

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Review Petition No. 6/RP/2017

**In
Petition No. 280/TT/2015**

Coram:

**Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member**

Date of Order : 5.7.2017

In the matter of:

Review petition under Regulation 103 (1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking review of order dated 31.3.2016 in Petition No. 280/TT/2015.

And in the matter of:

Power Grid Corporation of India Limited,
'SAUDAMINI', Plot No. 2, Sector- 29,
Gurgaon – 122 001 (Haryana)

...Review Petitioner

Vs

1. Rajasthan Rajya Vidyut Prasaran Nigam Limited,
Vidyut Bhawan, Vidyut Marg, Jaipur- 302 005
2. Ajmer Vidyut Vitran Nigam Limited,
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur.
3. Jaipur Vidyut Vitran Nigam Limited,
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur.
4. Jodhpur Vidyut Vitran Nigam Limited,
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur
5. Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Kumar House Complex Building II
Shimla-171 004



6. Punjab State Power Corporation Limited,
Thermal Shed TIA, Near 22 Phatak,
Patiala-147 001.
7. Haryana Power Purchase Centre,
Shakti Bhawan, Sector-6,
Panchkula (Haryana)-134 109
8. Power Development Department,
Government of Jammu and Kashmir,
Mini Secretariat, Jammu
9. Uttar Pradesh Power Corporation Limited,
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226 001.
10. Delhi Transco Limited,
Shakti Sadan, Kotla Road,
New Delhi-110 002
11. BSES Yamuna Power Limited,
2nd Floor, A Block, Shakti Kiran Building,
Opp. Karkardooma Court,
Karkardooma, Delhi-110 092
12. BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place, New Delhi
13. Tata Power Delhi Distribution Limited,
Cennet Building, Adjacent to 66/11kV
Pitampura-3Grid Building, Near PP Jewellers,
Pitampura, New Delhi-110 034
14. Chandigarh Administration,
Sector-9, Chandigarh.
15. Uttarakhand Power Corporation Limited,
Urja Bhawan, Kanwali Road, Dehradun
16. North Central Railway,
Allahabad
17. New Delhi Municipal Council,
Palika Kendra, Sansad Marg,
New Delhi-110 002
18. Bihar State Power (Holding) Company Limited
(Formerly Bihar State Electricity Board),
Vidyut Bhawan, Bailey Road, Patna-800001



19. West Bengal State Electricity Distribution Company Limited
Bidyut Bhawan, Bidhan Nagar,
Block DJ, sector-II
Salt Lake City, Kolkata – 700091

20. Grid Corporation of Orissa Limited
Shahid Nagar, Bhubaneshwar – 751007

21. Damodar Valley Corporation, DVC Tower,
Maniktala, Civic Centre,
VIPO Road, Kolkata - 700054

22. Power Department, Government of Sikkim
Gangtok – 737101

23. Jharkhand State Electricity Board,
In front of Main Secretariat,
Doranda, Ranchi – 834002

.....Respondents

For Petitioner: Shri Sanjay Sen, Sr. Advocate, PGCIL
Shri S. S. Raju, PGCIL
Shri Rakesh Prasad, PGCIL
Shri Mukesh Bharar, PGCIL
Shri Pallav Mongia

For Respondents: None

ORDER

The instant review petition has been filed by Power Grid Corporation of India Limited (PGCIL) under Section 94(1)(f) of the Electricity Act, 2003 (the Act) read with Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 and Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, seeking review of the order dated 31.3.2016 in Petition No. 280/TT/2015, wherein the tariff for 2014-19 period was allowed for **Asset-I**: Balance portion of 400 kV D/C Maithon Gaya transmission line CKT II including multi circuit, **Asset-II**: Balance portion of



400 kV D/C Maithon Gaya transmission line CKT I including multi circuit, **Asset-III**: 1 no. 400 kV Line Bay at 765/400 kV Gaya Sub-station (Koderma II Bay) and **Asset IV**: 765 kV Line Bay at 765/400 kV Gaya Sub-station associated with 765 kV S/C Gaya Balia transmission line under common scheme for 765 kV pooling stations and network for NR, import by NR from ER and from NER/SR/WR via ER and common scheme for network for WR and import by WR from ER and from NER/SR/WR via ER in Eastern Region for the 2014-19 tariff period.

