

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

- 1. Dr. Pramod Deo, Chairperson**
- 2. Shri R.Krishnamoorthy, Member**
- 3. Shri S.Jayaraman, Member**
- 4. Shri V. S. Verma, Member**

Review Petition No. 138/2008

In

Petition No 01/2003

In the matter of

Petition for review under regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business Regulations 1999) against CERC order dated 13.6.2005 in Petition No. 01/2003 and under Regulation 114 of the Central Electricity Regulatory Commission (Conduct of Business Regulations 1999) for condonation of delay in respect of Talcher Super Thermal Power Station, Stage –II of NTPC for the period from doco to 31.3.2004.

And in the matter of

Tamil Nadu Electricity Board, Chennai

...**Petitioner**

Vs.

National Thermal Power Corporation Ltd., New Delhi

...**Respondent**

The following were present

1. Shri P. R. Kovilan, Advocate TNEB
2. Shri R. Kaishnaswami, TNEB

**ORDER
(DATE OF HEARING: 21.5.2008)**

The application has been made for review of order dated 13.6.2005 in Petition No. 1/2003.

2. Heard Shri P.R. Kovilan, learned counsel for the petitioner on maintainability of the application for review.

Facts

3. Petition No. 1/2003 was filed by Respondent No.1, NTPC Ltd. (hereafter 'NTPC') for approval of tariff in respect of Talcher Super Thermal Power Station, Stage II (hereafter 'the generating station') from the date of its commercial operation, that is, 1.8.2003 to 31.3.2004, based on the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001. The tariff was determined by order dated 13.6.2005.

4. Subsequently, NTPC filed another petition, being Petition No. 179/2004, for approval of tariff for the generating station for the period 1.4.2004 to 31.3.2009. In the proceedings in Petition No. 179/2004, NTPC, under the directions of the Commission, submitted details of outstanding liabilities as on 1.4.2004, 1.11.2004, 1.4.2005 and 1.8.2005 included in the capital cost claimed for determination of tariff. While approving tariff for the generating station for the period 1.4.2004 to 31.3.2009, the Commission excluded the outstanding liabilities from the capital cost. The tariff was approved by order dated 31.1.2008, certified copy of which was sent to the petitioner under letter dated 4.2.2008 and was received by the petitioner on 6.2.2008 (page 75 of the application).

5. The petitioner made an application for review of the order dated 31.1.2008 in Petition No. 179/2004. The application was taken on the file of the Commission as Review Petition No. 47/2008. In that application for review, the petitioner, inter alia,

sought directions to NTPC to refund the excess tariff recovered for the period from 1.8.2003 to 31.3.2004 awarded and recovered, allegedly based on inflated capital cost as it included undischarged liabilities. The Commission in its order dated 29.5.2008, rejected the petitioner's claim on the ground that the tariff approved by order dated 13.6.2005 in Petition No. 1/2003 could not be re-opened through the review petition filed in Petition No. 179/2004. The relevant part of the Commission's order dated 29.5.2008 is extracted hereunder:

“21. The application for review has been made against the order dated 31.1.2008 in Petition No. 179/2004. The applicant in the present proceedings cannot be permitted to reopen the tariff for the period ending 31.3.2004 decided by order dated 13.6.2005 in Petition No. 1/2003, while seeking review of the order dated 31.1.2008 in Petition No. 179/2004. The said order dated 13.6.2005 cannot be reopened by invoking the process of review of a subsequent order.”

6. The order dated 29.5.2008 was communicated to the petitioner under letter dated 5.6.2008 and was received in the petitioner's office on 7.6.2008, (page 143). Thereafter, the petitioner filed the present application for review of order dated 13.6.2005, which was received in the Secretariat of the Commission on 16.10.2008.

Grounds for Review

7. According to the petitioner, it noticed that NTPC was filing the petitions for approval of tariff based on annual audited accounts, and the capital cost claimed for the purpose included the outstanding liabilities. This, according to the petitioner, was pointed out by it in its counter-reply dated 8.11.2004 in a petition filed by NTPC for approval of the revised fixed charges for the period 2001-04 in respect of Kayamkulam CCGT. It has been stated that the tariff approved by order dated 13.6.2005 (presently sought to be reviewed) for the period 1.8.2003 to 31.3.2004 in

respect of the generating station was based on inflated capital cost as it included the outstanding liabilities. This position was set right while approving the tariff for the period 1.4.2004 to 31.3.2009, it has been claimed by the petitioner. Accordingly the petitioner has filed the present application for review.

Delay and laches

8. The principal and first issue that falls for our consideration is whether the application has been filed within the period of limitation and can be considered at this stage.

