

No.L-7/14/2010/CERC
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: 1.6.2010

In the matter of

Central Electricity Regulatory Commission (Power system Development Fund) Regulations, 2010.

STATEMENT OF REASONS

1. Introduction

1.1 As per the provisions of various regulations issued by the Commission, Regulatory Funds have been created and are being maintained and operated by the Regional Load Despatch Centres (RLDC). There are provisions of "Congestion Charge Account" in the Central Electricity Regulatory Commission (Measures to relieve congestion in real time operation) Regulations, 2009, "Unscheduled Interchange Pool Account Fund" in the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 and "Reactive Energy Charges Account" in the Indian Electricity Grid Code, 2006, specified by the Commission. The relevant regulations provide that accounts of these regulatory funds may be maintained by any other entity as the Commission may, by notification direct from time to time. The relevant regulations also provide that any surplus funds available in these regulatory accounts may be utilised for specified purposes with the prior approval of the Commission.

1.2 The surplus amounts available in various regulatory accounts are meant for utilisation for the purpose as stipulated in the relevant regulations. Presently, accounts are maintained by the RLDCs and shown in their books of accounts. Strictly speaking,

these are regulatory funds and as such, do not belong to the RLDCs. In order to deal with such funds independently, maintain proper books of accounts, process the applications for approval of various schemes by the Commission for sanction of grant out of these funds and for keeping track of the progress of the on-going projects financed out of such funds, the Commission considered it necessary to specify separate regulations so that surplus funds available under various account could be brought under the Power System Regulatory Fund and necessary exemptions on the collection of fund and interest earned thereon may be sought under the Income Tax Act, 1961.

1.3 The Commission is empowered u/s 178(1) and 178(2) (ze) of the Electricity Act, 2003 (the Act) to make regulations on any other matter which is to be, or may be specified by regulations consistent with this Act and the Rules. Sub-section (1) and clause (ze) of Sub-section (2) under section 178 of the Act provide as under:

"178. (1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of following matters, namely,

x x x x x x x
(ze) any other matter which is to be, or may be, specified by regulations."

1.4 In exercise of the powers vested under Section 178(1) and 178(2) (ze) of the Act, the Central Commission published draft regulations on Central Electricity Regulatory Commission (Power System Development Fund) Regulations,2010 (hereinafter "PSDF regulations) and invited comments from the stakeholders by 25th February, 2010 vide public notice no. No.L-7/14/2010/CERC dated 21st January, 2010. Comments received on the draft regulations from the stakeholders have been compiled and listed in the Annexure. The oral hearing was held on 8th March, 2010.

2. Comments of the Stakeholders

2.1 Gist of comments received from stakeholders are as under:

- a) PSDF Regulations should not be framed under 178(1) & 178(2)(ze) as it is not consistent with the basic functions entrusted to the CERC and other related provisions of Electricity Act 2003.
- b) Collection of unutilised fund through PSDF Regulations is against the provision of Section 61, 62 and Section 29 of Electricity Act 2003.
- c) Matter relating to validity of various Regulations on UI is sub-judice.
- d) The words “RLDC reactive energy charges” in Regulations 2(e), 3(1)(c) and 3(2) may be replaced by “Reactive energy charges”.
- e) Separate region-wise accounts should be maintained for (1) balance from UI Pool Fund (2) Congestion charges (3) Congestion Revenue Account (4) Reactive Energy charges (5) Miscellaneous charges.
- f) The congestion charges should be used to strengthen the regional system.
- g) To carry out detailed study relating to usage/replacement of one fuel (liquid) by another fuel (gas) for the optimum utilization of resources.
- h) To carry out separate analysis & study for optimum utilization of ULDC Scheme.
- i) The word “strategic importance” mentioned in Regulation 4 (i) is vague or general which can be interpreted in more than one way depending upon the facts and circumstances. The word “strategic importance” may be defined or spelt out to avoid disputes.
- j) No tariff shall be allowed for the investment made out of PSDF in transmission lines of strategic importance. Similarly no return on equity, depreciation etc. shall be permitted to utilities to whom fund is given from PSDF.
- k) Surplus Fund should be distributed as incentive to the entities in the respective region which have helped the system (grid).
- l) The reactive energy charges shall be distributed as incentive among the suppliers of the reactive energy in the region.
- m) Details of all proposals received, the rational and scoring system to choose a project should be available on Fund website.

- n) Regional Power Committees may also be included to furnish project schemes to management Committee of the Fund to facilitate identification and prioritization of schemes.
- o) Representatives of Central Institutes/Organisations like CEA, RLDC, NLDC and Chairman of RPCs may be made members of the Management Committee or they shall be included therein as permanent/special invitees.
- p) Fund should be maintained at regional level and for managing the same respective RPC may create sub-Committees with members from regional entities on rotational basis.
- q) Regional Fund Management Committee under the Chairmanship of respective RPC involving all State utilities. However, funds generated from the power market (from the assets of IPP, merchant power plants) CERC may form independent body for the management of such funds.
- r) Two independent external members may be nominated from the generator side.
- s) As the PSDF arises through market participants of power sector there should be at least one member from generation, transmission, distribution and power-exchanges. An economist may also be appointed as advisor to the Management Committee to ensure equitable allocation based on market principles.

3. Analysis of the Comments and the Commission's decision thereon

3.1 The Commission has given thoughtful consideration to the suggestions/ comments received from the stakeholders. The decisions of the Commission on the various issues raised are given in the succeeding paragraphs.

3.2 UPPCL has raised the issue that the PSDF regulations should not be framed under Section 178(1) and 178(2)(ze) of the Act being inconsistent with the provisions of the Act. The contention of UPPCL is not tenable as the Commission has been vested with the power to regulate inter-State transmission of electricity under Section 79(1)(c) of the Act. The word 'regulate' has a wider connotation. The Hon'ble Supreme Court in K Ramanathan Vs State of Tamil Nadu (1985)2SCC116} has explained the scope of 'power to regulate' as under:

"19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word 'regulate' is not synonymous with the word 'prohibit'. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the things subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated."(emphasis supplied)

3.3 Thus, the Commission, which has been entrusted with the functions to regulate inter-State transmission of electricity, has got the plenary power over inter-State transmission which would encompass within its fold such regulatory measures like imposition of UI charges, congestion charges and reactive energy charges in order to ensure smooth operation of the inter-State transmission system and maintenance of the safety and security of the integrated national grid in accordance with the provisions of the Grid Code. The funds created out of various charges are in the nature of regulatory funds aimed at improving and facilitating the inter-State transmission of electricity in the interest of the beneficiaries and the consumers which is in consonance with the objects and purpose of the Act.

3.4 The Supreme Court in its judgment dated 15-3-2010 in Civil Appeal No. 3902 of 2006 (PTC India Ltd. versus Central Electricity Regulatory Commission) and other related appeals has explained the scope of the power of Central Commission under Section 178 of the Act as under:

"59(1) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze)."

3.5 Above decision of the Supreme Court, leaves no doubt that the Commission has the power under Section 178 (1) read with Section 178 (2) (ze) of the Act to specify the

regulations on the Power System Development Funds which is incidental to the function of regulation of inter-State transmission of electricity.

3.6 UPPCL has further raised the point that the Power System Development Funds is against the provisions of Sections 61, 62 and 69 of the Act. It has been argued that the Hon'ble Supreme Court has held UI charges as tariff and, therefore, separate regulations regarding UI charges is not consistent with the provisions of the Act. The contention of UPPCL is not tenable. The purpose of introduction of UI charges was to provide an economic signal to those utilities who were drawing in deviation of the schedule, by prescribing a higher UI price during shortage conditions. The commercial mechanism was conceived to be reinforced by enforcement of provision of the Grid Code. UI charge is applicable both in the case of generating stations as well as the beneficiaries. From the point of view of the generating station, if actual energy supplied is higher than scheduled energy, the generating station becomes entitled to get a payment for the excess energy at a rate dependent on the frequency at that time. If, on the other hand, the energy actually supplied is less than what is scheduled, the generating station would be required to pay back for the energy shortfall, also at the frequency linked rate. From the point of view of beneficiaries, any State drawing power in excess of its schedule has to pay for the excess energy at the same frequency-dependent rate. The high UI rate during the low frequency conditions would induce all States to reduce their drawal from the grid, by maximizing their own generation and/or by curtailing their consumer load. If a State draws less power than scheduled, it pays for the scheduled quantum at the normal rate and gets paid back for the energy not drawn at UI rate. During high frequency conditions, a State can draw extra power at a lower rate, and is thus encouraged to back down its own costlier generating stations. Thus, the UI pricing mechanism is expected to serve the twin objectives of specifying settlement rate for deviations from schedule in normal operating range and ensuring 'grid discipline' on the one hand while ensuring maximisation of generation at optimal cost for grid participants on the other hand.

3.7 The Hon'ble Supreme Court in Central Power Distribution Company and Others Vs. Central Electricity Regulatory Commission and Another [(2007) 8 SCC 197] has made the following observation with regard to the powers of the Central Commission to maintain grid discipline, particularly in the context of UI charges:

“22.1 The application of availability-based tariff and imposition of Unscheduled Interchange (UI) charges are essential part of the functions of the Central Commission under Section 79(1)(h) of the Electricity Act, 2003 which reads “to specify Grid Code having regard to the grid standards”, and sub-section (2) of Section 28 read with Section 178(2)(g) dealing with the Central Commission's powers to frame Grid Code. The maintenance of Grid discipline envisaged under the Grid Code is regulated by the mechanism of ABT and UI charges. There is no basis for the appellant to contend that unless something is a part of tariff the Central Commission cannot exercise powers and functions. ABT and UI charges are commercial mechanism to control the utilities in scheduling, dispatch and drawal and UI charges are tariff or charges payable for deviations.” (emphasis supplied)

