



Delhi Electricity Regulatory Commission
ViniyamakBhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 17.

No. F.11(1464)/DERC/2017-18/5686

Petition No. 08/2018

In the matter of: Petition regarding inconsistency between rate of Late Payment Surcharge levied by State Utilities & rate of carrying cost allowed by the Commission on the Regulatory Asset.

M/s BSES Rajdhani Power Limited

.....**Petitioner**

Vs.

M/s Indraprastha Power Generation Co. Ltd.&Ors.

....**Respondents**

And

Petition No. 26/2018
(Tagged with Petition No. 08 of 2018)

In the matter of: Petition regarding inconsistency between rate of Late Payment Surcharge levied by State Utilities and rate of carrying cost allowed by the Commission on the Regulatory Asset .

M/s BSES Yamuna Power Ltd.

....**Petitioner**

Vs.

M/s Indraprastha Power Generation Co. Ltd. &Ors.

....**Respondents**

Coram:Hon'ble Mr. Justice S S Chauhan, Chairperson

ORDER

(Date of Order: 13.05.2019)

1. The instant petitions No. 08/2018 and 26/2018 have been filed by M/s BRPL and BYPL, respectively on the issue of Late Payment Surcharge (LPSC) and carrying cost on Regulatory Assets. The Petitioners have made following similar prayers in the petitions:
 - a) Relax following Regulations and permit the petitioner to pay Late Payment Surcharge (LPSC) equivalent to rate of carrying cost allowed by the Commission to the petitioner for amortization of Regulatory Asset:

- i. Regulation 7.24 of MYT Generation Regulations, 2005;
 - ii. Regulation 5.32 of MYT Transmission Regulations, 2007;
 - iii. Regulation 7.25 of MYT Generation Regulations, 2011;
 - iv. Regulation 5.27 of MYT Transmission Regulations, 2011 and
 - v. Regulation 137 of MYT Tariff Regulations, 2017.
 - b) In the alternative, increase the rate of carrying cost allowed by the Commission equivalent to the LPSC being levied by the State Utilities.
2. The Petitioners have submitted that:
- (i) it is seeking resolution of the grievance arising on account of the creation of Regulatory Asset by this Commission year after year and its accumulation which has resulted in a situation that the petitioner is unable to pay the dues of the Central, State Generating and Transmission utilities entirely and the payments are delayed due to factors beyond the control of the petitioner.
 - (ii) The Commission has allowed carrying cost at a rate of 11.26% outstanding Regulatory Asset of Rs. 5105 Crore during FY 2015-16, whereas the state utilities, i.e. IPGCL, PPCL and DTL are levying LPSC at the rate of 15% in terms of MYT Regulations, 2007 and MYT Regulations, 2011. The rate of LPSC has been further increased to 18% in accordance with Regulation 137 of DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017 applicable from 01.02.2017.
 - (iii) The LPSC is being levied by the State Utilities in their bills on account of delay in clearing payments by the Petitioner. The delay in payments to the State Utilities is primarily on account of the non-cost reflective tariff determined by the Commission on a year to year basis since FY 2009-10. The same has been admitted by the Commission in its Statutory Advices to the Delhi Government dated 15.12.2010 and 01.02.2013.
 - (iv) The year to year revenue gap between the ARR determined by the Commission for a particular Financial Year has led to the creation of Regulatory Assets. The Regulatory Assets primarily comprises of the unrecovered power purchase cost billed by Central and State

Utilities, ROCE and other legitimate costs including cost of funding of loans availed by the petitioner towards funding of Regulatory Assets. Since, the tariff was not reflective; it consequently led to creation of a gap between the costs incurred by the Petitioner towards power purchase and the power purchase costs allowed by the Commission in Tariff.