2. As per investment approval dated 29.8.2008, the instant assets were scheduled to be commissioned within 48 months from the date of investment approval and hence the assets were to be commissioned progressively upto 1.9.2012. However Assets I, II, III and IV were commissioned on 8.9.2014, 30.12.2014, 30.12.2014 and 8.1.2015 respectively. Thus, there is time over-run of 24 months and 7 days in case of Asset-I and 28 months each in case of Asset-II to IV. The time over-run was attributed to serious law and order situation, Right of Way issues and delay in obtaining of forest clearance. The time over-run of 28 months in case of Assets IV was condoned and time over-run of 16 months in case of Assets-I, II and III was condoned and accordingly IDC and IEDC for the period not condoned was disallowed. The relevant portion of the order dated 25.4.2016 is extracted hereunder:-

"19. In case of Assets I, II and III, the petitioner submitted the proposal for forest land in May, 2010 and got the final clearance on 8.11.2012 after 26 months. We are of the view that the time taken for getting forest clearance is beyond the petitioner. However, the petitioner has not submitted the time considered in the investment approval while claiming the delay. The processing time including preparatory activities for submission of proposal will have to be completed by the petitioner within a year to complete the project within schedule date of commissioning. In view of above consideration, we have considered that the petitioner would have factored 12 months for getting forest clearance. Hence, time over-run of only 14 months (after excluding 12 months) due to delay in forest clearance is condoned. It is further observed there were problems due to



naxalites and hence this time over-run of 2 months is also condoned. Accordingly, we have condoned the total delay of 16 months in case of Assets I, II and III. Thus, we have disallowed the delay of 8 months and 7 days in case of Asset-I and 12 months in case of Asset-II and III.

20. In case of Asset-IV, the petitioner submitted that the asset could have been commissioned only after commissioning of 400 kV D/C Maithan Gaya line and 400 kV D/C Kodarma Gaya line as per original scheme. However, the completion of 400 kV D/C Maithan Gaya line and 400 kV D/C Kodarma Gaya line got delayed due to pending forest clearance. Therefore, to commission the Asset-IV, an interim arrangement was approved and completed on 30.12.2014. Thereafter, the Asset-IV was commissioned on 8.1.2015. We are of the view that the time taken for commissioning the Asset-IV is beyond the petitioner and hence 28 months delay are condoned.

21. The Hon'ble Appellate Tribunal for Electricity in its Judgment dated 27.4.2011 in Appeal No.72/2010 has held that the additional cost due to time over-run due to the factors beyond the control of project developer shall be capitalized.

22. The time over-run of 16 months in commissioning of Asset-I, II and III and 28 months in commissioning of Asset- IV is beyond the control of the petitioner and it cannot be attributed to the petitioner. As per the judgement of Hon'ble Tribunal, the additional cost due to time over-run not attributable to the petitioner shall be capitalized. Accordingly, the time over-run in case of the instant assets is condoned and accordingly IDC and IEDC for the delay is allowed to be capitalised."

3. Aggrieved by the order dated 31.3.2016, the review petitioner has filed the instant review petition. The review petitioner has prayed for condonation of the full period of time over-run in case of Assets I, II, and III. The review petitioner has submitted that while disallowing the time over-run in case of Assets I, II, and III, the gravity of change of law, Right of Way issues and delay in obtaining of forest clearance issues was not considered by the Commission. Accordingly, PGCIL has filed the instant review petition on the ground that there are apparent errors in the impugned order and sought review with respect to the following grounds :-

(a) Issuance of the notification dated 3.8.2009 by Ministry of Environment and Forest (MOEF) subsequent to the Investment Approval dated 29.8.2008, amounts to change-in-law events. Non-consideration of such



events in the order dated 31.3.2016 is a sufficient ground for review of the impugned order.

