



DELHI ELECTRICITY REGULATORY COMMISSION

Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi- 110017.

No. F.11(1222)/DERC/2015-16/

IA No. 28 & IA No. 29 of 2015

And

IA No. 41 & IA No. 42 of 2015 **in Suo Motu Petitions No. 67 & 68/2011**

In the matter of: Regulation/Diversion of Power Supply relating to BSES Rajdhani Power Limited (BRPL) and BSES Yamuna Power Limited (BYPL) for Non-payment and Non-maintenance of Letter of Credit & Show Cause Notice U/s 24 of the Electricity Act, 2003.

BSES Rajdhani Power Limited
Through its : **CEO**
BSES Bhawan, Nehru Place,
New Delhi-110019.

BSES Yamuna Power Limited
Shakti Kiran Building,
Karkardooma
Delhi 110 032

Coram:

Sh. P. D. Sudhakar, Chairperson,
Sh. J.P. Singh, Member &
Sh. B.P. Singh, Member

ORDER

(Date of Order: 22.07.2015)

1. IA No. 28 and IA No. 29 of 2015 and IA No. 41 & IA No. 42 of 2015 were heard on 02.06.2015 and after hearing the arguments put forth by the concerned parties, the order thereon was reserved. Further, this Commission directed the parties to file written submissions in support of their arguments within a week. An Interim Order dated 12.06.2015 was issued to this effect.
2. In compliance with the said order, BRPL, BYPL, NHPC, DTL and SJVN have submitted their written submissions and the same have been taken on record.

3. The arguments advanced by the Respondents in their respective written submissions are appended in the succeeding paragraph;

3.1 Submissions by BRPL and BYPL

- a. The Central and State Utilities had alleged non-payment of dues as the root cause for issuance of show cause notice dated 25.11.2015 u/S 24 of the Electricity Act, 2003. Whereas, the case of BRPL and BYPL is that the non payment of dues by to the Central and State Utilities is in consequence of an absence of a cost reflective tariff in past tariff orders. The proceedings to this effect have been challenged by them in the Hon'ble Supreme Court vide C.A. No(s) 4011-12 and the same is pending for adjudication.
- b. The allegation of non-compliance of this Commission's Orders issued from time to time comprises of 11 issues which have been raised for the first time in the Communication dated 30.03.2015. The same is alleged to have been wrongly included by this Commission in a pending proceeding without complying with the mandate of Section 24 of the Electricity Act, 2003. under which a prima facie formation of opinion is necessary before issue of Show Cause Notice .
- c. Fresh allegations as in Communication dated 30.03.2015 cannot be brought within the ambit of the existing proceedings as DERC being a quasi judicial body has not formed an opinion before issuing notice under Section 24 of the Electricity Act, 2003.

3.2 Submission by NHPC

- a. The Hon'ble Supreme Court while reserving its judgement in the Writ Petitions/Civil Appeals filed by BRPL and BYPL directed them to regularly pay the dues of the generators vide order dated 26.03.2014.
- b. Further, Hon'ble Supreme Court vide their order dated 06.05.2015 has directed these Discoms to make payment as per the order dated 26.03.2014 and also mentioned that if the payment is not processed by the due date, failing which the stay shall stand vacated. As these DISCOMs have defaulted in making payment, thus the burden of law, as such, is not in their favour and they are not entitled for any relief from this Commission.

3.3 Submissions by DTL

- a. DTL whilst relying on the Hon'ble Supreme Court Order dated 03.07.2014 and 10.03.2015 submitted that despite clear directions of all statutory authorities as well as the Apex Court, BRPL and BYPL are not making any payments to DTL including the current monthly dues. Moreover, no stay orders have been sought against the orders and directions passed by the Hon'ble Supreme Court, and the DISCOMs are wilfully flouting the Orders of the Apex Court.
- b. BPRL and BYPL are misleading this Commission on the pretext that the matter is sub-judice before the Hon'ble Supreme Court basically to prevent this Commission from taking action. However, there is no bonafide in their arguments since they are clearly defying the orders of the Hon'ble Supreme Court.

3.4 Submissions by SJVN

- a. No stay operates against this Commission from enforcing its pending directions. No such stay was either sought by the DISCOMs, or granted by Hon'ble Supreme Court, in the Writ Petition (C) Nos. 104 and 105 of 2014.
- b. It is a settled principle of law that, unless the proceedings before the subordinate court/forum is specially stayed by the superior court, the subordinate forum should not invoke a self imposed stay and abdicate its jurisdiction. The Supreme Court has enunciated this principle in *Britannica Industries vs. Maharashtra General Kamgar Union* 2009 (3) BOM Cr. 562.
- c. As the petitioner has not moved any application in the Hon'ble Supreme Court requesting stay of proceedings, and the Hon'ble Supreme Court, has also not passed any specific order in that regard, the Petitioner has no ground to invoke judicial propriety before this Hon'ble Commission. Rather the Hon'ble Supreme Court has specifically directed the two DISCOMs to pay their current dues with effect from 01.01.2014.

4. Summation

Perusal of IAs reveal that prayers of the petitioner revolves around two pivotal issues viz, the various matters co-related to the issues pertaining to non-payment of dues, which are pending adjudication in the Supreme Court, may not be considered to decide the instant petitions and secondly the issues raised in DERC's letters dated 30.03.2015 and 28.05.2015 may not be treated as a part of the instant petition as no formal show cause notice required under section 24 of the Electricity Act, 2003 has been issued.

