

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Record of Proceedings

Petition No.86/2007 with I.A.No. 26/2007

Subject : Review of order dated 23.11.2006 in Petition No.120/2005- Determining the tariff for Kahalgaon STPS for the period from 1.4.2004 to 31.3.2009 in terms of the order of the Appellate Tribunal dated 16.12.2008 in Appeal No.128/2008 along with I.A.No. 26/2007.

Coram: Dr. Pramod Deo, Chairperson
Shri R.Krishnamoorthy, Member
Shri S.Jayaraman, Member
Shri V.S.Verma, Member

Date of Hearing: **30.7.2009**

Petitioner: M. P. Power Trading Company Limited (MPPTCL), Jabalpur

Respondents : NTPC, WBSEB, BSEB, JSEB, GRIDCO, DVC, PD, Govt of Sikkim, TNEB, KSEB, Electricity Deptt., UT Pondicherry, UPPCL, PDD, Govt. of J&K, DTL, UT Chandigarh, MSEDCL, GUVNL, Admn of Daman and Diu and Admn.of Dadra and Nagar Haveli

Parties present: Shri Pradip Mishra, Advocate, MPPTCL
Shri M.G.Ramachandran, Advocate, NTPC
Shri S.K.Samui, NTPC
Shri G.K.Dua, NTPC
Shri V.K.Padhan, NTPC
Shri D.Kar, NTPC
Shri R.B Sharma, Advocate, BSEB

This application has been made for review of order dated 23.11.2006 in Petition No.120/2005 pertaining to the determination of tariff for Kahalgaon STPS for the period from 1.4.2004 to 31.3.2009. The interlocutory application No. 26/2007 is for condonation of delay, in terms of the order of the Appellate Tribunal dated 16.12.2008 in Appeal No.128/2008.

2. Learned counsel for petitioner submitted that in terms of the order of the Appellate Tribunal dated 16.12.2008, it placed relevant material before the Commission through additional affidavit. The learned counsel also submitted that there had been a

delay of about 7 months in filing of the review petition and submitted the reasons for delay as shown in the additional affidavit. The learned counsel further submitted that in terms of Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, the Commission had inherent powers to modify/rectify the errors in its orders, and in terms of Regulation 103, the Commission had powers to review its own orders. As regards the contentions of the first respondent NTPC, that the judgment of the Appellate Tribunal in Appeal No.135 to 140/205 dated 4.10.2006, relating to Power Grid was not applicable in respect of the generating stations of NTPC and that the matter had attained finality and could not be re-opened on the ground that in some other matter filed at the behest of some other similarly situated persons a different view had been taken by a superior court, the learned counsel submitted that once the Appellate Tribunal had interpreted the relevant regulations, the Commission could *suo motu* take steps to revise its orders based on the said interpretation, as was done in other matters wherein the Commission had revised the tariff for all the generating stations of the petitioner after working out the normative repayment of loan, based on the decision of the Appellate Tribunal in Appeal No.94/2005. The learned counsel reiterated that the decision of the Appellate Tribunal dated 4.10.2006 in Power Grid's case was applicable to the generating stations of the petitioner also, and prayed that the benefits should be passed on to the consumers. On merits, the learned counsel submitted that there would not be any change in the debt-equity ratio in respect of the generating stations of the first respondent, since the capital cost, after accounting for the exchange rate variation, would be divided in the ratio of 50:50. According to the learned counsel the loan amounts got reduced based on the repayments made during the previous year, and hence apportionment of FERV to loan in terms of the judgment of the Appellate Tribunal would not change the equity in any manner. The learned counsel also pointed out that the decision of the Appellate Tribunal dated 5.5.2009 in Appeal No.25/2009 (APTRANSCO-v-CERC) was not applicable as the facts there were different. To substantiate, the learned counsel pointed out that while the order of the Commission leading to Appeal No.25/2009 was prior to the judgment of the Appellate Tribunal dated 4.10.2006 (in Power Grid's case), the order of the Commission in the instant case was passed after the judgment dated 4.10.2006 and hence, the Commission should have implemented the judgment dated 4.10.2006 for the generating stations of the first respondent, NTPC. The learned counsel also submitted that the reply of respondent No.4, TNEB indicating that the Commission had capitalized FERV amounting to Rs 1207 lakh, as against the actual FERV of Rs 539 lakh, for the period 2001-04 for purpose of tariff supported its stand and prayed that the matter be looked into by the Commission. For the reasons above, the learned counsel prayed that the delay be condoned and petition be allowed by the Commission

