

**BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

Petition No.4/99, 5/99, 11/99 and 21/99 IA No.12/2000

Coram:

1. Shri S.L. Rao, Chairman
2. Shri D.P. Sinha, Member
3. Shri G.S. Rajamani, Member
4. Shri A.R. Ramanathan, Member

In the matter of :

Petitions filed by National Thermal Power Corporation Ltd., for approval of  
incentive for the year 1998-99

In the matter of :

M/s National Thermal Power Corporation Ltd.,  
7, Institutional Area,  
NTPC Bhawan,  
Scope Complex,  
Lodi Road,  
New Delhi – 110 003. .... Petitioner

Vs

APTRANSCO & others .... Respondents

Following were present:

- |                     |   |       |             |
|---------------------|---|-------|-------------|
| 1.                  | Shri Sharat Kapoor, Advocate, NTPC        | ..... | Petitioner  |
| 2.                  | Shri Shyam Wadhera, GM(Comml.), NTPC      |       | -do-        |
| 3.                  | Shri Balaji Dubey, Sr. L.O., NTPC         |       | -do-        |
| 4                   | Shri P.S. Shankar, CE, TNEB               |       | Respondents |
| (4/99)              |   |       |             |
| 5.                  | Shri S. Sowmyanarayan, OSD, TNEB          |       | -do-        |
| 6.                  | Shri G.R. Vasudevan, SE(Elec.), KPTCL     |       | -do-        |
| 7.                  | Shri A.N. Ghosh, DGM, UPPCL               |       |             |
| Respondents (5/99)  |   |       |             |
| 8.                  | Shri G.C. Jain, EE, UPPCL                 |       | -do-        |
| 9.                  | Shri B.K. Saxena, Sr.AE, UPPCL            |       | -do-        |
| 10.                 | Shri R.K. Arora, Xen/Tariff, HVPN         |       | -do-        |
| 11.                 | Shri V.K. Gupta, SE, RSEB                 |       | -do-        |
| 12.                 | Shri Umesh Gupta, Div (LA), RSEB          |       | -do-        |
| 13.                 | Shri Shyam Moorjani, Advocate, for RSEB   |       | -do-        |
| 14.                 | Shri H.S. Bedi, Dir, PSEB                 |       | -do-        |
| 15.                 | Shri H.N. Lamba, XEN, DVB                 |       | -do-        |
| 16.                 | Shri Ashwani Kumar, Sr. Advocate, with... |       | -do-        |
| 17.                 | Ms. Ruchi Gaur Narula, Advocate for DVB   |       | -do-        |
| 18.                 | Shri S.K. Thapar, ACE (Com.) DVB          |       | -do-        |
| 19.                 | Shri Venugopal, DVB                       |       | -do-        |
| 20.                 | Shri Shiv Raj Singh, Addl.CE, MPEB        |       |             |
| Respondents (11/99) |   |       |             |
| 21.                 | Shri S.P. Degwekar, SE (Com), MPEB        |       | -do-        |
| 22.                 | Shri D.R. Rao, AGM, GRIDCO                |       |             |
| Respondents (21/99) |   |       |             |
| 23.                 | Shri G.P. Sarkar, Sr. G.M. (PP), GRIDCO   |       | -do-        |
| 24.                 | Shri P.K. Patnaik, DM, GRIDCO             |       | -do-        |
| 25.                 | Shri S.N. Akhauri, E in C, BSEB           |       | Respondents |

**ORDER**

**(Dates of Hearing 8/2, 9/2,10/2,14/2, 21/2, & 23/6/2000)**

These petitions have been filed by National Thermal Power Corporation Ltd. (NTPC) seeking the Commission's approval for the proposal for incentive for the year 1998-99 for Southern Region (Petition No.4/99), Northern Region (Petition No.5/99), Western Region (Petition No.11/99) and Eastern Region (Petition No.21/99). These petitions have been heard together since they involve certain common questions of law.

