

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 151/MP/2012

Coram:

**Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member**

Date of Hearing: 21.5.2013

Date of Order: 4.7.2013

IN THE MATTER OF

Petition for relaxation of provisions in regard to Additional Capitalization from the date of commercial operation up to the cut-off date for determination of tariff of Bhilai Expansion Power Plant (2 x 250 MW) and also for exercise of inherent powers to do substantial justice

IN THE MATTER OF

NTPC-SAIL Power Company Private Ltd, New Delhi

...Petitioner

Vs

1. Electricity Department, UT of Dadra & Nagar Haveli, Silvassa
2. Electricity Department, UT of Daman & Diu, Daman
3. Chhattisgarh State Power Distribution Company Ltd, Raipur
4. Steel Authority of India Ltd, New Delhi

...Respondents

Parties present

Shri M. G. Ramachandran, Advocate, NTPC-SAIL
Shri G. Basu, NTPC- SAIL
Shri S. D Jha, NTPC-SAIL
Shri Sakesh Kumar, Advocate, ED, UT of Dadra & Nagar Haveli

ORDER

The petitioner, NTPC SAIL Power Company Private Ltd (hereinafter referred to as 'NSPCL'), has filed this petition with the following specific prayers:

- (a) *Relax the norms relating to the cut-off date for additional capitalization in the case of Bhilai Township packages as per Sl. no 12 above of Bhilai Expansion Power Project(2 x 250 MW) unit beyond 31.3.2012 for one year upto 31.3.2013;*
- (b) *Pass such further order or orders as may be considered together with complete relief.*

2. The petitioner is a joint venture company of NTPC Ltd and Steel Authority of India Ltd (SAIL) having equal equity participation in the ratio of 50:50. The petitioner has acquired certain



captive power plants owned by SAIL, which includes the captive power plant at Bhilai with capacity of 74 MW (2x30 MW + 1 x 14 MW), which is expanded by addition of 2 units of 250 MW each. The power generated from the generating station will be consumed to the extent of 51% for captive requirements of SAIL and the balance power is supplied to the respondents 1 to 3 in terms of the Power Purchase Agreements entered into between them.

3. Out of total capacity of 500 MW, only 170 MW of power is utilized for the captive requirements of SAIL and the remaining 330 MW of power is supplied to the beneficiaries as under:

Beneficiaries	Allocated Capacity (MW)
UT of Dadra & Nagar Haveli (Respondent No.1)	135
UT of Daman & Diu (Respondent No.2)	95
CSPDCL (Respondent No.3)	100
SAIL/BSP (Respondent No.4)	170

4. The actual dates of commercial operation of the units are as under:

Units	Original schedule as per Ministry of Power, GoI	Actual date of commercial operation
Unit No. I	February, 2008	22.4.2009
Unit No. II	August, 2008	21.10.2009

5. The Commission by its order dated 29.7.2010 in Petition No. 308/2009 had approved the generation tariff of Unit-I (250 MW) for the period 22.4.2009 to 20.10.2009 and for the generating station (Unit-I and Unit-II) (500 MW) for the period from 21.10.2009 to 31.3.2014, based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 ('the 2009 Tariff Regulations').

6. The petitioner in this petition has submitted that in accordance with the provisions of Regulations 9 read with Regulations 3(3), 3(11) and 3(12) of the 2009 Tariff Regulations, the additional capitalization for capital expenditure which are within the original scope of work but actually incurred after the date of commercial operation is allowed up to cut-off date. The petitioner has also submitted that while the units of the generating station has been commissioned to generate power and make available the same to the respondents, it has not

been able to complete the entire capital works in regard to the project before the close of the financial year 2011-12 due to delay in supply of material by contracting agencies and execution of project related activities by the agencies for reasons beyond the control of the petitioner. The main reasons for delay as submitted by the petitioner are as under:

(a) Construction of township packages for Bhilai Expansion Power Plant was awarded to M/s Engineering Project (India) Ltd. (EPIL) on 23.10.2009. The scope of work envisaged the completion of 34 blocks of buildings consisting of 13 B-type blocks of 130 apartments, 12 C-type blocks of 120 apartments, 8 D-type blocks of 48 apartments and one HOP bungalow totaling 299 dwellings. EPIL in turn engaged M/s MSKL projects (India) Ltd., to execute the project as their sub-contractor. Detailed engineering and site mobilization was completed and site works commenced in January, 2010 as per plan. However, after site preparation and excavation, the work came to a halt due to heavy and unprecedented monsoon which extended for 4 months from June, 2010 to September, 2010. The entire area where the construction was to be undertaken became slushy and inaccessible for the movement of machinery.