- (v) The Regulatory Asset as trued up till FY 2013-14 in Tariff Order dated 29.09.2015 passed by the Commission for the Petitioner is Rs. 5,105.28 Crore. In the Tariff Order dated 29.09.2015 the Commission has allowed carrying cost at the rate of 11.26 % on outstanding Regulatory Assets during FY 2015-16. While the carrying cost on the Regulatory Asset is allowed at a rate of 11.26% the LPSC levied by the State Utilities towards unpaid dues is 15% as per MYT Tariff Regulations, 2007 and MYT Tariff Regulations, 2011. The same has been increased to 18% in terms of Regulation 137 of MYT Regulations, 2017 which is applicable from 01.02.2017. therefore, there is a substantial mismatch in the interest rate allowed by the Commission for amortization of Regulatory Asset and the LPSC being charges by the State Utilities from the petitioner as it again leads to a gap of approximately 5%-8% and consequently the LPSC is not cost neutral for the Petitioners but in fact financially detrimental. The same is also contrary to Clause 8.2.2 (e) of the Tariff Policy, 2006 which provides that if Regulatory Asset is proposed, then the State Commission has to ensure that the return on equity should not become unreasonably low in any year so that the capability of the licensee to borrow is not adversely affected.
- (vi) The present petition has been necessitated since, the MYT Regulations framed by the Commission from time to time is causing financial prejudice to the petitioner and the petitioner's borrowing capabilities has been constrained by the Commission itself by repeated creation of Regulatory Assets due to which the Petitioner has not been able to pay the dues of State Utilities and on the other hand, the State Utilities have been permitted recovery of LPSC from the Petitioner that for at a higher rate. This violates the doctrine of reasonableness, proportionality and the maxim, "actus curiae neminemgravabit" i.e, an act of Court shall prejudice no one.

3. The respondents IPGCL, PPCL and DTL have filed their replies wherein they have stated that:

- (i) The petition filed is misconceived and seeks merely a relaxation of the Statutory Regulations framed by this Commission but an amendment to the said regulations. The petition also seeks to relate unrelated issues, namely the tariff and regulatory gap aspects of BRPL vis-à-vis the provisions of the Tariff Regulations on LPSC between the petitioner and the Respondents;
- (ii) The contract between the parties itself provides for the application of the Statutory Regulations framed by this Commission in so far as the issue of LPSC is concerned. The issue of LPSC is purely contractual subject to the Statutory Regulations as against the aspect of regulatory gap and its funding which is a pure tariff issue and to be decided on a periodic basis;
- (iii) The Respondent No. 1, IPGCL and Respondent No. 2, PPCL have submitted that in terms of the PPA and the provisions of the Regulation 137 of the DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017 is charging LPSC @ 18% per annum effective from 01.02.2017. As stated in the petition itself, prior to the MYT Regulations, 2017, the LPSC was charged since October 2010 as per Regulation 7.24 of the MYT Regulations 2007 & Regulation 7.25 of the MYT Regulations 2011 and the very fact that the petitioner has never raised a dispute either under the MYT Regulation, 2007 or the MYT Regulations, 2011 shows that the issue of LPSC has always been governed by the PPA read with the Statutory Regulations as against the aspect of regulatory gap and its funding;
- (iv) Similarly, the Respondent No. 3, DTL had entered into a Bulk Power Transmission Agreement dated 09.10.2009 with the petitioner. As per the BPTA, in the event there is a delay in the payment of bills of transmission charges beyond a period of one month from the date of presentation of the bill, the transmission licensee may levy a late payment surcharge at the ratio of 1.25% per month on the unpaid amount from the due date up to the actual date of payment;