2. NTPC is a generating company within the meaning of Section 2(4A) of the Electricity (Supply) Act, 1948 (the Supply Act), wholly owned by the Central Government. The Central Government, by virtue of powers under sub-section (2) of Section 43A of the Supply Act, notified the factors for determination of tariff for sale of electricity, in terms of SO 251 (E) dated 30-3-92. Based on these factors, the tariff for each generating station used to be notified separately, also under sub-section (2) of Section 43A of the Supply Act. The tariff so notified was a two-part tariff, comprising of the fixed charges and the variable charges. These notifications further provided for incentive payable by the beneficiaries to NTPC when the Plant Load Factor was above 68.49% at the end of each financial year in the same proportion as fixed charges billed by NTPC for that financial year. Subsequently, an amendment notification was issued on 19-6-95 providing for provisional billing of incentive, on monthly basis, subject to adjustment at the end of the financial year. NTPC was liable to give credit to the beneficiaries, when Plant Load Factor was below the prescribed limit, which has been termed as disincentive. As per the tariff notifications, incentive/disincentive is to be determined by the Central Government. The tariff notified by the Central Government remained in force for a period of five years from the date it came into force. It was provided that the tariff notified shall remain in force beyond the period fixed in case new tariff is not decided. For facility of reference, the relevant provision of the notification No. 3/19 (I)/92 – US (CP) dated 2-11-92 pertaining to Singrauli Thermal Power Station is extracted below.

“In case a new tariff for the period beyond above is not finalised before that date, the beneficiary(ies) shall continue to pay to NTPC for the power supplied from STPS beyond this date on ad hoc basis in the manner detailed in this notification.”

3. It is an undisputed fact that the tariff initially fixed for a period of five years had not been renotified after expiry of the prescribed period and the charges were being paid by the beneficiaries to NTPC on ad hoc basis in terms of the provisions extracted above.

4. Meanwhile, Electricity Regulatory Commissions Act 1998 (the Regulatory Commissions Act) was enacted by the Parliament which, *inter alia*, provides for establishment of the Central Electricity Regulatory Commission (the Commission) whose functions include the regulation of tariff of the generating companies owned or controlled by the Central Government. Section 51 of the Regulatory Commissions Act empowers the Central Government to omit, by notification in the Official Gazette, sub-section (2) of Section 43A of the Supply Act with effect from a date that may be appointed by it. By virtue of these powers, the Central Government has omitted sub-section (2) of Section 43A of the Supply Act with effect from 15-5-99 in accordance with the notification dated 22-3-99. Thus from that date, the powers to regulate tariff for sale of electricity by NTPC is vested in the Commission, constituted by the Central Government in exercise of power under sub-section (1) of Section 3 of the Regulatory Commissions Act. By virtue of powers under Section 55 of the Regulatory Commissions Act, the Commission has notified Central Electricity Regulatory Commission (Conduct of Business) Regulations 1999. The second proviso to Regulation 79 (2) permits the generating companies owned or controlled by the Central Government to continue to charge the existing tariff being charged on the date of notification of the Regulations for such period as may be specified in the notification, without prejudice to the powers of the Commission to take up any matter relating to tariff falling within the scope of the Regulatory Commissions Act. A further notification was issued by the Commission on 12-5-99 on similar lines, permitting the generating companies w.e.f. 15.5.1999 to continue to charge tariff for the period it was approved, or till further order in this regard is passed by the Commission.

5. As we have already noted, these petitions relate to incentive for the year 1998-99. NTPC, the petitioner, has based its claim for the incentive on the tariff notifications issued by the Central Government prior to vesting of powers of tariff regulation in the Commission.

6. The respondents in their responses, have opposed reliefs claimed by NTPC. They have questioned the norms earlier prescribed by the Central Government for determination of tariff. It has been urged on behalf of the respondents that the tariff notifications whose validity had lapsed before the year 1998-99, cannot form the valid basis for payment of incentive. The respondents have pleaded that the question of

payment of incentive should be decided on the basis of new parameters to be notified by the Commission from the date of expiry of tariff notifications for the concerned power stations. The case of the respondents is that incentive being part of the tariff, cannot be allowed unless the regular tariff for the year for which incentive has been claimed is notified by the Commission, in view of expiry of the validity of the incentive earlier notified by the Central Government. Before considering the merits of the claim, we deemed it appropriate to examine certain preliminary issues in regard to jurisdiction of the Commission that arise in these petitions. Accordingly, through our order dated 20-12-99, we formulated the following preliminary legal issues for determination:

(a) Whether the notification of incentive is a matter of procedure and not of adjudication, and as such can be taken up by the Commission

(b) Whether the Commission has jurisdiction to exercise the function being exercised by the Central Government relating to any period prior to 15.5.1999 for determination of incentive under tariff notification issued by the Central Government in pursuance of provision of Section 43 A(2) of the Electricity (Supply) Act, 1948, on the ground that it only involves change of forum.

(c) Whether any vested right accrues in favour of the petitioner to claim incentive for the year 1998-99 based on ad hoc arrangement continued by the Central Government on the basis of notification dated 2.11.1992, for any period beyond November, 1997.

(d) Whether the Commission can exercise jurisdiction for notifying the ad hoc incentive amount payable to the petitioner for the period prior to 15.5.1999 on the ground that the notification of the ad hoc incentive amount for prior period can affect the vested rights of the parties.

(e) Whether the claim for incentive preferred by the petitioner for the year 1998-99 based on the principles/basis and assumption of the 1992 notification could be extended on ad hoc basis beyond July, 1998 when the Commission was established, or beyond 15.5.1999 when the jurisdiction was vested in the Commission consequent to omission of Section 43 A (2) of the Electricity (Supply) Act, 1948.

7. The Commission also obtained the opinion of the learned Attorney General of India who has opined that the Commission has jurisdiction and authority to adjudicate upon the issues relating to fixation of tariff, and other incidental matters for the period prior to 15.5.1999. It has been further advised by the learned Attorney General that until fresh regulations are published, the Commission may adjudicate issues in the light of guidelines notified by the Central Government in the matter of fixation of tariff from time to time and also relating to the period prior to 15.5.1999. The copy of the opinion of the learned Attorney General was circulated amongst the parties present for hearing on 8.2.2000 for their reaction to the views recorded by him. None of the parties during the hearing disputed the correctness of the views recorded by the learned Attorney General.

8. We had heard at great length Shri Sharat Kapoor, Advocate on behalf of the petitioner, Shri Ashwin Kumar, Senior Advocate for Delhi Vidyut Board, Shri Shyam Moorjani, Advocate, for Rajasthan Electricity Board, and the representatives of other respondents present at the hearing. After hearing the parties on the preliminary legal issues, the Commission decided that these petitions be heard on merits as it was of the opinion that its findings on these issues could be recorded in the final order. Accordingly, these petitions were listed for hearing on 22-3-2000. Before the commencement of the proceedings on that day, the petitioner filed an interlocutory application (No.12/2000), praying that before proceeding to hear the petitions on merits, the Commission may determine the preliminary issues in order to define the limit and scope of the petitions. We have heard the parties on IA 12/2000 and proceed to record our findings since we are satisfied that a decision on the preliminary issues will not prejudice the claims of the parties on merits.

### **Issue (a)**

#### **Whether the notification of incentive is a matter of procedure and not of adjudication, and as such can be taken up by the Commission.**

9. According to the learned counsel for the petitioner, incentive and disincentive are integral part of the tariff notified by the Central Government. It has been contended that the principles and formulae for calculation of incentive are already incorporated in the notifications. Under these circumstances, the determination of exact amount of

incentive is merely a matter of procedure, without involving any substantial issues that may require adjudication by the Commission. The respondents have, however, contested the claim of the petitioner in this regard. We find in the present case, the Commission has to examine the question of admissibility of the incentive in the light of principles and norms prescribed by the Central Government in exercise of powers under Section 43 A (2) of the Supply Act; after affording opportunity to the respondents against whom the claim has been lodged. This necessarily involves adjudication of the claim of the petitioner in the light of the objections filed by the respondents on the question of propriety and admissibility of the claim for incentive. We, therefore, do not agree with the contention raised on behalf of the petitioner that the notification of incentive is only a matter of procedure. We firmly believe that the question of notification of incentive by the Commission necessarily involves adjudication of rights of the parties. We are also of the opinion that in exercise of the powers under Section 13 of ERC Act and successor of the Central Government on the matter of determination of tariff, the Commission can look into the question of payment of incentive for the periods prior to vesting of jurisdiction for the reasons that are being discussed below.

### Issue (b)

**Whether the Commission has jurisdiction to exercise the function being exercised by the Central Government relating to any period prior to 15.5.1999 for determination of incentive under tariff notification issued by the Central Government in pursuance of provision of Section 43 A(2) of the Electricity (Supply) Act, 1948, on the ground that it only involves change of forum.**

