

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. **Shri Ashok Basu, Chairperson**
2. **Shri Bhanu Bhushan, Member**
3. **Shri A.H. Jung, Member**

Petition No. 17/2006

In the matter of

Seeking direction to TNEB for payment of power bills of NLC as per the Commission's order dated 19.10.2005 and to refund excess rebate availed.

And in the matter of

Neyveli Lignite Corporation Limited, Chennai

...**Petitioner**

Vs

Tamil Nadu Electricity Board, Chennai

... **Respondent**

The following were present:

1. Shri K. Sekar, CGM (Comml), NLC
2. Shri R. Suresh, DGM(Comml), NLC
3. Shri A Ganesan, CM (Fin), NLC
4. Shri S. Sowmyanarayanan, Consultant, TNEB
5. Ms S. Geetha, EE, TNEB
6. Shri S. Krishnaswami, AAO, TNEB

**ORDER
(DATE OF HEARING: 14.7.2006)**

The petition has been filed seeking direction to the respondent for payment of power bills in accordance with the Commission's order dated 19.10.2005 in Petition No. 97/2005, to refund excess rebate unilaterally availed by the respondent and in future avail rebate in accordance with the Commission's regulations on the subject.

2. As per the order dated 19.10.2005 *ibid*, the respondent had agreed to release payments in favour of the petitioner in accordance with the approved tariff for TPS-I

and TPS-I (Expansion) generating stations owned by the petitioner. In the said order dated 19.10.2005 it was also directed that in future the respondent would be entitled to claim rebate on payments made for the power bills strictly in accordance with the Commission's regulations on the subject. The respondent was further directed to refund or adjust the amount of rebate retained by it in excess of the amount payable under the Commission's regulations for the past period, within three months from the date of the order. It was noted that the respondent could claim rebate @ 1% only and not @ 2.5% or 2% since the payments were not made through LC, though made within three days or even earlier of the raising of the bills by the petitioner.

3. The petitioner has contended that undertaking given on behalf of the respondent as regards payment of power bills for TPS-I and TPS-I (Expansion) has not been honoured, and directions of the Commission on the question of rebate as contained in the order dated 19.10.2005 have not been complied with. In addition, the petitioner has submitted that the respondent has not made payments for the bills raised for TPS-II generating station, based on the Commission's order dated 2.11.2005 in Petition No.5/2002, approving provisional tariff for this generating station. Incidentally, this was not an issue before the Commission in the proceedings in Petition No.97/2005.

4. The contentions of the parties are being considered hereunder.

Re TPS-I

5. According to the petitioner, it has been raising power bills in respect of TPS-I, @ 182.05 paise/kWh computed in accordance with the Commission's orders dated 31.8.2004, 1.2.2005 and 21.4.2005. The petitioner has submitted that the respondent

has, however, worked out the tariff at 172.05 paise/kWh and 157.38 paise/kWh for mines capacity of 65 LT and 75 LT respectively. The petitioner has alleged that despite the direction of the Commission in the order dated 19.10.2005, the respondent continues to make payment of tariff @ 174.71 paise/kWh.

6. The respondent in its reply has submitted that the Commission vide its Order dated 31.8.2004 in Petition No. 33/2004 directed the petitioner and the respondent to mutually determine the tariff for the period 1.4.2002 to 31.3.2004 based on the terms and conditions in the BPSA, which expired on 31.3.2002, except that the auxiliary consumption was chargeable @12% for the period 2002-04. However, the tariff could not be agreed to mutually due to differences in the capacity and rate of return on equity. It has been stated that the Commission by its order dated 1.2.2005 in Petition No. 194/2004 directed that capacity be taken as 600 MW and the rate of return on equity be computed at 16%. The respondent has submitted that in keeping with the Commission's orders, the tariff is payable @ 172.05 paise/kWh against the petitioner's claim of 182.05 paise/kWh. The respondent claims to have made excess payment of Rs.9.96 crore as on 31.3.2005. The respondent filed a review petition against the above order dated 1.2.2005, which was dismissed by the Commission and an appeal from this order has been filed before the Appellate Tribunal for Electricity. The representative of the respondent submitted that there is no interim order by the Appellate Tribunal in the appeal. The respondent has pointed out that as the Commission had ordered that the tariff in respect of TPS –I be mutually worked out, but this could not be so decided, there is no question of non-adherence of the Commission's order, as alleged by the petitioner.