- (v) The petitioner is citing two issues in the petition, one being regulatory assets being created on account of non-cost effective tariff of the petitioner allowed by the Commission and the second issue with regard to the rate of carrying cost allowed by the Commission. It is submitted that none of these aspects concern the Respondents and are matters between the Petitioner and the Commission;
- (vi) The petitioner itself has filed civil appeal being WP (c) no. 104 of 2014 on the aspect of creation of regulatory assets by the Commission and the matter is pending judgment. In the circumstances, the petitioner cannot once again raise the very same issue before the Commission;
- (vii) The other aspect relates to carrying cost and not the LPSC as has been stated by the petitioner itself in the petition. The LPSC is levied by the Generation and Transmission companies for late payment of bills by the Distribution Companies. However, carrying cost allowed in the tariff proceedings either to Generation, Transmission of Distribution Companies is for recovery amounts later than are due;
- (viii) Further, there can be no question of retrospective relaxation of Regulation 7.24 of the Tariff Regulations, 2007 and Regulation 7.25 of the MYT Regulations, 2011. These Tariff periods are already over and neither the 2007 nor the 2011 Regulations are applicable today. The Tariff Orders passed under the 2007 and 2011 Regulations are already over and petitioner cannot be permitted to reopen the issues under the garb of relaxation so sought to be done in the present petition.
- (ix) With regard to Clause 137 of the MYT Regulations, 2017, if the relaxation as being sought for by the petitioner is allowed, it would render the provisions of Regulations 151, 154 & 155 of the very same Regulations meaningless and nugatory. Such an interpretation is impermissible and certainly not be permitted under the power to relax. Further, the Hon'ble Appellate Tribunal has now settled the principle that the power of relaxation can be exercised only in case the same is in public interest and not otherwise (Ref: Indraprastha Power Generation Company Limited Vs. DERC &Ors. Judgment dated 12.12.2013 in Appeal No. 168 of 2012 and Haryana Power

Generation Corporation Limited Vs. Haryana Electricity Regulatory Commission, Judgment dated 18.09.2015 in Appeal No. 196 of 2014 and 326 of 2013).

4. The petitioners in their rejoinders and at the time of the hearing have submitted that:

- (i) The grievance of the petitioner arises on account of the creation of Regulatory Asset by this Commission year after year and its accumulation which has resulted in a situation that the petitioner has been unable to make timely payments towards the dues of the Central, State Generating and Transmission Utilities, and as such are beyond the control of the petitioner. Moreover, the rate of LPSC levied by the State Utilities versus the rate of Carrying Cost allowed by this Commission on the Regulatory Asset has further exacerbated the difficulties of the Petitioner. In view of the same, the petitioner has approached this Commission to relax the provisions of LPSC as contained in the applicable MYT Regulations and the Tariff Regulations, 2011.
- (ii) It is the case of the petitioner that the LPSC levied by the Central/State utilities on the petitioner vis-a-vis Carrying cost allowed by this Commission on the Regulatory Asset are intrinsically linked to each other. Noteworthy is the fact that, the Regulatory Asset is created on account of the year on year, non-cost reflective tariff determined by this Commission;
- (iii) The Regulatory Asset primarily comprises of the unrecovered power purchase cost billed by Central and State Utilities, ROCE and other legitimate costs including cost of funding of loans availed by the petitioner towards funding of Regulatory Asset. Since, the tariff was not cost reflective, it consequently led to creation of a gap between the costs incurred by the petitioner towards power purchase and the power purchase costs allowed by this Commission in Tariff;
- (iv) It is further submitted that since FY 2007-08 the ARR determined by this Commission has not even been sufficient to meet the actual Power Purchase Cost of the petitioner DISCOMs which has led to creation of a huge Revenue Gap;