(b) Though the work again started in October, 2010, there were several disputes and differences between the EPIL and its sub contractor arising out of the cost and time overrun as well as the changes in the control of the sub contractor and the project execution work came to a standstill. The sub-contractor was not willing to carry out the work as per the terms of original agreement reached between M/s MSK Projects (India) Ltd. and EPIL. This led to disputes resulting in cancellation of contract by EPIL in April, 2011 and invoking of the Bank Guarantee. NSPCL then intervened as the cancellation of the contract with the sub contractor and re-tendering of partially executed work would lead to substantial delays.

(c) The delay occurred in construction of residential buildings due to reasons beyond the control of the petitioner had adverse/cascading effect on other works also, namely site development, sewerage and drainage network, water supply network and underground tank, sewerage treatment plant, non-residential buildings etc. The detail reasons for delay of these packages enclosed at Annexure-A are summarized as under:

(i) Site development works (Site leveling, road, boundary wall, horticulture, central parks/ grounds within block:

From the beginning, the Municipal Corporation of Bhilai, did not accord clearance to construct boundary wall on the southern side and till date it is being disputed. Water Resources Department, Govt. of Chhattisgarh accorded clearance to construct approach/entrance road to township along irrigation canal on North side after 18 months of award of site development package. Consequent upon delayed clearance by concerned authorities only 750 m out of total 2 km of boundary wall work could be constructed during 4 months with interruptions. Development of site was affected adversely due to interference from the ongoing residential and non residential building works, lack of space for labour hutment, material stockyard, extended monsoon etc. Due to ongoing civil and electrical cabling work of residential buildings, the development of central ground/parks and paving and fencing work could not be completed. Pending completion of parks/ground, the horticulture work is also incomplete. Site encountered rocky strata which were not envisaged in the beginning. Rock boulders excavation and transportation could not be ensured timely due to space constraints for stacking and unresolved contractual issues /extra financial implication. As a consequence the portion of site could not levelled that remained encroached with excavated rock boulders. Road works could not be completed due to on-going civil works in residential buildings, stacking of required construction material, movement of machinery and transit mixer, trucks supplying the building material.

(ii) Sewerage and Drainage Network:

The sewerage and drainage pipes originated from the first building location in front and rear courtyards of residential blocks. The delay and interface with the on-going civil works of residential blocks delayed taking up of sewerage and drainage work. The work was stopped due to heavy and protracted monsoon. Consequently, the already constructed brick masonry drain (as per drawings) collapsed for its design inefficacy. This resulted into re-designing of drain, as RCC instead of brick masonry, and awarding of a new contract. Due to rocky strata encountered in deep excavation, which was not envisaged earlier, the work progress got delayed.

(iii) Water Supply Network and Underground (UG) Tank:

Due to interface with the site development work and building civil works (and that required fronts in rear side of block/open ground remained occupied with the building material) the drinking and horticulture water supply pipe network could not be completed in time around residential blocks. Under-ground tank civil works got delayed due to deep excavation and rocky strata encountered as mentioned earlier. There has not been space to stack rock boulders that remained piled up in the vicinity besides contractual disputes, which delayed site development work.

(iv) Non-Residential Buildings:

Non-residential building civil work got delayed due to relocation of recreation centre/field hostel/sub-station owing to overhead HT/LT lines. Huge quantity of rock boulders had to be excavated from the deep excavation of swimming pool area (not envisaged earlier as mentioned before) whereby delaying the package. Civil works of swimming pool building and mechanical system of filtration plant are still incomplete.

(v) Sewage Treatment Plant:

The agency did not turn up when STP was awarded for the first time two years back. During NIT process second time, the parties did not meet the stipulated qualifying requirement for STP work and other technical specifications in the bid documents. Hence, STP work was to be tendered for the third time. This resulted in delay of two years.

