

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 244/MP/2016

**Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member**

Date of Order: 19th of September, 2018

In the matter of:

Measurement of GCV of coal from the samples taken from the Railways Wagon Top

And

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 read with Regulations 111 and 115 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for removal of difficulties and for consequential orders on the measurement of GCV of coal from the samples taken from the Railway Wagon top

And

In the matter of:

The AGM (Commercial)
NTPC Limited
NTPC Bhawan, Core-4
SCOPE Complex, Lodhi Road
New Delhi-110003

....Petitioner

Vs.

- 1) The Sr. General Manager (Power Purchase)
Grid Corporation of Orissa Limited (GRIDCO)
Vidyut Bhavan, Janpath
Bhubaneswar-751022, Orissa
- 2) Chief General Manager (Commercial)
MPPMCL, Shakti Bhawan
Vidyut Nagar, Rampur
Jabalpur-110003
- 3) Chief Engineer (Power Purchase)
MSEDCL, Pradashgad
Bandra (East)
Mumbai- 400051



- 4) General Manager (Commercial)
GUVNL
Sardar Patel Vidyut Bhawan
Race Course, Vdodara
Gujarat-390007
- 5) Executive Director (Commercial)
CSPDCL
P.O.- Sundernagar
Danganiya
Raipur- 492013
- 6) Chief Electrical Engineer
Electricity Department
Government of Goa
Vidyut Bhawan
Panaji
Goa- 403001
- 7) Executive Engineer
Electricity Department
Administration of Daman & Diu
Daman- 396210
- 8) Superintending Engineer
Electricity Department
Administration of Dadra & Nagar Haveli
Silvasa- 396230
- 9) Chairman & Managing Director
APEPDCL (AP Eastern Power Distribution Company Ltd.)
Corporate Office
P&T Colony, Seethammadhara
Visakhapatnam- 530013 (AP)
- 10) Chairman & Managing Director
APSPDCL (AP Southern Power Distribution Company Ltd.)
Corporate Office
Back side Srinivasa Kalyana Mandapam
Tiruchhanur Road Kesavayana Gunta
Tirupathi- 517503 (AP)
- 11) Chairman & Managing Director
TSNPDCL (Telangana Northern Power Distribution Company Ltd.)
Formerly Andhra Pradesh Northern Power Distribution Company Ltd.
H. No. 2-5-31/2 Vidyut Bhavan, Nakkalagutta, Hanamkonda
Warangal- 506001



- 12) Chairman & Managing Director
TSSPDCL (Telangana Southern Power Distribution Company Ltd.)
Formerly AP Central Power Distribution Company Ltd
Mint Compound, Corporate Office, Hyderabad- 500063
- 13) The Managing Director
Bangalore Electricity Supply Company Ltd (BESCOM)
Krishna Rajendra Circle, Bangalore – 560001
- 14) The Managing Director
Mangalore Electricity Supply Co. Ltd., (MESCOM)
Paradigm Plaza, A. B. Shetty Circle, Pandeshwar
Mangalore – 575001
- 15) The Managing Director
CESC Mysore (Chamundeshwari Electricity Supply Corp. Ltd.)
CESC, Corporate Office, No. 29, Ground Floor
Kaveri, Grameena Bank Road, Vijay Nagar, 2nd Stage
Mysore- 570017
- 16) The Managing Director
GESCOM (Gulbarga Electricity Supply Company Ltd.)
Main Road, Gulbarga
Gulbarga-585102, Karnataka
- 17) The Managing Director
HESCOM (Hubli Electricity Supply Company Ltd.)
Corporate Office
P.B. Road, Navanagar
Hubli-580025
- 18) The Chief Engineer
Tariff and Regulatory Affairs Cell
KSEB Ltd.
Vaidyuthi Bhavanam, Pattom
Thiruvananthapuram- 695004
- 19) The Chief Financial Controller (Regulatory Cell)
7th Floor, NPKRR Maligai
Tamil Nadu Generation & Distribution Corporation Ltd. (TANGEDCO)
144, Anna Salai
Chennai-600002
- 20) The Superintending Engineer-I
Electricity Department
Govt. of Puducherry
137, NSC Bose Salai
Puducherry-605001



- 21) SE (SPA & TC)
Uttar Pradesh Power Corp. Ltd. (UPPCL)
Shakti Bhawan Extn., 10th Floor
14, Ashok Marg
Lucknow-226001 (UP)
- 22) On behalf of Jaipur VVNL, Ajmer, VVNL and Jodhpur VVNL
Chief Engineer (RUVNL)
Rajasthan Urja Vikas Nigam Limited
Shed No. 5/5, Vidyut Bhawan
Janpath, Jyoti Nagar
Jaipur- 302005
- 23) The CEO & ED
Tata Power Delhi Distribution Ltd
33 KV sub-station, Hudson Lines
Kingsway Camp, Delhi-110009
- 24) The CEO
BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place
New Delhi-110019
- 25) The CEO
BSES Yamuna Power Limited
Shakti Kiran Building
Karkardooma, Delhi-110092
- 26) The Chief Engineer (Commercial)
Haryana Power Purchase Centre (HPPC)
Shakti Bhawan, Sector-6
Panchkula, Haryana- 134109
- 27) Director (Distribution)
Punjab State Power Corporation Limited (PSPCL)
The Mall, Patiala- 147001
- 28) The Chief Engineer (SP)
Himachal Pradesh State Electricity Board (HPSEB)
Kumar Housing Complex Building-II
Vidyut Bhawan
Shimla- 171004 (HP)
- 29) The Superintending Engineer
Electricity Department (Engineer)
Union Territory of Chandigarh
Addl. Office Building
Sector-9 D, Chandigarh



- 30)The Chairman & Managing Director
Uttarakhand Power Corp. Ltd. (UPCL)
Urja Bhawan, Kanwali Road
Dehradun- 248001
- 31)The Director (Power)
New Delhi Municipal Council
Palika Kendra Building
Opp. Jantar Mantar
Parliament Street
New Delhi-110001
- 32)The Chief Engineer, Delhi Zone
Military Engineering Service
Delhi Cantt.
New Delhi- 110010
- 33)The Development Commissioner (Power)
Power Development Department (PDD)
Govt. of J&K, Civil Secretariat
Jammu
- 34)The PCE cum Secretary
Power Department
Govt. of Sikkim, Kazi Road, Gangtok
Sikkim- 737101
- 35)The Chief Engineer (Commercial)
Jharkhand Urja Vikas Nigam Ltd.
Engineering Building
HEC, Dhurwa
Ranchi- 834004
- 36)The Chief Engineer (Commercial)
Damodar Valley Corporation
DVC Towers, VIP Road
Kolkata- 700054
- 37)The Chairman cum Managing Director
Bihar State Power (Holding) Company Ltd.
Vidyut Bhawan, Bailey Road
Patna- 800001
- 38)The Managing Director
North Bihar Power Distribution Company Ltd. (NBPDCCL)
Vidyut Bhawan
Bailey Road
Patna (Bihar) - 800001
-