(b) Non-consideration of certain documents evidencing the ROW issues and its cascading effect which were not adequately considered is an error apparent on the face of record; and

(c) Certain documents and events could not be brought on record at the time of adjudication of the Tariff Petition No. 280/TT/2015 as the contract entered into with the contractors had expired and the documents were not traceable. The review petitioner even after the exercise of due diligence, failed to produce the said documents at the time of hearing of the tariff petition. Subsequently, the documents were traced and filed in the Review Petition for proper adjudication of the instant review petition and for appreciation of the material facts.

4. The review petition was admitted on 19.4.2017 and notices were issued to the respondents directing to submit their replies. However, none of the respondents have filed any reply.

5. During the hearing on 13.4.2017, learned senior counsel for the review petitioner submitted that the MOEF vide order dated 3.8.2009, directed all State Governments to ensure compliance of Forest Rights Act, 2006, which inter-alia required NOC and written consent from each Gram Sabha (in which at least 50% of the members were present) and subsequent certification of the same by the respective State Governments. Learned senior counsel submitted that the requirement was made mandatory for submission of forest proposal which



consumed a lot of time leading to time over-run. Learned senior counsel further submitted that in the case of Koderma-Gaya line, the Commission in order dated 30.3.2016 in Petition No. 132/TT/2015 had condoned the entire time over-run under similar circumstances and accordingly, requested to condone the time over-run in commissioning of the instant assets.

6. The Commission while admitting the Review Petition vide interim-order dated 19.4.2017 directed the Review Petitioner to place details of the number of Gram Sabhas from which clearances were required to be obtained in compliance with the Forest Rights Act, 2006 and the time taken for the same. In response, the review petitioner, vide affidavit dated 16.5.2017, has submitted that discussions were initiated with the Gram Sabhas of the villages through which the transmission line was passing for obtaining the consent of the land owners. The Review Petitioner has submitted that consent of the 50% of the members present at the Gram Sabha is a pre-requisite for submission of the forest proposal as per the MOEF Notification dated 3.8.2009. The instant case required forest clearance from 3 DFOs in Jharkhand and one DFO in Bihar. Holding Gram Sabha in each village was a cumbersome and time consuming exercise and it delayed the submission of forest proposal. The Review Petitioner has submitted that this process required holding meetings and discussions in 85 villages (in 6 districts involving 7 forest divisions and corresponding 14 blocks). The clearance from the last Gram Sabha was obtained in July, 2011 (around 6 months from the date of approaching the Gram Sabhas).

7. The Review Petitioner was directed, vide RoP dated 23.5.2017, to submit the timeline considered at the planning stage for obtaining forest clearance and



the reasons for filing application for forest clearance on 3.9.2009, when the Investment Approval was on 29.8.2008. In response, the Review Petitioner, vide affidavit dated 28.6.2017, has submitted that the as per the L2 network, detailed survey of the land was to be completed by July, 2009, i.e. 10 months from the date of Investment Approval, However, due to certain exigencies, the detailed survey took 12 months instead of 10 months envisaged. A Period of 300 days from the date of Investment Approval was considered for forest clearance as per the procedure and guidelines of MOEF. As regards the reasons for delay in filing of the application for forest clearance on 3.9.2009, while the Investment Approval was received on 29.8.2008, the Review Petitioner has submitted that the route alignment, preliminary survey and detailed survey were prerequisites for preparation of forest proposal and were included in the scope of contract. The route alignment work was started in September, 2008 after the Investment Approval and was completed as targeted in LOA in July, 2009, inspite of Left Wing Extremism, because of the proper scheduling of work by the Review Petitioner. After survey and finalisation of route, information regarding plot no., mouza, area of land and tree details were to be furnished for Land Scheduling by concerned Circle (C.O.) and thereafter NOCs from the concerned Dy. Commissioners were to be obtained. These details were submitted for Land Scheduling in July and September, 2009 in 7 Forest Divisions. Due to the time consumed for detailed survey and subsequent land scheduling process, which were beyond the control of the Review Petitioner, the initial forest proposal could be submitted only on 24.9.2009 and 31.8.2009.