7. Under the circumstances, it is necessary for us to adjudicate the issue.

8. During the hearing held on 14.7.2006, we had directed the parties to furnish the details in support of their computations of the tariff. The information submitted by the parties are as under:

(paise/kWh)

Description	As per Petitioner	As per respondent	Difference
Capacity charges	48.96	47.55	1.41
Energy charges	133.09	124.49	8.60
Total	182.05	172.04	10.01

9. The difference in capacity charges is on account of difference in capital base, leading to differences in equity and loan components considered by the parties. There is no difference in the component of O&M and depreciation. The difference in energy charges is attributable to difference in lignite transfer price considered by them. While the petitioner has considered the lignite transfer price of Rs. 796.88/MT, the respondent has taken the same at 746.77/MT.

10. We first seek to reconcile to the differences arising on account of capital base. The difference in the capital base considered by the contesting parties is due to the fact that the petitioner has computed the additions to the capital base for the period 1997-98 to 2001-2002 on the basis of the actuals. On the other hand, the respondent's figures are based on its own estimates without any supporting basis. As the details of additional capitalization submitted by the petitioner are based on the actuals, we hold that the same have to form the basis for working out the capacity charges.

11. While the petitioner has submitted the broad details of lignite transfer price of Rs.797/MT, the respondent in Petition No.186/2004 for determination of tariff of the instant station for the period 2004-09 has submitted the details, for a lignite transfer price of Rs.767/MT and not for Rs.746.77. The figure of Rs.746.77 has therefore, been ignored. The difference of Rs.30/MT in the lignite transfer price considered by the two parties has arisen on account of the difference in the return on equity for the captive mines, as shown hereunder:

(Rs/MT)			
S.No	Description	As per petitioner	As per respondent
(a)	As per BPSA expired on 31.3.2002 with 12% return on equity	666.00	666.00
(b)	For additions from 1997-98 to 2001-02 with 12% return on equity	49.00	50.53
(c)	For increase in return on equity from 12% to 16%	32.00	0.00
(i)	On base rate	24.00	0.00
(ii)	On additions	8.00	0.00
(d)	Lignite transfer price excluding royalty	747.00	716.53
(e)	Royalty	50.00	50.00
(f)	Lignite transfer price including royalty	797.00	767.00

12. It is seen that the difference in the amounts worked out by the parties is attributable to the difference in the rates of return on equity adopted by them. While the petitioner has computed the lignite transfer price based on the return on equity @ 16%, the respondent has computed the transfer price by applying return @ 12% only.

13. In our opinion this issue is no longer *res integra* and has already been settled. Consequent to the expiry of the BPSA for supply of power from TPS-I by the petitioner to the respondent on 31.3.2002, the petitioner filed Petition No 33/2004 for approval of energy charges and capacity charges, for the period from 1.4.2002 to 31.3.2004. Based on the acceptance of the respondent, the Commission, vide its order dated

31.8.2004, decided that tariff for the period 1.4.2002 to 31.3.2004 be fixed by extending the terms of the BPSA. The following extract from the order is relevant:

“5. The petition was initially heard on 22.6.2004. At the hearing the representative of respondent submitted that the respondent would require to reconsider whether fixation of tariff for TPS-I may continue based on the terms (financial) contained in the BPSA which expired on 31.3 2002 or to adopt the terms and conditions for determination of tariff notified by the Commission, as applicable to TPS-I. For this purpose, hearing of the petition was adjourned. The respondent has since filed an affidavit wherein it has agreed that tariff for the period 1.4.2002 to 31.3.2004 be fixed by extending the terms of BPSA with certain improved operational parameters.

6. We have considered the request of the respondent in regard to change of operational parameters. In our opinion, the norms, including the operational norms as contained in the BPSA signed between the petitioner and the respondent have to govern determination of tariff. The representative of the respondent brought to our notice that the petitioner had agreed for auxiliary energy consumption of 12%, though in the BPSA the auxiliary energy consumption of 12.5% was provided. In view of the revised agreement between the parties, the representative of the petitioner agreed that auxiliary energy consumption should be charged at the rate of 12% from 1.4.2002. All other terms contained in the BPSA shall govern determination of tariff from 1.4.2002 to 31.3.2004 and the auxiliary energy consumption shall be charged @12%.