- 39) The Managing Director
South Bihar Power Distribution Company Ltd. (SBPDCL)
Vidyut Bhawan
Bailey Road
Patna (Bihar) – 800001
- 40) The Chief Engineer (PT & P)
West Bengal State Electricity Distribution Co. Ltd.
Vidyut Bhawan, Bidhannagar
Block DJ, Sector-II, Salt Lake City
Kolkata – 700 091
- 41) The Managing Director
Assam Power Distribution Ltd.
Bijulee Bhawan, Paltan Bazaar
Guwahati - 781001
- 42) The Chairman cum Managing Director
Meghalaya Energy Corporation Ltd.
Lum Jingshai, Short Round Road
Shillong – 793001
- 43) The Chief Engineer (WEZ)
Department of Power
Government of Arunachal Pradesh
Itanagar- 791111
- 44) The Engineer-in-Chief (Power)
Department of Power
Govt. of Mizoram
Khatla, Aizawl- 796001
- 45) The Managing Director
Manipur State Power Distribution Company Ltd. (MSPDCL)
Keishampat
Imphal- 795001
- 46) The Chief Engineer (P&E)
Department of Power
Govt. of Nagaland
Kohima- 797001
- 47) The Chairman cum Managing Director
Tripura State Electricity Corporation Ltd. (TSECL)
Bidyut Bhaban
Banamlipur
Agartala- 799001

....Respondents



Parties present:

- 1) Shri M.G. Ramachandran, Advocate, NTPC
- 2) Ms. Anushree Bardhan, Advocate, NTPC
- 3) Shri Shubham Arya, Advocate, NTPC
- 4) Shri Prashanti Pasupuleti, Advocate, NTPC
- 5) Ms. Swapna Seshadri, Advocate, GUVNL
- 6) Ms. Parichita Chowdhury, Advocate, GUVNL
- 7) Shri Buddy Ranganadhan, Advocate, BRPL & BYPL
- 8) Shri Rahul Kinra, Advocate, TPDDL, BRPL & BYPL
- 9) Shri Janmali M., Advocate, WBSEDCL
- 10) Shri Ravin Dubey, Advocate, MPPMCL
- 11) Shri R.B. Sharma, Advocate, BSP(H)CL
- 12) Shri Ashutosh Kr Srivastava, Advocate, TPDDL, BRPL & BYPL
- 13) Shri Anivesh Bharadwaj, Advocate, TPDDL, BRPL & BYPL
- 14) Shri Anupam Varma, Advocate, TPDDL, BRPL & BYPL
- 15) Shri Rajkumar Mehta, Advocate, GRIDCO
- 16) Ms. Himanshi Andley, Advocate, GRIDCO
- 17) Shri S. Vallinayagam, Advocate, TANGEDCO
- 18) Shri P.B. Venkatesh, NTPC
- 19) Shri Ajay Dua, NTPC
- 20) Shri Nishant Gupta, NTPC
- 21) Shri Umesh Ambati, NTPC
- 22) Shri Ashok Kumar Samontary, GRIDCO
- 23) Shri C.K. Dash, GRIDCO
- 24) Shri R.K. Jha, DVC
- 25) Shri Pratik Biswas, DVC
- 26) Shri Pulak Bhattacharya, DVC
- 27) Shri Haridas Maity, BYPL
- 28) Shri Nishant Grover, BYPL
- 29) Shri Sameer Singh, BYPL
- 30) Shri Gagan Swain, BYPL
- 31) Ms. Shefali Sobti, TPDDL
- 32) Shri Uttam Kumar, TPDDL

ORDER

The Petitioner, NTPC Ltd. has filed the present petition under Section 79 of the Electricity Act, 2003 (hereinafter "2003 Act") read with Regulations 111 and 115 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter "CBR") for removal of difficulties and for consequential orders on the measurement of GCV of coal from the samples taken from the Railway Wagon top. The Petitioner has made the following prayers in the Petition:



“(a) In view of the difficulties expressed herein above in regard to sampling from wagon top for certain stations having overhead Electric traction at Track hopper or coal feeding through conveyor, Hon'ble Commission may allow for measurement of 'as received' GCV by taking samples from conveyor after crusher

(b) In view submissions made herein above related to recording of higher GCV at wagon top and loss of GCV within the power station, Hon'ble Commission may consider allowing a margin of one Grade of coal on Normative Basis on the GCV measured on "as received basis".

(c) To allow a transit and handling loss of 4% for coal received through Indian Railway system;

(d) To allow on normative basis an additional loss of 0.2% due to loss of coal in power station as per submissions at para 9.2 above.

(e) To allow the Transit & Handling Loss for Farakka station as a non-pit head station

(f) pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.”

2. The Petitioner has submitted that Regulation 30(6) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter “2014 Tariff Regulations”) provides for the formula for determination of the Energy Charge Rate (ECR) of thermal power plants in which CVPF has been defined as “Weighted Average Gross Calorific value of coal as received, in kCal per kg for coal based stations”. The Petitioner has challenged the said provision in Writ Petition No.1641 of 2014 before the Hon'ble High Court of Delhi in which the Petitioner has prayed that the sampling of coal for measurement of Gross Calorific Value (GCV) should be as on fired basis as was in existence prior to the 2014 Tariff Regulations. The Petitioner has further submitted that:

(a) The Commission in its order dated 25.1.2016 in Petition No.283/GT/2016 has held that the sampling of coal for measurement of GCV on “as received” basis should be taken from the Railway Wagon top upon the wagon reaching the



site of the generating station, and not after the coal is unloaded nor at the stage of secondary crusher.

(b) The Commission has not allowed the Review Petition No.25/RP/2016 vide order dated 30.6.2016.

(c) The Commission in order dated 19.2.2016 in Petition No.33/MP/2014 directed for instituting mechanism and installing facilities for measurement of GCV on as received basis.

(d) Without prejudice to its rights and contention in the Writ Petition No.1641/2014 pending before the High Court of Delhi, NTPC proceeded to undertake the sampling of coal from the Railway Wagon top from 1.10.2016 onwards by undertaking various preliminary activities to install necessary infrastructure such as fabrication and erection of platforms alongwith unloading places, review of safety and sampling procedures/protocol for personnel to be engaged in wagon load sampling etc. and also entering into an Memorandum of Understanding with Central Institute of Mining and Fuel Research (CIMFR) under CISR, Government of India for undertaking sampling at the generating stations.

(e) During implementation of the sampling of coal taken from the Railway Wagon top to measure the GCV, the Petitioner was confronted with circumstances such as: (i) safety issues in case of five generating stations (Simhadri, Talcher Thermal, Dadri, Unchahar, and Barh), (ii) coal not received through wagons but Conveyor Belts (Vallur and Talcher TPS).