Analysis and Decision

8. We have considered the submissions of the review petitioner. The review petitioner has filed the instant review petition seeking condonation of the time over-run disallowed in case of Assets I, II and III and has further prayed for allowing the IDC and IEDC which were disallowed in the impugned order. As regards time over-run, the review petitioner has contended that the reasons for time over-run were submitted in the affidavit dated 31.10.2015 which were not adequately considered by the Commission in the impugned order. We did not find any affidavit dated 31.10.2015 on record. However, the petition was filed on 31.10.2015 in which the petitioner had stated that time over-run in case of Assets I, II and III occurred due to delay in forest clearance for Maithan-Gaya line owing to Maoist threat which hindered survey of the line and the MOEF order dated 3.8.2009 which directed all State Governments to ensure compliance of Forest Rights Act, 2006 which inter-alia required NOC and written consent from each Gram Sabha and certification of the same from the respective State governments. The compliance of these conditions being cumbersome and time consuming exercise, considerably delayed the forest proposal submission was considerably delayed. Thereafter, the forest clearances for Bihar and Jharkhand were received 16 months after submission of proposal in State of Bihar and 26 months in the state of Jharkhand. Further, Maoist activities also led to delay in completion of the project.

9. We have gone through the contents of the main petition and the impugned order. We note that these reasons for time over-run, submitted in the main petition were considered by the Commission in the impugned order and



accordingly, part of the time over-run in commissioning of Assets I, II and III due to the above said reasons was condoned. Hence, we are not able to agree with the contention of the Review Petitioner that its submissions in the main petition were not considered. In our view, the Review Petitioner is seeking re-appreciation of the submissions made in the main petition which is outside the scope of review and therefore, the ground for review on this count fails.

10. The Review Petitioner has submitted that certain documents in support of its contention that the reasons for time over-run are not attributable to the Review Petitioner. The Review Petitioner has submitted that these documents were not at its disposal at the time of filing the main petition. The Review Petitioner has requested to consider the documents in the interest of justice and condone the time over-run. The Review Petitioner has relied upon Order 47, Rule 1, of Code of Civil Procedure and has contended that the said provision allows review on discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the Review Petitioner at the time when the impugned order was passed. In the instant case, the documents which have been produced now were available and were within the knowledge of the Review Petitioner at the time of filing of main petition. The Review Petitioner has submitted that after the contract with the contractor expired, the documents were consigned to the site office and hence could not be produced at the time of filing or during the course of arguments of the main petition. We are unable to agree with the Review Petitioner that these documents could not be produced as the same was available with site office. The site offices are functioning under the command and control of the corporate



office of the Review Petitioner. Had the Review Petitioner carried out due diligence to search for all the relevant documents, the Review Petitioner could have traced these documents from the site office and filed them alongwith the main petition. In our view, this is not a case where the document was not within the knowledge of the Review Petitioner, but a case where the Review Petitioner has not been able to trace the documents on account of absence of proper system of maintenance and retrieval of old records. The case of the Review Petitioner does not meet the requirement of order 47 Rule 1 of the CPC and therefore, there is no error apparent on the face of record and accordingly, the review on this count is not allowed.