- (v) Consequently, the State Utilities are imposing a LPSC on the petitioner which is in the range of 15%-18% in accordance with the Regulations framed by this Commission. On the contrary this Commission has been allowing carrying cost in the range of 11%-12%, which is substantially lower than the LPSC being imposed on the petitioner. As such there is no difference to the extent of 4%-5%, in the rate of LPSC being recovered from the petitioner as against the carrying cost allowed to be recovered by the petitioner from its consumers.
- (vi) In view of the above inconsistency in the approach, the petitioner has invoked power to relax and removal of difficulty (as provided under Section 86 (1) (a) and (b) of the Electricity Act, 2003 read with (i) Regulation 13.3 and 13.4 of the MYT Regulations, 2007; (ii) Regulation 12.3 and 12.4 of the MYT Regulations, 2011; and (iii) Regulation 171 and 172 of the Tariff Regulations, 2017) to address this peculiar situation for all the aforesaid financial years.
- (vii) The counsel for the petitioners submitted that the Tariff Regulations 2007 and Tariff Regulations 2011 are applicable for any claims made under the relevant control period i.e from FY 2007-12 and FY 2013-17, respectively. Therefore, any claims made under these Regulations would be governed by the provisions of the aforesaid Regulations. It was submitted that tariff is a continuous process and it cannot be said that this Commission does not have regulatory power to make necessary relaxation where required. In this regard, reliance is placed on the Hon'ble Supreme Court's judgment in **PTC India Vs. CERC [(2010) 4 Supreme court Cases 603]** wherein the apex court has stated:

"26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made

appealable vide Section 111. These provisions, namely Section 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination."

- (viii) Similarly, the Hon'ble Appellate Tribunal for Electricity vide **judgment dated 04.09.2012 in Appeal No. 94 of 2012 in the matter of BRPL Vs. DERC** stated that the term 'Regulate' has got a wider scope and implication not merely confined to determination of tariff. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff.
- (ix) Further, regarding the question on retrospective relaxation of Regulations, the Counsel for the petitioners submitted that in **Kanoria Chemicals & Industries Ltd. &Anr. Vs. State of U.P &Ors. (1992) 2 SCC 124**, a question was raised with regard to the competence of the Electricity Board to determine tariff with retrospective effect. The Supreme Court was of the view that retrospective effect to the revision of tariff was clearly envisaged in law. Further, the Hon'ble APTEL in **Appeal no. 179 of 2012 in the matter of Kerala High Tension and Extra High Tension Industrial Electricity Consumer's Association Vs. Kerala State Electricity Commission & Anr. Vide judgment dated 31.05.2013 and in Appeal No. 111 of 2013 in the matter of Snam Alloys Pvt. Ltd., Puducherry &Ors. Vs. JERC &Anr. Vide judgment dated 22.08.2014** has stated that "Section 62, which provides for determination of tariff by the Commission, does not suggest that the tariff cannot be determined with retrospective effect. In the instant case, the whole exercise was undertaken by the PSERC to determine tariff and the annual revenue requirement of the PSERB for the period April, 1, 2005 to March 31, 2006, therefore, logically tariff should be applicable from April 1, 2005. According to sub-section (6) of Section 64 of the Act, 2003, a tariff order unless amended or revoked continues to be in force for such period as may be specified in the tariff order. Thus the commission is vested with the power to specify the period for which the tariff order will remain in force. The Commission deriving its power from Section 64(6) has specified that the order shall come

into force from April 1, 2005. No fault can be found with such a retrospective specification of the Commission."

- (x) The Counsel for the petitioners also submitted that the relief sought by the BSES Discoms in the petition is in consumer interest as a distribution utility, BSES Discoms are part of the value chain as such the generating and transmission utilities and is supplying reliable 24x7 supply to the consumers on the NCT of Delhi at rates determined by this Commission. As such if there are defaults on part of the Discoms to pay the dues of Gencos and Transco the same would affect borrowing capacity of the Discoms. The same would affect the ratings of BSES Discoms for loans for capex and new projects, which would be availed at high rates which would have a cascading effect on the tariff ultimately paid by the consumers. It is in this context that the entire system needs to be tariff neutral so that the Discoms can supply electricity at the most economically viable rates to consumers of the NCT of Delhi. Therefore, the Commission may grant the relaxation claimed in this petition keeping in view the largest interest of consumers.
5. On the basis of the submissions of the parties following four issues have to be decided:
- (i) Whether Late Payment Surcharge (LPSC) and carrying cost are meant for the same purpose and can be taken as alternative to each other;
 - (ii) Whether Late Payment Surcharge (LPSC) and Rebate are part of Tariff;
 - (iii) Whether the prayer for revision of LPSC which tantamount to amendment in the extant Regulations can be granted through this Review petition;
 - (iv) Whether such amendments can be made effective retrospectively, especially when the impugned Regulations have lapsed by flux of time.