7. In addition to the above, the petitioner has also submitted that out of total works ₹75.00 crore related to Township Packages, the works amounting to ₹40.00 crore only could be completed by cut-off date i.e. upto 31.3.2012 despite all out efforts put in by the petitioner and the balance works amounting to ₹35.00 crore got delayed beyond 31.3.2012 due to reasons beyond the control of the petitioner. A detailed list of such items along with amounts that are proposed to be deferred for capitalization beyond the cut-off date has been enclosed at Annexure-B of the petition. The petitioner has further submitted that besides the works which are deferred for capitalization beyond the cut-off date (as mentioned in Annexure-B of petition), there are certain works which have been completed but the final payments are held up on account of closing of contracts also got delayed beyond 31.3.2012. A detailed list of such works along with

amounts withheld including reasons for deferred payments have been enclosed at Annexure-C of the petition.

8. Accordingly, the petitioner has submitted that the above mentioned works which have been delayed /payments to be released beyond the cut-off date have not in any manner affected the rights of the beneficiaries of power. It has also submitted that serious prejudice would be caused if relaxation is not given for additional capitalization beyond 31.3.2012. In the circumstances, the petitioner has prayed that the Commission may exercise the 'power to relax' under Regulation 44 of the 2009 Tariff Regulations and/or inherent power under Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 to provide extension on the cut-off date for additional capitalization in respect of the generating station.

9. By letter dated 20.7.2012, the Commission directed the petitioner to submit additional information on the following:

"Delay in construction of approach road

(i) Documentary evidence, in justification of the submission that the permission for construction of approach/entrance road along irrigation canal on north side to township was received from the Water Resources Department of Government of Madhya Pradesh after 18 months from Award of Site Development Package.

Delay in Construction of Boundary Wall

(ii) It is stated that the delay in construction of boundary wall was due to non-receipt of clearance from the Municipal Corporation of Bhilai for construction of boundary wall, even on the date of filing the petition. Documentary evidence indicating that the matter was taken up with the Municipal Corporation on urgent basis, to be furnished.

Cost overrun due to Time over run

(iii) Clarification as to whether there is any cost over run on any of the packages where the completion of work has been delayed."

10. In compliance, the petitioner vide its affidavit dated 3.8.2012 has submitted the additional information as sought above along with documentary evidence and has prayed that the relief may be granted.

11. Reply to the petition has been filed by the respondent No.1, D&NH and the respondent No.3, CSPDCL and the petitioner has filed its rejoinder to the reply of CSPDCL.

12. Heard the learned counsels for the parties. Taking into consideration the submissions of the parties and the documents available on record, we now examine the relief prayed for by the petitioner in the subsequent paragraphs.

13. Regulation 3(11) of the 2009 Tariff Regulations defines 'Cut-off date' as under:

"Cut-off date means 31st March of the year closing after two years of the year of commercial operation of the project, and in case the project is declared under commercial operation in the last quarter of a year, the cut-off date shall be 31st March of the year closing after three years of the year of commercial operation."

14. The respondent, CSPDCL has submitted that the investment approval was accorded by the Board of the petitioner company on 28.9.2007 and whereas, orders for construction packages towards various civil works were placed by the petitioner only on 23.10.2009 at the time of COD of Unit-II. It has also submitted that had the orders been placed on time, the project could have been completed before the stipulated deadline with proper planning and hence the delay in execution and completion of works is attributable to the petitioner. Thus, according to the respondent, the delay on the part of the petitioner has occurred in the beginning itself. Similar submissions have been made by the respondent, D&NH in its reply dated 11.3.2013. In response, the petitioner in its rejoinder dated 24.1.2013 while objecting to the submissions of the respondent has submitted that the construction of town packages required the appointment of an external consultant which was finalised in May, 2008 and due to involvement of intricate design procedures and after obtaining removal of certain encumbrances like 4 no. overhead transmission line etc., the award for construction package could be started as early as May, 2009 within the least possible time required for any complicated contract like this one. It has further submitted that it took six months for placing the final award of the packages as per stringent procedures and rules specified therein. The matter has been examined. Considering the fact that the work related to the construction of township packages involves the designing of a comprehensive layout of the proposed township and also the procedure and rules involved in the finalisation and award of such complicated contract packages are required to be complied by the petitioner, we are of the considered view that the bare minimum time taken by the petitioner

for finalisation and award of contract cannot be considered as an unreasonable delay on the part of the petitioner in awarding the contract. Accordingly, the submissions of the respondent are not accepted.