5. Each of the issues as aforesaid shall be dealt simultaneously. As regard non-payment of dues to GENCOs and TRANSCO's this Commission had issued show cause notice dated 25.11.2011 to BRPL and BYPL for suspension of licence U/s 24 of E.A 2003. The Commission vide order dated 25.01.2012 directed BRPL and BYPL to liquidate the current outstanding dues from September, 2011 onwards of all their power suppliers and transmission utilities latest by 01.02.2012 failing which the Commission shall initiate appropriate proceedings. Against this order BRPL and BYPL approached the APTEL in Appeal No. 23 & 24 of 2012. Subsequently, the APTEL vide its order dated 06.09.2012 remanded back the matter to this Commission directing the Commission to consider the Affidavit and other materials as submitted by BRPL and BYPL in Suo-motu Petition No. 67 & 68 of 2011 and give opportunity of hearing to both the Appellants as well as the Respondents and come to a conclusion in accordance with the Law uninfluenced by the observations made by the Delhi Commission in the order dated 25.01.2012.
6. The issues considered by the Commission in its order dated. 25.01.2012, which were remanded under Appeal No. 23 & 24 of 2012 were as follows:
 - (i) Inability to make payments to the Generating Companies as well as Transmission utilities.
 - (ii) Low Revenue Collection;
 - (iii) AT&C Losses;
 - (iv) Un-explained discrepancies in the information relating to power purchase by both BRPL and BYPL; and
 - (v) Discrepancy in the cash flow statement.

7. The Commission on 30.03.2015 issued a letter to BRPL and BYPL intimating following 12 additional violations committed by them and were asked to give reasons in the instant proceedings :

- 1) Non payment of dues to GENCOS and TRANSCOs;
- 2) Reconciliation of account and monthly submission of information about the finances of the Commission;
- 3) Renewal of PPAC without approval of the Commission;
- 4) Receipt of cash payment for the amount more than Rs. 4000 from the Consumers;
- 5) GIS mapping and capitalization;
- 6) Non implementation of various CAPEX Schemes;
- 7) Division wise DT losses and rectification of consumer tagging/indexing;
- 8) Trading through RETL;
- 9) Refund of Consumer Contribution;
- 10) Net worth erosion;
- 11) Rotation of Auditors;
- 12) Non-compliance of RPO

8. In a subsequent notice dated. 28.05.2015 to BRPL and BYPL, the issue of discrepancies in the cash flow for the period 01.04.2014 to 28.02.2015 was also raised.

9. Though BRPL and BYPL have submitted a preliminary reply to the aforesaid issues, at the same time they have requested that the issues raised in the letters dated 30.03.2015 and 28.05.2015 may not be treated as a part of the instant proceedings.

10. To make the records straight and for better understanding, it is mentioned that the Writ Petitions No.104-105 of 2014 filed in Supreme Court are in respect of Power Regulation Notice issued by NTPC due to non-payment of dues by the Discoms, whereas, the CA No. 4011 and 4012 were filed in the Supreme Court by BRPL and BYPL against the order dated 11.03.2014 of APTEL in IAs No. 81-82/2014 in Appeals No.265-266 of 2013, whereby the APTEL had allowed the DERC to proceed in the instant suo-motu petitions. Records reveal that the Supreme Court after hearing the parties in WP N.104-105/2015 has reserved the judgement. Whereas, the CA No. 4011 and 4012 has not been yet heard and will be adjudicated only after

pronouncement of judgment in the WP 104-105/2015. No stay order or any injunction has been granted against the order of APTEL.

11. It is observed that the issue of non-payment to Gencos and Transcos, is the subject matter of adjudication pending before the Supreme Court in the WP (C) 104-105 of 2014 wherein the judgement is reserved. Although the petitioner has submitted that the judicial propriety demands that such issues are not dealt at this juncture, however, the Commission observed that there is no legal impediment or embargo to proceed against BRPL and BYPL in respect of violations of Low Revenue Collection, AT&C Losses, un-explained discrepancies in the information relating to power purchase by both BRPL and BYPL and Discrepancy in the cash flow statement as reflected in para 6 above.
12. As regards objection to the inclusion of issues related to violations of extant orders raised in the letters dated 30.03.2015 and 28.05.2015, the Commission after deliberations holds that the fresh issues raised in the letters dated 30.03.2015 and 28.05.2015 shall be delinked from the present proceedings. These issues can be raised independently through separate proceedings in accordance with the law and by due process. It shall be ensured that in the said proceeding by the Commission, the allegations contained in the said petitions prima facie constitute contravention or violation of any of the provisions of the Act, Rules and Regulations made thereunder or directions issued by the Commission which necessitates the issuance of a show cause notice to conduct an enquiry under the Act. In this connection, guidelines passed by APTEL in Appeal No. 183/2010 decided on 19.04.2015, wherein the procedure to be followed in dealing with violation of regulations, has been spelt out is relevant.
13. Considering the written submissions and arguments advanced by the parties concerned, Judicial propriety demands that the issues raised in Supreme Court wherein the judgement has been reserved, may be deliberated upon after the Apex Court disposes of the pending W.P(c) 104 and 105 of 2014.
14. Accordingly, the first plea of BRPL and BYPL is allowed to the extent that the specific issue of non-payment to Gencos and Transcos, which is the subject matter of adjudication pending before the Supreme Court in the WP (C) 104-105 of 2014 will not be adjudicated upon pending disposal of

the case in the Hon'ble Supreme Court. On other issues the proceedings shall continue as per due process of law in conformity with APTEL directions. This Commission also holds that issues raised in the letters dated 30.03.2015 and 28.05.2015 shall not be treated as a part of the instant petition at this juncture. Separate proceedings in respect of those issues shall be taken up by due process of law as explained in para 12 above.

15. Accordingly, the IAs are disposed off with the aforesaid direction

Sd/-
(B.P. Singh)
Member

Sd/-
(J.P. Singh)
Member

Sd/-
(P. D. Sudhakar)
Chairperson