(f) There is variation in GCV measured from the samples drawn from the loaded Railway Wagons and GCV available up to the stage of firing for various reasons such as (i) GCV from the samples taken from the wagon top being higher and not representative of the lot; (ii) Loss of GCV during handling/processing within the power station; (iii) Loss of GCV during/processing in the power station; (iv) Loss of coal within power station premises; and (v) Transit and Handling losses for Farakka.

3. As regards the safety issues, the Petitioner has submitted as under:

“7.1 Safety issues: In the case of generating stations such as Simhadri, Talcher Thermal, Dadri, Unchahar and Barh, the transportation by railway is up to the track hopper of the generating station with electric wires on the top. The existence of electric wires has created a serious issue of safety of personnel at the time of sampling. The very short (around 1.5 m) vertical distance between the coal heap on the wagon and the overhead traction wire poses a serious risk to the personnel engaged in collecting samples. NTPC had taken up the issue with Railways and explored the possibility of disconnecting the supply to overhead wires at the time of sample collection. This has not been accepted by Railways as it involves repeated on-off situation for collecting sample from one rake and in case of any mistake on on-off may lead to electrocution of personnel. The copy of the letters written by the Indian Railways is attached hereto and marked as Annexure 'A. In the order dated 25.01.2016, the Hon'ble Commission has relied upon sampling procedure adopted by GSECL. It would be relevant to mention here that the generating stations of GSECL do not have overhead electric traction.”

As regards the generating stations where coal is not received through wagons, the Petitioner has submitted as under:

“7.2. Coal not received through Wagons: Further, some of the stations like Vallur, Talcher TPS (about 70-80%) receive coal through conveyor belts and not through railway wagons. At some stations, certain quantum of coal is received through barges/road etc. Hence the order of sampling from wagon top would not be applicable to such stations and directions of Hon'ble Commission cannot be implemented. Hon'ble Commission may like to consider a different point of sampling for 'as received' GCV in such stations.

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Keeping in view the difficulties mentioned herein above for sampling of coal in case of stations where there is overhead traction in the unloading area and special



circumstances in stations where the coal is received through conveyor, it is prayed that Hon'ble Commission may consider allowing to take samples of coal for measurement of 'as received' GCV from the conveyor after crusher for such stations only.”

4. As regards the variation in GCV of coal measured from the samples drawn from the loaded Railway Wagons and GCV available up to the stage of firing, the Petitioner has submitted that the sampling of coal to be drawn from the Railway Wagon Top was generally of the coal at the upper part of the Railway Wagon and an increasing trend of moisture content in coal is experienced as one goes from top to the bottom of a wagon. Therefore the samples taken from the wagon top would be inherently biased and likely to lead to a non-representative higher GCV as against actual GCV of the lot. As regards the loss of GCV during handling/processing within the power station, the Petitioner has submitted that at the time of notification of 2014 Tariff Regulations, there was shortage of coal and the coal receipts were immediately taken to bunkers directly. Since NTPC is receiving full quantum of coal and has been storing/stacking the coal for a period upto 31 days, there is loss of GCV on account of self-ignition, loss of volatile matter, efflux of time apart from loss of GCV in handling/crushing/process of coal in the power station. The Petitioner has prayed for a margin of one Grade of coal on the GCV measured on “as received” basis. The Petitioner has also submitted that the quantum of coal on the Railway Wagons received at the generating stations have been found to be significantly at variance from the quantum of coal which was loaded by the Coal Company at the mines’ end which has resulted in under receipt of coal upto 7.7% for non-pit head stations. The Petitioner has prayed for transit loss of 4% as it is not within its control to handle the coal till it reaches the generating stations, particularly rail fed generating stations. The Petitioner has also submitted that there is loss of quantity of



coal when it is handled at the generating station on account of spraying of water, winds and mill rejects. The Petitioner has prayed for allowing loss of 0.2% on account of loss of coal within the premises of the generating station. The Petitioner has submitted that MGR of Farakka has 85 km of track passing through hilly terrain in West Bengal and Bihar and pilferage from the rakes takes place whenever rakes slow down or stops, despite the deployment of CISF. The Petitioner has submitted that transit and handling loss of Farakka is in excess of 1.0% as compared to the norm for pit head station of 0.2% and accordingly, the Petitioner has prayed for applying the norms for non-pithead stations in case of Farakka.

5. NTPC has submitted that the Hon'ble High Court of Delhi in its order dated 10.11.2016 in WP(C) No.1641/2014 directed as under:

“4. It is represented by Shri M.G. Ramachandran, the learned counsel appearing for the petitioner that petitioner/NTPC Ltd. is facing certain difficulties in implementing the orders of CERC and, therefore, they may be permitted to move an appropriate application for modification.

5. The learned counsel for the CERC states that if any such application is moved, the same would be considered in accordance with law. The statement of the learned counsel for the CERC is placed on record.”

The Petitioner has submitted that in terms of the above, the Petitioner has placed the difficulties and issues faced by it in implementing the orders dated 25.01.2016 and 30.6.2016 through the present petition.

6. Notices issued to the Respondents as per the memo of parties submitted by the Petitioner. Replies to the petition have been filed by (i) GRIDCO Ltd., (ii) Uttar Pradesh Power Corporation Ltd., (iii) Tamil Nadu Generation and Transmission Company Ltd., (iv) Gujarat Urja Vikas Ltd., (v) Tata Power Delhi Distribution Ltd., (vi)



Assam Power Distribution Company Ltd., (vii) Bihar State Power Holding Company Ltd., (viii) Madhya Pradesh Power Management Company Ltd., (ix) West Bengal State Electricity Distribution Company Ltd., (x) BSES Rajadhani Power Ltd., (xi) Kerala State Electricity Board Ltd., (xii) Punjab State Power Distribution Company Ltd., (xiii) BSES Yamuna Ltd. The Petitioner has also filed rejoinder to the replies of the Respondents.

7. The Respondents have challenged the maintainability of the Petition. The Commission heard the Petitioner and Respondents on 11.9.2018 through their respective counsels on the issue of maintainability and reserved the order. Accordingly, the submissions of the Respondents and the Petitioner on the issue of maintainability have been considered in this order.

8. The Respondents have challenged the maintainability of the petitions on the following grounds:

(a) By way of the present Petition, the Petitioner is in effect seeking a second review of the order dated 25.01.2016. The Petitioner sought amendment of the Regulation 30(6) of the 2014 Tariff Regulations which was rejected with a reasoned and speaking order dated 25.1.2016. Thereafter, the Petitioner sought review of the order which was dismissed by way of Order dated 30.6.2016. The Petitioner in the garb of removing difficulty is seeking a second review of the Order dated 25.1.2016 as the relief sought in the present petition has the effect of amending the Regulation 30 (6) of the CERC Tariff Regulations 2014. It is a settled principle of law that a second review petition by whatever name it is called is not maintainable in the light of the



Judgments passed by the Hon'ble Supreme Court in Delhi Administration v. Gurdip Singh Uban and Ors,[(2000) 7 SCC 296] and in J. Ranga Swamy v. Government of Andhra Pradesh and Ors.[(1990) 1 SCC 288].