Re: Whether Late Payment Surcharge (LPSC) and carrying cost are meant for the same purpose.

6. The Petitioners have submitted that due to non-cost reflecting tariff, there is a huge gap of revenue (Regulatory Asset) and because of this Regulatory Asset the DISCOMs are unable to make timely payments to the Central/State utilities. On the issue of creation of Regulatory Asset there had been discussion in various forums of Law. Creation of Regulatory Asset in a regulatory regime is every possibility and cannot be treated as a strange or unique proposition. It must be understood that it is duty incumbent upon the Commission to safeguard the interest of consumers vis-a- vis the utilities. In certain situations, it may not always be possible that cost reflective tariff is allowed to the DISCOMs, especially when allowing the cost reflective tariff may result in tariff shock to the consumers, the tariff is moderated resulting in a revenue gap. For recovery of Revenue Gap, measures are taken in subsequent tariff orders and the same has been done in the present case also. It was in the year 2011, when to avoid tariff shock to consumers, a non-cost reflective tariff was allowed. However, for the last few years cost reflective tariff is allowed along with carrying cost to meet the expenses towards managing the funds against the Regulatory Asset; besides 8% surcharge is also allowed so as to recover the Regulatory Asset. The aforesaid arrangement has resulted in reduction of Regulatory Assets in the past 2 or 3 years. Therefore, the contention of the Petitioners that the cost reflective tariff has not been made available to them resulting in failure to meet even the power purchase cost is without substance and merit.
7. On the issue of parity or equivalence or linkage between LPSC and Carrying Cost, it is to be noted that the Carrying Cost is allowed to the DISCOMs to meet the cost or expenses for arranging for funding the Regulatory Asset. In other words, that to make good the short fall by taking loans etc. to carry out the functions of DISCOM, the Carrying Cost is allowed. Once the carrying cost is allowed to arrange the fund, it is understood that DISCOMs are having required fund to run their business either through loan or equity, so as to make timely payment of bills and dues. In case the DISCOMs make prompt payment of their bills, some rebate is available to them and on late payment a surcharge (LPSC) is levied. It is presumed and understood that the DISCOMs by arranging the

required fund would have made timely the payment and have availed the required rebate so as to ease the burden on consumers.

8. It is already discussed that there is no linkage between LPSC, which is levied for late payment and the carrying cost which is allowed to meet the expenses towards managing fund against the Regulatory Assets so as to run the business of the utilities. It is wrong to say that there is inconsistency in the approach as the rate of LPSC is not equal to the rate of carrying cost.
9. On the other hand, the LPSC is the mechanism in the form of a deterrent against default of payments. It is, in a way, but not exactly, a penalty for not making payments in time and each defaulter whether it is a DISCOM/Consumer or Generator has to pay late payment surcharge. LPSC in strict sense is not amortisation of the loss caused due to delayed payment but to ensure timely payment of bills/dues viz. carrying cost and LPSC. This is why it is kept on slightly higher side.
10. From the above discussion it is evident that two things are designed for different purposes and as such no direct relations or link can be made between them, therefore it is not prudent to equate Carrying Cost with LPSC or vice versa.

Re: Whether Late Payment Surcharge (LPSC) and Rebate are part of Tariff.

11. To demonstrate that LPSC and rebate are a part of tariff, the Counsel for the Petitioner has referred to the judgement of Hon'ble APTEL in Appeal No. 94 of 2012 dated 04.09.2012 in the matter of BRPL vs. DERC. The contention of the petitioner is based on wrong interpretation or understanding of the judgment. Hon'ble APTEL in the aforesaid appeal has held that:

*“31. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. **This will also have an impact on terms and conditions for rebate and late payment surcharge.** Similarly, billing and payment of capacity charge will depend on the availability of*

the power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.

