

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 1/2011
in
Petition No.195/2009**

**Coram: 1. Dr.Pramod Deo, Chairperson
2. Shri V.S.Verma, Member
3. Shri M.Deena Dayalan, Member**

DATE OF HEARING: 24.3.2011

DATE OF ORDER: 1.6.2011

IN THE MATTER OF

Review of order dated 20.1.2011 in Petition No.195/2009 relating to determination of revised fixed charges due to additional capital expenditure incurred during the period 2004-09 in respect of Talcher STPS-Stage-I (1000 MW).

AND IN THE MATTER OF

NTPC Ltd, New Delhi
Vs

.... Petitioner

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

...Respondents

The following were present:

1. Shri V.K.Padha, NTPC
2. Shri Ajay Dua, NTPC
3. Shri Shyam Kumar, NTPC

ORDER

This application for review has been filed by NTPC, the petitioner herein, against the order of the Commission dated 20.1.2011 in Petition No.195/2009 relating to determination of revised fixed charges due to additional capital expenditure incurred during the period 2004-09 in respect of Talcher STPS, Stage-I (1000 MW) (hereinafter referred to as 'the generating station').

2. The Commission by its order dated 20.1.2011 in Petition No. 195/2009 revised the tariff of the generating station for the period 2004-09 after considering the impact of additional capital expenditure incurred for the period 2004-09. The annual fixed charges determined by order dated 20.1.2011 is as under:

Particulars	(₹ in lakh)				
	2004-05	2005-06	2006-07	2007-08	2008-09
Interest on loan	3506.04	2670.76	1822.34	1004.16	298.66
Interest on Working Capital	1946.37	1963.22	1981.21	2004.26	2028.25
Depreciation	8884.93	8883.91	8870.79	8874.84	8910.78
Advance Against Depreciation	0.00	0.00	0.00	0.00	0.00
Return on Equity	17597.45	17596.24	17580.63	17585.45	17628.17
O & M Expenses	9360.00	9730.00	10120.00	10520.00	10950.00
Total	41294.79	40844.13	40374.96	39988.71	39815.86

3. Aggrieved by the said order, this review petition has been filed by the petitioner raising the following issues:

- (a) Disallowance of exclusion of de-capitalization of "bogie" for ₹23.61 lakh during the year 2007-08.
- (b) Non-consideration of escalation of 6% per annum in the Maintenance spares cost based upon historical cost of the station as on COD, for the period from 1.7.1997 (COD) to 31.3.1998 for calculating interest on working capital (IWC) for the period 2004-09.
- (c) Consideration of opening capital cost in place of average capital cost for determining the total depreciable value during the corresponding year.

4. The petition was listed before us for admission. We heard the representative of the petitioner on the points raised in the application for review. After careful examination of the material on record and the oral submissions made on behalf of the petitioner, we propose to dispose of the application at the admission stage for the reasons recorded in succeeding paragraphs:

Disallowance of exclusion of de-capitalization of 'bogie' for ₹23.61 lakh during the year 2007-08.

5. The petitioner has submitted that in the petition for additional capital expenditure (Petition No.195/2009) it had claimed exclusion of de-capitalisation of the asset (bogie) for the purpose of tariff on the ground that the same was under procurement. The petitioner has also submitted that the justification for exclusion of de-capitalisation of the said asset during 2007-08 was revised by affidavit dated 20.1.2010, stating that the claim for capitalisation of bogie during the year 1999-2000 having not been allowed by the Commission in Petition No.72/2000, its de-capitalisation should be considered under exclusion. Referring to paragraph 18 (c) (ii) of the order dated 20.1.2011, the petitioner has submitted that since the Commission has allowed the exclusion of de-capitalisation of such assets in respect of which capitalisation was not allowed in Petition No.72/2000 and thereby did not form part of the capital base, the de-capitalisation of the asset (bogie) during 2007-08 should also be considered under exclusions for the purpose of tariff.

6. On scrutiny of records, it is observed that the petitioner had neither revised its justification for exclusion of de-capitalisation of bogie (in the exclusion sheet) nor had specifically prayed for exclusion of de-capitalisation of bogie on the ground that the capitalisation of 'bogie' during the year 1999-2000 was not allowed to be capitalised in Petition No. 72/2000. The Commission while considering capitalisation of expenditure

in Petition No. 195/2009 had directed the petitioner to furnish certain details like the year of put to use, capitalisation amount and the depreciation recovered till date etc, and in response, the petitioner had submitted against this asset as under:

“the Hon’ble Commission has not allowed the capitalisation of these assets during the period 1998-2001 against Petition No. 72/2000. Accordingly, no depreciation has been recovered on these assets presently de-capitalised.”

