garg, UPPCL
Ms. Sonia DoGra, SJVNL

Shri Ashok Kumar, SJVNL
Ms. Suparna Srivastava, CSPDCL
Shri M.K.Adhikary, APDCL
Shri B.M.Saikia, APDCL

Record of Proceedings

During hearing, the learned counsel for the petitioners, PGCIL and NTPC Ltd., submitted as under:

- (i) Since the issue in this petition P.No.101/2010 and the other petitions filed by NTPC Ltd., as mentioned above, pertains to impact of the pay revision of employees in the element of employee cost under O&M expenses, common arguments are being advanced on behalf of both PGCIL and NTPC Ltd.
- (ii) All the details sought for by the Commission regarding the facts of the case have been filed and the arguments on the question of law are being addressed before the Commission.
- (iii) The impact of pay revision given to employees was on the basis of the 6th Central Pay Commission (CPC), which is an event subsequent to the framing of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (2004 Tariff Regulations) for the period 2004-09 and the implication of this pay revision had not been factored in the normative parameter in the said 2004 Regulations under O&M expenses.
- (iv) During consideration of the tariff petitions filed by the petitioner for the period 2004-09 , when it was pointed out to the Commission regarding the impact of the wage revision on account of implementation of the 6th CPC, the Commission observed to take a holistic view on the issue when the expenditure is actually incurred and to approach at a later stage.
- (v) The impact of the pay revision has already been recognized by the Commission in its Tariff Regulations for the period 2009-14.
- (vi) The judgment dated 3.6.2010 in Appeal No.134/2008 [2010 ELR (APTEL) 0833] relied upon by the respondents in support of their contention regarding the impact of pay revision on O&M expenses would not be applicable to the issue regarding impact of pay revision on O&M expenses. In the said case, the abnormal water charges payable to local authorities could not be finalized before a particular period and the amount paid towards the water charges was claimed in a particular manner, which was disallowed stating that abnormal

water charges cannot be taken in isolation as the tariff is a complete package.

- (vii) Since the impact of the pay revision which came into effect from 1.1.2007 is a subsequent event after the norms in respect of the tariff period 2004-09 were factored, the petitioner has prayed for relaxation of the norms. Unless the Commission relaxes the norms and consider the impact this expenditure, the cost plus tariff would become meaningless. The circumstances under which the Commission would relax the norms would depend on the facts of each case.
- (viii) It was not the fault of the petitioner that the pay revision came into effect from 1.1.2007 instead of 2004. Therefore, the aspect that the expenditure which was to be necessarily incurred by the petitioner, and which was not factored in the normative parameters in the 2004 Tariff Regulations, was due to a subsequent event beyond its control. Therefore, the same should be taken into consideration and allowed as part of the petitioner's employees cost.
- (ix) Referring to the judgments of the Hon'ble Supreme Court as reported in (1994) 2 SCC 691 (*Premium Granites and another vs. State of Tamil Nadu and others*) and (1986) 3 SCC 398 (*Hindustan Paper Corporation Ltd. vs. Government of Kerala and others*), the learned counsel urged that the very purpose of 'Power to Relax' and 'Power to Remove Difficulties' are inherent powers envisaged in the Regulations to deal with the circumstances which may arise in future. Unless the Commission exercises those inherent powers when necessity arises, as in the present case, the cost plus tariff as envisaged under section 61 of the Electricity Act, 2003 becomes meaningless.
- (x) The petitioner has prayed for actual impact of pay revision and not asking for any profit out of it.
- (xi) As far as the PGCIL and NTPC Ltd. are concerned, all the details have been furnished to the Commission on affidavit, which may be considered and in case of any issue, validation can be done.

2. The learned counsel appearing for Bihar State Electricity Board (BSEB), Jharkhand State Electricity Board (JSEB), GRIDCO and BSES (Rajdhani) Power Limited (BRPL) submitted as under:

- (i) Reply has been filed respectively in all the petitions and in the event of non-filing of reply in any petition, the reply filed on behalf of JSEB, BRPL and GRIDCO may be adopted.

- (ii) The main concern is relating to the procedure being adopted which would factually reopen all the tariff petitions of the PGCIL and NTPC Ltd. decided for the tariff period 2004-09 in respect of the O&M expenses and hence, the petitions are not maintainable.
- (iii) These respondents have opposed the claim of the petitioner regarding the impact of pay revision for increase of the O&M expenses even in the respective tariff petitions for the period 2004-09 on the ground that any increase in the employees cost due wage revision must be taken care by the petitioners by improving their productivity level and the beneficiaries should not be unduly burdened.
- (iv) The settled position of law is that after passing of the order, the same becomes final and the earlier order passed cannot be varied except by means of a review. The court which passes the order becomes *functus officio* and it cannot set-aside or alter the order.
- (v) Referring to the order dated 10.6.2008 of the Commission in Review Petition No.46/08 and 149/04, the learned counsel submitted that these miscellaneous petitions cannot amend or alter the findings already settled by the Commission in various tariff petitions pertaining to the tariff block 2004-09, in accordance with law. The petitions have to be dismissed for abuse of the process of the Commission.
- (vi) No separate dispensation for the year 2007-09 on account of the impact of wage revision would be permissible, as the same has already been factored in the Tariff Regulations for the tariff period of 2009-14.
- (vii) The petitioner is not certain as to under which provision the claim is to be made i.e. whether to claim under the “Power to Relax’ or “Power to Remove Difficulties” and are concerned only about commercial consideration.
- (viii) Referring to section 61(d) of the Electricity Act, 2003, it was submitted that the tariff becomes unreasonable if norms are liberalized/changed.
- (ix) Section 61(d) of the Electricity Act, 2003 envisages for recovery of the cost of electricity in a reasonable manner and hence, if tariff consists of various components, all the components of the tariff cannot be tested individually on the ground of reasonableness, as tariff is a composite package.