*32. Accordingly, the billing, payment consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement, etc., are nothing **but terms and conditions of supply.** "*

12. The APTEL has not considered LPSC or rebate as part of Tariff but has held that the tariff will also have an impact on terms and conditions of rebate and LPSC. It was further held by the Hon'ble APTEL that rebate or LPSC etc. are the terms and conditions of supply. Therefore, considering it as a part of tariff is not correct and accordingly the rate of LPSC which is provided in the Regulations cannot be modified through this petition as if treating it as a condition of the tariff.

Re: Whether the prayer for revision of LPSC which tantamount to amendment in the extant Regulations can be granted through this Review petition.

13. Now on the question whether any change in rate of LPSC can be done through this review petition, it is to be kept in mind that the rate of LPSC are provided in extant Regulations namely MYT Regulations. Any change in the rate of LPSC will tantamount to amending the Regulations and has to be carried out by observing the due procedure and not through a Review Petition like the present petition.
14. Further, no force has been found in the contention of the counsel for the petitioner that the provisions related to LPSC may be modified by invoking the Removal of Difficulty and Relaxation clause as given in the extant Regulations. Before invoking these clauses, one must understand the purpose of these provisions. It is settled law that provisions of Regulations etc. can be supplemented but not supplanted through Clarification or Removal of Difficulty Order etc. In the instant case it is payed to alter the rate of LPSC, which is not supplemental to the provisions of Regulations. Secondly, there is no case to demonstrate that there is a difficulty across the DISCOMs in implementing the provisions of LPSC so as to invoke the provision of removal of difficulty clause. Further, the petitioners are seeking

amendment in the provisions of Regulations which have expired by the flux of time and are no longer in operation. The provisions which have already been implemented by some of the DISCOMs under the lapsed Regulations cannot be amended at this stage as it would amount to discrimination.

15. The power to relax as contemplated under Regulation 172 of DERC (Determination of Tariff) Regulations, 2017 can be exercised in certain unavoidable conditions only. The conditions enumerated in the Regulation 172 in respect of relaxation are very clear and distinct. This power can be exercised only in public interest and for the reasons to be recorded in writing. The moot question is whether equating LPSC with the carrying cost will serve the public interest or otherwise. The Counsel for the Petitioner has not been able to demonstrate the aforesaid issue and to satisfy the Commission that it will be in the public interest for genuine and germane reasons to exercise the power. The claim of the Petitioner therefore in absence of the conditions enumerated in Regulation 172 cannot be granted and neither the said relief would be contemplated under law

Re: Whether such amendments can be made effective retrospectively, especially when the impugned Regulations have lapsed by flux of time.

16. On the issue of retrospective operation of the amendment of Regulation, the Petitioners have relied upon the judgements of Hon'ble APTEL in Appeal No. 111/2013 dated 22.08.2014 and in Appeal No. 179/2012 dated 31.05.2013. However, on careful reading of the judgment it is evident that Hon'ble APTEL has opined on retrospective operation of the Tariff and not the Regulations. In appeal No.111/2013, Hon'ble APTEL has held that;

“Section 62, which provides for determination of tariff by the Commission, does not suggest that the tariff cannot be determined with retrospective effect. In the instant case, the whole exercise was undertaken by the PSERC to determine tariff and the annual revenue requirement of the PSERB for the period April, 1, 2005 to March 31, 2006, therefore, logically tariff should be applicable from April 1, 2005.

According to sub-section (6) of Section 64 of the Act of 2003, a tariff order unless amended or revoked continues to be in force for such period as may be specified in the tariff order. Thus the Commission is vested with the power to specify the period for which the tariff order will remain in force. The Commission deriving its power from Section 64(6) has specified that the order shall come into force from April 1, 2005. No fault can be found with such a retrospective specification of the Commission.