7. On examination of the claim of the petitioner for additional capital expenditure in Petition No. 72/2000, it was noticed that there was no reference to the claim for capitalisation of the asset "bogie" in the said petition. In view of this, the Commission came to the conclusion that de-capitalised "bogie" form part of the capital cost of the generating station and the claim for exclusion for de-capitalisation could not be permitted. In our view, there is no error apparent on the face of record and consequently, the petitioner's prayer for review of order dated 20.1.2011 on this ground is liable to be rejected.

Non-consideration of escalation of 6% per annum in the maintenance spares cost based upon historical cost of the station as on COD, for the period from 1.7.1997 (COD) to 31.3.1998 for calculating interest on working capital (IWC) for the period 2004-09

8. The petitioner has submitted that the date of commercial operation of the generating station is 1.7.1997 and the historical cost of the generating station excluding initial spares was ₹245170 lakh as on 1.7.1997. The petitioner has also submitted that the Commission in its order dated 20.1.2011 has considered the value of maintenance spares as ₹3634 lakh for 2004-09 for computation of working capital for determination of Interest on Working capital (IWC) as in order dated 9.5.2006 in Petition No. 144/2006 and while computing the value of maintenance spares at 1% of the historical cost as on 1.4.1998, the escalation in maintenance spares @ 6% from 1.7.1998 has not been considered. The petitioner has submitted that the Commission by considering the annual escalation with effect from 1.4.1999, has denied the petitioner the escalation

with effect from 1.7.1998. The maintenance spares as worked out in order dated 20.1.2011 is as under:

	(₹ in lakh)				
	2004-05	2005-06	2006-07	2007-08	2008-09
Maintenance Spares	3640.77	3853.02	4082.98	4331.70	4608.14

9. On scrutiny of the records, it is noticed that an inadvertent arithmetical error had occurred in the computation of the value of maintenance spares of ₹3634 lakh in our order dated 9.5.2006 in Petition No.144/2006, by considering the value of maintenance spares @ 1% of historical cost of ₹245170 lakh as on 1.4.1998 and escalation @ 6% thereof from 1.4.1999. This value has been considered while computing the value of maintenance spares in our order dated 20.1.2011 and hence the error. This inadvertent arithmetical error in the computation of the value of maintenance spares for working capital for determination of IWC in our order dated 20.1.2011 is an error apparent on the face of the record and the prayer of the petitioner is accepted. Hence, review on this ground is allowed and the error is sought to be corrected by this order.

Consideration of opening capital cost in place of average capital cost for determining the total depreciable value during the corresponding year.

10. The petitioner has submitted that the Commission in its order dated 20.1.2011, while calculating the total depreciable value for the generating station for a year, has inadvertently considered the opening capital cost for the corresponding period instead of the average capital cost for the year. It has also submitted that the Commission in the tariff orders pertaining to other generating stations of the petitioner has considered the average capital cost for the purpose of computing the total depreciable value and the same may be considered for this generating station also for the sake of consistency and uniformity.

11. On scrutiny, it is observed that the opening capital cost has been taken into consideration for computation of the total depreciable value of the generating station due to inadvertent arithmetical/linkage error in the calculations, instead of the average capital cost. This inadvertent error in the computation of total depreciable value is an error apparent on the face of the record and the same is ought to be rectified by this order.

12. In view of the foregoing, the issues raised by the petitioner in paragraph 3 (b) and (c) above fall within the scope of review under Order 47, Rule 1 of the Civil Procedure Code and review of the order dated 20.1.2011 is allowed on these counts and the tariff for the generating station is sought to be revised after rectification of the errors.

13. Before proceeding, we revert to the observations made in our order dated 20.1.2011 in Petition No. 195/2009, with regard to the claim of the petitioner for determination of issues in terms of the judgment of the Appellate Tribunal for Electricity (the Tribunal) in Appeal Nos.139 to 142 etc of 2006, 10, 11 and 23/2007. The relevant portion of the order containing the observations of the Commission is extracted hereunder:

“5. Appeal No.156/2006 was filed by the petitioner before the Tribunal challenging the order dated 9.5.2006 in Petition No.144/2006 determining tariff of the generating station for 2004-09. Similar appeals (Appeal Nos.139 to 142 etc of 2006, 10, 11 and 23/2007) were also filed by the petitioner challenging the various orders of the Commission determining tariff for other generating stations of the petitioner during the period 2004-09. Appeal No.156/2006 was clubbed along with the said appeals and the Tribunal by its common judgment dated 13.6.2007 allowed the prayers of the petitioner and remanded the matters for re-determination by the Commission. Against the judgment dated 13.6.2007, the Commission filed 20 Civil Appeals before the Hon’ble Supreme Court (C.A. Nos. 5434/2007 to 5452/2007 and 5622/2007) including Civil Appeal No. 5439/2007 pertaining to this generating station, on issues such as:

