

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

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3. Shri S. Jayaraman, Member
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**Review Petition No. 86/2007
in
Petition No. 120/2005
with
I.A.No. 26/2007**

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**

Following were present:

1. Shri Pradip Mishra, Advocate, MPPTCL
2. Shri M.G.Ramachandran, Advocate, NTPC
3. Shri S.K.Samui, NTPC
4. Shri G.K.Dua, NTPC
5. Shri V.K.Padha, NTPC

6. Shri D.Kar, NTPC
7. Shri R.B Sharma, Advocate, BSEB

ORDER
(DATE OF HEARING: 30.7.2009)

Madhya Pradesh Power Trading Company Limited (hereinafter referred to as “the review applicant”) has made this application to seek review of the Commission’s order dated 23.11.2006 (though described as order dated 20.11.2006) in Petition No. 120/2005 wherein the tariff for Kahalgaon STPS (hereinafter referred to as “the generating station”) for the period 1.4.2004 to 31.3.2009 was approved. The prayer for review is limited to the question of apportionment of FERV capitalized between debt and equity.

2. The facts, in brief, are that the first respondent, National Thermal Power Corporation Ltd., (hereinafter referred to as “NTPC”) made an application for approval of tariff for the generating station for the period 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”), review of which is presently sought. In the tariff order, additional capitalization of Rs.1207.27 lakh on account of FERV against foreign currency loan for the period ending 31.3.2004 was approved. The amount of FERV approved was apportioned between debt and equity in the ratio of 50:50 and tariff was computed based on debt and equity so arrived.

3. The review applicant has questioned the methodology of apportionment of FERV between debt and equity. It has argued that FERV arising out of foreign currency loan cannot be added to equity, but is to be adjusted against loan only. The review applicant’s claim is based on 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), which has been followed by the Appellate Tribunal in its

subsequent judgment dated 22.12.2006 in Appeal No.161/2006 (M.P. State Electricity Board Vs Power Grid Corporation of India and others). The Appellate Tribunal in these judgments while considering the scope of clause 1.13 (a) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001, (hereinafter referred to as “the 2001 regulations”) held that FERV on account of foreign currency loan was to be adjusted against debt only. By applying the ratio of the judgments of the Appellate Tribunal, the review applicant has argued, in the case of the generating station, the entire amount of FERV should be allocated to loan as no portion of equity was invested in foreign currency.

4. The application is accompanied by an interlocutory application (IA No.26/2007) for condonation of delay in making the application for review.

5. NTPC in its reply has questioned the maintainability of the application on the ground of limitation. NTPC has stated that the decision of the Appellate Tribunal in a case relating to Power Grid could not be extended to the generating stations owned by it. According to NTPC, review of the tariff order based on the judgments of the Appellate Tribunal relied upon by the review applicant is not justified. NTPC has further pointed out that the methodology considered by the Commission was in vogue for a very long time when determination of tariff was within the jurisdiction of the Central Government. NTPC has submitted that the methodology followed in case of its generating stations was extended to the transmission system of Power Grid for the first time from 1.4.2001, applicable for the tariff period 2001-04 and therefore, NTPC has urged, no analogies could be drawn between the two. It has been further submitted on behalf of NTPC that the capitalization of FERV allowed related to the period prior to 1.4.2004 and could

not be revisited by reviewing the tariff order, applicable for the period 1.4.2004 to 31.3.2009.

6. NTPC has submitted that treatment of FERV by it had been in accordance with the notifications issued from time to time by the Central Government based on which FERV was consistently apportioned into debt and equity. NTPC has also referred to the earlier orders of the Commission, pertaining to the period prior to 1.4.2001 wherein the similar procedure was followed. NTPC has stated that loan on account of FERV was paid through its internal resources, that is, equity and for this reason allocation of entire amount of FERV to equity was the only option, but was apportioned between debt and equity in the ratio of 50:50. According to NTPC, apportionment of FERV into debt and equity previously operated to the advantage of the respondents, since they were charged ROE @ 12% when the interest rates varied between 13.5% and 18%. Therefore, the review applicant, or any of the respondents could not be permitted to raise the issue at this belated stage, NTPC has argued.

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

8. The application was filed on 25.6.2007, with some delay. 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.

9. The Commission examined the application for condonation of delay in the light of the Full Bench judgment of the Appellate Tribunal dated 12.1.2007 in IA No.191/2006 in AFR No.1374 of 2006 (Punjab State Electricity Board Vs PGCIL and another). The Commission found that the review applicant had not been able to justify the delay in making the application for review. The application for condonation of delay was found to be cryptic and did not disclose all the necessary details. Accordingly, by order dated 21.5.2008, the application for condonation of delay was dismissed. This resulted in dismissal of the application for review on grounds of limitation.

