

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
**Appellate Jurisdiction, New Delhi**

**Appeal 102 of 2008**

Dated : 28.04.2009

**Coram: Hon'ble Mrs. Justice Manju Goel, Judicial Member**  
**Hon'ble Mr. H. L. Bajaj, Technical Member**

**IN THE MATTER OF:**

NTPC Limited (Formerly National Thermal Power Corporation Ltd.)  
NTPC Bhawan,  
SCOPE Complex,  
7, Institutional Area,  
Lodhi Road,  
New Delhi – 110 003

... Appellant

Versus

1. Central Electricity Regulatory Commission  
SCOPE Complex,  
Core-3, 7<sup>th</sup> Floor,  
Lodhi Road,  
New Delhi – 110 003
2. Northern Regional Load Despatch Centre  
18-A, Qutab Institutional Area,  
Katwaria Sarai,  
New Delhi – 110 016.
3. Western Regional Load Despatch Centre  
Plot No. F-3, MIDC Area,  
Marol, Andheri (East)  
Mumbai – 400 093.

4. Eastern Regional Load Despatch Centre  
14, Golf Club Road,  
Tollygunge,  
Kolkata – 700 033.
5. Southern Regional Load Despatch Centre  
29, Race Course Cross Road,  
BANGALORE – 560 009.
6. Uttar Pradesh Power Corporation Ltd. (UPPCL)  
Shakti Bhawan Extn., 10<sup>th</sup> Floor,  
14, Ashok Marg,  
Lucknow – 226 001.
7. Jaipur Vidyut Vitran Nigam Ltd. (JVVN)  
Vidyut Bhawan, Janpath,  
Jaipur – 302 005.
8. Ajmer Vidyut Vitran Nigam Ltd. (AVVN)  
Old Power House, Hathi Bhata,  
Jaipur Road,  
Ajmer – 305 001.
9. Jodhpur Vidyut Vitran Nigam Ltd. (JdVVN)  
New Power House, Industrial Area,  
Jodhpur – 342 003.
10. Delhi Transco Limited (DTL)  
Shakti Sadan,  
Kotla Road, Near ITO  
New Delhi – 110 002.
11. Haryana Power Generation Company Ltd. (HPGCL)  
Shakti Bhawan,  
Sector -6, Panchkula,  
Haryana – 134 109.

12. Punjab State Electricity Board (PSEB)  
220 kV Substation  
Ablowal  
Patiala – 147 001.
13. Himachal Pradesh State Electricity Board (HPSEB)  
Kumar Housing Complex Building-II  
Shimla – 171 004.
14. Power Development Department (PDD)  
Govt. of J&K,  
New Secretariat Building,  
Jammu – 180 001.
15. Electricity Department (Chandigarh)  
Union Territory of Chandigarh  
Addl. Office Building  
Sector – 9 D  
Chandigarh – 160 009.
16. Uttaranchal Power Corp. Ltd. (UPCL)  
Urja Bhawan,  
Kanwali Road,  
Dehradun – 248 001.
17. Madhya Pradesh Power Trading Corporation Ltd.  
Shakti Bhawan, Vidyut Nagar,  
Jabalpur – 482 008.
18. Maharashtra State Electricity Distribution Company Ltd.  
Prakashgad, Bandra (East)  
Mumbai – 400 051.
19. Gujrat Urja Vikas Nigam Ltd.  
Sardar Patel Vidyut Bhawan,  
Race Course,  
Baroda – 390 007.

20. Chhatisgarh State Electricity Board  
Dhagania  
Raipur – 492 013.
21. Electricity Department  
Govt. of Goa, Vidyut Bhavan,  
3<sup>rd</sup> Floor Panaji,  
Goa – 403 001.
22. Electricity Department  
Administration of Daman & Diu (DD)  
Daman – 396 210.
23. Electricity Department  
Administration of Dadra and Nagar Haveli (DNH)  
Silvassa, Via VAPI – 396 330.
24. West Bengal State Electricity Board  
Vidyut Bhawan, Block-DJ,  
Sector-II, Salt Lake City,  
Kolkata – 700 091.
25. Bihar State Electricity Board  
Vidyut Bhawan, Bailey Road,  
Patna – 800 021.
26. Jharkhand State Electricity Board  
Engineering Building of Heavy Engineering Corporation  
Dhurwa,  
Ranchi – 834 004.
27. GRID Corporation of Orissa Ltd.  
24, Janpath,  
Bhubaneswar – 751 007.
28. Power Department

Govt. of Sikkim  
Kazi Road, Gangtok,  
Sikkim – 737 101.

29. Eastern Power Distribution Company Ltd. (EPDCL)  
Sai Shakthi Bhavan,  
30-14-09, Near Saraswathi Park,  
Visakhapatnam – 530 013.
30. Southern Power Distribution Company Ltd. (SPDCL)  
H. No. 193-93 (M) Upstairs  
Renigunta Road,  
Tirupathi – 517 501.
31. Northern Power Distribution Company Ltd. (NPDCL)  
Opp. : NIT Petrol Pump  
Chaitanyapuri,  
Warangal – 506 004.
32. Central Power Distribution Company Ltd. (CPDCL)  
Singareni Bhavan,  
Red Hills  
Hyderabad – 500 004.
33. Electricity Department  
Govt. of Puducherry  
137, NSC Bose Salai,  
Puducherry – 605 001.
34. Tamilnadu State Electricity Board  
800, Anna Salai  
Chennai – 600 002.
35. Kerala State Electricity Board  
Vaidyuthi Bhavanam, Pattom,  
Thiruvananthapuram – 695 001.

36. Bangalore Electricity Supply Company (BESCOM)  
Corporate Office, KR Circle,  
Bangalore – 560 009.
37. Mangalore Electricity Supply Company (MESCOM)  
Corporate Office  
Paradigm Plaza, AB Shetty Circle,  
Mangalore – 575 001.
38. Chamundeshwari Electricity Supply Corporation (CESCORP)  
Corporate Office  
No. 1633, Sri Annapoorneshwari Complex,  
Anekethana Road, Kuvempu Nagar,  
Mysore – 570 009.
39. Gulbarga Electricity Supply Corporation (GESCOM)  
Corporate Office  
Railway Station Area,  
Main Road,  
Gulbarga – 585 102.
40. Hubli Electricity Supply Company (HESCOM)  
Corporate Office,  
Navanagar,  
Hubli – 585 025.
41. Assam State Electricity Board  
Bizuli Bhawan,  
Paltan Bazar,  
Guwhati – 781 001.
42. Tripura State Electricity Corp. Ltd.  
Bidyut Bhawan,  
North Banamalipur  
Agartala – 799 001  
Tripura

43. Damodar Valley Corporation  
DVC Towers, VIP Road,  
Kolkata – 700 054.

... Respondents

Counsel for the appellant : Mr. M. G. Ramachandran,  
Mr. Anand K. Ganesan and  
Ms. Swapna Seshadri

Counsel for respondents : Mr. Pradeep Misra  
Mr. Daleep Kumar Dhayani  
Mr. R. B. Sharma  
Mr. Dipak Bhattacharya  
Mrs. S. Shama  
Mr. R. Chowdhri  
Mr. Manoj Kumar Sharma

## **J U D G M E N T**

### **Ms. Justice Manju Goel, Judicial Member**

The appeal challenges the order of Central Electricity Regulatory Commission (hereinafter referred to as the Commission for short) dated 18.06.08 whereby Petition No. 13 of 2007 filed by the appellant was disposed of at the admission stage. The facts leading to the petition No. 13 of 2007 before the Commission are as under:

2) The appellant is a generating company and a central public sector undertaking. The appellants as well as other Central Public Sector Undertakings (CPSUs for short) were facing problem of

realisation of dues from the State utilities. In March, 2001 it was resolved in a conference of Chief Ministers to set up an expert group to recommend a one time settlement of all outstanding dues of CPSUs. On the recommendation of the expert group, a scheme was brought about w.e.f. 17.04.02, to ensure timely payment of current dues. The scheme provided for signing of Tripartite Agreement between The Government of India, the respective State Governments of India and Reserve Bank of India. The agreements were also signed by all utilities to whomever the appellant was supplying power. One of the essential conditions in that Tripartite Agreement was establishment and maintenance of Letters of Credit (LC) equivalent to 105% of average monthly billing as an essential condition. The clause relating to LC is extracted below:

***“Letter of Credit (LC)***

*13.1 SEBs or their successor entities shall open and maintain irrevocable LCs that are equal to 105 per cent of their average monthly billing for the preceding 12 months. The amount shall be revised once in six months, based on the said average.*

*13.2 The requisite LCs shall be opened no later than 31.09.2002, and failure to do so shall attract reduction in supplies from all CPSUs equal to 2.5 per*



*cent of the average daily supply for the preceding 90 days, in addition to the suspension of APDRP as mentioned in paragraph 16 below. These penal provisions shall also apply if the LCs are not maintained in future. However, SEBs shall be free to establish any other security mechanism that is mutually acceptable to the contracting parties.”*

3) Apart from the clause regarding LC another clause provided for reduction of power supply in case of default in payment. When the appellant requested the Northern Region Load Despatch Center (NRLDC) to regulate power supply to the State of Jammu & Kashmir on account of non establishment of LC in accordance to the clause extracted above, the NRLDC did not implement the same.

4) The Commission had issued a “Generic procedure for Regulation of Power Supply on commercial grounds” (hereinafter referred to as the Generic Procedure) on 11.01.02. The relevant regulation dealing with default is Regulation 1 which is as under:

*“1. For the purpose of this order, “regulation of power supply” means the discontinuance, stoppage or reduction of power supply by a Central Utility to a beneficiary in case of default by the latter in making payment of the billed dues and whose dues remain outstanding for a*

*minimum period of 2 months from the date of service of bills.” (emphasis supplied)*

The generic procedure had no specific clause requiring LC or providing for dealing with non-establishment of LC.

5) The appellant filed the petition No. 13 of 2007 on 25.01.07 asking for regulation of power supply to the State utilities in case of default in opening and maintaining LC. The Commission referred to the generic procedure in case of default in payments by the State utilities. The Commission also noticed that the Tripartite Agreements required opening of LCs which, inter alia, provided for reducing the supply in case the LC was not opened. The Commission noted that the Tariff Regulations did not make opening of LCs mandatory although the Regulation provided that in case LCs were opened the State utility would be allowed rebate of 2%. The Commission then proceeded to say that when a Tripartite Agreement was finalized and signed in 2001-02, the Availability Based Tariff (ABT) had not been implemented and there was no proper way of curtailing supply from a generating station to the defaulting State other than opening of lines supplying power to that State which was a rather difficult proposition. The Commission noted that after implementation of ABT, the supply from a generating station to a defaulting utility can be readily curtailed through the curtailment of schedule and further that if the utility

draws power despite curtailment of schedule they would be subjected to Unscheduled Inter change (UI) rate. The Commission therefore, concluded as under:

*“6. Since the above measure can be readily adopted in case of a payment default, opening of revolving LC for the generating companies, though desirable, is no longer of such criticality which would warrant supply regulation for not opening an LC. It is no longer required as a pre-emptive measure against payment defaults.*

*7. Therefore, in our opinion, it is not a fit case for admission. It is, however, clarified that for the view we have taken, the provisions of opening of LCs in the Tripartite Agreements should not be deemed to have been diluted by this order, since we have held that a payment default itself (for generators) can be tackled under ABT mechanism. Nevertheless, we expect that the spirit of the Tripartite Agreements shall be maintained by the State utilities.”*

6) Thus the Commission declined to instruct the NRLDC to reduce/regulate the supply of power to the State of J&K which had defaulted in opening the LC. In effect the Commission declined to implement the clause in the Tripartite Agreement permitting the

appellant, NTPC, to reduce power supply to be given to the defaulting State. The Commission expressed its expectation that the spirit of Tripartite Agreement would be maintained by the State utilities without however, providing for the eventuality of the LC not being opened. Hence, the appeal.

7) Notices were issued to all the respondents, namely, the utilities who have been drawing power from NTPC. Notice was also issued to the Commission as well as to the NRLDC and other Regional Load Despatch Centers. The State of Bihar, the Uttar Pradesh Power Corporation Ltd., Bihar State Electricity Board, Tamil Nadu Electricity Board, West Bengal State Electricity Board have put in their appearance in this appeal. Two counter affidavits have been filed. It appears from the response and submissions made during the hearing that except the State of Jammu & Kashmir, no other utility or beneficiaries of appellant has defaulted in opening the LCs. Nonetheless, they have opposed the present appeal. All the three contended that the “generic procedure on regulation of power supply to beneficiaries in case of non-payment of dues of central power utilities prescribed by the Commission vide order dated 11.1.02 was sufficient to deal with default in payment and the Tripartite Agreement could not be given effect to. The NRLDC who put in appearance only on 15.4.09 filed written submissions to defend its act of declining to give effect to the notice issued by NTPC for reducing power supply to the State of Jammu & Kashmir. It is

pointed out, inter alia, in the submissions of NRLDC that the LC opened by the State of Jammu & Kashmir had been extended upto 30.06.06. The NTPC informed the NRLDC on 10.07.06 about the alternate beneficiary for the regulated power. Further details as required by NRLDC as required by scheduling methodology were also received by 26.07.06. It appears that the NRLDC was still looking for certain clarifications from the appellant and the State of Jammu & Kashmir when the appellant approached the Commission with petition No. 13 of 2007. The NRLDC submits in the response that reduction in the schedule, to a particular State, is done only in two conditions namely: (i) downward change in allocation by Ministry of Power due to any reason, and (ii) a request from the generator in line with the Commission's generic procedure dated 11.01.02. However, NRLDC submits that in case the generating company involved is not a central generating company the RLDCs would be governed by contract entered into by a generating company and its customers and based on the agreement any request from the generator for regulation would be taken care of by RLDC through its scheduling process.

8) We have heard all the counsel who appeared before us and have examined the relevant legal provisions.

9) The generic procedure prescribes that the central utility proposing to regulate power supply to the defaulting utility shall

make a request to Regional Load Despatch Centre (RLDC) at least 30 days in advance of the proposed date of commencement of regulations. The regulating utility is required to hold consultation with other State utilities who may be willing to absorb the regulated power. The regulating utility is then required to submit in its proposal the quantum of power to be regulated during the period of regulation and also whether the regulation of power supply would cause reduction in generation or whether the power becoming available consequent to regulating shall be diverted to other utilities. The generic procedure then gives the procedure by which the RLDC will finalise a scheme of regulation. RLDC then would advise the regulated utility for regulating drawal of its own (self regulation) according to the curtailed schedule. However, in case self regulation is not resorted to the RLDC can issue instructions for implementing the next stage of the scheme of regulation which is not necessary for us to examine. It may be stated here that the generic procedure dated 11.01.02 was in place when the scheme based on the recommendations of expert group was brought into effect on 17.04.02. Therefore, the Tripartite Agreements cannot be undermined on account of existence of the generic procedure. It has to be assumed that the expert group provided for a scheme requiring opening of LC and the consequence of default in opening of LC by reduction in supply despite being aware of the generic procedure.

10) The Commission while declining to admit the petition of the appellant has observed that when the Tripartite Agreements were executed the ABT mechanism was not in force and at that time there was no proper way of curtailing supply from a generating station to the defaulting State other than by opening of lines supplying power to that State which was always a difficult proposition. At that stage it was necessary to provide for a preemptive measure like opening of an LC. The Commission observed that the provision of curtailment of power supply now has a totally different connotation after implementation of ABT wherein a supply from the generating station to the defaulting utility can be curtailed through the curtailment of schedule. On such curtailment of schedule, the Commission felt, the generator's receivable would stop rising and in case the defaulting utility still continues to draw power from the grid it would amount to over drawal for which the defaulter will have to pay at prevailing rate into the regional UI pool account. Accordingly, the Commission felt that such measure was sufficient to take care of the situation of default and concluded, as extracted in paragraph 5 above. While it is true that the ABT mechanism as is available in the CERC (Tariff) Regulations 2004, read with Indian Electricity Grid Code makes the provision for UI rate, it does not really ensure prompt payment. The ABT regime makes an inducement to prompt payment whereas the LC actually ensures cash flow into the hands of a generating company. It is easy to see the difference in the modus operandi of

the ABT system and the LC. An LC ensures payment even before the transaction has been entered into while ABT is only the mechanism of penalizing the defaulter.

11) The Commission has said that it did not intend to dilute the clause regarding opening of LC. It also says that it is desirable that the LC is opened. Nonetheless, the Commission has declined to instruct the NRLDC to give effect to the clause by reducing the supply to the defaulting State of J&K. The impugned order of the Commission is thus self contradictory. If the LC is desirable and if the clause 13.1 and 13.2 of the Tripartite Agreement are not to be diluted the NRLDC is required to be instructed to act on the notice given by the appellant to reduce the supply to the defaulting State of J&K. It was a mistake on the part of the Commission not to have ordered so.

12) On behalf of Uttar Pradesh Power Corporation Limited, Mr. Pradeep Misra, Advocate has drawn our attention to the provisions of section 28, section 61 and section 178 of the Electricity Act 2003 as well as to the CERC (Terms and Conditions of Tariff) Regulations 2004. Section 28 prescribes the functions for RLDC. Sub-section 2 & 3 of section 28 makes it mandatory for RLDC to dispatch power in the ratio of allocation of share of power agreed in the agreement entered into by the beneficiaries with the appellant or as per requisition made by the beneficiaries. Mr. Misra



submits that there is no power with the RLDC to curtail the supply of a beneficiary on the direction of the appellant. Section 61 empowers the appropriate commissions to frame regulations for determination of tariff. Section 178 of the Act empowers the central commission to make regulations and rules to carry out the provisions of the Act. The CERC has framed regulations under the provisions of section 61 and 178 of the Act. Regulation 27 of the CERC (Terms and Conditions of Tariff) Regulations 2004 provides for scheduling. This regulation requires a generator to make an advance declaration of capacity of its generating station. The capacity declared shall form basis of generation scheduling. Based on the declaration by the generator the RLDC has to communicate to the beneficiaries their shares out of which the beneficiaries have to give their requisition. Based on the requisition of the beneficiaries, the load dispatch centre has to prepare the economically optimal generation schedules and drawal of schedules and communicate the same to the generator and the beneficiaries. Deviation from the schedule, either by the generating company or by the beneficiaries attracts UI charges.

13) It is also pointed out by Mr. Misra that Regulation 25 of the Tariff Regulations prescribes that a rebate of 2% would be available if the payment of bills of capacity charges and energy charges is ensured by an LC. However, if the payments are made by a mode other than LC but within a period of one month of presentation of

bills by the generating company a rebate of 1% shall be allowed. Mr. Misra submits that clause 13 of the Tripartite Agreement is inconsistent with the Regulation 25 and with the scheduling mechanism given in Regulation 27. Further, he says that section 174 of the Act has an over riding effect and therefore, the Tripartite Agreement cannot be given effect to.

14) We have carefully considered the plea of Mr. Misra. We fail to see how the agreement is inconsistent with either the ABT mechanism as laid down by the Indian Electricity Grid Code or by Tariff Regulations. In fact, clause 13 of the agreement is almost the same as Regulation 25 of the Tariff Regulations 2004 which also prescribes that the State Electricity Boards would be free to establish any other security mechanism that is mutually acceptable to the contracting parties. It is not the case that the State of J&K and the appellant has entered into any other security mechanism. Nor has any other security mechanism been established by any of the other respondents in this appeal.

15) Neither the Act nor the Regulations prohibits opening of LC. Accordingly, it cannot be said that the contract requiring an LC is inconsistent with the Act or Regulations framed under it. The contract is in perfect harmony with the Act and the Regulations. Therefore, there is no reason why clause 13 should not be given

effect to and the demand of the appellant to reduce supply to the defaulting State should not be carried into effect.

16) One question has arisen in this appeal about the jurisdiction of this Tribunal vis-à-vis State of J&K. Section 1 of the Act extends to the whole of India “except the State of Jammu & Kashmir”. This limit is territorial in nature. The supply of electricity is made at the bus bar of the generating station and not within the territory of J&K. The compliance of the direction of this Tribunal is not required to be made within the State of J&K. The situs of generation and sale of electricity by NTPC is outside J&K. This Tribunal is not called upon by the appellant to pass any direction on the State of Jammu & Kashmir. This Tribunal is only being asked to issue certain directions on the NRLDC which is governed by the Electricity Act and amenable to the jurisdiction of this Tribunal. Hence the appeal cannot be said to be bad for want of jurisdiction of this Tribunal.

17) In view of the above analysis, we allow the appeal, set aside the impugned order and direct the NRLDC to give effect to the notice of the appellant to reduce supply of electricity in the event of failure to open an LC as per the provisions of the Tripartite agreements mentioned above.

Pronounced in open court on this **28<sup>th</sup> day of April, 2009.**

**( H. L. Bajaj )**  
**Technical Member**

**( Justice Manju Goel )**  
**Judicial Member**