- (a) Consequences of refinancing of loan;*
- (b) Treating of depreciation as deemed repayment of loan;*
- (c) Cost of maintenance spares related to additional capitalization;*
- (d) Depreciation availability up to 90% in the event of disincentive; and*
- (e) Impact of de-capitalization of assets on cumulative repayment of loan*

6. *The Hon'ble Supreme Court on 26.11.2007 granted an interim order of stay of the operation of the order dated 13.6.2007 of the Tribunal. However, on 10.12.2007, the Hon'ble Supreme Court passed interim order as under:*

"Learned Solicitor General appearing on behalf of the National Thermal Power Corporation stated that pursuant to the remand order, following five issues shall not be pressed for fresh determination:

- (a) Consequences of refinancing of loan;*
- (b) Treating of depreciation as deemed repayment of loan;*
- (c) Cost of maintenance spares related to additional capitalization;*
- (d) Depreciation availability up to 90% in the event of disincentive; and*
- (e) Impact of de-capitalization of assets on cumulative repayment of loan*

The Commission may, however, proceed to determine other issues.

It is clarified that this order shall apply to other cases also.

In view of this, the interim order passed by the Court on 26th November, 2007, is vacated. The interlocutory applications are, accordingly, disposed of."

7. *The petitioner has submitted that it has been advised that the statement of the Solicitor General of India (SGI) before the Hon'ble Supreme Court resulting in the interim order dated 10.12.2007 does not restrict it from claiming additional capitalization based on the principles laid down by the Tribunal in its judgment dated 13.6.2007 and that the effect of the statement of SGI was that it would not seek fresh determination pursuant to the remand order. The petitioner has also submitted that the Hon'ble Supreme Court has not stayed further proceedings before the Commission for determination of additional capitalization and even if it was construed as stay, the decision of the court (the Tribunal) does not become non est.*

8. *As stated above, the Hon'ble Supreme Court in its interim order dated 26.11.2007 had granted stay of the operation of the judgment dated 13.6.2007 of the Tribunal. In view of the undertaking given by the Solicitor General of India on behalf of the petitioner that "the five issues shall not be pressed for fresh determination", the Hon'ble Supreme Court vacated the interim order dated 26.11.2007 and directed that "the Commission may proceed to determine the other issues". It was clarified that "this order shall apply to other cases also". It is the contention of the petitioner that the undertaking before the Hon'ble Supreme Court does not restrict it from claiming additional capitalization based on the principle laid down by the Tribunal. In our view, the petitioner has given an undertaking in the Civil Appeals pertaining to the tariff in the original petition before the Hon'ble Supreme Court that "the five issues shall not be pressed for fresh determination". It is logical that original tariff as well as revision of tariff for the generating station on the basis of additional capital expenditure is decided on the basis of the same principles. Accepting the contention of the petitioner would mean that additional capitalization should be determined on the principles different from those which have fallen for consideration while determining the tariff for the generating station in the original petition. The tariff for the period 2004-09 is a composite package which needs to be determined on the same principle. From the point of view of regulatory uniformity and continuity and also in line with the spirit of the interim order of the Hon'ble Supreme Court, we are of the view that the extension of the impact of the judgment of the Tribunal on the five issues should be deferred till the final disposal of the said Civil Appeals by the Hon'ble Supreme Court"*

14. In terms of the above, the Commission has deferred the implementation of the judgment of the Tribunal dated 13.6.2007 on the five issues mentioned therein, till the final disposal of the same by the Hon'ble Supreme Court.

15. While so, in Appeal No.92/2010 (NTPC-v-CERC & ors) filed by the petitioner against the order of the Commission pertaining to one of its generating station (Talcher TPS, Stage-II), the Tribunal by its judgment dated 4.2.2011 has observed that pendency of Civil appeals before the Hon'ble Supreme Court (against the judgment of the Tribunal dated 13.6.2007) was not a ground to ignore the orders of the Tribunal. The Commission is in the process of filing Civil Appeal against this judgment. Keeping in view the observations of the Tribunal in Appeal No. 92/2010 and considering the fact that the tariff for 2004-09 is a composite package which needs to be determined on the same principle, the tariff of the generating station is sought to be revised after considering the issues raised by the petitioner in terms of the judgment of the Tribunal dated 13.6.2007, subject to the final decision of the Hon'ble Supreme Court in the said Civil Appeals.

16. As stated in para 12 above, the issues raised by the petitioner in para 3(b) and (c) have been allowed and the errors are sought to be rectified. The impact on account of rectification of these errors would be considered while working out the tariff of the generating station through a separate order, based on the directions contained in the judgment of the Tribunal dated 13.6.2007.

17. Review Petition No.1/2011 in Petition No. 195/2009 stands disposed of at the admission stage, in terms of the above.

Sd/-
(M.DEENA DAYALAN)
MEMBER

Sd/-
(V.S.VERMA)
MEMBER

Sd/-
(DR.PRAMOD DEO)
CHAIRPERSON