10. The review applicant filed an appeal (Appeal No. 127/2008) before the Appellate Tribunal against the said order dated 21.5.2008. By order dated 16.12.2008, the appeal was allowed. The Appellate Tribunal remitted the matter to the Commission. Pursuant to the directions of the Appellate Tribunal in the remand order, the review applicant has filed an additional affidavit dated 17.3.2009 explaining the reasons for delay in making the application for review, in detail.

11. We heard learned counsel for the parties present at the hearing.

12. Learned counsel for the review applicant urged that the reasons for delay were duly explained in the additional affidavit filed on its behalf. Learned counsel submitted that in terms of Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, (hereinafter “the Conduct of Business Regulations”), the Commission had inherent powers to modify/rectify the errors in its orders and in exercise of this inherent power, the Commission could condone the delay. Learned counsel further submitted that in terms of Regulation 103 of the Conduct of Business Regulations, the Commission had powers to review its own orders. Learned

counsel argued that after the judgment of the Appellate Tribunal in Appeal Nos.135 to 140/2005 dated 4.10.2006, the Commission, without waiting for the application for review could *suo motu* take steps to revise the tariff order, as done in other matter based on the decision of the Appellate Tribunal in Appeal No.94/2005. Learned counsel strongly refuted the contention of NTPC that the ratio of the judgment of the Appellate Tribunal in Appeal Nos.135 to 140/2005 dated 4.10.2006 relating to Power Grid was not applicable to the generating station or that the matter of fixation of tariff of the generating station had attained finality and could not be re-opened. Learned counsel submitted that once the Appellate Tribunal had interpreted the relevant regulations, the interpretation was uniformly applicable to all cases of similar nature. Learned counsel reiterated that the judgment of the Appellate Tribunal dated 4.10.2006 in Power Grid's case was applicable to the generating stations of NTPC as well, and prayed that the benefits should be passed on to the consumers by revising the tariff. Learned counsel submitted that by extending the judgment of the Appellate Tribunal to the generating station, there would not be any change in the debt-equity ratio in absolute terms, and the capital cost, after accounting for the exchange rate variation, could still be in the ratio of 50:50 as the loan amounts got reduced over a period of time. Learned counsel submitted that allocation of FERV to loan in terms of the judgment of the Appellate Tribunal would not reduce the petitioner's equity in any manner. Learned counsel also submitted that the reply of respondent No.4, TNEB indicated that the Commission had capitalized FERV amounting to Rs 1207.27 lakh, as against the actual FERV of Rs 539 lakh, for the period 2001-04 for purpose of tariff and this supported the review applicant's stand and sought the matter be looked into by the Commission. For the reasons above, learned counsel prayed that the delay to be condoned and application for review be allowed.

13. Learned counsel for respondent, BSEB, while adopting the arguments made by learned counsel for the review applicant, submitted that NTPC had attempted to distinguish the treatment of FERV between Power Grid and NTPC, although the same regulations of the Commission were applicable in both cases during 2001-04. Learned counsel also submitted that any reference to the period prior to 2001 was not relevant, as the dispute related to apportionment of FERV accruing during the tariff period 2001-04, and considered during the tariff period 2004-09. Learned counsel further submitted that the Commission should have applied the judgment of the Appellate Tribunal dated 4.10.2006 as the tariff order was made subsequently. Learned counsel further submitted that the Commission was to safeguard the interest of the consumers not only by framing regulations but also by interpretation and application of regulations and determining tariff. He argued that based on the interpretation of the Appellate Tribunal, FERV was to be allocated to loan in the interest of consumers of electricity. While summing up, learned counsel submitted that the delay should be condoned and the application for review be admitted as the Commission was expected to maintain balance between the consumers and the utilities, by treating the entire FERV component as loan.

14. Learned counsel for NTPC took preliminary objection to the maintainability of the application on the ground of delay in its filing. Learned counsel submitted that though it was in the discretion of the Commission to condone the delay, the grounds urged by the review applicant did not warrant such condonation. For this, learned counsel relied upon the decision of the Appellate Tribunal dated 5.5.2009 in Appeal No.25/2009 (APTRANSCO vs CERC). Learned counsel submitted that the review applicant should have filed the application for review on time. According to learned counsel, there was no justifiable reason to condone the delay.

