

Bihar Electricity Regulatory Commission

Vidyut Bhawan-II, Bailey Road, Patna - 800 021

**Review Petition No. 01/2010, Review Petition No. 02/2010, Review
Petition No. 01/2011, Review Petition No. 02/2011, Review Petition No.
03/2011, Review Petition No. 04/2011**

In

Petition No. FPPCA-01/10 & FPPCA-02/10

**Coram: S.M. Sahay
Member & Chairperson**

Date of Hearing : 09.02.2011

Date of Order : 18.02.2011

In the matter of :

**Review of the orders of the Commission dated 30.03.2010 and 19.05.2010
in Case No. FPPCA-01/10 & FPPCA-02/10 pertaining to Fuel and Power
Purchase Cost Adjustment Charges for the period from 01.10.2008 to
31.03.2009 and 01.04.2009 to 30.09.2009 respectively.**

AND

In the matter of Review Petitions filed by :

1. M/s Bihar Industries Association (BIA)
2. M/s Kalyanpur Cements Limited (KCL)
3. M/s Shiva Poly Tubes Pvt. Ltd.,
4. M/s Patwari Udyog,
5. M/s Patliputra Gases Limited,
6. M/s Balmukund Concast Limited,

..... Petitioners

The following were present :

1. Shri Arjun Lal, Advocate for BIA & KCL
2. Shri Sanjay Bhartiya, Patliputra Gases Ltd.
3. Shri C.L. Prakash, CE (Com), BSEB
4. Shri V.K. Sinha, Chief Advisor, BSEB
5. Shri R.C. Singh, EEE (Tariff), BSEB
6. Shri J.K. Dubey, AEE (Tariff), BSEB
7. Shri Rakesh, EEE / Interstate, BSEB
8. Shri Ajay Goenka, BIA

9. Shri Suraj Samdarshi, Advocate, Patliputra Gases Ltd.
10. Shri Ramesh Chandra Gupta, Shiva Polytubes (P) Ltd.
11. Shri Raju Giri, Advocate, Balmukund Concast Ltd.
12. Shri S.D. Sanjay, Advocate, Shiv Polytubes
13. Shri S.K. Patwari, Patwari Udyog
14. Shri Shrinandan Prasad Singh, Advocate

ORDER

These are six petitions filed against the impugned order dated 30.03.2010 and 19.05.2010 seeking review of the order passed by Bihar Electricity Regulatory Commission (hereinafter referred to as 'Commission') for levy of Fuel and Power Purchase Cost Adjustment (hereinafter referred to as 'FPPCA'). An appeal (172 of 2010) on similar ground has also been filed by Bihar Steel Manufacturers Association for revocation of the same order dated 30.03.2010 and 19.05.2010 before the Appellate Tribunal for Electricity (APTEL) New Delhi constituted under Section 110 of the Electricity Act, 2003. The appeal has already been admitted.

Bihar Industries Association CWJC No. 14795/2010 along with four more CWJCs have been filed by different stakeholders. Thus the same matter is subjudice before two august judicial bodies.

The Hon'ble High Court Patna in its order dated 17.01.2011 passed in CWJC No. 14527 of 2010 and four other CWJCs hearing analogously observed that if a statutory review has been filed, the authority concerned is bound in law to deal with and decide the same in accordance with law by a reasoned and speaking order and the Hon'ble High Court has directed the Commission to dispose of the statutory review application by an order preferably within a maximum period of four weeks. Thus, the two applications are pending before two august bodies for consideration of grievances raised in review applications of M/s Bihar Industries Association

and five others which are similar in nature. All the five applications were heard together and are being disposed of in terms of the direction of the Hon'ble Patna High Court by this common order.

Section 62(4) of Electricity Act, 2003 and Bihar Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2007 (hereinafter referred to as 'Tariff Regulation') expressly permits levy of Fuel and Power Purchase Cost Adjustment charges by a formula specified by the Commission. Supply of energy that is made to the consumers by the licensee also authorizes the licensee to recover charges from them. However, if there is upsurge in cost of generation of energy and other factors, provision has been made in the Electricity Act, 2003 to neutralize its effect on the Licensee making provision of Section 62(4) of the Electricity Act, 2003 read with Regulation 21 of the Bihar Electricity Regulation Commission (Terms and Conditions for Determination of Tariff) Regulations, 2007 which authorizes the licensee for proper cost adjustment based on FPPCA formula as specified in the Tariff order for FY 2008-09.

Pursuant to determination of Tariff by order dated 26.08.2008 and subsequent order of the Commission passed on 30.03.2010 and 19.05.2010 to recover Fuel and Power Purchase Cost Adjustment (FPPCA) charges provisionally at the rate of 69 paise per unit on the energy consumption during the period October, 2008 to March, 2009 and April 2009 to September, 2009 is subject to final adjustment on audit of Annual Accounts of the Board.

Learned Counsel of the respective applicants were heard. The main thrust of grievances of the petitioners in the review applications and raised during hearing primarily covers the following issues:

- (1) That the impugned order mentioned above were passed without any hearing/audience.

- (2) That the formula for levying of FPPCA charges should have been specified by the Commission in the Regulation instead of Tariff Order for FY 2008-09.
- (3) That the FPPCA charges should not be levied with retrospective effect.
- (4) That the data submitted by BSEB in respect of levy of FPPCA charges has not been scrutinized by the Commission.

Bihar State Electricity Board (hereinafter referred to as 'BSEB' or 'Board') has also been heard through its official Shri V.K. Sinha and others who submitted that the Board is paying power purchase cost to the Central Sector Power Generating Units which is much higher than the power purchase cost approved by the Commission in its Tariff Order dated 26.08.2008 and so Board has to pass on the increased cost to its consumers in the form of Fuel and Power Purchase Cost Adjustment (FPPCA) charges.

It was also submitted by the Board that the charging of FPPCA based on formula as specified in the Tariff Order dated 26.08.2008 of the Commission which is expressly permitted under section 62(4) of the Electricity Act, 2003 read with Regulation 21 of Bihar Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2007. They further argued that provision of realization of FPPCA was provided and its formula was also specified in the Tariff order itself and before the issue of Tariff order, public objections/suggestions were invited through leading newspapers and public hearing was also conducted by the Commission.

Regarding the levy of FPPCA charges with retrospective effect, it was submitted by BSEB that it is levied only after incurring the extra cost on generation and power purchase and so it can be charged only from retrospective effect. This has been specified under section 62(4) of Electricity

Act 2003 read with Regulation 83(b) of Bihar Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2007.

The learned counsel appearing on behalf of the Commission contended that the petitioner M/s Bihar Industries Association had challenged the Tariff order for FY 2008-09 of the Commission before APTEL in Appeal No. 128/08 which was dismissed by order dated 12.02.2009 in which the FPPCA formula as specified in the Tariff order was not challenged and as such this issue is barred by res judicata. Further it cannot be said that the FPPCA formula and its application has been made without fulfilling the mandatory provisions of public hearing. The learned counsel also stated that Board has submitted all technical and financial data including copies of bills raised in different months by NTPC on affidavit and order for levy of FPPCA was issued after examining all the records, technical and financial data by the Commission.

Having heard the parties and considering the materials placed on record, it is clear that public hearing was not required as provision for levy of FPPCA has been provided in the Tariff Schedule of the Tariff order for FY 2008-09 and under Rule 21 of the Tariff Regulation the formula has been specified by the Commission in Tariff order dated 26.08.2008 which has been determined after public hearing. The levy of FPPCA charges is only the implementation of the said order on the basis of formula specified by the Commission which is provisional subject to final adjustment on audited accounts of the Board. Further, contention of the petitioners that data submitted by BSEB in respect of levy of FPPCA charges has not been scrutinized by the Commission is not correct. The same has been thoroughly scrutinized by the Commission with due care and caution. Also the contention that FPPCA charges should not be from retrospective effect, the same cannot be with prospective effect as it is levied after incurring the extra

cost which is specified in the Act and Tariff Regulation. The same is dependent on subsequent increase/decrease of Fuel and Power Purchase Cost.

The question now arises as to whether the grounds raised and plea taken by the petitioners are any thing in addition to already placed earlier on records which are sufficient to review the impugned orders dated 30.03.2010 and 19.05.2010. The review petition is entertained and allowed only when some new and important fact or evidence or apparent error or mistake on the face of the record or order are found. The petitioners have not brought anything new before the Commission and whatever arguments and facts explained by learned Counsels appearing on behalf of the petitioners do not appear to have any such substance or force in their submission.

From the above facts and circumstances, the thrust of the grievance of the petitioners in the review application do not make out a case of review/ modification of the order dated 30.03.2010 and 19.05.2010. The same cannot be modified unless there is apparent error on the record or there is material irregularity in the counter affidavit, the licensee has made on the issue.

In face of facts and circumstances, I find no merit in the case and the petitions are accordingly dismissed.

Sd/-
(S.M. Sahay)
Member & Chairperson