84. The learned counsel for the industrial consumers relied on the decision of the Supreme Court in *Sri Vijay Lakshmi Rice Mills vs. State of Andhra Pradesh*, AIR 1976 SC 1471, wherein it was held that a notification takes effect from the date it is issued and not from a prior date unless otherwise provided by the statute, expressly or by appropriate language from which its retrospective operation could be inferred. This decision is of no avail to the industrial consumers, in view of the provisions of Section 64 (6) of the Act of 2003, which empowers the Commission to specify the period for which the tariff order will remain in force. In other words, the Commission is empowered to specify the date on which the tariff order will commence and the date on which it will expire."

17. Further in Appeal No. 179 of 2012 in the matter of Kerala High Tension and Extra High Tension Industrial Electricity Consumer's Association vs. Kerala State Electricity Regulatory Commission and Kerala State Electricity Board.

"Learned counsel for the Appellant has referred to the full bench judgment of the Tribunal dated 11.1.2011 in Appeal nos. 111 of 2010 and batch in the matter of Tamil Nadu Spinning Mills Association vs. Tamil Nadu Electricity Board & Others in support of his argument that the State Commission is not empowered to issue tariff order retrospectively. In that case the State Commission amended the Supply Code Regulations retrospectively to allow the Electricity Board to raise certain charges retrospectively. It was seen that when the State Commission passed the order for recovery of these charges, the Supply Code Regulations had not been amended and these were amended retrospectively subsequent to passing of the order for recovery of the charges. The Tribunal held that in the absence of a statute providing for power for delegated legislation to operate retrospectively, the Regulations can only have prospective application. This judgment will not be applicable to the present case where the amendment of the regulation retrospectively is not involved. In the present case, the ERC and ARR proceedings for FY 2012-13 had been initiated in December, 2011. The tariff petition was also filed before the commencement of the FY 2012-13 and the stakeholders were put to notice. The Appellants also furnished their objections and suggestions in the ARR and ERC proceeding and tariff proceeding for FY 2012-13 separately and all along they were aware that tariff were going to be revised for the FY 2012-13. It is not the case of the Appellants that they were unaware that the tariff was going to be revised for FY 2012- 13 and the order has been passed applying the tariff retrospectively without their having any knowledge about the revision of tariff for FY 2012-13. Thus, the above judgment referred to by the Appellant will not be of any help to him."

18. From the above it is abundantly evident that Hon'ble APTEL has discussed about retrospective operation of tariff. Whereas, in the instant case it is not the matter of revision of tariff rather claiming amendment in Regulations and usually amendments in Regulations are not carried out with retrospective effect. There is no cogent reason to make the revision of LPSC retrospectively.
19. The Petitioners have been avoiding to make payment since long with the understanding that LPSC should be equivalent to the carrying cost so as to non cost reflective tariff, which has resulted in creation of Regulatory Asset. The amount of LPSC could have been minimised by making sincere efforts on the part of the Petitioners and if they have not made the payment then they run the risk of paying the late payment surcharge as contemplated under the Regulations.
20. It is also observed that the entire issue is regarding rate of LPSC and it appears that the Petitioners have defaulted in payments due to the circumstances, as stated by them, were beyond their control; and for the rate of LPSC, the pending bills have not been reconciled between the parties. If the petitioners are interested to make payment or dues under negotiations, this Commission may not have any objection to a bilateral settlement, which should be as per the provisions of the Electricity Act, 2003. Let the aforesaid exercise be undertaken within two months.
21. In view of the above foregoing discussions, it would not be legally sustainable to relax provisions of extant Regulations so as to permit the petitioner to pay Late Payment Surcharge (LPSC) equivalent to rate of carrying cost or to increase the rate of carrying cost allowed by the Commission equivalent to the LPSC being levied by the State Utilities. Therefore, the prayers of the Petitioners cannot be granted and accordingly the petitions are dismissed.

Sd/-
(Justice S S Chauhan)
Chairperson