(b) The Petitioner had ample opportunity to raise such issues during the proceedings in Petition No. 283/GT/2014 as well as Review Petition No. 11 of 2016 which the Petitioner did not do. The present petition is not maintainable in view of the provisions of Order II Rule 2 of the Code of Civil Procedure which provides that all reliefs in respect of the same cause of action must be claimed in one suit and in case the petitioner omits to sue for all such reliefs, he cannot afterwards sue for any relief so omitted.

(c) The present Petition is barred by res-judicata as provided for in Explanation IV of Section 11 of the Code of Civil Procedure, 1908. If an issue could have been raised but not was not raised, it is deemed to have been raised and decided as held by the Hon'ble Supreme Court in the case of Forward Construction Co and Ors vs Prabhat Mandal [(1986) 1 SCC 100]. The contentions of the Petitioner in the present Petition regarding the difficulties in measuring GCV of coal from the wagon tops, coal samples showing higher GCV and not being representative of the GCV of the entire lot of coal, loss of quantity of coal between coal mine and power station, loss of coal within power station premises and higher transit loss at Farakka, had not been raised in the proceedings in Petition No. 283/GT/2014 and Review Petition No. 11 of 2016. Since the aforementioned issues could have been raised but



had not been raised, it is deemed that such issues had been raised and decided by this Hon'ble Commission.

(d) This is a clear abuse of the process of the court and the very same reasons are being cited by the Petitioner firstly for setting aside the Regulations, thereafter for interpreting the Regulations in a particular manner and now for removal of difficulty. The 'power to remove difficulties' as prayed for by the Petitioner cannot be interpreted to mean power to remove difficulties in implementation of the Regulations. Regulation 115 of the CERC (Conduct of Business) Regulations, 1999, gives the Commission the power to remove difficulties. The Appellate Tribunal for Electricity in the judgment dated 6.5.2011 in Appeal No. 1720 of 2011 [MPPMCL vs MPERC & Ors.] has held that the power of removal of difficulties is an administrative power. This power is exercisable only to ensure that the Regulations are implemented and it is in furtherance of the Regulations. Such power to remove difficulty does not contemplate removal of hardship that may arise as a result of giving effect to the Regulations. Hon'ble Supreme Court in M. U. Sinai v. Union of India [(1975) 2 SCR 640] has held that the difficulty which needs to be removed ought to be a difficulty for giving effect to the statute/delegated legislation, and not a difficulty arising in the course of implementation of the statute/delegated legislation. The power to remove difficulty conferred on the Commission is a limited power to make minor adaptations and peripheral adjustments in the statute for making its implementation effective without touching its substance.



- (e) The inherent powers conferred upon the Commission in terms of Regulation 111 of the CBR are different from the power to remove difficulty. The said powers are not at all exercisable when there is specific provision of law to address a remedy. When there is no specific provision in a given situation, inherent power can be exercised.
- (f) The Commission made 2014 Tariff Regulations for the MYT period FY 2014-15 to 2018-19 as per provision 178 (2)(s) and (3) after taking into consideration the suggestions/objections of all the stakeholders. The Petitioner is in effect praying for amendments to be made to the 2014 Tariff Regulations by way of the present Petition for removal of difficulties.
- (g) The relief sought by the Petitioner is a violation of the principles enshrined in Section 61(c) and (d) of the Electricity Act. By way of the present Petition, the Petitioner is seeking to transfer the impact of various inefficiencies in the transport and supply of coal to its generating stations onto the consumers. The transit losses faced by the Petitioner and the corresponding relaxations claimed by the Petitioner go against the principles of efficiency and economic use of resources. It is also contrary to the interest of the consumer's interest because it increases the burden on the end consumers. It is settled law that where there are regulations, orders/exercise of power by this Commission has to be in accordance with such regulations as held by the Hon'ble Supreme Court of India in PTC India Vs. CERC & Ors [2010 4 SCC 603].

(h) The Collieries are not the parties to the petition with whom the Petitioner has a running disputes for so many years in so far as the GCV is concerned. The dispute to the GCV, if any, is required to be sorted out between the Petitioner and the Collieries. Now which route, the Petitioner intends to take to resolve the issue is entirely up to the Petitioner. Not taking the correct route and moving in circles only shows that the interest of the Petitioner has been served so far at the cost of the beneficiaries. The Appellate Tribunal in its judgment dated 26.2.2015 in Appeal No. 107 of 2014 has clearly upheld the views of this Commission that the disputed matter is required to be sorted out between the Petitioner and the Party concerned for its resolution.

(i) GRIDCO has filed an appeal on 23.12.2016 before the Appellate Tribunal for Electricity against the order dated 25.01.2016 of the Hon'ble Commission in Petition No. 283/GT/2014 vide DFR No. 4224 of 2016. It is thus submitted that in view of the pendency of the appeal against the order dated 25.01.2016, the present petition is not maintainable.

9. The Petitioner in his rebuttal to the preliminary objections of the Respondents has submitted as under:

(a) The Petitioner had taken due permission of the Hon'ble High Court of Delhi in the pending petition before filing the application for removal of difficulties. In the proceedings before the Hon'ble High Court on 10.11.2016, some of the Respondent - Procurers were duly represented by their counsels. No issue was then sought to be raised by the counsels for the Respondent-Procurers



on the maintainability of the petition to be filed before the Commission. In the circumstances, it is improper and unfair for any of the Respondent-Procurementers to raise the issue of maintainability of the petition for removal of difficulties with the prayers as mentioned in the petition.

(b) The earlier Petition being No. 283/GT/2014 was filed seeking approval of the Commission for taking samples in all cases (for the purpose of measurement of the GCV) at the stage of secondary crusher and the review petition was also in respect of the above prayer for taking samples from the secondary crusher. However, the present petition has not been filed for seeking any order to the effect that the directions by this Commission to sample coal from the Railway Wagon Top should generally be substituted by a direction for samples to be drawn at any later stage or at the crusher stage, except in cases of six generating stations where there are issues of taking samples from the Railway Wagon Top on account of electric wires (for traction purpose) and two generating stations where the coal at station is not received through wagons but through Conveyor Belt. In all other respects, the present Petition has clearly proceeded on the basis that the samples have to be drawn from the Railway Wagon Top. Therefore, the cause for filing the present petition is different from the earlier petition. In the present petition, NTPC has not sought any order, directly or indirectly, for reinstating the claim of NTPC made in the earlier petition or in the review petition decided by the Commission. Since October 2016, the Petitioner is drawing samples from the Railway Wagon top including in respect of six generating stations where there are railway traction wires by employing manual methods. In case of supply of



coal through Conveyor Belt, samples could be taken on the conveyor system as there is no transfer of coal through wagons. Therefore, the Respondent Procurers are wrongly alleging that the present petition is a second review petition in disguise.