3. The learned counsel for respondent, BSEB, endorsed the submissions of the counsel for MPPTCL and submitted that the first respondent NTPC had attempted to distinguish the treatment of FERV in the case Power Grid to that of its generating stations, although the regulations of the Commission were applicable to both the parties. The learned counsel also submitted that matters relating to the period prior to 2001 were irrelevant, as the instant case related to the tariff periods 2001-04 and 2004-

09 and the regulations of the Commission during the said tariff periods were applicable for both Power Grid and NTPC. The learned counsel further submitted that the Commission should have considered the judgment of the Appellate Tribunal dated 4.10.2006 as the order in the instant case was passed subsequently. The learned counsel pointed out Chapter-XV of the Appellate Tribunal Rules, 2007, wherein a register containing entries of the appeals made to Hon'ble Supreme Court against the orders of the Appellate Tribunal were maintained and submitted that if similar system would have been in place in the Commission, the judgment of the Appellate Tribunal dated 4.10.2006 could have been *suo motu* taken cognizance of and implemented by the Commission. The learned counsel further submitted that the Commission was to safeguard the interest of the consumers not only by framing regulations but also by interpretation of regulations and determining tariff and hence based on the interpretation of the Appellate Tribunal, FERV was to be apportioned to loan. Summing up, the learned counsel submitted that the delay should be condoned and petition be admitted as the Commission was expected to maintain balance between the consumers and the utilities by treating the entire FERV component as loan.

4. The learned counsel for respondent, NTPC took preliminary objection to the application and submitted that prior to the coming into force of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 (the 2001 regulations) the treatment of FERV in case of the generating stations of NTPC was different from that of Power Grid as it was based on the notifications issued by the Govt. of India which provided for capitalization of FERV on annual basis. To substantiate, the learned counsel pointed out to Annexure-A of the affidavit dated 27.5.2009 and differentiated the methodology applied to the treatment of FERV to its generating stations and Power grid. The learned counsel also pointed to page-22 para-5 and page-4 of the reply dated 26.11.2007 and submitted that the Commission had consciously applied the methodology for treatment of FERV to the generating stations without any deviation. Referring to para 15 of the judgment of the Appellate Tribunal dated 4.10.2006, the learned counsel pointed out that the Appellate Tribunal had also recognized that the equity component remained constant upto the technical life of the asset in case of Power Grid. The learned counsel further submitted that since payment of increased loan amount on account of FERV was made by NTPC out of internal resources, the same needs to be serviced towards equity, but the Commission had apportioned it on a normative debt-equity ration of 50:50 as per para 6.3.1 of the order dated 21.12.2000. The learned counsel also submitted that the beneficiaries including the petitioner had in the past allowed capitalization of FERV at a time when the Return on Equity allowed to NTPC was 12% and the interest on loan ranged between 13.5% to 18%. The learned counsel also submitted that the application of the methodology for capitalization of FERV was different from that of Power Grid and the practice which was consistently followed could not be changed. As regards delay in filing the petition, the learned counsel submitted that though it was the discretion of the Commission to condone the delay, the grounds urged by the petitioner did not warrant any condonation of delay. To substantiate, the learned counsel submitted that the judgment dated 4.10.2006 was a result of an appeal by TNEB against the Commission's order relating

to Power Grid and not NTPC. The learned counsel submitted that the petitioner should have filed the review on time without waiting for a decision in another case and hence there was no justifiable reason to condone the delay. The learned counsel also added that the grounds raised by the petitioner were devoid of merits and prayed that the review petition be dismissed.

5. In response, the learned counsel for the petitioner submitted that once regulations had come into force, the practices which were followed, as contended by NTPC, should come to an end and the Commission should decide the issues based on relevant regulations. The learned counsel referred to page 36 para 5.0 of the reply filed by NTPC and submitted that the relevant provision did not indicate capitalization of FERV as claimed by NTPC. The learned counsel objected to the submission of NTPC that FERV should be apportioned to equity and submitted that consumers should not be burdened on this count and further prayed that the Commission as regulator should decide on issues which were beneficial to the consumers. The learned counsel further submitted that the issue was not in the nature of adversarial litigation and the Commission should not be strictly bound to apply the period of limitation. As regards the submission of NTPC that equity did not remain constant as in cases of Power Grid, the learned counsel submitted that it would submit documents to show otherwise.

6. The Commission directed the petitioner to submit the information as at para 5 and reserved orders on the petition.

7. Let the information be submitted by the petitioner by 24.8.2009.

Sd/-
(K.S.Dhingra)
Chief (Legal)