

436

**BEFORE  
THE BIHAR ELECTRICITY REGULATORY COMMISSION  
PATNA**

PETITION NO:.....

**IN THE MATTER OF: Petition under Section 94 1(f) of The Electricity Act, 2003 as amended from time to time for seeking amendment of Paragraph 4.11 & suitable order regarding realization of the transmission charges in paragraph 7.15 of the Hon'ble BERC Tariff Order for Bihar State Power Transmission Company Limited dated 15.02.2019 in accordance with BERC (Terms and conditions for determination of Tariff) Regulations, 2007 & BERC (Multi Year Transmission Tariff and SLDC Charges) Regulations, 2018.**

**AND IN THE MATTER OF:**

**Bihar State Power Transmission Company Limited .....Petitioner**

**Vs**

- 1. Bihar Grid Company Limited**
- 2. Bihar State Power (Holding) Company Ltd.**
- 3. North Bihar Power Distribution Company Ltd.**
- 4. South Bihar Power Distribution Company Ltd.....Respondents**

**To,**

**The Chairman & its companion members,  
Bihar Electricity Regulatory Commission,  
Vidyut Bhawan-II  
Bailey Road,  
Patna.**

**MOST RESPECTFULLY SHOWETH**

- 1. The Petitioner herein, Bihar State Power Transmission Company Limited (hereinafter referred to as "BSPTCL") has filed this petition for seeking review and modification of Paragraph 4.11 & suitable order**



regarding realization of the transmission charges in paragraph 7.15 of the Tariff Order dated 15.02.2019, circulated vide letter dtd 22.02.2019, in accordance with BERC (Terms and conditions for determination of Tariff) Regulations, 2007 & BERC (Multi Year Transmission Tariff and SLDC Charges) Regulations, 2018 and to condone the delay in filing the petition.

2. Description of the Parties

**The Petitioner** is a company registered under the provision of Companies Act 1956 and is a fully owned subsidiary company of BSPHCL.

**Bihar Grid Company Limited** (hereinafter referred to as 'BGCL') is a 50:50 Joint Venture of Power Grid Corporation of India Limited and Bihar State Power (Holding) Company Limited, the concerned Shareholders' Agreement signed between the parties dated 29th Dec., 2012.

**"Bihar State Power (Holding) Company Limited" or "BSP(H)CL"** means the Company that will own shares of newly incorporated reorganized four companies i.e. Bihar State Power Generation Company Limited, Bihar State Power Transmission Company Limited, South Bihar Power Distribution Company Limited, and North Bihar Power Distribution Company Limited.

**The Discoms/South Bihar Power Distribution Company Limited and North Bihar Power Distribution Company Limited (SBPDCL and NBPDCCL)** are companies registered under the provision of Companies Act 1956 and are subsidiary companies of Bihar State Power Holding Company Limited (BSPHCL).

Discoms have the universal obligation to supply electricity to all the consumers of the State.

**Issue 1. Review & modification of para 4.11 of BSPTCL tariff order dated 15.02.2019.**

1.1 The Hon'ble Commission vide the tariff order dated 15.02.2019, circulated vide letter no. BERC-case No.-42/2018 & 51 /2018-268 dtd 22.02.2019, issued to BSPTCL approved Rs. 5.53 Crs against 11.55 Crs as incentive for the FY 2017-18 while truing up for achieving higher



transmission system availability. The relevant pages of the order have been annexed as **Anexure-1**.

1.2 Aggrieved by the above order, BSPTCL has filed this petition praying for condonation of delay in filing the review petition and review and amendment of the tariff order dated 15.02.2019 (circulated vide letter no. BERC-case No.-42/2018 & 51 /2018-268 dtd 22.02.2019) issued to BSPTCL for the control period starting from FY 2019-20 onwards.

1.3 It is respectfully submitted that the Hon'ble Commission has framed BERC (Terms and conditions for determination of Tariff) Regulations, 2007 and issued it vide notification dated 24.04.2007.