(c) The Respondent-Procurers have wrongly alleged the application of principles of Order 2 Rule 2 of the Code of Civil Procedure, 1908 in the present case. The first Petition filed was on the interpretation of Regulation 30 (6) of Tariff Regulations, 2014 in regard to the scope of the term "as received". By the Orders dated 25.1.2016 and 30.6.2016, the Commission held that "as received" basis would mean drawing samples from the Railway Wagon Top. It is only after implementing the same that the Petitioner could file a Petition for removal of difficulties in following the interpretation made by the Commission, namely, the taking of samples from the Railway Wagon Top. The prayers in the present petition could not have been included in the earlier petition or in the review petition filed.

(d) There is no merit in the contention of the Respondent-Procurers that the exercise of power to remove difficulties is not sustainable, when there is no difficulty in the implementation of the 2014 Tariff Regulations. There are genuine and bona fide difficulties faced by the Petitioner in the determination of GCV on 'as received' basis which include: (i) taking of samples from the Railway Wagon Top in the case of generating stations where there are electrical traction wires; (ii) when the coal is supplied through Conveyor Belt; (iii) difficulties in taking out a representative sample of coal; (iv) difficulties on



account of loss of GCV on various counts including the changed scenario in respect of coal availability with a corresponding increase in the storage time of coal than what was envisaged at the time of the notification of the 2014 Tariff Regulations. The provisions in the 2014 Tariff Regulations providing for the power to remove difficulties and similar provision in the Conduct of Business Regulations are precisely meant for the above purpose and particularly in the context that the Regulations cannot anticipate all aspects and provide for the same. Reliance has been placed on the following authorities in support of the contention:

- I. M.P. Jain - Cases and Materials on Indian Administrative Law - 1994 Edition Volume 1, Page 117:
- II. Judgement of Appellate Tribunal in the matter Maharashtra State Power Generation Co. Limited -v- Maharashtra Electricity Regulatory Commission & Ors. [2010 ELR (APTEL) 0189]:
- III. NTPC Limited v, Madhya Pradesh State Electricity Board 2007 ELR APTEL 7:

The above clearly shows that the difficulties in giving effect to the Regulations are covered within the scope. The judgement of the Hon'ble Supreme Court in case of M.U. Sinai Vs. Union of India [(1975)2SCR640] only excludes extraneous circumstances or reasons for exercise of power to remove difficulty and supports the case of the Petitioner as the difficulties



have arisen to give effect to the regulations for measurement of GCV on “as received” basis.

(e) The contention of Respondents-Procurers that the exercise of inherent powers is not available when there is a specific provision in the regulations is misplaced in the facts and circumstances of the present case. In the present case there is no specific provision in regard to the manner in which the measurement of GCV from the Railway Wagon Top should be conducted. The Regulation only provides for measurement of GCV on "as received" basis for taking samples. The exercise of inherent power in the present case is fully justified on the principles laid down by the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited -v- Solar Semiconductor Power Company (India) Pvt. Limited and Ors [(2017) 12 SCALE 781] wherein the scope of inherent power of the Regulatory Commissions has been re-iterated.

(f) The Petitioner has not sought any amendment whatsoever of the Regulation. It is only dealing with the implementation of Regulation 30(6) of 2014 Tariff Regulations which provides for the measurement of GCV on 'as received' basis. On the other hand, it is the Respondent Procurers who are claiming that GCV should be measured on 'as billed' basis which is contrary to the specific Regulations which provide for measurement of GCV on as received basis.

(g) GRIDCO Limited has filed Appeal No 238 of 2017 before the Appellate Tribunal in which the Order dated 25.01.2016 in Petition No.283/GT/2014 has



been challenged on the ground that the Commission ought to have adopted the GCV as on 'billed' basis. Since the cause of action of the two petitions are separate - Petition No. 283/GT/2014 related to the interpretation of the Regulations whereas Petition No. 244/MP/2016 is a removal of difficulties Petition for implementing the Regulations-, there is no reason as to why the proceedings in the present petition should be deferred as prayed by GRIDCO.

10. The matter was heard on 11.9.2018 on maintainability of the present petition. Learned counsels for the Petitioner and Respondents reiterated their submissions made in the written pleadings which are not repeated for the sake of brevity.

Analysis & Decision

11. The main issue for consideration is whether the petition in the present form is maintainable. The Petition has been filed under Section 79 of the Act read with Regulation 111 and 115 of the CBR for removal of difficulty and issue of consequential order on the measurement of GCV of coal from the samples taken from the Railway Wagon top. The Respondents have challenged the maintainability of the Petition on the following grounds:

- (a) The Petition is a second Review Petition in disguise.
- (b) The Petition is hit by the principles of Order 2 Rule 2 of the Code of Civil Procedure.
- (c) The Petition is hit by Res Judicata.



(d) The Petitioner is in effect seeking amendment of the Regulations.

(e) The Petition is not maintainable under Section 79 of the Act.

(f) Inherent power under Regulation 111 of CBR cannot be exercised in this case.

(g) The Removal of Difficulties petition lies in case of implementation of the regulations and not otherwise.

Second Review Petition in disguise

12. The Respondents have submitted that the Petitioner is in effect seeking second review of the order dated 25.1.2016 in Petition No. 283/GT/2014 since the Review Petition No. 11/2016 has been dismissed vide order dated 30.3.2016. The Respondents have submitted that as per the settled position of law, the second review petition, however, nomenclatured is not maintainable. In this connection, the Respondents have relied on the judgment of the Supreme Court in Delhi Administration Vs. Gurdip Singh Uban and Others [(2000) 7 SCC 296], Zahira Habibulla Sheikh Vs. State of Gujarat [(2001) 5 SCC 353] and Saurabh Chaudri Vs. Union of India [(2004) 5 SCC 618]. The Petitioner has submitted that the prayers in the Petition No. 283/GT/2014 for measurement of the GCV of coal on “as received” basis by taking the sample at the secondary crusher and in Review Petition No. 16/2016 for taking the sample from the crusher house immediately after unloading. However, after the Commission decided in its order dated 25.1.2016 that the sample for GCV on “as received” basis should be taken from the Wagon Top, the Petitioner is implementing the same and is not seeking any order to substitute the said



direction by a direction for sample to be taken at any latter stage or crusher stage except in a few cases where difficulties are experienced in taking sample from Wagon Top or where coal is supplied through other means such as roads/barges/conveyor belt. Therefore, the allegation of the Respondent that the present petition is a second review petition in disguise is incorrect.