11. The Review Petitioner has also submitted that the notification dated 3.8.2009 by MOEF was issued subsequent to the Investment Approval dated 29.8.2008, making it mandatory to comply with the specific provisions of 'Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter 'The Forest Act, 2006'), and this amounted to change-in-law event which led to delay in commissioning of instant assets. As regards the Change in Law, we notice that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 came into effect from 1.1.2008 which is prior to 29.8.2008 when the Investment Approval was accorded. In other words, the Review Petitioner was aware of the requirements under the said Acts and Rules. The Review Petitioner should have factored the timeline realistically in the Investment Approval after taking into account the procedural requirements of the said Act



and the Rules. Further, the letter dated 3.8.2009 merely stressed upon the need for strict implementation of the provisions of the said Acts and Rules. The Commission while passing the impugned order has kept all relevant provisions of the Act and the Rules in view including the letter dated 3.8.2009. The Review Petitioner is arguing the case on merit while adverting the various provisions of the letter dated 3.8.2009 which falls outside the scope of review. In our view, there is no ground for review on this account.

12. The Review Petitioner has also contended that in similar circumstances, in case of Koderma-Gaya line, the Commission in order dated 30.3.2016 in Petition No. 132/TT/2015 had condoned the entire period of time over-run whereas the Commission has disallowed a period of 8 months and 7 days in case of Asset I and 12 months in case of Assets II and III. In our view, the facts of both cases are not similar and the decision regarding the extent of condonation of time over-run has been taken based on merit of each case.

13. The Review Petitioner had not explained with the help of Pert Chart the time which was envisaged for different activities for implementation of the project and time actually consumed for execution of the project. The Review Petitioner submitted a L2 network which only contains the route alignment, route approval and detailed survey besides the schedule of activities for Supply & Erection of Tower Package. The L2 network does not show the time envisaged in the Investment Approval and the actual time taken for execution of various activities including the forest clearance. Despite clear cut directions, the Review Petitioner has not submitted the Pert Chart in the absence of which the impact of time over-run vis-a-vis the efforts made by the Review Petitioner to mitigate the time over-



run cannot be realistically assessed. The process involved for taking forest clearance is being presently taken by the Commission as 12 months which is expected to be factored in the Investment Approval by the Review Petitioner. The time over run beyond this period is condoned as case to case basis subject to proof to the satisfaction of the Commission that the factors were beyond the control of the Review Petitioner. The Review Petitioner has taken 26 months to obtain forest clearance reckoning the same from the date of application to the forest authorities. After adjusting 12 months, the entire period of 14 months have been condoned beyond SCOD. Apart from the 14 months, 2 months have been condoned on account of Maoist violence. The balance of 8 months and 7 days in case of Asset I and 12 months in case of Assets II and III has not been condoned. The relevant portion of the order is extracted below:-

“19. In case of Assets I, II and III, the petitioner submitted the proposal for forest land in May, 2010 and got the final clearance on 8.11.2012 after 26 months. We are of the view that the time taken for getting forest clearance is beyond the petitioner. However, the petitioner has not submitted the time considered in the investment approval while claiming the delay. The processing time including preparatory activities for submission of proposal will have to be completed by the petitioner within a year to complete the project within schedule date of commissioning. In view of above consideration, we have considered that the petitioner would have factored 12 months for getting forest clearance. Hence, time over-run of only 14 months (after excluding 12 months) due to delay in forest clearance is condoned. It is further observed there were problems due to naxalites and hence this time over-run of 2 months is also condoned. Accordingly, we have condoned the total delay of 16 months in case of Assets I, II and III. Thus, we have disallowed the delay of 8 months and 7 days in case of Asset-I and 12 months in case of Asset-II and III.”

14. In the light of the above discussion, we are of the view that, there is no scope for review of the impugned order merely because time over run has been condoned in full in Petition No 132/TT/2015 where the facts of the case are completely different.



15. In view of the above, the review petitioner's prayer for condonation of the entire period of time over-run in case of Assets I, II and III is not allowed. Consequently the corresponding IDC and IEDC are also not allowed.

16. This order disposes of Petition No. 6/RP/2017.

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(A.S. Bakshi)
Member

