

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

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

**Review Petition No.25/2007
in Petition No.33/2003**

In the matter of

Review of Commission's order dated 14.12.2006 in Petition No.33/2003 in connection with fixation of tariff for Assam Gas Based Power Project of NEEPCO for the period 1.4.2003 to 31.3.2004.

And in the matter of

Assam State Electricity Board

....**Petitioner**

Vs

1. North Eastern Electric Power Corporation Ltd, Shillong
2. Meghalaya State Electricity Board, Shillong
3. Department of Power, Govt of Tripura, Agartala
4. Power & Electricity Department, Govt of Mizoram, Aizawl
5. Electricity Department, Govt of Manipur, Imphal
6. Department of Power, Govt of Arunachal Pradesh, Itanagar
7. Department of Power, Govt of Nagaland, Kohima
8. North-Eastern Regional Electricity Board, Shillong
9. North –Eastern Regional Load Despatch Centre, Shillong**Respondents**

The following were present:

1. Shri P.K. Hazarika, GM (Comml.), ASEB
2. Shri K. Goswami, Sr. Manager, ASEB
3. Shri D. Dey, NEEPCO

**ORDER
(DATE OF HEARING: 12.6.2007)**

We have heard Shri P.K. Hazarika, GM (Comml.), with Shri K. Goswami on admission.

2. The application has been made for review of order dated 14.12.2006 in Petition No.33/2003, whereby the Commission had approved tariff in respect of Assam Gas Based Power Station (hereinafter referred to as "the generating station") owned by North Eastern Electric Power Corporation Ltd. (hereinafter referred to as "the respondent") for the period 1.4.2003 to 31.3.2004.

3. The tariff for the generating station was initially approved by order dated 22.8.2005. However, the respondent made an application for review of the said order dated 22.8.2005, being Review Petition No.115/2005, on the following grounds, namely:

- (a) Calculation of capital cost and deduction of net revenue earned from sale of infirm power from the capital cost,
- (b) Computation of interest on loan,
- (c) Calculation of interest on working capital, and
- (d) Calculation of O&M expenses

4. The Commission by its order dated 2.8.2006 had allowed review on two grounds namely, consideration of the capital cost, and computation of O&M expenses. Consequently, the tariff was re-determined by order dated 14.12.2006, presently sought to be reviewed by the petitioner.

GROUND FOR PRESENT REVIEW

Capital Cost

5. In the order dated 22.8.2005, the Commission had arrived at a total capital cost of Rs.145163 lakh after adjusting revenue of Rs.287 lakh earned by the respondent by

sale of infirm power. It was, however, submitted by the respondent that an amount of Rs.173 lakh on account of sale of infirm power was already adjusted against the capital cost claimed as on the date of commercial operation. The respondent had submitted that further reduction needed to be restricted to Rs.114 lakh only. The Commission, based on available evidence accepted the plea of the respondent and by its said order dated 14.12.2006, allowed adjustment of Rs.114 lakh on account of additional revenue earned by sale of infirm power and thereby arrived at capital cost of Rs.145336 lakh which was considered for the purpose of determination of tariff for the year 2003-04.

6. The petitioner has submitted that the Commission has accepted the respondent's claim that it had adjusted Rs.173 lakh from capital cost as net income from sale of infirm power based on its submission and on the basis of Auditor's certificate, which in fact did not confirm that the said income was actually adjusted in the capital cost by the respondent. The petitioner has further submitted that if the net income from sale of infirm power was Rs.173 lakh as per audited books of accounts of 1998-99 then the earlier tariff petition filed before the Commission for the period 1998-2001, should have been based on the adjusted capital cost. But from the statements submitted in earlier petition as well the figures do not substantiate the claim of the respondent that the income from sale of infirm power was adjusted.