- (x) The principle laid down under section 61(e) regarding incentive based performance is one to be decided by the Commission and not by the petitioner.
- (xi) The learned counsel submitted that the Commission may in the alternative consider to introduce trueing up exercise as done by the State Electricity Regulatory Commissions in accordance with the Electricity Act, 2003 and undertake yearly revision of tariff so that all parties would be assured of the cost of electricity in a reasonable manner.
- (xii) Referring to paragraphs 48 to 50 of the Judgment dated 3.3.2009 of the Hon'ble Supreme Court in Civil Appeal No.1110/2007 (*UPPCL vs. NTPC Ltd. and others*), the learned counsel contended that petitioner cannot revisit the tariff for the period 2004-09 which is already over and submitted that there is no merit in this petition either on facts or on procedure or on law.
- (xiii) Tariff being a composite package, if there is a little loss in specific parameter and huge gain in other parameters, like that of specific oil consumption, it may not be appropriate to seek indulgence of the Commission for exercising the inherent power to relax for recovering the small amount of loss.

3. The representative of the Uttar Pradesh Power Corporation Limited (UPPCL) submitted as under:

- (i) The actual expenditure incurred on individual elements, in this case water charges/employee cost, cannot be considered in isolation under the component of O&M expenses, without regard to other elements of the same or other components of tariff.
- (ii) It is the mandate of the Central Commission to specify the terms and conditions of tariff in respect of the generating companies covered under section 79 (1) (a) and (b) of the Electricity Act, 2003 and inter-State transmission of electricity, based on norms and not actuals.
- (iii) Only in the event of any difficulty in the implementation of the 2004 Tariff Regulations, regulation 12 will operate and correspondingly the 'Power to Relax' will come into operation only when there is any deviation in the norms fixed by the Commission. The petitioner has not explained as to what difficulty they are facing in implementation of the 2004 Regulations. Hence, these petitions are not maintainable and should not be entertained.

4. The learned counsel for BSES (Yamuna) Power Limited (BYPL) submitted that he opposes these petitions and adopts the submissions of learned counsel for BSEB, JSEB, GRIDCO and BRPL, and that of the representative of UPPCL.

5. The representative for the Punjab State Power Corporation Limited (PSPCL) (*erst while PSEB*) opposed the petitions submitting that the Tariff Regulations are based on norms and not actuals and since, tariff is a complete package, a specific parameter of it cannot be reviewed in isolation. Reply has been filed on the same lines in connected matters also, in which PSPCL is a party respondent, which may be considered.

6. The learned counsel for TANGEDCO submitted that the power to relax envisaged under regulation 13 of the 2004 Regulations cannot be exercised retrospectively, since the petitioners has sought for revision of tariff in view of impact of the pay revision under O&M expenses for the tariff period 2004-09. The O&M expenses should be on normative basis and hence, to claim for consideration of revision of tariff already settled on the basis of actuals, instead of normative basis, would amount to amendment of the Regulations itself, which should not be allowed.

7. The learned counsel for MPPTCL submitted that the Office Memorandum No.2(70)/08-DPE(WC)-GEXVL/08 dated 26.1.2008 issued by the Department of Public Enterprises specified about affordability of the company for implementation of pay revision and a careful consideration of the same would make it amply clear that the pay revision for the last tariff block 2004-09 was definitely subject to the affordability of the petitioners to pay the same from their resources available to them under the Return on Equity (ROE) during the relevant year. He submitted that the impact of pay revision should not be passed on to the beneficiaries.

8. The learned counsel for the petitioners, PGCIL and NTPC in his rejoinder submissions referred to paragraphs 32 and 33 of the judgment dated 3.3.2009 of the Hon'ble Suprme Court in Civil Appeal No.1110/2007 (*UPPCL vs. NTPC Ltd. and others*) and submitted that the said judgment is in favour of the petitioners. He further submitted that keeping in view the principles laid down in section 61 (b) and (c) of the Electricity Act, 2003, the Commission should allow the employees cost which was not factored in the norms of 2004 Tariff Regulations. He further submitted that regulation 38 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 is not applicable in the present case as contended by the representative of UPPCL. He further submitted that incentives and efficiency gain were matters of right of the petitioners vested under the statutory Regulations of the Commission.

9. As regards the water charges, the learned counsel for petitioners submitted that the additional liability on this account has occurred on account of the statutory notification of the respective State Governments, subsequent to the

fixation of norms for the period 2004-09, which was beyond the control of the petitioners. He also questioned the data submitted by the representative of UPPCL with regard to water charges and sought permission of the Commission to file written submissions in that regard. The learned counsel also refuted the contention that the aspect of pay revision from 1.7.2007 to 31.3.2009 has been factored in the norms fixed for 2009 Tariff Regulations. He submitted that the increase in salary is on year to year basis and the expenditure on this account has not been factored in the 2009 Tariff Regulations.

10. The learned counsel for the petitioners, PGCIL and NTPC further clarified that they are strictly following the regulations. The relaxation of norm is an accepted concept and that would not amount to amendment of the regulations. Relaxation of the norms is inbuilt in the regulations. Due written submissions in this regard would be filed by the petitioners.

11. The Commission, after hearing the parties, directed the petitioners and the respondents to file their written submissions, if any, on or before 24.2.2012.

12. The Commission reserved its orders in the petitions.

By order of the Commission

**Sd/-
(T. Rout)
Joint Chief (Law)**