13. We have considered the submission of the Respondent and the Petitioner. We have gone through the pleadings of the Petition No. 283/GT/2014 and Review Petition No. 11/2016 and find that the prayers in the said petitions are completely different from the prayers in the present petition. The Petitioner is also not questioning the decision of the Commission that samples for measurement of GCV on "as received" basis shall be taken from the Wagon Top. The Petitioner is also taking the samples from the Wagon Tops including those generating stations where it is facing difficulties on account of the traction where above the railway wagons. The Petitioner is only seeking directions with regard to the generating stations where overhead traction wire is posing hazards to the personnel collecting the sample and where the supply of coal is through conveyor belt/roads/barges. In our view, the present petition does not seek review of the order dated 25.1.2016 in Petition No. 283/GT/2014. We have perused the judgment of the Delhi Administration Supra. In the said judgment the Hon'ble Supreme Court has observed that the Court should not permit hearing of such application for clarification, modification or recall if the application is in substance one for review. The Hon'ble Supreme Court has further observed as under:-

"20. We should not however be understood as saying that in no case an application for "clarification", "modification" or "recall" is maintainable after the



first disposal of the matter. All that we are saying is that once such an application is listed in Court, the Court will examine whether it is, in substance, in the nature of review and is to be rejected with or without costs or requires to be withdrawn with leave to file a review petition to be listed in chambers by circulation.”

As per the above judgment, the Court has to examine whether the application is in substance in the nature of review before taking a decision with regard to its maintainability. In this case, we have already noted that the scope and prayers of the Petition No. 283/GT/2014 and Review Petition No. 11/2016 are different from the present petition and therefore, the present petition is not in the nature of second review. The judgment in the case of Zahira Habibulla Sheikh Vs. State of Gujarat [(2004) 5 SCC 353] and Saurabh Chaudri Vs. Union of India [(2004) 5 SCC 618] are not applicable, since the facts are different.

Order 2 Rule 2 of the Code of Civil Procedure

14. The Respondents have submitted that the present petition is not maintainable in view of the provisions of Order II Rule 2, Code of Civil Procedure, 1908. The Respondents have submitted that since the Petitioner has not claimed all reliefs in the main petition, the Petitioner cannot be allowed to file subsequent petition to claim the relief so omitted. The Petitioner has submitted that the first petition was on the interpretation of Regulation 30 (6) of 2014 Tariff Regulations in regard to the scope of the word “as received”. By the orders dated 25.1.2016 and 30.6.2016, the Commission held that “as received” basis would mean drawing sample from the Railway Wagon Top. The Petitioner has filed the present petition for removal of difficulties in following the interpretation made by the Commission with regard to



taking samples from the Wagon Top. Therefore, the prayers in the present petition could not have been included in the earlier petitions.

15. We have considered the submissions of the parties. Order II Rule 2 of the CPC provides as under:-

“2. Suit to include the whole claim. - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim. - Where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.”

16. The Order dated 25.1.2016 in Petition No. 283/GT/2014 was issued with regard to the stage of drawing the sample for the purpose of measurement of GCV on “as received” basis as per the directions of the Hon’ble High Court of Delhi. The Commission decided that the samples shall be drawn from the Wagon Top. The Review Petition filed by the Petitioner for review of the said decision was rejected. The Petitioner has approached the Commission for consideration of the difficulties encountered in given effects to the directions of the Commission with regard to taking samples from the Wagon Top in certain cases and other modes of transport such as roads/barges. Considering the nature of these petitions, we are of the view that Order 2 Rule 2 is not applicable in this case.

The Petition is hit by Res Judicata

17. The Respondents have submitted that the present petition is barred by Res Judicata as provided in Explanation 4 of Section 11 of the Code of Civil Procedure.



The Respondents have submitted that since these difficulties could have been raised but were not raised by the Petitioner in the Petition No. 283/GT/2014, it would be deemed that such issues were raised and decided by the Commission. For the reasons recorded in Para 16 of this order, Explanation 4 under Rule 11 of the CPC will not be applicable in this case.

The Petitioner is in effect seeking amendment of the Regulations

18. The Respondents have submitted that the Commission has specified the 2014 Tariff Regulations in terms of Section 178 of the Act after taking into consideration the suggestions/objections of all stakeholders and the present petition is in effect praying for amendment to the 2014 Tariff Regulations by way of seeking removal of difficulties. The Petitioner has submitted that it has not sought any amendment whatsoever of the Regulation but is only seeking implementation of the Regulation 30 (6) of the 2014 Tariff Regulations through removal of difficulties. We have considered the submissions of the parties. The 2014 Tariff Regulations only provides for measurement of GCV on “as received” basis. The Commission in its order dated 25.1.2016 clarified the stage at which the sample for measurement of GCV should be taken. The Petitioner has approached the Commission with the present petition for removal of difficulties for implementation of the Regulation with regard to measurement of GCV on “as received” basis. In our view, since the Petitioner has implemented the measurement of GCV on “as received” basis (without prejudice to the Petitioner’s contention before the Hon’ble High Court) and has only sought the directions of the Commission with regard to the difficulties for taking samples from Wagon Top where there is hazard to the personnel due to live



traction wire and in case where the coal is supplied to the conveyor belt/roads/barges, the present petition cannot be said to seek amendment to the 2014 Tariff Regulations.

Section 79 of the Act

19. Section provides for the functions of the Commission. Section 79 (1) (a) provides that the Central Commission shall have the function “to regulate the tariff of the generating stations owned or controlled by the Central Government”. It is undisputed that the Petitioner is a company owned and controlled by the Central Government. The Commission has the power to regulate the tariff of the Petitioner. In *K. Ramanathan v. State of Tamil Nadu* [(1985) 2 SCC 116], Hon’ble Supreme Court has held that Regulation is “a word of broad import, having a broad meaning, and is very comprehensive in scope.” Therefore, the term “regulate the tariff” is of wide amplitude and takes within its sweep the powers related to all aspects of tariff. GCV of coal is an integral part of the ECR and therefore, any difficulties relating to GCV of coal including its measurement will fall within the regulatory jurisdiction of the Commission under Section 79(1)(a) of the Act. Therefore, the present petition is maintainable under Section 79(1)(a) of the Act.

Inherent Power of the Commission under Regulation 111 of CBR

20. The Petitioner has invoked the provisions of Regulation 111 of the CBR with regard to inherent powers of the Commission for establishing the maintainability of the Petition. The Respondents have submitted that the exercise of inherent powers is not available when there is a specific provision in the regulations. The Petitioner has submitted that there is no specific provision in regard to the manner in which the



measurement of GCV from the Railway Wagon Top should be conducted. The Regulation only provides for measurement of GCV on "as received" basis for taking samples. Therefore, exercise of inherent power by the Commission in this case is fully justified.