1.4 It is further submitted that the Hon'ble Commission framed BERC(Multi Year Transmission Tariff and SLDC Charges) Regulations, 2018 which came into force from the date of notification in the Official Gazette i.e.27.08.2018.

1.5 The True-up for FY 2017-18 has been done by the Hon'ble Commission in accordance with BERC (Terms and conditions for determination of Tariff) Regulations, 2007.

1.6 It is submitted that section 76 of the Bihar Electricity Regulatory Commission (Terms and conditions for determination of Tariff) Regulations, 2007 states-

**"76. Incentive**

(1) The transmission licensee shall be entitled to incentive @ 1% of equity for each percentage point of increase in annual availability beyond the target availability prescribed under Regulation 68 in accordance with the following formula:

$$\text{Incentive} = \text{Equity} \times (\text{Annual availability achieved} - \text{target availability}) \div 100$$

1.7 It is further submitted that section 68 of the Bihar Electricity Regulatory Commission (Terms and conditions for determination of Tariff) Regulations, 2007 states-

**"Target Availability for recovery of full transmission charges**

(i) AC System 98%

(ii) HVDC System 95%

Note: Recovery of fixed charges below the level of target availability shall be on pro rata basis. At zero availability, no transmission charges shall be payable."

The relevant pages of the regulations have been annexed as **Anexure-2**.



1.8 It is respectfully submitted that BSPTCL is highly aggrieved and put into financial burden of 6.02 Crs as due to mere approval of Rs. 5.53 Crs against the Claimed amount of Rs. 11.55 Crs as incentive for the FY 2017-18 during truing up for achieving higher TAFM. The excerpt of the order is:

*"The Commission has examined the incentive claim of the Petitioner for FY 2017-18 in truing-up. The Petitioner has furnished the detailed month-wise computation of Transmission system availability and has claimed the ~~incentive as per the formula prescribed in Regulation 76 of the BERC Tariff Regulations 2007.~~ The Petitioner has considered target availability at 98% for claiming incentive for FY 2017-18.*

*The Commission, in tariff order dated 07.03.2018, considered target availability at 98.50% in line with CERC regulations and allowed incentive for FY 2016-17 for achieving higher transmission system availability factor (TAF). The Petitioner has filed review petition on the issue and requested to consider the TAF at 98% for computation of incentive. The Commission vide order dated 20.11.2018 in Case No.15/2018 has deliberated issue in detail and in terms of Regulation 38 of the CERC Tariff Regulations 2014 read with regulation 13 (2) of the BERC (Terms and conditions for determination of Tariff) Regulations 2007 has not acceded the request of the Petitioner.*

*The Petitioner again considered the TAF at 98% instead of 98.5% for computation of incentive for FY 2017-18 even after well aware of the orders of the Commission on the subject.*

*The Commission in view of the above has computed the incentive as follows:  
Incentive = [(99.13 - 98.50) x 872.27]/100 =5.53 Crore BSPTCL Tariff Order for FY 2019-20*

***The Commission approves the incentive at Rs.5.53 Crore for achieving higher Transmission System Availability during FY 2017-18 in truing up."***

1.9 The transmission system availability for the FY is 99.13 and the same has been examined by the Hon'ble Commission while truing up.

1.10 It is respectfully submitted that the Hon'ble Commission while truing up for FY 2016-17 also, had approved Rs. 2.29 Crs as incentive against the claim of Rs. 5.10 Crs. The excerpt of the order is:

*"The Commission has examined the incentive claim of the Petitioner for FY 2016-17 in truing-up. The Petitioner has furnished the detailed month-wise computation of Transmission system availability and has claimed the*



MS2

incentive as per the formula prescribed in Regulation 76 of the BERC Tariff Regulations 2007.