15. On merits, learned counsel reiterated the submissions made in the reply of NTPC to the effect 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 had no connection with NTPC. Learned counsel submitted that prior to the coming into force of the 2001 regulations, the treatment of FERV in case of the generating stations of NTPC was different from that given to Power Grid as FERV was apportioned based on the notifications issued by the Central Government which provided for capitalization of FERV on annual basis. To substantiate his claim, learned counsel pointed to Annexure-A of the affidavit dated 27.5.2009 and sought to differentiate the methodology applied to the treatment of FERV to its generating stations and the transmission assets of Power Grid. Learned counsel also pointed to 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 the judgment of the Appellate Tribunal dated 4.10.2006, learned counsel pointed out that the Appellate Tribunal had also recognized that the equity component remained constant during the technical life of the transmission asset in case of Power Grid. Learned counsel further submitted that since payment of increased loan amount on account of FERV was made by NTPC out of its internal resources, the same had to be added to equity, but the Commission had apportioned it on normative basis in debt-equity in the ratio of 50:50. Learned counsel also submitted that the beneficiaries including the review applicant in the past did not object to apportionment of FERV between debt and equity when the Return on Equity allowed to NTPC was @ 12% and the interest rates on loan ranged between 13.5% to 18%. Learned counsel also submitted that the methodology for capitalization of FERV and apportionment consistently followed could not be changed at this stage. Learned counsel prayed that the review petition be dismissed.

16. Learned counsel for the review applicant, in his rejoinder, pointed out that the decision of the Appellate Tribunal dated 5.5.2009 in Appeal No.25/2009 (APTRANSCO vs CERC) was not applicable to the present case as the facts of two cases were different. Learned counsel further pointed out that while the impugned order in Appeal No.25/2009 was previous to the judgment of the Appellate Tribunal dated 4.10.2006 (in Power Grid's case), the tariff order sought to be reviewed was passed thereafter and hence, the Commission should have implemented the judgment dated 4.10.2006 for the generating stations of NTPC.

Issues

17. We have gone through the pleadings and the submissions made by learned counsel for the parties. At this stage, it is not necessary for us to go into merits of the claims of the parties, that is, whether or not tariff of the generating station should necessarily be revised based on the judgment of the Appellate Tribunal dated 4.10.2006. In the first instance we need to examine whether the tariff order calls for review in the light of the grounds raised in the application and answered by NTPC. For this purpose, the following issues arise for our consideration, namely -

- (a) Whether the application is barred by limitation?
- (b) Whether the case for review has been made out?
- (c) Relief.

Bar of Limitation

18. Under clause (f) of sub-section (1) of Section 94 of the Electricity Act, 2003 (hereinafter "the Act"), the Commission has been given the same powers of review as are vested in a civil court under the Code of Civil Procedure, 1908 (hereinafter "the

Code”). The Act does not lay down any period of limitation for making such application. The Commission in Regulation 103 of the Conduct of Business Regulations, as applicable at the relevant time, had provided limitation period of 60 days from the date of the order for making an application for review. Regulation 116 of these regulations, however, empowers the Commission to extend or abridge, for sufficient reason, the time prescribed whether or not such time has already expired. Thus, Regulation 116 permits the Commission to condone delay in seeking review of an order, in individual cases for “sufficient reason”. 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.

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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.”

19. Thus, though limitation for making an application for review was 60 days, this period could be extended 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.

20. From the records it is seen that the copy of the tariff order was despatched on 27.11.2006. After allowing some reasonable time for receipt of the order by the review

applicant, it could be presumed that the copy was received in its office by 30.11.2006. So as to be within the specified period of limitation of 60 days, the application for review could be filed by 31.1.2007, without attracting the bar of limitation. The application verified on 19.6.2007, was actually received in the Commission's office on 25.6.2007. In the additional affidavit, the review applicant, while explaining the reasons for delay has submitted that it wrote a letter dated 15.1.2007 to the Secretary of the Commission pointing out that the judgment of the Appellate Tribunal regarding apportionment of FERV be applied to all cases involving FERV. It has been stated that the review applicant filed its counter-reply in Review Petition No. 96/2006 (filed by NTPC) for review of tariff order pertaining to Korba STPS, wherein the review applicant pointed out the implications of the Appellate Tribunal's judgment dated 4.10.2006. The review applicant is said to have written a letter dated 4.4.2007 to Maharashtra State Electricity Distribution Company Ltd (MSEDCL) urging it to file a review petition against the tariff order as the latter had more allocation from Kahalgaon STPS. On 4.5.2009 the review applicant reportedly wrote a letter to West Bengal State Electricity Distribution Company Ltd (WBSEDCL) to expedite filing of review petition before the Commission. However, the review applicant does not seem to have received any response either from MSEDCL or WBSEDCL. The review applicant has stated that it took up the matter with its Financial Analyst vide letter dated 24.5.2007. The Financial Analyst by his letter dated 29.5.2007 is stated to have advised the review applicant to take up the issue with the Commission. The review applicant has explained that on 12.6.2007 during hearing of Review Petition No. 96/2006 (pertaining to Korba STPS) again raised this issue. However, the Commission in its order dated 15.6.2007 in Review Petition No. 96/2006 did not permit the review applicant to raise the issue as it was not arising in those proceedings, directly or indirectly, but granted liberty to the review applicant to make an appropriate

application in accordance with law for review of apportionment of FERV between debt and equity in respect of Korba STPS. Thereafter, the present application for review was filed on 25.6.2007.

