

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 239/MP/2019**

Subject : Petition for recovery of money due and outstanding from BSES Yamuna Power Limited as per the tariff determined by the Commission and in terms of the Agreement between THDC India Limited and BSES Yamuna Power Limited

Petitioner : THDCIL

Respondent : BYPL

**Petition No. 54/MP/2021**

Subject : Petition under Section 79(1)(f) of the Electricity Act, 2003 seeking adjudication of disputes with THDC India Ltd.

Petitioner : BRPL

Respondents : THDCIL

**Petition No. 135/MP/2022**

Subject : Petition under Section 79(1)(f) of the Electricity Act, 2003 seeking adjudication of disputes with THDC India Ltd.

Petitioner : BYPL

Respondents : THDCIL

Date of Hearing : **10.8.2022**

Coram : Shri I.S Jha, Member  
Shri Arun Goyal, Member  
Shri Pravas Kumar Singh, Member

Parties present : Shri Buddy Ranganadhan, Advocate, BYPL & BRPL  
Shri Amit Kapoor, Advocate, BYPL & BRPL  
Shri Anupam Varma, Advocate, BYPL & BRPL  
Shri Aditya Ajay, Advocate, BYPL & BRPL  
Shri Rahul Kinra, Advocate, BYPL & BRPL  
Shri Girdhar Gopal Khattar, Advocate, BYPL & BRPL  
Ms. Megha Bajpeyi, BRPL  
Ms. Anushree Bardhan, Advocate, THDC (239/MP/2019)  
Shri Tabrez Malawat, Advocate, THDC (54/MP/2021 & 135/MP/2022)  
Ms. Ankita Bafna, Advocate, THDC  
Shri Syed Hamza, Advocate, THDC  
Shri Sourajit Sarkar, Advocate, THDC



Shri Rajesh Sharma, THDC  
Shri Neeraj Kumar Gupta, THDC  
Shri Mukesh Kumar Verma, THDC  
Ms. Ambika Prasad Vyas, THDC  
Ms. Ajay Vaish, THDC

### **Record of Proceedings**

As the issues raised in these petitions are interdependent, the same were clubbed and heard through virtual hearing.

#### **Petition No. 239/MP/2019**

2. During the hearing, the learned counsel for the Petitioner, THDC circulated a short note of submissions and mainly submitted as under:

- (a) As on the date of filing of this petition in 2019, the claim of the Petitioner was Rs. 286.96 crores. Though attempts were made by the parties to settle the disputes, an amount of Rs. 18.24 crore, is due, as on 27.7.2022, from the Respondent BYPL, mainly on account of the method adopted by the two parties for appropriation of amount paid by BYPL to THDC.
- (b) PPA also provides for the payment of the Delayed Payment Surcharge for the delay in the payment of the monthly bills in terms of the Tariff Regulations notified by this Hon'ble Commission. The payments made by BYPL have to be first adjusted towards the late payment surcharge and then the principal amount in terms of the general principle as laid down by the Hon'ble Supreme Court (*judgments of the Hon'ble Supreme Court in Gurpreet Singh vs. Union of India and Others (2006) 8 SCC 45, (ii) Bharat Heavy Electricals Limited v. R.S. Avtar Singh and Company (2013) 1 SCC 243 and (iii) Kerala State Electricity Board and another v Kurien E. Talatal and Others, (2018) 4 SCC 793 were referred to*).
- (c) Pursuant to the communication of the Petitioner vide letter dated 9.8.2019, to Respondent BRPL for payment of Rs 18.54 crore, Petition No.54/MP/2021 has been filed by the Respondent BRPL, challenging the same.

#### **Petition No. 54/MP/2021 and Petition No.135/MP/2022**

3. The learned counsel for the Petitioners BRPL & BYPL (in short 'BSES Discoms') circulated note of arguments, on the issues covered in these petitions, and mainly submitted as under:

- (a) The Petitioners and the Respondent THDC were apportioning the payments made first towards principal dues, since inception (2004). This was consistent with the Hon'ble Supreme court's order dated 26.3.2014 in W.P (c) Nos. 104 & 105/ 2014 (filed by the BSES Discoms), which is pending. Even though the Respondent was not a party in the said Writ Petition, it was represented by its Counsel who made submissions before the Hon'ble Court.



- (b) However, the Respondent vide communication dated 9.8.2019, has unilaterally imposed a new mechanism for appropriating payments made by BSES Discoms, i.e first, towards LPSC and thereafter, towards the principal amounts, with effect from 1.9.2019. The Respondent cannot unilaterally change the mechanism of adjustment of payments made by BSES Discoms and circumvent the pending proceedings before the Hon'ble Supreme Court.
- (c) Clause 10.3 of the PPA, does not provide for appropriation of any payment towards LPSC, as contended by the Respondent. Despite the payment of principal overdues, current energy dues and LPSC (if any), the conduct of the Respondent showing principal amount outstanding, as payable by the BSES Discoms, is arbitrary and unlawful.
- (d) The Respondent has acted contrary to its own Rebate Scheme 2014-19, which categorically provides that payments would be first adjusted towards current bills. As per past practice and mutual agreement between the Petitioners and the Respondent, the payments made by the BSES Discoms were being adjusted first towards principal dues. This methodology was agreed to by the Respondent and reconciliation statements were signed on this understanding (*reconciliation statement signed for third quarter of 2018-19 was referred to*). The Respondent having followed the said methodology from March, 2011 onwards and having waived its rights, if any, accruing under the PPA, is estopped by the principle of acquiescence by conduct.
- (e) The Respondent is acting against the express instruction by the BSES Discoms to adjust the amounts paid, towards principal amounts first, which is against the principles of Section 59 and 60 of the Indian Contract Act, 1872, wherein, the payment adjustment mechanism between the parties, has to be, as specified by the Debtor (i.e BSES Discoms) while making payment, and cannot be done in a unilateral manner, by the Respondent.
- (f) The Respondent has been taking inconsistent stands viz., 'common understanding', 'standard business practice' and the Second amendment to the 2019 Tariff Regulations (in 2021), in support of its unilateral change in payment adjustment mechanism against past practice.
- (g) Reliance placed by the Respondent on the LPSC Rules dated 3.6.2022 notified by MOP, GOI, is erroneous, since (i) LPSC rules do not apply retrospectively to amounts which fell due prior to 3.6.2022 (ii) the amount is not 'legally payable' and therefore, cannot be said to be 'due' (iii) BSES Discoms have cleared all undisputed outstanding amounts to Respondent (iv) LPSC Rules are not applicable to the present case, in the light of the Hon'ble Supreme Court dated 26.3.2014 in W.P. No. 104 & 105/2014, which has directed the BSES Discoms to make payment of the current dues.
- (h) Reliance placed by the Respondent on the Commission's order dated 8.7.2022 in Petition No. 199/MP/2021 (JPL v TANGEDCO), is not applicable to the present case, since in the said case, the liability to pay the LPSC amount claimed in the said petition, was admitted by the Respondent therein, and there was no dispute which required adjudication. Even otherwise, in the present



case, the alleged outstanding amount, is subject to adjudication in these petitions.

- (i) Reliance placed by the Respondent THDC on the judgments viz., *Gurpreet Singh vs. Union of India and Others (2006) 8 SCC 457 and ICDS Ltd Vs Smithaben H. Patel (1999) 1 SCR 555*, is misplaced and erroneous, since the payment of LPSC is a distinct debt and that the present dispute pertains to a period which is at a pre-decretal stage. There is no decree of any court of law, which has provided the payment appropriation mechanism being followed by the parties, prior to the communication dated 9.8.2019.
- (j) The communication dated 6.4.2022 of the Respondent threatening strict action, including initiation of insolvency proceedings against the Respondent BYPL before NCLT, is liable to be set aside, as the provisions of IBC do not apply to issues of alleged non-payment of dues by Discoms to generating companies. The dispute falls within the exclusive domain and jurisdiction of this Commission, under Section 79(1)(f) of the Act.

4. At the request of the learned counsel, the Commission permitted the Petitioners to upload the note of arguments in the web portal.

5. In response to the above, the learned counsel for the Respondent THDC, clarified the following:

- (a) Section 59 to 61 of Indian Contract Act, 1872 are not applicable to the present dispute between the Petitioner and Respondent THDC. These provisions do not deal with cases in which principal and interest are due under a single debt;
- (b) In terms of Clause 10.3 of the PPA, the payment received from the Petitioners, is required to be first adjusted towards earlier longest overdue and undisputed invoice, if any. Thereafter adjustment shall be done in date-wise descending order of pending invoices. For appropriation of payment towards current bill, adjustment shall be made firstly towards Capacity Charges and thereafter towards Energy Charges, Incentive and other charges. The Respondent THDC has sought to adjust the payment against bills on date-wise First in First out (FIFO) basis, in terms of agreed understanding as stipulated in Clause 10.3 of the PPA.
- (c) The reconciliation as a matter of fact is an exercise to determine the amounts due and the question as to how the amounts due is not the subject matter of the reconciliation statement. Hence, the statement of the Petitioners that the Respondent THDC had agreed for the adjustment mechanism, contrary to the PPA, is incorrect.
- (d) Even prior to the Hon'ble Supreme Court order dated 26.3.2014, payments made by the Petitioners were appropriated first towards LPSC. In the note to the reconciliation statement, it has been endorsed by the Petitioners that 'all payments made are adjusted with current bills only as per SC order'.



(e) The liquidation plan dated 18.8.2021/27.8.2021 was accepted subject to the fact that the differential amount was payable by the Petitioners. The Respondent THDC has a statutory right under the Tariff Regulations to claim its long pending outstanding amount towards LPS which the Petitioners have categorically failed to pay since August, 2013;

9. On a specific query by the Commission as to whether all payments made by the BSES Discoms after 26.3.2014, were in accordance with Hon'ble Supreme Court order, the learned counsel for the BSES Discoms sought time to seek instructions and place the same on record.

10. At the request of the learned counsel for the parties, the Commission permitted the Petitioners and the Respondent THDC to file their written submissions, by **31.8.2022**.

11. Subject to the above, order in these petitions, was reserved.

**By order of the Commission**

**Sd/-**  
(B. Sreekumar)  
Joint Chief (Law)