BERC Tariff Regulations, 2007 stipulates as below:

1. Regulation - 68: Target availability for recovery of full transmission charges for AC system as 98%.

2. Regulations- 76: Incentive - The transmission licensee shall be entitled to incentive at 1% of equity for each percentage point of increase in annual availability beyond the target availability prescribed under Regulation - 68 in accordance with the following formula.

$$\text{Incentive} = \text{Equity} \times (\text{Annual availability achieved} - \text{target availability}) \div 100$$

Incentive shall be shared by the long-term customers in the ratio of their average allotted transmission capacity for the year”

3. Regulation-4: Guidelines for determination of Tariffs:

The Commission shall be guided in determination of tariff by the following:

“The principles and guidelines specified by Central electricity Regulatory Commission for determination of tariff applicable to an integrated utility or generating company or transmission licensee from time to time”.

Further, Regulation 38 of CERC Tariff Regulation for FY 2014-15 to FY 2018-19 stipulates that Normative Annual Transmission System Availability Factor shall be as under:

For Recovery of AC System - 98%

**For incentive considerations:**

(i) AC System - 98.50%

Conjoint reading of the above Regulations infers that for incentive consideration the transmission system availability during FY 2014-15 to FY 2018-19 shall be atleast 98.50% and above.

The Commission has observed from the data furnished by the Petitioner that there are some discrepancies in the computation of month-wise TAF. The Petitioner vide letter no. 17 dated 10.01.2018 has furnished the revised month-wise TAF and the TAF achieved at 98.918% for FY 2016-17, which is found in order by the Commission.

Accordingly, the Commission has computed the incentive as follows:

$$\text{Incentive} = [(98.918 - 98.50) \times 547.67] / 100 = 2.29 \text{ Crore}$$



*The Commission approves the incentive for achieving higher Transmission System Availability during FY 2016-17 at Rs.2.29 Crore in truing up for FY 2016-17."*

1.11 It is respectfully submitted that aggrieved by the above said order, BSPTCL had filed a review petition before the Hon'ble Commission. The Hon'ble Commission held the same view as recorded in the tariff order and the request of the BSPTCL was not acceded to.

1.12 Being aggrieved by the above said order, BSPTCL moved to APTEL for relief and the matter is pending for hearing.

1.13 It is respectfully submitted that the State Commission is bound by the statutory regulations (PTC India Limited v. Central Electricity Regulatory Commission and Haryana Power Generation Corporation Ltd. v. Haryana Electricity Regulatory Commission.

1.14 It is submitted that the Constitution Bench Judgment in PTC India observed that a regulation under Section 178 is in the nature of a subordinate legislation. In that case the Constitution Bench was inter alia considering whether capping of trading margins could be done by the Central Electricity Regulatory Commission (CERC) by making a regulation in that regard under Section 178 of the Electricity Act. The Constitution Bench considered the CERC's power to make a regulation and the various areas enumerated in Section 79 (1) in which the CERC is mandated to take such measures as it deems fit to fulfil the objects of the Electricity Act. The Constitution Bench observed that a regulation under Section 178 is in the nature of a subordinate legislation. The Constitution Bench observed that the CERC can make a regulation fixing a trading margin under Section 79 (1) (f), but making of a regulation in that regard is not a pre-condition to the CERC exercising its powers to fix a trading margin under Section 79(1)(f). **The Constitution Bench clarified that if however the CERC in an appropriate case makes a regulation fixing a cap on the trading margin under Section 178, then whatever measures the CERC takes under Section 79(1)(j) have to be in conformity with it.**

As can be seen from the reasoning of the Constitution Bench that even the State Commission is mandated to follow its regulations if they are in place and cannot sidetrack them or ignore them. Measures it takes must be in tune with and in conformity with the regulations.



430

The relevant paragraphs of PTC India Judgement have been set out herein below (**Annexure-3**):

"54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objective inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76 (1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Section 76 (1) and 79 (1) one finds that Central Commission is empowered to take measures / steps in discharge of the functions enumerated in Section 79 (1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for interstate transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, **have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79 (1), therefore, have got to be in conformity with the regulations under Section 178.**

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). **As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178.** This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order /



decision making process. Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). .....

56. ....

57.

