

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 137/MP/2011**

Subject: Petition for recovery of ₹6.45 crore along with interest thereon related to recovery of fixed charges on account of regulation of supply of power in the month of October, 1998.

Date of Hearing: 11.12.2012

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

Petitioner: NTPC

Respondent: WBSEDCL and DVC

Parties present: Shri M. G Ramachandran, Advocate, NTPC  
Ms. Swapna Seshadri, NTPC  
Shri A. K. Bishoi, NTPC  
Shri Shyam Kumar, NTPC  
Shri Shailendra Singh, NTPC  
Shri Sakya Chaudhari, Advocate, WBSEDCL  
Shri Anand Shrivastava, Advocate, WBSEDCL  
Shri Pravakar Jena, DVC

**RECORD OF PROCEEDINGS**

The petitioner NTPC Ltd. has filed this petition under Section 79(1)(f) for adjudication of disputes on the claim of NTPC for fixed charges of Rs 6.45 crore related to the regulation of power supply in the month of October, 1998 against West Bengal State Electricity Distribution Company Ltd (WBSEDCL) and Damodar Valley Corporation (DVC), with interest thereon till the date of realization.

2. The learned counsel for the petitioner submitted as under:

(a) During the month of October, 1998, supply of electricity to the respondents was regulated on account of non-payment of bills which had become due from

them to the petitioner. Some of the beneficiaries including GRIDCO adjusted the amount claimed under the one time settlement scheme of the Government of India. Subsequently, GRIDCO filed Petition No. 16/2006 before the Commission for recovery of fixed charges on drawl basis and in the said petition, the petitioner raised alternate plea that in case the petition is allowed, the respondents herein should be directed to make payments. However, the Commission by its order dated 30.9.2008 allowed the petition and directed the petitioner to refund ₹6.45 crore along with interest to GRIDCO. Aggrieved by the said order, the petitioner filed Appeal No. 43 of 2009 before the Appellate Tribunal for Electricity (Tribunal) which was dismissed by judgment of the Tribunal dated 18.1.2011. Against this, the petitioner filed second appeal before the Hon'ble Supreme Court which was dismissed on 6.5.2011. Since the question as to whether the petitioner can claim the said amount from the regulated entities or not had been left open and undecided by the Commission in its order, the present petition has been filed to recover the proportionate amount of fixed charges for October 1998, from the respondents.

(b) There is no delay or laches in the filing of the present petition as the petitioner was bonafide pursuing the remedy for recovery of its fixed charges from GRIDCO and had also made alternate claim against the respondents herein in the earlier proceedings which had culminated by order dated 6.5.2011 of the Supreme Court. Thus, the present petition is covered under Section 14(2) of the Limitation Act, keeping in view the liberty granted by the Commission which had been confirmed by the Tribunal in the said orders.

(c) The petitioner may be permitted to file its rejoinder to the reply filed on 10.12.2012 by the respondent, WBSEDCL.

3. The learned counsel for respondent no. 1, WBSEDCL submitted as under:

(a)The claim of the petitioner in the bills generated against WBSEDCL were 'nil' amounts at the relevant time, which has attained finality.

(b)The present petition is barred by limitation. In terms of the principle laid down by the Appellate Tribunal in GUVNL Vs Essar Power Ltd. (2010 ELR 359), the petitioner cannot after a lapse of 14 years initiate proceedings for recovery of its alleged dues, for its own failure to perform its obligations under the Bulk Power Supply Agreement (BPSA).

(c)The petitioner has failed to justify the grounds on which the petition is covered under Section 14(2) of the Limitation Act. Firstly, the proceedings were not initiated by the petitioner, as the claim was filed by GRIDCO (in Petition No. 16/2006) for recovery of the amount from the petitioner, which was allowed.

Moreover, the said proceedings were not initiated against this respondent as it was a dispute raised by GRIDCO against the petitioner. Also, since the claim of the petitioner had been rejected in all the forums, viz the Commission, Tribunal and the Supreme Court, there is no ground to claim the same from the respondent against whom no charges were claimed.

(d) The claim of the petitioner against the alleged non-payment by the respondent had been settled in the one-time securitization scheme without any reference towards the claim for fixed charges. Therefore, the petitioner is estopped from claiming such amount again.