21. We have considered the submissions of the parties. Regulation 111 of the CBR is extracted as under:

“Saving of inherent power of the Commission

111. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.”

In Civil Appeal No. 1110/2007 (NTPC Vs UPPCL), Hon'ble Supreme Court has recognised the inherent powers of this Commission under Regulation 111 of CBR as under:

“35. The Central Commission, as indicated hereinbefore, has a plenary power. Its inherent jurisdiction is saved. Having regard to the diverse nature of jurisdiction, it may for one purpose entertain an application so as to correct its own mistake but in relation to another function its jurisdiction may be limited. The provisions of the 1998 Act do not put any restriction on the Central Commission in the matter of exercise of such a jurisdiction. It is empowered to lay down its own procedure.”

Since the provisions of CBR are saved under Section 185 of the Act, the above principles will also apply for exercise of inherent powers by the Commission in discharge of its functions under the Act.

22. Next we have to consider whether it is a fit case for exercise of our inherent power under Regulation 111 of the CBR. The provisions of Regulation 111 of the Conduct of Business Regulation are *pari materia* with the provisions of Section 151 of the Code of Civil Procedure. The Hon'ble Supreme Court in *Padam Sen v. State*



of UP [(1961) 1SCR 884] has dealt with the scope of inherent powers of the Courts under the Code of Civil Procedure as under:

"8. Section 151 of the Code reads:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code. "

Further, in the case of K.K. Velusamy Vs. N. Patattisamy, [(2011) 11 SCC 275], the Supreme Court has held as under:-

"12. The Respondent contended that Section 151 cannot be used for reopening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of Section 151 has been explained by this Court in several decisions []. We may summarize them as follows:

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances."

From the above two judgments, it emerges that the inherent powers can be exercised in order to address the procedural infirmities in the CPC to achieve the ends of justice and to prevent abuse of the process of the court.



23. The Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited Vs Solar Semiconductor Power Company (India) Pvt. Limited and Ors [(2017) 12 SCALE 781] dealt with the scope of inherent powers of Gujarat Electricity Regulatory Commission in terms of Regulation 80 Gujarat Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 (Gujarat Commission CBR). Hon'ble Justice Kurien in the said judgement has explained the scope of inherent power of the GERC as under:

“32. Regulations 80 to 82 are instances of such powers specified by the Commission. Regulation 80 has provided for the inherent power of the Commission to the extent of making such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Commission. It has to be borne in mind that such inherent powers are to be exercised notwithstanding only the restrictions on the Commission under the Conduct of Business Regulations, meaning thereby that there cannot be any restrictions in the Conduct of Business Regulations on exercise of inherent powers by the Commission. But the specified inherent powers are not as pervasive a power as available to a court under Section 151 of the Code of Civil Procedure, 1908:

“151. Saving of inherent powers of court.- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court.”

However, the Commission is enjoined with powers to issue appropriate orders in the interest of justice and for preventing abuse of process of the Commission, to the extent not otherwise provided for under the Act or Rules. In other words, the inherent power of the Commission is available to it for exercise only in those areas where the Act or Rules are silent.”

In a concurrent judgement, Hon'ble Justice Bhanumati has explained the inherent powers of GERC as under:

“15. By a reading of Regulation 80, it is clear that inherent powers of the State Commission are saved to make such orders as may be necessary:- (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission. The inherent powers being very wide and incapable of definition, its limits should be carefully guarded. Inherent powers preserved under Regulation 80 (which is akin to Section 151 of the Code) are with respect to the procedure to be followed by the Commission in deciding the cause before it. The inherent powers under Section 151 CPC are procedural in nature and cannot affect the substantive right of the parties. The



inherent powers are not substantive provision that confers the right upon the party to get any substantive relief. These inherent powers are not over substantive rights which a litigant possesses.”

From the above judgement, it emerges that inherent power can be exercised by GERC to issue appropriate orders in the interest of justice and to prevent the abuse of process of the Commission to the extent not otherwise provided in the Act or the Rules. Further, inherent powers are with regard to procedure to be followed by the said Commission in deciding the cause before it and are not substantive provisions that confer powers on a party to get any substantive relief.

24. Regulation 111 of the CBR has the same provisions as Regulation 80 of Gujarat CBR which provides that nothing in CBR shall limit or affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission. In the present case, Regulation 30(6) of the 2014 Tariff Regulations provides for measurement of GCV on “as received” basis. The Commission in its order dated 25.1.2016 in Petition No.283/GT/2014 clarified that the point of taking sample for measurement of GCV on “as received” basis shall be from the wagon top at the generating stations. Regulation 30(6) read with the order dated 25.1.2016 clearly demonstrate that measurement of GCV has been provided in the tariff regulations as a substantive provision. The Petitioner is seeking certain clarifications or guidelines for measurement of GCV in cases where it is encountering difficulties to take sample of coal from wagon top to measure GCV which are in the nature of substantive relief. There are no procedural limitations in the Conduct of Business Regulations to consider relief to the Petitioner which requires exercise of inherent power by this



Commission. Therefore, we conclude that recourse to the inherent power in Regulation 111 of the CBR in the context of relief sought in the petition is not maintainable.

Power to remove difficulties

25. The Petitioner has invoked the powers of the Commission under Regulation 115 of the CBR which deal with “removal of difficulties”. The Petitioner has submitted that there exist genuine difficulties related to measurement of GCV by samples taken from the wagon top. The Petitioner has submitted that the provisions of 2014 Tariff Regulations providing for the power to remove difficulties and similar provisions in the Conduct of Business Regulations are meant for removing the difficulties in giving effect to the regulations, and particularly when the Regulations cannot anticipate all the aspects and provide for the same. The Respondents have submitted that “power to remove difficulty” provisions cannot be invoked in this case as there is no difficulty in the implementation of the 2014 Tariff Regulations with regard to measurement of GCV on “as received” basis. The Petitioner and respondents have relied upon various authorities in support of their contention.

26. We have considered the submissions of the parties. Regulation 115 of CBR and Regulation 55 of the 2014 Tariff Regulations dealing with the power of the Commission to remove difficulty is extracted as under:

“Regulation 115 of CBR

“115. If any difficulty arises in giving effect to any of the provisions of these Regulations, the Commission may, by general or special order, do anything not being inconsistent with the provisions of the Act, which appears to it to be necessary or expedient for the purpose of removing the difficulties.”



Regulation 55 of 2014 Tariff Regulations

“55. Power to Remove Difficulty:

If any difficulty arises in giving effect to the provisions of these regulations, the Commission may, by order, make such provision not inconsistent with the provisions of the Act or provisions of other regulations specified by the Commission, as may appear to be necessary for removing the difficulty in giving effect to the objectives of these regulations.”