9. The order dated 13.6.2005 was conveyed to the petitioner vide letter dated 14.6.2005 which was received by the petitioner on or around 21.6.2005, (page 25). The application for review has been made on 16.10.2008. In accordance with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, the limitation period for filing an application for review is 60 days after making the order, etc. It is obvious that the present application has been filed with a delay of 3 ¼ years. In terms of Regulation 116 of the Conduct of Business Regulations, the Commission is empowered to extend or abridge the time for 'sufficient reason'. The provision is analogous to Section 5 of the Limitation Act, 1963 so far as it concerns extension of time. The petitioner has prayed for condonation of delay in making the application by virtue of Regulation 116.

10.. It has been explained by the petitioner that in its order dated 31.1.2008 in Petition No. 179/2004, the Commission accepted the petitioner's plea that the

outstanding liabilities could not be included in the capital cost considered for approving the fixed (capacity) charges. Therefore, the petitioner raised the issue of adjustment of excess recovery in Review Petition No. 47/2008, filed for review of the order dated 31.1.2008. However, the petitioner's plea for such adjustment was turned down in the order dated 29.5.2008. Therefore, the petitioner has contended that the cause of action for filing of the application for review arose only on receipt of the order dated 29.5.2008. The petitioner has submitted that the order dated 29.5.2008 was received by it on 7.6.2008. The petitioner seeks condonation of delay from 8.6.2008 to 14.10.2008, in making the application sent to the Commission under its letter dated 14.10.2008, considering "the huge financial implications and the irreparable loss" caused to the beneficiaries of the generating station (the excess recovery is said to be of Rs. 25.91 crore, as claimed by the petitioner) during the period from 1.8.2003 to 31.3.2004.

Decision

11. We have very carefully considered the matter. We are unable to agree with the petitioner that the cause of action for filing of the application arose on 7.6.2008, after receipt of the order dated 29.5.2008 in Review Petition No. 47/2008, when the Commission turned down the petitioner's plea for refund of the excess tariff, allegedly based on the inflated capital cost. The cause of action, if any, arose to the petitioner on 13.6.2005 when the Commission decided tariff for the period 1.8.2003 to 31.3.2004 in Petition No. 01/2003, which was duly received by the petitioner on 20.6.2005. The petitioner is claimed to have objected to inclusion of outstanding

liabilities in the capital cost, much before issue of the said order dated 13.6.2005, in the counter-reply dated 8.11.2004 filed in the petition for approval of tariff for Kayamkulum CCGT since the petitioner felt that NTPC was claiming tariff based on inflated capital cost.. Thus, according to the petitioner, the matter was already within the knowledge of the petitioner. However, the petitioner did not take any steps to seek review of the said order dated 13.6.2005 on the ground of inclusion of undischarged liabilities in the capital cost of the generating station. Therefore, cause of action arose on receipt of the order dated 13.6.2005.

12. The Commission by its order dated 31.1.2008 disposed of Petition No. 179/2004 filed by NTPC for approval of tariff for the generating station for the period 1.4.2004 to 31.3.2009. In that order, the Commission had rejected NTPC's claim for inclusion of outstanding liabilities in the capital cost. Even at that stage, the petitioner did not make any efforts to seek review of the said order dated 13.6.2005, but in the application made for review of order dated 1.3.2007 sought refund of the excess tariff allegedly recovered by NTPC, without any further details. As such a relief could not be granted, the petitioner's plea was rejected by the order dated 29.5.2008.

13. The petitioner claims that cause of action for filing the application for review arose on 7.6.2008 when it received the Commission's order dated 29.5.2008. Yet the application has not been filed within sixty days thereof. Accordingly, the petitioner has sought condonation of delay from 8.6.2008 to 14.10.2008, (though the application was in fact received in the Secretariat of the Commission on 19.10.2008)

but without explaining the reasons for delay. Even if, for sake of argument only, it is presumed that the cause of action arose after rejection of the petitioner's claim by order dated 29.5.2008, the onus lies on the petitioner to explain the delay in filing the application for review thereafter. However, in the application there is not even a whisper to justify the delay. It is established law that 'sufficient cause' or 'sufficient reason' for seeking condonation of delay is the 'cause' or 'reason' which is beyond the control of the person seeking condonation. In the present case, as no reasons are given in support of the plea for condonation, the question of condoning the delay or even considering the prayer cannot arise.

Conclusion

14. For the reasons already recorded, we are of the opinion that there is unreasonable and unexplained delay in making the application for review. As such, the application is dismissed as barred by limitation. We make it clear that since the petitioner has not been able to cross the threshold, we have not considered the maintainability of the application for review on the touchstone of Rule 1, Order XLVIII of the Code of Civil Procedure, which governs the procedure for review of orders, directions of the Commission.

Sd/-
[V. S. VERMA]
MEMBER

Sd/-
[S. JAYARAMAN]
MEMBER

Sd/-
[R. KRISHNAMOORTHY]
MEMBER

Sd/-
[DR. PRAMOD DEO]
CHAIRPERSON

New Delhi, dated 25th June 2009