(e) The BPSA provides that the terms and conditions for power supplied by the petitioner were to be determined by Statutory notifications issued by the Government of India (GOI) under Section 43A (2) of the Electricity Act, 1948. The fixed charges were to be calculated using the formula as mentioned in Clause 2 and the note to Clause 2 which clearly provides "*that fixed charges cannot be apportioned on the basis of entitlement of the beneficiaries, until the date of implementation of availability based tariff in the region*". The Availability Based Tariff (ABT) was implemented in the Eastern Region only from April, 2003 and the notification does not provide for recovery of fixed charges in the absence of supply of power to the beneficiaries. Any other interpretation for recovery of fixed charges in case of non supply of power would amount to an introduction of a new provision in the said notification, which has not been envisaged by the legislative authority. This is also not permissible, in line with the principle laid down by the Hon'ble Supreme Court in the case of S.R. Bommai v Union of India. (Copy of judgment filed)

(e) Under Clause 7.5 of the BPSA, the petitioner had the authority to issue directions to the Eastern Regional Electricity Board (EREB) to exclude the allocation of power of such customer whose supply was being regulated, from scheduling and energy accounting and reallocate the share of the regulated customer amongst other Bulk Power customers. Hence, the BPSA provides for an inbuilt mechanism for recovery of the cost of the power projects of the petitioner, It also casts an obligation upon the petitioner to issue necessary directions for reallocation of power in case of regulation of power supply. In view of this, the petition is not maintainable.

4. The representative of the respondent no. 2, DVC submitted as under:

(a) The submissions put forward by the learned counsel for respondent no. 1, WBESDCL is adopted by this respondent.

(b) The respondent has not been a party to the dispute between the petitioner and GRIDCO during the last thirteen years and hence Section 14(2) of the limitation Act is not applicable. Even during the reconciliation undertaken some time back between the petitioner and this respondent, this particular claim had not been raised by the petitioner. Since no claims were made by the petitioner, this petition is not maintainable.

5. In response to the above submissions, the learned counsel for petitioner submitted as under:

(a) Both the respondents herein were parties to the proceedings initiated by GRIDCO in Petition No. 16/2006, as respondent no. 4 (WBSECL) and 5 (DVC).

(b) The submissions of the respondent, WBSEDCL and the interveners (Tata Steel etc) as referred to in paragraph 17 and 19 of the Commission's order dated 30.9.2008 may be taken note of by the Commission.

(c) The question of limitation was raised by the petitioner in the proceedings before the Commission earlier and the same was decided by the Commission in paragraph 26 of the order dated 30.9.2008. As the proceedings before the Commission did not suffer from limitation, the pendency of the same is covered under Section 14(2) of the Limitation Act.

(d) Clause 7.5 of the BPSA deals with non-payment of bills and non establishment of letter of credit which provides the petitioner with certain rights in case of default by parties. In case of default on the part of WBSEDCL or DVC and if the statutory notification does not provide for the petitioner to get payments from non regulated entity or drawl entity, the provisions of Contract Act would prevail. Therefore, in view of the Commission's order and the judgment of the Tribunal, since statutory notification is not applicable, the petitioner is entitled for relief from the defaulting parties.

6. The learned counsel for respondent no. 1, WBSEDCL submitted that:

(a) Even if it is assumed that there has been default on the part of WBSEDCL then the remedy available for the petitioner is in the form of surcharge payable on delayed payment and not in the form of damages. This is in terms of Clause 7.0(c) of the statutory notification.

(b) The question of limitation is with regards to the proceedings initiated by GRIDCO against the petitioner and not with WBSEDCL. There has been no communication in this regard with WBSEDCL from 1998 till the present petition filed by the petitioner.

7. On a specific query from the Commission as to whether there exists any contradiction between the provisions in the contract and the statutory notification, the learned counsel for the respondent, WBSEDCL clarified that the provisions of the contract and the said notification should be harmonized to give a purposeful construction.

8. The Commission accepted the prayer and directed the petitioner to file its rejoinder to the reply filed by the respondent WBSEDCL, on or before 4.1.2013. Subject to this, order in the petition was reserved.

By order of the Commission

Sd/-

(T. Rout)  
Joint Chief (Law)