10. It is an undisputed fact that, prior to 15-5-99, the incentive was being notified by the Central Government by virtue of powers under Section 43 A (2) of the Supply Act. The position in this regard had been made explicit in the tariff notifications. Although the tariff was being claimed on monthly basis provisionally, the tariff notifications further provided that the final adjustment of incentive/disincentive would be made at the end of the financial year. In exercise of powers under Section 51 of the Regulatory Commissions Act, sub-section (2) of Section 43 A of the Supply Act has been omitted w.e.f. 15-5-99. As a consequence of omission of sub-section (2) of Section 43 A of the Supply Act, the Central Government, as a forum for determination of tariff and other incidental matters in respect of generating companies owned or controlled by it, has ceased to exist. The Commission has succeeded the Central Government on the function of determination of tariff of the generating companies owned or controlled by the latter. Some of the respondents like UPPCL have asserted that the jurisdiction to exercise function of the Central Government under Section 43 A (2) of the Supply Act cannot be vested in the Commission in view of its omission. We are, however, not convinced by such an argument. The substitution of the Commission for the Central Government merely involves change of forum. It is trite law that in the case of change of forum, the parties have to approach the new forum for enforcement of its rights since the rights cannot be deemed to have extinguished by merely change of forum. There is a well known legal maxim "*Ubi jus ibi remedium*". The remedy provided under the substituted forum only is available to the parties. Our aforesaid conclusion draws support from the law laid down by the Supreme Court in *New India Insurance Co. Ltd., VS Shanti Misra* (AIR 1976 SC 237) as reproduced below:

*"A change in forum is a matter of procedural law and not substantive law. Such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum.*

*A change in forum is a matter of procedure and therefore, if a new Act requires certain types of original proceedings to be instituted before a special tribunal constituted under the Act to be exclusion of civil courts, all proceedings of that type whether based on old & new cause of action will have to be instituted before the tribunal."*

11. In the light of the above discussion we hold that the Commission has jurisdiction to exercise the powers as were being exercised by the Central Government regarding determination of incentive under the notifications issued by that Government under Section 43 A (2) of the Supply Act, prior to 15-5-99 consequent to omission of these statutory provisions

### Issue (c)

**Whether any vested right accrues in favour of the petitioner to claim**

**incentive for the year 1998-99 based on ad hoc arrangement continued by the Central Government on the basis of notification dated 2.11.1992, for any period beyond November, 1997.**

**Issue (d)**

**Whether the Commission can exercise jurisdiction for notifying the ad hoc incentive amount payable to the petitioner for the period prior to 15.5.1999 on the ground that the notification of the ad hoc incentive amount for prior period can affect the vested rights of the parties.**

12. Prior to omission of Section 43 A (2) of the Supply Act, the Central Government had been issuing tariff notifications for individual generating stations in exercise of the statutory power. These tariff notifications are based on the principles and norms contained in the principal notification dated 3—0-3-92, which itself was issued in exercise of statutory power under Section 43 A (2) of the Supply Act. The individual tariff notifications were valid for a period of five years and after expiry of the period fixed, fresh tariff notifications were required to be issued. However, clause 6 of these notifications provides for the continuity even in cases where fresh tariff notifications have not been issued, since it provides that in such a situation the beneficiaries shall continue to pay to NTPC for the power supplied on ad hoc basis in the manner detailed in these notifications. It is an admitted fact that the respondents have been making the monthly payments, including the incentive, in view of these provisions.

13. It has been contended on behalf of the respondents that incentive cannot be determined based on ad hoc tariff continued under clause 6 and, therefore, there is no vested right based on the lapsed notifications, in view of the observations of the Supreme Court in *Thyssen Stareunion GMBH VS SAIL 1999 IXAD (SC) 89* that right to take advantage of an enactment is not a vested right. It has been argued by the respondents that the entire tariff structure should be reviewed by the Commission since the original tariff notified by the Central Government was based on irrational, arbitrary and unreasonable considerations. It has been urged that the Commission should apply its mind independently to fix tariff afresh after expiry of the validity of the tariff notifications issued by the Central Government, on the analogy that Central Government on review could have fixed the tariff from a retrospective date.