Thus the above quoted provisions in the CBR and 2014 Tariff Regulations provide that in case of giving effect to the regulations, the Commission by order make such provisions not inconsistent with the Act or regulations as may be considered necessary. So the primary consideration is the difficulty in “giving effect to the provisions of the regulations” and if such difficulty is encountered, then the Commission in exercise of its power of removing difficulty can provide the missing link to make the regulations workable, without doing violence to the express provisions of the regulations.

27. The Respondents have relied on the judgement of the Hon’ble Supreme Court in M.U. Sinai Vs Union of India {(1975) 2 SCR 640} have submitted that removal of difficulty clause cannot be taken recourse to for difficulties in implementation of the regulations. The Respondents have submitted that as per the said judgement, the difficulty must arise in giving effect to the provisions of the Act and not any external difficulty or the difficulty in implementation of the provisions of the Act. According to the Respondents, there is no difficulty in the present case in giving effect to the provisions of the Regulations with regard to measurement of GCV on as received basis, but the difficulties have arisen while implementing the regulations. The Respondents have further argued that the removal of difficulty power can be exercised only to round off the angularities or minor obscurities to make the



regulations workable and cannot be used to change the basic structure of the regulations or directions of the Commission in order dated 25.1.2016 with regard to the measurement of GCV on as received basis.

28. Relevant observations of the Hon'ble Supreme Court in the said judgement are extracted as under:

"The existence or arising of a difficulty is the sine qua non for the exercise of power. If this condition precedent is not satisfied as an objective fact, the power under this clause cannot be invoked at all. Again, the "difficulty" contemplated by the clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. Further, the Central Government can exercise the power under the clause only to the extent it is necessary for applying or giving effect to the Act etc., and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty change the scheme and essential provisions of the Act".

As per the above judgement, the difficulty must arise in giving effect to the provisions of the Act, and not any extraneous difficulty which would justify the exercise of power to remove difficulty. Further, removal of difficulty power cannot be exercised to change the scheme and essential provisions of the Act.

29. Therefore, the issue for consideration in the present case in the context of the prayers of the Petitioner is whether difficulties are of such nature which arise in giving effect to the provisions of the regulations regarding measurement of GCV on as received basis and exercise of power to remove difficulty would remove the minor obscurities and smoothen angularities to make the regulations workable.

30. In Regulation 30 of 2014 Tariff Regulations, Caloric Value of Primary Fuel or CVPF has been defined in the above formula as equal to the "the weighted average Gross calorific value of coal as received, in kCal per kg for coal based stations". The



Petitioner challenged the above provisions of the regulation in Writ Petition No.1641/2014 before the Hon'ble High Court of Delhi pleading that the measurement of GCV of coal should be on "as fired basis" instead of being on "as received basis". Hon'ble High Court, in their order dated 7.9.2015 directed the Commission to decide at what stage the GCV of coal on "as received basis" should be measured and pass appropriate order. The Commission after hearing the Petitioner, Association of Power Producers and the Respondent Procurers passed an order on 25.1.2016 holding as follows:

"58. In view of the above discussion, the issues referred by the Hon'ble High Court of Delhi are decided as under:

- (a) There is no basis in the Indian Standards and other documents relied upon NTPC etc. to support their claim that GCV of coal on as received basis should be measured by taking samples after the crusher set up inside the generating station, in terms of Regulation 30(6) of the 2014 Tariff regulations.
- (b) The samples for the purpose of measurement of coal on as received basis should be collected from the loaded wagons at the generating stations either manually or through the Hydraulic Auger in accordance with provisions of 436(Part1/Section1)-1964 before the coal is unloaded. While collecting the samples, the safety of personnel and equipment as discussed in this order should be ensured. After collection of samples, the sample preparation and testing shall be carried out in the laboratory in accordance with the procedure prescribed in IS 436(Part1/Section1)-1964 which has been elaborated in the CPRI Report to PSERC."

The Petitioner filed Review Petition No.11/RP/2016 seeking review of the above order was rejected by the Commission vide order dated 30.6.2016.

31. In the present petition, the Petitioner has submitted that it has started implementing the measurement of coal from the sample taken from the Wagon Top since October, 2016. The Petitioner has clearly averred that it is not seeking any order for substituting the direction of the Commission to draw samples from the Wagon Top by a direction for samples to be drawn at the latter stage or at the



crusher stage. The Petitioner has submitted that there are bonafide difficulties for taking samples from the Wagon Top in case of generating stations (a) where there are electrical traction wires; (b) when the coal is supplied through conveyor belt; (c) difficulties in taking out representative samples of coal; and (d) difficulties on account of loss of GCV on various counts including increase in storage time of coal.

32. As regards the first difficulty involving safety issues, the Petitioner has submitted that in five generating stations, such as, Simhadri, Talcher Thermal, Unchahar, Dadri and Barh, the transportation by railway is up to the track hopper of the generating stations with electric wires at the top with short vertical distance of 1.5 meters between the coal heap on the wagon and the overhead traction wire which poses risks to the personnel engaged in collecting the samples. The Petitioner is stated to have taken up the issue with railways to explore the possibility of disconnecting the supply to overhead wires at the time of sample collection which as not been accepted by Railways as it involved repeated on-off situation and any mistake would result in electrocution of personnel. The second difficulty is where the coal is supplied through conveyor belt in stations like Vallur and Talcher TPS (about 70% to 80%) and not through railway wagons. The Petitioner has submitted that at some stations, certain quantum of coal is received through barges/road etc.

33. We are of the view that these two difficulties are of such nature which arise in giving effect to the provisions of the regulations regarding measurement of GCV on as “received basis”. The Commission in para 35 of the order dated 25.1.2016 had observed that “the purpose of adopting measurement of GCV on as received basis was to introduce transparency and accuracy for computation of energy charges in a



just, fair and equitable manner so that end consumers are not unduly burdened.” If these difficulties are not addressed, then the Petitioner would not be able to take representative samples from the wagon top where there are overhead traction lines and where the coal is received through conveyor belts or through barges/roads. It is pertinent to mention that IS-436 Part I/Section.I-1964 provides for different methods of taking sample for measurement of coal on as received basis. Therefore, consideration of the prayers of the Petitioner for drawing samples through alternate methods at the unloading point where it is not possible or hazardous to draw sample from wagon top will not change the scheme and essential provisions of the 2014 Tariff Regulations read with the Indian Standards with regard to measurement of GCV on as received basis. Rather it will help in effective implementation of the provisions of Regulation 30(6) of the 2014 Tariff Regulations. In view of the above discussion we hold that the present petition is maintainable under section 79(1)(a) of the Act read with Regulation 55 of the 2014 Tariff Regulations read with Regulation 115 of CBR.

34. The petition shall be listed for hearing on merit on 11.10.2018.

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

sd/-
(P. K. Pujari)
Chairperson