15. As stated in paragraph 6 above, the petitioner has furnished detailed reasons for the delay in execution and completion of the capital works of the generating station (exhibits A and B of the petition and the affidavit dated 3.8.2012) and has submitted that the same are beyond its control. The respondent, CSPDCL has submitted that the reasons given by the petitioner like disputes between main contractor, sub-contractor and with the petitioner for delay in execution and completion of work are not tenable as the respondents are not responsible for the said disputes. It has also been submitted that the petitioner has not conducted any proper soil testing to ensure soil conditions and the hurdles quoted by the petitioner during execution of the project are normal hurdles usually encountered by project developers during execution of projects. It has further been submitted that adequate time has been given to the petitioner for completion of the project and if the project could not be completed in all respects due to improper planning on the part of the petitioner, the respondents are not at all responsible for such delay and not liable for making payment. Accordingly, the respondent has prayed that the works completed after the cut-off date should not be allowed to be capitalised and cost of all such works completed after cut-off date should only be borne by the petitioner. In response, the petitioner while reiterating its submissions made in the petition has prayed that the submissions of the respondent are wrong and may not be accepted. We have considered the matter. The date of commercial operation of the generating station is 21.10.2009 and in terms of the definition under Regulation 3(11), the cut-off date of the generating station is 31.3.2012. The tariff of the generating station approved by order dated 29.7.2010 in Petition No. 308/2009 from the date of commercial operation till 31.3.2014, is inclusive of the projected additional capitalization of ₹40960 lakh towards deferred works up to cut off date i.e. 31.3.2012. No additional capital expenditure was claimed by the petitioner for the years 2012-13 and 2013-14.



16. It is noticed that disputes and differences between the main contractor and sub-contractor resulted in the cancelation of contract during April, 2011 and invoking of Bank Guarantee. The timely intervention of the petitioner had avoided cancellation of the contract which would have otherwise led to substantial delays on account of re-tendering etc. It is also noticed from Exhibits 1 to 10 of the petition that the work of construction of town package had come to a halt due to heavy and unprecedented monsoon during the period from June, 2010 to September, 2010, wherein the entire area, where construction was to be undertaken had become slushy and inaccessible for movement of machinery. From the documentary evidence submitted by the petitioner vide affidavit dated 3.8.2012, it is observed that the permission for construction of approach/entrance road along irrigation canal on north side of township was received from the Water Resources Department, Govt. of Chhattisgarh only after 18 months from award of development package. It is also clear from the documentary evidence that the delay in construction of boundary wall was due to delay in clearance from the Bhilai Municipal Corporation (BMC), despite the petitioner taking up the matter with BMC. Also, due to delay in getting clearances from agency of the State Govt. / Municipal body of Chhattisgarh, the petitioner could not complete some of the deferred works within the cut-off date. The detailed reasons submitted by the petitioner as justification for the delay in completion of the ancillary package for township buildings, non-residential building, site development packages would reveal that despite due diligence there has been delay in completion of the work for which the petitioner cannot, in our view, be penalised. It is pertinent to mention that in response to our query, the petitioner vide its affidavit dated 3.8.2012 has submitted that there has been no extra cost implication due to time overrun, other than the price variation clause as per Letter of Award (LOA) which has been restricted to original L-2 schedule in respect of most of the packages for which relaxation has been sought. Considering the submissions of the petitioner in totality and keeping in view that, despite due diligence, the delay in completion of the said works was for reasons beyond the control of the petitioner, we are of the considered view that the petitioner has shown sufficient cause in justification of its prayer for relaxation of the cut-off date for a period of one year beyond 31.3.2012. Accordingly, in exercise of power under Regulation 44 of



the 2009 Tariff Regulations, and in the interest of justice, we extend the cut-off date of the generating station for additional capitalisation for a period of one year from 31.3.2012 to 31.3.2013. However, the additional capital expenditure actually incurred would be considered at the time of truing up exercise to be undertaken for the generating station in terms of Regulation 6 of the 2009 Tariff Regulations. The other prayer of petitioner to consider certain capitalization of expenditure in respect of works which have been completed, but final payments are held up on account of closing of contracts beyond 31.3.2012 (as per Annexure-C of the petition) is also disposed of in line with the observations above.

17. Petition No. 151/MP/2012 is disposed of in terms of the above.

Sd/-
[M. Deena Dayalan]
Member

Sd/-
[V.S. Verma]
Member