21. It is matter of common knowledge that the Hon'ble Supreme Court has been emphasising adoption of a liberal approach in the matter of condonation of delay on showing of sufficient cause and has deprecated the pedantic approach followed in certain cases. The Hon'ble Supreme Court has declared that the courts should be rational, and apply the principle in a common-sense, pragmatic manner. In accordance with the law declared by the Hon'ble Supreme Court, there is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides for the reason that a litigant does not stand to benefit by resorting to delay and rather he runs a serious risk [See Collector, Land Acquisition Vs Mst Katiji (1987) 2 SCC 107]. Therefore, unless want of bona fides or inaction or negligence is proved, any delay cannot be refused to be condoned.

22. From the account given by the review applicant in the additional affidavit, it follows that the review applicant has been raising the issue from time to time. It, in the first instance took up the matter with the Secretariat of the Commission through the letter dated 15.1.2007, before expiry of the specified period of limitation. It also took up the issue with other beneficiaries of the generating station. It further raised the issue in the review proceedings pertaining to Korba STPS. However, as the efforts made by the review applicant were not yielding the results contemplated by it, it consulted its Financial Analyst and on his advice made the present application for review. The review applicant, based on facts now placed on record, cannot be said to negligent or wanting in

bonafides in pursuing the issue of extending the judgment of the Appellate Tribunal to the generating stations of NTPC. It cannot be said to be guilty of inaction.

23. Based on the above analysis, we allow IA No. 26/2007 and condone the delay in making the application for review of the tariff order.

Maintainability of Review Application

24. Now we consider the application for review. The main ground for seeking the review of the tariff order is that the Commission had not followed the judgment of the Appellate Tribunal dated 4.10.2006 while approving tariff for the generating station as regards the methodology for apportionment of FERV. NTPC has opposed the review applicant's plea on the ground that the decision of the Appellate Tribunal in the case of Power Grid does not apply to NTPC's generating stations. The contention of NTPC is on merits which can be gone into if the review has been permitted. But before that the question is whether the application for review is at all maintainable.

25. Under the code, review can be considered on any of the following grounds, namely –

- (a) discovery of new and important matter or evidence, which, after exercise of due diligence was not within the knowledge of the person seeking review or could not be produced by him at the time when order was made, or
- (b) on account of some mistake or error apparent on the face of recording or
- (c) for any other sufficient reason.

26. The review applicant has claimed extension of benefit of the judgment dated 4.10.2006 in Appeal Nos. 135-140/2005 to the generating station. For this, it is to be noted that original tariff petition (Petition No. 120/2005) was heard on 9.3.2006 when the

Commission reserved its order. The tariff order was passed on 23.11.2006. However, during the interregnum, the Appellate Tribunal in its judgment dated 4.10.2006 in appeals relating to Power Grid decided the methodology for apportionment of FERV which the review applicant seeks to be extended to the generating station. The parties did not have the opportunity to make their submissions on the issue for the reason that there was no hearing before the Commission after the judgment of the Appellate Tribunal was rendered. Perhaps for this reason, the Commission could not consider this issue in the tariff order. The merits of the parties' claims cannot be examined in the review proceedings because of their limited scope. The maintainability is needs to be examined based on the provisions of Order XLVII, Rule 1. Based on facts on record, we are satisfied that there exists 'sufficient reason' for review of the tariff order for the reason that the methodology decided by the Appellate Tribunal in Power Grid's cases was not even taken note of while deciding tariff for the generating station. Under these circumstances, we allow the application for review.

Relief

27. Having regard to the above discussion, we allow the application for review. The original tariff petition (Petition No. 120/2005) shall be set down for hearing on 22.10.2009. We make it clear that in these proceedings we have not considered the parties' claims on merits based on the judgment of the Appellate Tribunal. The issue will be considered when the original tariff petition is heard and decided.

Sd/-	Sd/-	Sd/-	Sd/-
(V. S. VERMA)	(S. JAYARAMAN)	(R. KRISHNAMOORTHY)	(DR. PRAMOD DEO)
MEMBER	MEMBER	MEMBER	CHAIRPERSON

New Delhi dated 29th September 2009