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. **A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79 (1) (j).**"

1.15 It is further submitted that Hon'ble APTEL has held that the State Commission is bound by its regulations while fixing tariff in Haryana Power Generation Corporation Ltd (**Annexure-4**). The excerpt from the judgement is presented below for kind reference:

"5. Bare reading of section 61 would make it clear that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such Regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission, National Electricity Policy, Tariff Policy etc. It also provide that while framing the Regulations, the State Commissions shall ensure that



generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer's interest. **Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases. However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations.** The Haryana Electricity Regulatory Commission has framed Terms and Conditions for determination of tariff for generation in the year 2008 and the State Commission is required to fix tariff as per these Regulations. However, as per Regulation 33 of the State Commission has power to relax any of the provisions of these Regulations after recording the reasons for such relaxation. "

- 1.16 In view of the facts & judgements reproduced above, our Humble Prayer to the Hon'ble commission to amend the Para 4.11 of the Tariff order dated 15.02.2019 and allow the incentive considering the availability factor of 98% as mandated in the BERC(Terms & Conditions for determination of Tariff) Regulations, 2007.

**Issue 2 Suitable order regarding realization of the transmission charges in paragraph 7.15 of the Hon'ble BERC Tariff Order for BSPTCL dated 15.02.2019 .**

*2.1 Clause 7.15 of the BSPTCL tariff order dated 15.02.2019 issued by Hon'ble BERC states*

**"BGCL the 2nd Transmission licensee will also submit its monthly invoice for recovering of its transmission charges from its users to the STU i.e. BSPTCL for arranging payment. In turn BSPTCL adding the BGCL monthly charges to its own monthly transmission charges computed as mentioned in the regulations above will raise the monthly bills to its users i.e. Discoms (NBPDC and**



427

**SBPDCL) and other long term open access customers such as Railway Transmission, etc.”**

2.2 Clause 7.19 of the BGCL tariff order dated 15.02.2019 issued by Hon'ble BERC states

**“The Commission directs the BGCL to recover the transmission charges in accordance with the Transmission Services Agreement as the same was agreed by the constituent companies.”**

**The Commission, based on the above analysis, has arrived at the Annual Revenue Requirement /Annual Transmission charges for FY 2019-20 which shall be recovered from the BSP(H)CL in 12 equal monthly installments .**

2.3 At present, BGCL raises the bills to BSP(H)CL in accordance with the agreement executed among them (The copy of the agreement is annexed as **Annexure-5**) and tariff order of BGCL dated 15.02.19.

2.4 **The humble submission before Hon'ble BERC that the clarification is required on following in realization of transmission charges according to the para 7.15 of the tariff order dated 15.02.19 of BSPTCL issued by the Hon'ble BERC .**

2.4.1 Procedure and time frame for accounting, billing and collection of charges including late payment surcharge & rebate.

2.4.2 Accordingly BGCL, BSP(H)CL & DISCOMs (SBPDCL & NBPDC) are required to be intimated for this system and they need to be directed to follow the procedure.



126

2.5 *Alternatively, BSPTCL may be allowed to follow the procedure as passed by the Hon'ble Commission in tariff order of BSPTCL dated 07.03.2018 (FY 2018-19) in case no. 37 of 2017.*

2.6 In view of the above stated facts and for smooth realisation of transmission charges by BSPTCL & BGCL , it is our humble prayer to the Hon'ble commission to pass suitable order regarding realization of the transmission charges in paragraph 7.15 of the tariff order dated 15.02.2019 of BSPTCL , Or pass any such suitable order as deem fit.

3. In view of the circumstances, facts and judgments presented above, the petitioner prays before the Hon'ble Commission to admit the matter, condone the delay in filing this review petition, amend of the tariff order dated 15.02.2019 issued to BSPTCL for the control period starting from FY 2019-20 to the extent prayed or pass such other order as the Hon'ble Commission deems fit and proper under the circumstances of the case and in the interest of justice.

*A Kumar*  
24/05/19  
(Dileep Kumar)  
Chief Engineer (P & E and C & RA Cell)

Place: Patna  
Dated: