

**IN THE JHARKHAND STATE ELECTRICITY
REGULATORY COMMISSION AT RANCHI**

Case No. 19 of 2014

M/s Jamshedpur Utilities & Services Co.Ltd. (JUSCO) Petitioner

Case No. 21 of 2014

M/s Tata Steel Limited (TSL) Petitioner

Case No. 24 of 2014

M/s Jamshedpur Utilities & Services Co.Ltd.(JUSCO) Petitioner

**CORAM: HON'BLE MR. JUSTICE N.N. TIWARI, CHAIRPERSON
HON'BLE MR. SUNIL VERMA, MEMBER (FINANCE)**

For the Petitioners : Shri M.S. Mittal, Sr. Advocate and
Mrs. Shilpi John, Advocate

For the Commission: Shri Sudarshan Shrivastava, Advocate

ORDER

Dated: 12th January 2015

1. A common issue arose in all the above petitions and as such the petitions are being disposed of by this common order.

2. The above petitions filed by the petitioners seeking for Fuel Price and Power Purchase Adjustment (hereinafter referred to as "FPPPA") for their respective supply area under clauses 6.59/6.65 of Clause 6 of JSERC (Terms and Conditions for determination of Distribution Tariff) Regulations, 2010 (hereinafter referred to as "the Regulations 2010"). The prayer in the petitions was for

adjustment of FPPPA, but the claim was with respect to the different span of period. In Case No. 19 of 2014 the petitioner-M/s JUSCO claimed for recovery of FPPPA charges for the period of September 2014. In Case No. 21 of 2014 the petitioner-M/s Tata Steel Limited has sought approval of the proposed recovery of FPPPA charges from the consumers as charged by TPCL Unit No.2 and TPCL Unit No.3 for the period from April 2014 to September 2014 whereas in case No. 24 of 2014 the petitioner-M/s JUSCO has applied for approval of recovery of FPPPA charges for the month of October 2014.

3. In course of hearing of the said petitions, the petitioners faced the provisions of Clause 6.62 of the Regulations 2010, which reads as follows:

*“6.62 – The licensee shall submit to the Commission, **on an annual basis**, a proposal for the FPPPA charge for the next year and revenue billed through FPPPA charge in previous year to all consumers for each month in the year, along with the detailed computations and supporting documents as may be required for verification by the Commission;”*

4. Since the petitions were contrary to the said provision of Clause 6.62 of the Regulations 2010 and, prima facie, not maintainable, the petitioners sought to amend their prayer seeking, inter-alia, the Commission’s indulgence to allow them to submit proposal for FPPPA charges on a monthly/quarterly basis notwithstanding the provisions of Clause 6.62 of the Regulations 2010 on the following grounds:-

- i) The provision of Clause 6.62 of the said Regulations 2010 is not in consonance with Section 62 (4) of the Electricity Act, 2003;
- ii) The Clause 7.19 of the Tariff Order provides for claiming FPPPA charges by the licensee as and when required;
- iii) Clause 13.3 of the said Regulations 2010 provides for “Powers to the Commission” to remove difficulties in case of any such necessity by general or special order;

- iv) Clause 13.4 of the said Regulations 2010 gives power of relaxing any provision of the said Regulations 2010 in public interest; and
- v) Clause 13.8 of the said Regulations 2010 confers inherent powers on the Commission to adopt a procedure even at variance with the provisions of the said Regulations in view of any special circumstances of the matter or class of matters which may be deemed necessary or expedient.

5. Besides the above, the petitioners sought the said indulgence also in view of the direction of the Hon'ble Appellate Tribunal for Electricity in OP No.1 of 2012 and OP No. 2 of 2012 in the case of **BSES Rajdhani Power Limited vrs. Delhi Electricity Regulatory Commission & another and BSES Vrs Jamuna Power Limited** respectively which, inter-alia, prescribed that FPPPA should preferably be on monthly basis on the lines of the Central Commission's Regulations for the generating companies and in no case exceeding a quarter.

6. Learned counsel - Shri Sudarshan Shrivastava – assisting the Commission, made the following submissions:

- i) The prayers made by the petitioners, if allowed, would amount to cause amendment in Clause 6.62 of the Regulations 2010 and is hit by the doctrine of estoppels. The petitioners are distribution licensees and had filed their petitions for determination of tariff under the provisions of the said Regulations 2010. The tariff was determined by this Commission. At that time they had not challenged the provisions of Clause 6.62 of the said Regulations 2010. The said provision is, thus, binding on them and they are estopped from seeking any amendment or modification in the said clause.

- ii) The Regulations are framed in accordance with the provisions of the Electricity Act 2003 and its publication is governed by the Electricity (Procedure for Previous Publication) Rules, 2005 framed under the provision of Section 176 (1) and (2)(z) of the Electricity Act 2003. The said Regulations 2010 was framed under the provisions of Section 181 of the Electricity Act 2003. Sub-clause (3) of Section 181 of the Electricity Act 2003 which, inter-alia, stipulates that **“All regulations made by the State Commission under this Act shall be subject to the conditions of previous publication”**. Thus modification/amendment in the Regulations can be made only after following the prescribed procedure of publication under the Electricity (Procedure for Previous Publication) Rules 2005.
- iii) The regulations once framed and published cannot be modified or altered by the Commission.
- iv) Power of relaxation of any provision of the regulations, removal of difficulty and inherent power of the Commission come into play when there is no specific Rule/Regulation.
- v) The judgements of the Hon'ble Appellate Tribunal for Electricity rendered in OP No.1 of 2012 and OP No. 2 of 2012 are based on different set of facts and are not applicable in the case of the Regulations already framed by the Commission specifically providing for formula/mechanism relating to FPPPA.
- vi) The functions of the Commission are many fold viz. Legislative, Adjudicatory and Administrative. Framing or amending Regulations is legislative in nature which cannot be effected by passing any order in discharge of adjudicatory function.

viii) In view of the above said legal impediments the prayer for allowing the petitioners to seek approval of the proposed FPPPA charges on monthly/ quarterly basis are not tenable/acceptable.

ISSUE:

7. The said rival contentions gives rise to the issue: **“Whether the petitioners can be allowed to seek approval of the proposed FPPPA on monthly/ quarterly basis in variance of the provisions in Clause 6.62 of the said Regulations 2010?”**

DISCUSSION:

8. Clause 6.62 of the Regulations 2010 as reproduced above specifically provides for submitting proposal for FPPPA charge on an annual basis by the licensee for the next year. The said Regulations 2010 has been framed under the provisions of Section 181 of the Electricity Act 2003.

9. The substantive provision for determination of tariff springs from Section 62 of the Electricity Act 2003. Sub-Section (4) of Section 62 of the Electricity Act 2003 provides for time for amendment, which reads as follows:-

*“62. Determination of tariff – (1) The Appropriate Commission
.....
.....*

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.”

10. The said provision, thus, provides for flexibility in amending the terms of any fuel surcharge formula as also for making amendment in tariff.

11. Clause 7.19 of the Tariff Order also permits the licensee to claim FPPPA charges as and when required. Clause 7.19 of the Tariff Order 2013-14 is reproduced hereinbelow:

“7.19 *The power purchase cost from DVC at 33 kV and 132kV for the MYT period has been approved at the average rate of Rs.4.06 per unit as approved for TSL. MYT Order for TSL for FY 2013-14 to FY 2015-16 dated 4th June 2014, subject to FPPPA claim **as and when required.***”

12. In OP No. 01 of 2011 the Hon’ble Appellate Tribunal for Electricity considered the issue relating to the provisions in Regulations for FPPPA and decided the same after considering several aspects at length. The Hon’ble Appellate Tribunal for Electricity also noticed the provisions of Section 62(4) of the Electricity Act 2003 and observed that the Section permits amendment of the tariff more frequently than once in any financial year in terms of fuel charge formula specified in the Regulations.

13. The Hon’ble Appellate Tribunal for Electricity has given directions to the State Commission in para 65 of the said judgement, inter-alia, as quoted hereinbelow:

“65. In view of the analysis and discussion made above we deem it fit to issue following directions to the State Commissions:

(i)
.....

(vi) Fuel and Power Purchase cost is a major expense of the distribution Company which is uncontrollable. Every State Commission must have in place a mechanism for Fuel and Power Purchase cost in terms of Section 62(4) of the Act. The Fuel and Power Purchase cost adjustment should preferably be on monthly basis on the lines of the Central Commission’s Regulations for the generating companies but in no case exceeding a quarter.”

14. Same view was reiterated in the judgement rendered by the Hon’ble Appellate Tribunal for Electricity in OP No. 01 of 2012 and OP No. 02 of 2012

dated 14.11.2013 in the case of **BSES Rajdhani Power Limited Vrs. Delhi Electricity Regulatory Commission & another and BSES Vrs. Jamuna Power Limited** respectively and further directing (in para 38) that the State Commission has to take immediate steps for recovery of the admitted revenue gap and decide amortization schedule and also ensure that the Fuel and Power Purchase costs are passed on regularly and effectively as per the above directions of the Tribunal to avert the problems of cash flow experienced by the licensee-petitioners which may come in the way of smooth operation of the distribution system and meeting the requirements of electricity of the consumers in the national capital in a reliable manner if not remedied in time.

15. Section 121 of the Electricity Act 2003 confers power on the Appellate Tribunal for Electricity to issue orders, instructions or directions from time to time on appropriate Commission which it may deem fit for the performance of its statutory functions under the Act.

16. In view of the said statutory power of the Appellate Tribunal the directions issued by the Hon'ble Tribunal to the State Commissions are binding in nature and the Clause 6.62 of the said Regulations 2010 is eclipsed by the aforesaid direction of the Hon'ble Appellate Tribunal for Electricity and bereft of its binding force.

17. The impediments enumerated by learned counsel for the Commission in modifying or amending the Regulations once framed and finalized by the Commission lose its relevance in view of the said direction of the Hon'ble Appellate Tribunal for Electricity.

18. Mr. M.S. Mittal, learned senior counsel, who led the counsels appearing in the said cases, submitted that though indulgence of the Commission has been sought for allowing the petitioners to claim FPPPA charges on monthly/

quarterly basis, the Commission may determine a period, at its discretion for allowing the licensee to submit their proposal for FPPPA charges.

CONCLUSION:

19. Considering the different aspects, the interest of the parties and the terms of the directions of the Hon'ble Appellate Tribunal for Electricity and in order to maintain uniformity and consistency, the Commission deems it fit to allow the petitioners/licensees to file their proposal claiming FPPPA charges on quarterly basis.

20. The amended prayer to that extent in all the petitions is allowed and the cases are accordingly disposed off. The petitioners are given liberty to file their petitions regarding FPPPA charges afresh, in accordance with the above term.

Sd/-
(Sunil Verma)
Member (Fin)

Sd/-
(N.N. Tiwari, J)
Chairperson