

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri Bhanu Bhushan, Member**
2. **Shri R.Krishnamoorthy, Member**

**Review Petition No.127/2002
in Petition No.30/2002**

In the matter of

Review of order dated 4.10.2002 in Petition No. 30/2002 – Approval of tariff of Rihand Super Thermal Power Station for the period from 1.4.1997 to 31.3.2001.

And in the matter of

National Thermal Power Corporation Ltd.**Petitioner**

Vs

1. Uttar Pradesh Power Corporation Ltd., Lucknow
2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd, Jaipur
3. Delhi Power Supply Company Ltd., New Delhi
4. Haryana Vidyut Prasaran Nigam Ltd, Panchkula
5. Punjab State Electricity Board, Patiala
6. Himachal Pradesh State Electricity Board, Shimla
7. Power Development Department, J&K, Srinagar
8. Power Deptt. Chandigarh, Chandigarh
9. Uttaranchal Power Corporation Ltd., Dehradun **Respondents**

The following were present:

1. Shri S.N.Goel, NTPC
2. Shri A. Basu Roy, NTPC
3. Shri S. Saran, NTPC
4. Shri M. Saxena, NTPC
5. Shri Ajay Dua, NTPC
6. Shri T.P.S. Bawa, PSEB
7. Shri M.K.Tomar, RRVPNL

**ORDER
(DATE OF HEARING 18.9.2007)**

The petitioner, through this application made under section 12 of the Electricity Regulatory Commissions Act, 1998, seeks review of order determining capacity (fixed)

charges component of tariff for power sold from Rihand Super Thermal Station (hereinafter referred to as "Rihand STPS").

2. The original petition was filed by the petitioner for approval of capacity charges component of tariff for sale of power from Rihand STPS for the period from 1.4.1997 to 31.3.2001. The capacity charges payable by the respondents were determined by the Commission vide its order dated 4.10.2002, based on terms and conditions of tariff contained in Ministry of Power notification dated 2.11.1992, with following basic elements:

- (a) Return on equity,
- (b) Interest on loan,
- (c) Depreciation,
- (d) O&M expenses, and
- (e) Interest on working capital.

3. The petitioner sought clarification and/or review and/or modification of the specific observations and findings/directions of the order dated 4.10.2002 on additional capitalisation, O&M expenses and calculation of interest on working capital on the ground of errors apparent on the face of record. The petition was heard on admission on 3.1.2003. The Commission by its order dated 23.1.2003, admitted review on the grounds of alleged error in computation of O&M expenses and interest on working capital. As regards additional capitalization, for the reasons recorded in the order dated 23.1.2003, review was not admitted. The methodology adopted by the Commission while approving capacity charges in respect of the remaining two items, the grievances of the petitioner as also our decisions thereon are discussed in the succeeding paras. However, before dealing with the actual grievances of the petitioner, we consider it appropriate to record the legal position.

LEGAL POSITION

4. Under Section 12 of the Electricity Regulatory Commissions Act, 1998, the Commission was conferred the same power of review of its order, decision, direction as is vested in a civil court under the Code of Civil Procedure (for short “the Code”) Section 114 read with Order 47 of the Code are the relevant provisions dealing with review of order/degree by a civil court. According to Rule 1, Order 47 of the Code, review of order/decree is permissible on the following grounds:

- (a) Discovery of new and important matter which was not within the knowledge of the person aggrieved or could not be produced by him after exercise of due diligence,
- (b) Error apparent on the face of record, and
- (c) Any other sufficient reason

5. The settled legal position is that the power of review can be exercised on discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the person concerned or could not be produced at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of record or for any other sufficient reason. A review cannot be sought merely for fresh hearing or argument or correction of an allegedly erroneous view taken earlier. The power of review can only be exercised for correction of a patent error of law or fact, which stares in the face without any elaborate argument being needed for establishing it. As held by the Hon`ble Supreme Court, the expression “any other sufficient reason” used in Order 47, Rule 1 of the Code means a reason sufficiently analogous to those specified in the earlier part of the rule. The above legal position emerges out of various judgements of the Supreme Court, notably, Smt. Meera Bhanja Vs Smt. Nirmala Kumari Choudhary

[(1995) 1SCC 170], Ajit Kumar Rath Vs. State of Orissa and others [(1999) 9 SCC 596] and Devendra Pal Singh Vs State and another [(2003) 2 SCC 501]. The petitioner's prayer for review of order is to be considered in the light of above-noted and well-settled legal position.

O&M EXPENSES

6. While notifying tariff for the period from 1.4.1992 to 31.3.1997, vide notification dated 2.11.1992, Ministry of Power considered the actual O&M expenses for the year 1991-92, that is, one year prior to the beginning of the tariff period, as the base, which were escalated @ 10% per annum for future years for arriving at O&M expenses for the respective year. While determining tariff for the period from 1.4.1997 to 31.3.2001, same methodology was adopted by the Commission and the actual O&M expenses of Rs.7388 lakh, which included water and power charges for the year 1996-97, one year prior to the start of tariff period, as per the audited balance sheet for the Rihand STPS were taken as the base and an escalation factor of 10% per annum was applied to work out O&M expenses for the years 1997-98 to 2000-2001.

7. It is stated by the petitioner that abnormal amount of water charges for the years 1997-98 and 1998-99 to the extent of Rs. 1409 lakh and Rs.1636 lakh, respectively, have been overlooked while calculating the base O&M figure . According to the petitioner, although the order states that the O&M expenses are inclusive of water charges, in fact, abnormal water and power charges have been kept out of consideration for calculation of base O&M charges. Accordingly, the petitioner seeks review of the order.

8. As noticed above, in the tariff notification dated 2.11.1992 issued by Ministry of Power, while fixing tariff for the period from 1.4.1992 to 31.3.1997, the actual expenses for the year 1991-92 were taken as the base with escalation factor of 10% per annum for arriving at O&M expenses for respective year during the tariff period. The Commission adopted the same methodology while approving tariff by order dated 4.10.2002, according to which, O&M expenses of Rs.7388 lakh which included water and power charges, for the year 1996-97 based on the station balance sheet for that year were taken as the base for determination of O&M expenses for the tariff period commencing from 1.4.1997. O&M charges payable by the respondents from 1.4.1997 to 31.3.2001 were calculated accordingly by escalating the base O&M expenses for the year 1996-97 and it is so stated in the order. Ministry of Power notification dated 2.11.1992 did not provide for computation of O&M charges based on actual expenditure for the year. In fact, the actual O&M expenses of a particular year cannot be accounted for in tariff as tariff is determined/notified in advance when actual O&M expenses are unknown.

9. The methodology adopted in case of Rihand STPS has been generally followed by the Commission in the cases involving revision of tariff including O&M expenses, for the period prior to 1.4.2001 based on Ministry of Power notifications. This position has been taken note of by the Appellate Tribunal in its judgement dated 14.7.2006 in Appeal No.94/2005 (NTPC Ltd vs CERC and others). In that case, the Commission had fixed O&M expenses in respect of Gandhar GPS for the year 2000-01 based on actual expenses for that year. The Appellate Tribunal in its judgement noted that the Commission "ought to have applied one yardstick or principle for determining O&M expenses for all generating stations" of the petitioner since "the principles of justice

and fair play require application of a uniform principle". In other words, the Appellate Tribunal upheld the methodology adopted by the Commission in cases other than Gandhar GPS, according to which to arrive at the admissible O&M expenses for a year, the actual O&M expenses for the preceding year were to be escalated @ 10%. Under these circumstances, we are unable to accept the petitioner's contention to allow O&M expenses for the years 1997-98 to 2000-01 based on actuals.

10. In view of this, we are satisfied that the petitioner has not been able to make out a case for review of order on this account.

INTEREST ON WORKING CAPITAL

11. For the purpose of Working capital for the computation of interest, the following elements were considered by the Commission in the tariff order dated 4.10.2002:

- (a) Fuel cost, coal stock and oil stock,
- (b) O&M expenses for one month,
- (c) Spares, and
- (d) Receivables (for two months) comprising of capacity (fixed) and variable charges.

12. For the purpose of calculation of fuel cost and variable charges, it is essential that information relating to price and calorific value of fuel is made available by the petitioner in the performa prescribed for the purpose. The petitioner, however, while submitting proposal for determination of capacity charges, did not furnish the necessary information relating to price and calorific value of coal/oil by stating "not applicable". In view of this, the Commission, in its order dated 4.10.2002 while approving capacity charges adopted the same values for calculation of working capital

as were followed by the Central Government in Ministry of Power in its notification dated 2.11.1992, for the tariff period ending 31.3.1997.

13. The petitioner in the present application has explained that the data on price and calorific value was not furnished as it was felt that even though there were variations on month-to-month basis, the average calorific value over a period remained more or less static. It is further submitted that the petitioner had not claimed the variable charges separately as these charges had already been billed. However, according to the petitioner, adoption of the value of calorific value or the variable charges, etc. as considered by the Central Government for the tariff period ending 31.3.1997, has put it into loss since it has been denied the benefit of escalation in fuel prices.

14. On the issue of computation of interest on working capital also, the review petition is not maintainable. According to the petitioner, it had not furnished information relating to Calorific Value of coal and oil in the original petition as, in its opinion, it was not relevant for determining the capacity charge for which it had filed the petition. The petitioner ought to have realised that it was in no position to decide whether information sought for in the formats prescribed by the Commission was relevant or not. In case, it chose to take such a decision the consequences could not be different. It is in due consideration of this that the Commission in its order recorded the following:

“The petitioner has not furnished the details of Calorific Value (CV) of Coal/Oil, by stating “Not Applicable”. In view of this, the Commission could not assess the working capital requirement on account of these items. At the same time, the Commission is conscious of the fact that these items are normally required in a power station and took a conscious view to provide for these items, on the

basis of what was provided for these items in the calculation of tariff in the previous tariff setting by Govt. of India. Accordingly, the working capital requirement on account of above items has been provided for in this tariff period. The Commission was constrained to take this view because the necessary details were not furnished by the petitioner despite the opportunities which were available to them”.

15. In view of the above decision taken by the Commission, it cannot be stated that there is any error apparent on the face of record necessitating review of the order on account of calculation of interest on working capital either.

CONCLUDING REMARKS

16. Before closing the matter, it is necessary to take note of certain other facts. The application for review was listed for hearing on 3.3.2003. During the hearing the representative of the RRVPL, Respondent No. 2 informed that a Civil Miscellaneous Appeal No. 133/2002 was filed by that respondent before the Rajasthan High Court, Jaipur Bench, against the said order dated 4.10.2002 and that High Court had on 10.1.2003 stayed operation of the said order. He further submitted that another miscellaneous application was also filed before the High Court for modification of the order. In view of these developments the application was kept pending till disposal of the appeal before the Rajasthan High Court.

17. However, on perusal of the order dated 10.1.2003, it is noticed that the stay of order dated 4.10.2002 was only up to 12.2.2003. We have no record about further extension of stay of order beyond that date. The contesting parties have not brought any other order of the High Court, extending the stay beyond 12.2.2003. It is also noticed that in the appeal filed before the High Court there is no dispute regarding computation of O & M expenses and interest on working capital by considering the

fuel cost, etc. In view these facts we have decided to consider and dispose of the application for review.

18. In the light of above discussion, the application for review (No.127/2002) is not maintainable and is liable to be dismissed. It is ordered accordingly. No order as to costs.

Sd/-
(R.KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi dated the 30th November 2007