

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

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

**Review Petition No. 86/2007
in
Petition No. 120/2005**

In the matter of

Review of order dated 23.11.2006 in Petition No. 120/2005 determining tariff for Kahalgaon STPS for the period from 1.4.2004 to 31.3.2009.

And in the matter of

M.P. Power Trading Company Limited, Jabalpur

.....**Petitioner**

Vs

1. National Thermal Power Corporation Ltd. and Others
2. West Bengal State Electricity Board, Kolkata
3. Bihar State Electricity Board, Patna
4. Jharkhand State Electricity Board, Ranchi
5. Grid Corporation of Orissa Ltd, Bhubaneswar
6. Damodar Valley Corporation, Kolkata
7. Power Department, Govt of Sikkim, Gangtok
8. Tamil Nadu Electricity Board, Chennai
9. Kerala State Electricity Board, Thiruvananthapuram
10. Electricity Department, Union Territory of Pondicherry, Pondicherry
11. Uttar Pradesh Power Corporation Ltd, Lucknow
12. Power Development Department, Govt of J & K, Srinagar
13. Delhi Transco Ltd, New Delhi
14. Power Department, Union Territory of Chandigarh, Chandigarh
15. Maharashtra State Electricity Distribution Company Ltd, Mumbai
16. Gujarat Urja Vikas Nigam Ltd, Baroda
17. Electricity Department, Administration of Daman & Diu, Daman
18. Electricity Deptt, Administration of Dadra & Nagar Haveli, Silvassa ...**Respondents**

The Following were present:

1. Shri Pradeep Misra, Advocate, MPPTCL
2. Shri. D.D. Khandewal, MPPTCL
3. Shri Dilip Singh, MPPTCL
4. Shri M. G. Ramachandran, Advocate, NTPC
5. Shri Anand K. Ganesan, Advocate, NTPC

6. Shri S.N.Goel, NTPC
7. Shri D. Kar NTPC
8. Shri V. Kumar, NTPC
9. Ms. Alka Saigal, NTPC
10. Shri G.K.Dua, NTPC
11. Shri Mithun Balaji, BSES
12. Shri. Vivek Soni, BSES
13. Shri R.B.Sharma, Advocate, BSEB

ORDER
(DATE OF HEARING : 13.12.2007)

MP Power Trading Company Limited (hereinafter referred to as “the review applicant”) has made this application seeking review of the Commission’s order dated 23.11.2006 (incorrectly mentioned as 20.11.2006) in Petition No. 120/2005 determining tariff for Kahalgaon STPS (hereinafter referred to as “the generating station”) for the period 1.4.2004 to 31.3.2009, limited to the question of apportionment of FERV capitalized for the period 2001-2004, between debt and equity.

2. Briefly, the facts are that National Thermal Power Corporation Ltd., the first respondent (hereinafter referred to as “NTPC”) made an application for approval of tariff for the generating station for the period from 1.4.2004 to 31.3.2009. The tariff was approved by the order dated 23.11.2006 (hereinafter referred to as “the tariff order”), presently sought to be reviewed. While approving tariff, the Commission allowed additional capitalization of Rs.1207.27 lakh on account of FERV against foreign currency loan for the period ending 31.3.2004 and apportioned the amount between debt and equity in the ratio of 50:50.

3. According to the review applicant, equity cannot be affected by FERV arising out of loan and FERV is to be adjusted against loan only. In support of its claim, the

review applicant has relied upon the judgment of the Appellate Tribunal dated 4.10.2006 in Appeal Nos.135-140/2005 (Tamil Nadu Electricity Board Vs Central Electricity Regulatory Commission and others), also followed in the judgment dated 22.12.2006 in Appeal No.161/2005 (M.P. State Electricity Board Vs Power Grid Corporation of India and others). According to the review applicant, the Appellate Tribunal in these judgments while interpreting clause 1.13 (a) of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001, (hereinafter referred to as "the 2001 regulations") has held that FERV adjustment arising out of foreign currency loan has to be done against debt and not against equity, since in the case of the generating station, no equity was invested in foreign currency. It is stated that inadvertently the review applicant lost sight of the Appellate Tribunal's order dated 4.10.2006 and could not produce it when order dated 20.11.2006 was passed by the Commission. The review applicant has made an application for condonation of delay in making the application for review also.

4. The application for review was admitted by order dated 25.9.2007 "subject to just and fair exceptions".

5. NTPC in its reply has questioned the maintainability of the application on the ground of limitation. It has been further stated that the decision of the Appellate Tribunal in a case relating to Power Grid Corporation cannot be applied to NTPC and, therefore, that decision cannot be a ground for review. NTPC has pointed out that the procedure was extended to Power Grid Corporation and others for the first time during the tariff period 2001-04. On the other hand in the case of NTPC, the procedure has been in vogue for a long time. It has been further submitted that the capitalization of

FERV allowed relates to the period prior to 1.4.2004 arrived at in terms of the 2001 regulations, and, therefore, cannot be revisited through review of the tariff order, applicable for the period 1.4.2004 to 31.3.2009.

6. It has been submitted that treatment of FERV by NTPC has been in accordance with the notifications issued from time to time by the Government of India which consistently allowed apportionment of FERV into debt and equity and the procedure has been consciously followed by the Commission in the case of NTPC. On the question of apportionment, NTPC has stated that payment of increased loan amount on account of FERV is being met through the internal resources of NTPC, which may validly justify servicing of FERV through equity only. However, it is being apportioned into debt and equity to the advantage of the beneficiaries of the generating station, since, according to NTPC, the beneficiaries have been charged ROE @ 12% against the interest cost of borrowing ranging between 13.5% and 18%. Having already acquired to the procedure in vogue since long, the review applicant, and for that matter any other beneficiary, cannot be permitted to raise the issue at this belated stage. In the view of NTPC, billing of beneficiaries by NTPC in accordance with the 2001 regulations is a fait accompli.

7. MSDCL, TNEB, BSEB and WBSEDC, some of the respondents, have filed replies in support of the case of the review applicant.

8. We have gone through the pleadings and heard the learned counsel for the parties. At this stage, it is not necessary for us to go into merits of the claims of the

parties. In the first instance we examine maintainability of the application on grounds of limitation.

Bar of Limitation

9. Under clause (f) of sub-section (1) of Section 94 of the Electricity Act, 2003, the Commission has been given the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 as regards review of its decisions, directions and orders. Neither the Electricity Act nor the Code of Civil Procedure lays the period of limitation for making an application for review. However, the Commission in Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, specified under the Electricity Regulatory Commissions Act, 1998 and presently in force, has specified period of limitation of 60 days of making of the decision, direction or order sought to be reviewed. Regulation 116 of these regulations, however, empowers the Commission to extend or abridge, for sufficient reason, the time prescribed under Regulation 103 whether or not such time has already expired. Thus, Regulation 116 permits the Commission to extend by an order, the period of limitation in individual cases for “sufficient reason”, at any stage. The relevant provisions of the Conduct of Business Regulations are extracted below:

“Review of the decisions, directions and orders”

“103. (1) The Commission may at any time, on its own motion, or on the application of any of the persons or parties concerned, within 60 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit.

(2) An application for such review shall be filed in the same manner as a Petition under Chapter II of these Regulations.

.....

Extension or abridgement of time prescribed

116. Subject to the provisions of the Act, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission.”

10. It would be seen that limitation for making an application for review in 60 days of making of the order. However, this period can be extended or abridged by the Commission for “sufficient reason”. The expression “sufficient reason” needs be interpreted in the same manner as the expression “sufficient cause” under Section 5 of the Limitation Act, 1963.

11. Construing the provisions of Regulation 103 extracted above, strictly, and without excluding the time spent on communication of the tariff order, the application for review could be filed by 22.1.2007, so as to be within the prescribed period of limitation. It was, however, filed on 26.6.2007, with a delay of about 5 months. In the application for condonation of delay, it has been stated that after receipt of the tariff order the review applicant obtained legal opinion as to the course of action to be adopted, since the Commission had not taken into account the Appellate Tribunal's judgment dated 4.10.2006. It is further stated that after getting legal opinion it took some time to get approval of its Board to file the application for review. The delay in making the application is claimed to be bonafide, unintentional, and not on account of negligence on its part. As already noted, NTPC in its reply has opposed condonation of delay on the ground that the application does not disclose any valid reason for doing so.

12. Undoubtedly, the Commission under Regulation 116 *ibid* is authorized to condone delay in appropriate cases, on the applicant showing “sufficient reason”. We are also aware that a liberal approach needs to be adopted while considering such applications, to advance the cause of justice. However, in the present case, the applicant has not been able to show the sufficient reason for seeking condonation of delay. The application for condonation of delay is too sketchy since it only states that after receipt of the Commission’s order, “it became necessary to obtain legal opinion as to the course of action to be adopted” and “after getting the legal opinion, it took some time to get approval of the executive Board” to file the application for review. It does not disclose when certified copy of the tariff order was received, what action was taken on receipt of copy of the tariff order, when the matter was referred for legal opinion, when legal opinion was received and when the matter was placed before the Executive Board to file the application for review. All these are material facts to enable the Commission to take a view on the question of condonation of delay, which are unavailable to us in the present case. It is clear that the review applicant has not been able to discharge burden of showing “sufficient reason” while seeking condonation of delay or extension of time for making the application for review.

13. The Full Bench of the Appellate Tribunal in its judgment dated 12.1.2007 in IA No.191/2006 in AFR No.1374 of 2006 (Punjab State Electricity Board Vs PGCIL & Another) had declined to condone delay under similar circumstances. The Appellate Tribunal held that the party seeking condonation of delay in filing the appeal must show that the delay resulted from a cause which was beyond his control and a cause for delay, which could have been avoided cannot be treated as a sufficient cause. While rejecting the plea for condonation of delay the Appellate Tribunal held as follows:

"We do not find any sufficient cause to condone the delay of 92 days in filing the appeal. In the application it is stated that the impugned order was passed on June 2, 2006 and a copy thereof was received from the Central Electricity Regulatory Commission on June 23, 2006. It is further averred that after the receipt of the certified copy of the order, the matter was considered at various levels and it was decided to file an appeal only in the month of October 2006.

These are the only grounds pleaded for condonation of delay in filing the appeal. The party seeking condonation of delay in filing the appeal must show that the delay resulted from a cause which was beyond his control. A cause for delay, which could have been avoided, cannot be treated as a sufficient cause. As per the averments made in the application, the delay was occasioned on account of administrative reasons. No cogent ground for condonation of delay has been advanced by the appellant."

14. In view of the foregoing and in the absence of sufficient material on record, we are not satisfied that there exists sufficient reason to condone delay in making application for review. Accordingly, the application for condonation of delay is dismissed and as a consequence the application for review also stands dismissed as barred by limitation.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi dated 21st May, 2008