14. In the Commission's order dated 1.2.2005 in Petition No. 194/2005 it was further held that in terms of the BPSA dated 9.3.2001, clause 10(c) thereof in particular, the petitioner was entitled to claim ROE @ 16%. Subsequently, in its review petition No.28/2005 in Petition No.194/2004 the respondent again raised the issue of rate of return on equity. While rejecting the claim of the respondent that return on equity is chargeable @ 12%, the Commission held as under:

“6. The Commission, while upholding the petitioner's claim for ROE @ 16% considered the fact that the Central Government in Ministry of Coal by its order dated 3.12.1998 had decided to revise the power tariff with effect from 1.11.1998 to ensure ROE of 16%, based on a similar revision of ROE by Ministry of Power from 12% to 16% in respect of the generating stations under latter's control. It was noted that the respondent had actually paid ROE at the revised rate of 16% from 1.11.1998 to August 2004 based on the BPSA dated 9.3.2001. In particular, the scope of Clause 10.3 of the BPSA was considered in the said order dated 1.2.2006. At the hearing of Petition No.194/2004, the

representative of the respondent had orally argued that ROE was paid @ 16% under protest. However, no evidence to that effect was placed on record.”

“11.The minutes do not reveal that the respondent at any stage objected to the petitioner’s claim for ROE of 16% or that any condition was put so far as the claim on this account is concerned. In fact, the minutes show that the respondent also indicated a figure of outstanding dues very close to that claimed by the petitioner. Therefore, the second ground taken by the representative for review is equally untenable.

12. We also take notice of the fact that the Commission in the norms notified on 26.3.2001 had also specified ROE of 16% for the period up to 31.3.2004.”

15. In view of the foregoing, we have no hesitation to hold that computation of the lignite transfer price for determination of tariff for the period 1.4.2002 to 31.3.2004 shall be based on return on equity for the mines @16%. Accordingly, the computation of lignite transfer price made by the respondent is erroneous inasmuch that it is based on 12% return on equity.

16. We, therefore, hold that the lignite transfer price of Rs. 797/MT as worked out by the petitioner is correct and the energy charges shall be computed accordingly.

17. In the light of above discussion, we direct that for the period 1.4.2002 to 31.3.2004, the petitioner is entitled to tariff @ 182.05 paise/kWh as claimed. The tariff for the period 1.4.2004 onwards in respect of TPS-I is yet to be decided.

TPS-I (Expansion) and TPS-II

18. The tariff for TPS-I (Expansion) was approved by the Commission by its order dated 7.4.2005 in Petition No.105/2002. According to the petitioner, the respondent has been paying only 95% of the capacity charges approved by the Commission vide order *ibid*. It has been submitted that respondent is paying incentive @ 21.5 paise/kWh against the claim of 25 paise/kWh.

19. The Commission has also approved provisional tariff for TPS-II by its order dated 2.11.2005 in Petition No.5/2002 for the period 1.4.2001 to 31.3.2004 pending final determination of tariff. The petitioner has stated that the respondent has made payments for the months of November 2005, December 2005 and February 2006 as per the BPSA which expired on 31.3.2001 and the same is less than the provisional tariff approved by the Commission. It has been stated that the bill for the month of January 2006, has been paid in accordance with the tariff approved since it is lower than the tariff worked out as per the BPSA.

20. The respondent has submitted that payment of 95% of the provisional tariff is in accordance with the provisions of the tri-partite agreement entered into with the PSUs for one time settlement of the dues and the balance 5% will also be released in line with the provisions of the agreement, since presently there are disputes on certain matters. It has submitted that the petitioner itself vide its letter dated 16.5.2005, has requested for release of payment of 95% only. The respondent has not explained the reasons for paying incentive @ 21.5 paise/kWh against the claim of 25 paise/kWh.

21. The respondent has further submitted that as the transfer price of lignite is determined based on 85% capacity utilization, any excavation above 85% capacity is only at marginal cost, say about 5 paise/kWh (royalty). With the excavation of lignite at 85% of the licensed capacity, the generating station can achieve more than 75% PLF. Thus, according to the respondent there is dispute regarding the transfer price of lignite, which is an input for determination of tariff.