3.8 In view of the above, the UI charges are not tariff but settlement rates for deviation from the schedule to regulate inter-State transmission in electricity and maintain grid discipline. The surplus available from the UI funds after meeting the liability of payment to the beneficiaries can be deposited in a fund to be created by the Central Commission. This fund named as Power System Development Funds, has been proposed to be created through these regulations to provide a mechanism under which the residual amounts available in the Unscheduled Interchange Pool Account Fund, Congestion Charge Account and Reactive Charge Account are maintained and utilized in a proper and transparent manner for the benefit of the electricity sector in accordance with the relevant regulations. Thus the proposed fund which is in the nature of a regulatory measure is in consonance with the objective and purpose of the Act.

3.9 UPPCL has further raised a point that it has filed some writ petitions before the Hon'ble High Court of Allahabad (Lucknow Bench) challenging the UI regulations of the Commission and therefore, the regulations on Power System Development Fund should not be framed. We are of the view that there is no embargo on the Commission to specify the Power System Development Fund regulations in exercise of its statutory

powers during the pendency of the writ petitions relating to the UI charges before the Hon'ble High Court.

3.10 UPPCL has raised another point that the purposes of utilisation of fund collected through PSDF regulations is the transmission projects/schemes and power system development and related work. It has been urged that the recovery from the consumer may not be done for investment or development of funds as there is no provision in the Act to recover development fund from the consumers. In this connection, the Commission would like to emphasise that there is no compulsion for overdrawal from the grid and utilities would not be required to pay any UI charge or congestion charge if they stick to their schedule of drawal and maintain grid discipline. The utilities are liable to pay UI charges or congestion charges for their failure to maintain grid discipline. In a way, the utilities over-drawing from the grid and creating congestion in the transmission corridor and paying the UI charges/congestion charges are doing a disservice to their consumers as the consumers are made to pay through tariff for the failure of the utilities to arrange for scheduled power for their consumers. Therefore, the purpose of UI charges or congestion charges is not to create a development fund but to instill grid discipline and maximise generation as the utilities would be incentivised to tap the costly form of scheduled power instead of drawing through UI. However, the residual amounts available in the various funds are proposed to be utilised in a transparent manner for the benefit of the electricity sector.

3.11 The words "RLDC reactive energy charges" in Regulations 2(e), 3(1)(c) and 3(2) has been replaced by "Reactive energy charges" keeping in view the suggestion of some of the stakeholders.

3.12 The Commission has considered the suggestions regarding maintenance of region- wise account for each fund and utilization of funds on strengthening regional

systems, carrying out studies on replacement of one fuel (liquid) to another (gas) for optimum use of resources, analysis and utilization of ULDC scheme and distribution of surpluses to entities which contributed to the system as well as to the Fund. The Commission is of the view that separate account for each head of regulatory charges shall be maintained as per the provisions of the respective regulations. In other words, if it has been provided in the respective regulation that account of fund is to be maintained region-wise, then account of surplus fund shall also be maintained region-wise in Power System Development Fund. Similarly, surpluses available under each account will be utilized for the purposes mentioned in respective regulations subject to the terms and conditions stipulated in the relevant regulations.

3.13 The Commission has appreciated the concerns of stakeholders regarding tariff on funds released from Power System Development Funds and has decided that no tariff shall be allowed for the investments made out of the Fund on any asset(s) permissible as per respective regulations.

3.14 The information regarding proposals received for funding from the Power System Development Funds and priority of releases will be hosted on the website of the Commission.

3.15 Most of the stakeholders have raised the issues of composition of the Managing Committee. It has been proposed that the representation of the organizations like CEA, CTU, NLDC, RLDC, RPC should be the members of the Managing Committee. The Commission is of the opinion the management of the fund should not be with the Commission although in the draft it was proposed to include the members and the officers of the Commission in the managing Committee. As is well known the fund is proposed to be created through various regulations specified by the Commission. Hence the Commission desires distance itself from the management of the funds except to

extent of regulatory management oversight. Composition of the Managing Committee has been revised by including therein representatives from the NLDC, RLDC and RPC

3.16 As per draft regulations, Managing Committee of the Fund may invest the money lying in the fund in the securities authorized under the Indian Trusts Act, 1882. However, it has been decided that Managing Committee of the Power System Development Fund may invest the money lying in the fund either in the securities authorized under the Indian Trusts Act, 1882 or frame guidelines from time to time with the approval of the Commission for the investment of balance funds.

3.17 In view of the foregoing, we direct that the regulations may be finalized accordingly and published in the official gazette to come into effect from the date of their publication.

Sd/- sd/- sd/- sd/-
[M Deena Dayalan] [V. S. Verma] [S. Jayaraman] [Dr. Pramod Deo]
Member Member Member Chairperson