7. The petitioner has affirmed that the income of Rs.173 lakh on account of sale of infirm power was in fact not adjusted in the project cost claimed by the respondent. The petitioner has also submitted that Form-5 of Petition No. 33/2003 has also not substantiated the claim of the respondent, since it is not clear against which item the respondent adjusted the sale proceeds of infirm power. Therefore, there is reason to

believe that the claim of adjustment of infirm power was not based on facts and had not been put into action in tariff petition practically.

O&M Expenses

8. Further, in the main petition, the respondent had claimed O&M expenses in accordance with clause 2.7 (d) (ii) of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 (hereinafter referred to as “the 2001 regulations”). Originally, the Commission in its order dated 22.8.2005 had considered O&M expenses of Rs.2520 lakh, based on the details of actual expenses considered in the order dated 16.1.2004 in Petition No.67/2003 (suo motu), relating to laying down of norms for the period 2004-09. It was then claimed by the respondent that the norms decided by the Commission for the period 2004-09 could not be extended backward for computation of O&M expenses for the year 2003-04. In the proceedings leading to issue of order dated 14.12.2006, the present petitioner had objected to the claim of the respondent for O&M expenses under clause 2.7 (d) (ii) of the 2001 regulations on the ground that there was no provision contained in these regulations for computation of O&M expenses applicable to the generating station and that the additional liability worked out based on clause 2.7 (d) (ii) of the 2001 regulations would put extra burden on the consumers in the State of Assam and other States in the region. The matter was considered by the Commission in its order dated 14.12.2006 and the Commission allowed O&M expenses in accordance with clause 2.7 (d) (ii) of the 2001 regulations.

9. The petitioner has now submitted that the Commission, while passing the order dated 22.8.2005 observed at para 47 that

“In this particular case there was a time and cost overrun which have generally been found beyond the control of the petitioner. Working on the above principle O&M expenses for the year 2003-04 work out as 4559 lakh. But the mere cost overrun does not lead to increase in O&M expenses of the generating station. The Commission, vide its order dated 16.1.2004. in petition No.67/2003 (suo motu), while deciding the normative O&M expenses for small gas/combined cycle power stations for the period 2004-09, worked out a normalised figure of Rs. 8.66 lakh/MW for the year 2003-04 for Assam GBPS based on the actual expenses of the generating station up to 2000-01. It is considered justified to allow O&M expenses for the generating station in 2003-04 as 8.66 lakh/MW. This translates in O&M expenses of Rs. 2520 lakh for the year 2003-04.”

10. The petitioner has contended that the Commission took such a view in the interest of fair and equitable justice for both sides.

11. The petitioner has further submitted that clause 2.7 (d) (ii) of the 2001 regulations does not become applicable to the generating stations owned by the respondent since it clearly states that it was applicable to the generating stations of NTPC and NLC. The petitioner has contended that it was the responsibility of the respondent to approach the Commission subsequent to the fixation of operational norms for its gas turbines so that necessary amendment to clause 2.7 (d) (ii) was also made. It is urged that there was lapse on the part of the respondent at that time which cannot be cured at this belated stage. The Commission, therefore, should not give a pecuniary benefit to a party who did not approach at right time to the Commission for proper dispensation of the regulations on the subject matter. According to the petitioner, it is admitted by the Commission in order dated 14.12.2006 that clause 2.7 (d) (ii) could not be amended due to oversight.

12. The petitioner, therefore, submits that the order dated 14.12.2006 passed in the Petition No.33/2003 is neither based on facts nor in the true spirit of the 2001

regulations. Therefore, the said order is erroneous and needs immediate cancellation/review/modification as deemed fit and just in the interest of justice by the Commission. Accordingly, the petitioner has sought review of the order dated 14.12.2006 on the grounds summarized hereunder:

- (i) The claim of respondent for adjustment of Rs. 173 lakh, being the income from sale of infirm power, based on the Auditor's certificate is not convincing and is not based on facts.
- (ii) The approval of O&M expenses in accordance with clause 2.7 (d) (ii) of the 2001 regulations is not fair and just since the said clause is meant only for the thermal power stations owned by NTPC and NLC and therefore, the norm cannot be extended to the generating station, which is owned by the respondent.
- (iii) The said order dated 14.12.2006 has deprived the beneficiaries of the benefit available under the Commission's order dated 22.8.2005, thereby affecting adversely the beneficiary States and their ultimate consumers financially.

ANALYSIS OF THE GROUNDS URGED

Capital Cost

13. Actual capital expenditure of the generating station was determined by the Commission for the first time by order dated 22.8.2005 based on the reconciliation of accounts furnished by the respondent. The actual capital expenditure in the respective year from the year of the date of commercial operation was as follows-

(Rs.in lakh)

Year	Opening Gross Block	Add. Cap. Expenditure	Closing Gross Block
1999-00 (Year of commercial operation)	77696	67047	144743
2000-01	144743	(-)1172	143571
2001-02	143571	5	144071
2002-03	144071	1379	145450

14. The actual capital expenditure as on 31.3.2003 was Rs.145450 lakh. While determining the tariff of the generating station for the year 2003-04, the Commission arrived at a capital cost of Rs.145163 lakh in the following manner:

	Amount (Rs in lakh)
Capital cost as on 31.3.2003 reconciled from books of accounts	145450
Less net revenue from sale of infirm power up to the date of commercial operation	287
Capital cost after deducting net revenue from infirm power	145163
Capital cost as on 1.4.2003	145163

15. Thus, the Commission had considered the actual capital cost as on 31.3.2003, after adjusting revenue of Rs.287 lakh earned by the petitioner by sale of infirm power. The respondent had submitted after the award of the tariff that it had already deducted from the capital cost an amount of Rs.173 lakh, on account of sale of infirm power, as on the date of commercial operation and any further reduction should have been restricted to Rs.114 lakh only. That the respondent had already adjusted Rs.173 lakh was not brought to the notice of the Commission in the original proceedings, perhaps by oversight. Accordingly, the Commission allowed review and in the order dated 14.12.2006 considered the capital cost on this count after adjustment of Rs.173 lakh, since it would not be justified to deny the respondent return on the investment made.

The revised capital cost arrived at after adjustment on account of additional revenue earned by sale of infirm power from the capital expenditure as on 31.3.2003, and considered in the order dated 14.12.2006 is as under :

(Rs in lakh)	
Capital expenditure as on 31.3.2003 as per books of accounts	145450
Less net revenue from sale of infirm power up to date of commercial operation	114
Capital expenditure less net revenue from sale of infirm power	145336
Capital cost as on 1.4.2003	145336

16. The capital cost considered in the order dated 14.12.2006 has been arrived at through the process of elaborate reasoning. Therefore, the said order dated 14.12.2006 is not amenable to review since it cannot be said to be on any of the grounds stated in Section 114 read with order XLVII of the Code of Civil Procedure. Therefore, review on this count is not maintainable.

17. We, however, consider the petitioner's contention that the Auditor's certificate did not confirm that the said income was already adjusted in the capital cost by the respondent before the order dated 22.8.2005. The Auditor's certificate generally makes only a verification statement of values appearing under different heads in the books of accounts and does not make any comment regarding adjustment ,additions ,deletions etc. Further, the opening gross block as on 1.4.1999 (date of commercial operation of the generating station) was as per the reconciliation of accounts furnished by the respondent and at the time of capitalization of the project, the respondent had calculated the net commissioning income for infirm power as Rs.173 lakh. This amount was deducted from the capitalized amount as on the date of commercial operation as per the accounting policy of the respondent. So, the petitioner's contention that the income of Rs.173 lakh on sale of infirm power was not adjusted in the project cost does not appear to be correct.

O&M Expenses

18. The 2001 regulations were notified by the Commission in exercise of powers conferred under Section 28 of the Electricity Regulatory Commissions Act, 1998. Clause 1.3 of the 2001 regulations provided that these regulations would apply where the capital cost based tariff was determined by the Commission. Clause 1.12, as originally notified, laid down that the norms prescribed under these regulations would not apply to the generating stations under the control of the respondent.

19. Under the 2001 regulations, the capacity charges comprised of interest on loan, depreciation, return on equity, operations and maintenance expenses and interest on working capital. Clause 2.7(d) (ii), which related to computation of O&M expenses for the new generating stations laid down as under:

“... In case of new thermal stations of NTPC and NLC which have not been in existence for a period of five years, the Base O&M expenses shall be fixed at 2.5% of the actual capital cost as approved by the Authority or an appropriate Independent agency, as the case may be, in the year of commissioning and shall be escalated at the rate of 10% per annum for subsequent years to arrive at O&M expenses for the base year 1999-2000 level. Thereafter the Base O&M expenses shall be further escalated at the rate of 6% per annum to arrive at permissible O&M expenses for the relevant year.”

20. The 2001 regulations were amended by the notification dated 1.5.2003 whereby clause 1.12 of the 2001 regulations was omitted. In addition to certain other amendments, the gross heat rate norm for the generating station (Assam Gas Based Power Station) was prescribed as under:

- (a) Open Cycle - 3225 kcal/kWh
- (b) Combined Cycle - 2250 kcal/kWh

21. There is no dispute that the notification dated 1.5.2003 was preceded by the Commission's order dated 25.9.2002 in Petition No.56/2002 (suo motu) wherein it was *inter alia* directed as under:

“As such, on above considerations, we direct that O&M cost norms as prescribed in notification dated 26.3.2001 shall also be applicable for thermal stations with small gas turbines of 50 MW and below.”

22. From the above chronology of events it is to be noted that the 2001 regulations, though initially not applicable to the generating stations owned by the respondent, were subsequently made applicable to the generating stations owned by the respondent, with certain modifications and amendments. While omitting clause 1.12 of the 2001 regulations on 1.5.2003, clause 2.7 (d) (ii) thereof should also have been amended so as to include the respondent in its ambit. However, it would not be reasonable to say that the unamended clause must be taken to mean that it can be applied only to NTPC and NLC, and that it cannot be extended to the respondent even after deletion of clause 1.12. In case the contention of the petitioner is accepted by such interpretation of clause 2.7 (d) (ii) it may transpire that O&M expenses for generating stations of the respondent cannot be levied as a part of the capacity charges, since the respondent does not find mention therein. However, such an interpretation will lead to absurdity since O&M expenses are necessarily a part of the tariff. By reading the 2001 regulations in their entirety including clause 1.3 thereof, the inescapable conclusion is that all components of the tariff, including O&M expenses for the generating stations owned by the respondent were to be determined under these regulations. This was also clear from the order dated 25.9.2002, the relevant part of which is extracted in the preceding para that O&M cost norms as prescribed in the notification dated 26.3.2001 (the 2001 regulations) would be applicable to thermal stations with small gas turbines of

50 MW and below, the category in which the generating station falls. Thus, as early as in 2002, the Commission had made its intentions very clear that the 2001 regulations would govern O&M expenses for the generating stations owned by the respondent. Therefore, to us there does not appear to be any illegality or irregularity in computing O&M expenses for the generating stations in accordance with clause 2.7 (d) (ii) of the 2001 regulations. This aspect has been duly deliberated upon in the order dated 14.12.2006, sought to be reviewed. Accordingly review of O&M expenses in the light of facts and circumstances stated above is not warranted, on merits as also on the touchstone of criteria laid down under the Code of Civil Procedure.

23. The petitioner in the application for review has referred to certain observations, stated to have been made by the Commission at the hearing of the original petition. It is made clear that the observations, if any, made at the hearing are meant for proper understanding and eliciting clarifications of the issues from the parties. In our view, these observations cannot be pressed into service by any of the parties as the base for seeking review of the order.

CONCLUSION

24. With the above observations, the review petition stands dismissed at admission stage.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi dated the 15th July 2007