22. The tariffs for TPS-I (Expansion) and TPS-II have been approved by the Commission. The energy charges approved for both these generating stations are provisional since the question of lignite transfer price is under consideration of the Commission in Petition No.5/2002. The provisional tariff allowed for TPS-I (Expansion) and TPS-II may have to be revised after the final decision is taken by the Commission on the lignite transfer price. However, till such time the tariff is finally determined, the respondent is under obligation to pay the tariff as approved by the Commission, unless the tariff is revised based on the orders of superior judicial authority. The respondent cannot raise a dispute based on the provisions of the defunct BPSA and on that pretext withhold payments. Neither does the respondent have the liberty to make payments on selective basis. We accordingly direct that respondent shall pay tariff for TPS-I (Expansion) as approved by the Commission in its order dated 7.4.2005 in Petition No.105/2002, and tariff for TPS-II as approved by order dated 2.11.2005 in Petition No.5/2002, till such time the tariff is modified under orders of the competent authority. Incentive shall be payable in accordance with the rates prescribed by the Commission under the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 or the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, as applicable. The unpaid amount shall be released by the respondent in favour of the petitioner within a period of two months from the issues of this order.

Excess Rebate

23. The Commission in its order dated 19.10.2005 in Petition No. 97/2005 had noted that the respondent had not opened LC for payment of bills of the petitioner. The respondent was, however, making payments within three days or may be even

earlier on raising of the bills by the petitioner and claiming rebate @ 2.5% or 2% in terms of the BPSAs. The BPSA had expired on 31.3.2002 as regards TPS-I and on 31.3.2001 as regards TPS-I (Expansion). Thereafter, the terms and conditions notified by the Commission are applicable. Therefore, the Commission had directed the respondent to refund or adjust the excess amount of rebate retained by it and also claim rebate on similar basis in future.

24. The petitioner has submitted that it had forwarded its claim for Rs.57.63 crore towards excess rebate withheld by the respondent for the period from 1.4.2001 onward consequent to the order dated 19.10.2005. The respondent, while overlooking the directions of the Commission had released payment for a sum of Rs.3.03 crore for the period from April 2004 to October 2004 without refunding the amount for the period ending 31.3.2004. It has been stated that respondent is yet to open LC but is claiming rebate @ 2% against its entitlements of 1%.

25. The respondent has submitted that it has decided to open LC in order to avail 2% rebate. It is stated that so far as the period prior to April 2004 is concerned, the payment was released within three days of the presentation of the bills and this entitles the respondent to claim rebate of 2% in accordance with clause 11.4 of the BPSA

26. We are not convinced with the reply of the respondent. In its order dated 19.11.2005 the Commission had clearly noted that the respondent could not claim rebate @ 2.5% or 2% unless the payment is made through LC. The respondent was

directed to refund or adjust the excess amount of rebate recovered, within a period of three months. The relevant part of the order is extracted hereunder:

“In terms of these regulations, liberty is granted to the beneficiaries to make payment by any mode other than the letter of credit. In such cases, the beneficiaries can claim a rebate of 1% in case the payment is made within a period of one month and in case the payments are withheld beyond 60 days, the beneficiaries become liable to pay late payment surcharge. It is however, made clear that in case, payment is made through a mode other than the letter of credit, the respondent as a beneficiary cannot claim rebate @ 2.5 or 2% *even if the payment of bill is made within 3 days of raising by the petitioner or earlier.* Therefore, in future, the respondent will be entitled to claim rebate strictly in accordance with the Commission’s regulations on the subject. We further direct that the respondent shall refund or adjust the excess amount of rebate withheld for the past period, in variance, with the Commission’s regulations within a period of three months from the date of this order.”
(Emphasis supplied)

27. In the light of the above order which leaves no room for any doubt, we find the respondent’s contention and reliance on the expired BPSA is wholly unjustified. We once again make it clear that the respondent in the past was entitled to claim 1% rebate on all payments made within one month from the date of raising of the bills by the petitioner, till such time it opens LC. Accordingly we direct the respondent to refund or adjust the excess amount withheld within a period of two months from the issue of this order. Any default or non-compliance may be a cause for invoking penal provisions under the Electricity Act, 2003.

28. This order disposes of Petition No. 17/2006.

Sd/-
(A.H. JUNG)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRPERSON

New Delhi dated the 14th September, 2006