14. We are not persuaded to accept the arguments advanced on behalf of the respondents that no vested right to claim incentive by the petitioner is created. The Commission will be notifying the norms and parameters for tariff determination in due course. The date from which these norms would apply will also be decided by the Commission while notifying these norms. Meanwhile, the respondents have been drawing power and they are bound to pay in accordance with the terms and conditions notified by the competent authority in exercise of statutory powers. The terms and conditions initially notified by the Central Government were valid for a period of five years but are being continued, though on ad hoc basis, beyond that period by virtue of the statutory notifications. We do not find much force in the argument put forth on behalf of the respondents that no rights are created by virtue of an ad hoc arrangement. According to Chambers, 21<sup>st</sup> Century Dictionary, "ad hoc" means "for one particular purpose, situation, etc. only". In our opinion, the term ad hoc has been used in clause 6 of the tariff notifications to cover a situation till such time tariff is notified by the competent authority. It is used in relation to time of fresh determination of tariff by the authority conferred with the jurisdiction under the law. By virtue of clause 6 of the tariff notifications, the terms and conditions of payment of tariff shall apply with equal vigour and force till such time these are superseded by the fresh terms and conditions, to be notified by the Commission. As the terms and conditions of tariff contain the provisions for incentive, and in fact the respondents have been paying incentive on provisional basis by the force of the terms and conditions notified by the Central Government, in our considered opinion, the petitioner has acquired a vested right to incentive. The omission of Section 43 A (2) of the Supply Act w.e.f. 15-5-99 does not alter the position since the rights accrued under the repealed statute are saved by virtue of Section 6 of the General Clauses Act which provides that the repeal shall not affect the previous operation of any enactment so repealed unless a different intention appears. After omission of Section 43 A (2) of the Supply Act w.e.f. 15-5-99, the Commission is vested with powers and functions under Section 13 (a) of the Regulatory Commissions Act. The Regulatory Commissions Act nowhere contains an intention to the contrary signifying that the operation of the omitted provision or the notifications issued thereunder was not to continue. In this context it will be pertinent to refer to the observations of the Supreme Court in *Vinod Gurdas Raikar VS National Insurance Co Ltd. (AIR 1999 SC 2156)*

*"It is firmly established that unless a new statute expressly or by necessary implication says so, it will not be presumed that it deprives the person of an accrued right"*

15. In the light of the foregoing discussion, we hold that the petitioner NTPC has a vested right to claim incentive for the year 1998-99 based on the tariff notifications issued by the Central Government in exercise of its power under Section 43 A (2) of the Supply Act and the Commission has jurisdiction to notify the ad hoc incentive amount payable to the petitioner for the period prior to 15-5-99.

#### **Issue (e)**

**Whether the claim for incentive preferred by the petitioner for the year 1998-99 based on the principles/basis and assumption of the 1992 notification could be extended on ad hoc basis beyond July, 1998 when the Commission was established, or beyond 15.5.1999 when the jurisdiction was vested in the Commission consequent to omission of Section 43 A (2) of the Electricity (Supply) Act, 1948.**

16. The Commission was established on 24-7-1998 under sub-section (1) of Section 3 of the Regulatory Commissions Act. However, the power to regulate tariff of the Central Generating Stations was vested in the Commission w.e.f. 15-5-99 consequent to omission of sub-section (2) of Section 43 A of the Supply Act. Therefore there should not be any controversy in regard to application of the principles/assumptions of 1992 notification for the period up to 15<sup>th</sup> May, 1999, as Section 43 A (2) of the Supply Act was on the statute book till that date and the power to determine the terms and conditions and tariff for sale of electricity by the generating companies owned by the Central Government continued to vest in it. As regards the application of principles/assumptions for the period from 15<sup>th</sup> May, 1999, the issue does not arise directly in these proceedings since the incentive claimed in these petitions pertain to the period ending 31<sup>st</sup> March, 1999. This issue may be examined in some other proceedings where the issue may arise. We are also guided by the opinion of the learned Attorney General that so long as the new regulations are not framed by the Commission, the existing regulations can continue to govern for the determination of tariff. This opinion has not been challenged by any of the parties specifically. In view of the above, we hold that the terms and conditions already notified by the Central Government prior to repeal of Section 43 A (2) of the Supply Act shall continue to hold the field before 15.5.1999, which is the relevant period covered by these petitions. We answer the issue accordingly.

17. With the above order, IA 12/2000 stands disposed of. We shall proceed to hear the petitions on merits on the claim for incentives preferred by the petitioner, NTPC on **1<sup>st</sup> August, 2000 at 10.30 AM.**

|                             |                          |                        |                       |
|-----------------------------|--------------------------|------------------------|-----------------------|
| Sd\-                        | Sd\-                     | Sd/-                   | Sd/-                  |
| (A.R. Ramanathan)<br>Member | (G.S.Rajamani)<br>Member | (D.P. Sinha)<br>Member | (S.L.Rao)<br>Chairman |

New Delhi,  
Dated 23.06.2000

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