

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 25/RP/2017**

**in**

**Petition No.7/GT/2016**

**Coram:**

**Shri A.K. Singhal, Member**

**Shri A.S. Bakshi, Member**

**Dr. M.K. Iyer, Member**

**Date of Order: 28<sup>th</sup> March, 2018**

**In the matter of**

Review of Commission's order dated 24.3.2017 in Petition No. 7/GT/2016 regarding revision of tariff of Udupi Thermal Power Station (1200 MW) for the period from 11.11.2010 to 31.3.2014 after truing up exercise.

**And**

**In the matter of**

1. Hubli Electricity Supply Company Ltd  
Navanagar, PB Road, Hubli,  
Karnataka - 580025

2. Mangalore Electricity Supply Company Ltd,  
Paradigm Plaza, AB Shetty Circle,  
Mangalore-575001

3. Gulbarga Electricity Supply Corporation Ltd  
Station Road, Kalburgi - 585102,  
Karnataka

4. Chamundeshwari Electricity Supply Corporation Ltd  
927, L J Avenue, GF, New Kantharaj Urs Road,  
Saraswatipuram, Mysore-570009

**...Petitioners**

**Vs**

1. Udupi Power Corporation Limited  
2nd Floor, "Le ParcRichmonde"  
51, Richmond Road  
Bengaluru-560025

2. Punjab State Power Corporation Limited  
The Mall, Patiala-147 001

**...Respondents**



## Parties present:

Shri D.L. Chidananda, Advocate, HESCL  
Shri Hemant Sahai, Advocate, UPCL  
Ms. Mazag Andrabi, Advocate, UPCL  
Ms. Shruti Dass, Advocate, UPCL  
Shri Amit Mittal, UPCL  
Shri Tanmay Vyas, UPCL  
Shri Omprakash, UPCL

## ORDER

The discoms of Karnataka, namely, HESCO Ltd, MESCO Ltd, GESCO Ltd and CESCO Ltd (referred to as 'the Review Petitioners') have filed this Petition seeking review of the Commission's order dated 24.3.2017 in Petition No.7/GT/2016 filed by Udupi Power Corporation Ltd (the 'Respondent No.1' herein), whereby the tariff of Udupi Thermal Power Station (1200 MW) for the period from 11.11.2010 to 31.3.2014 was revised after truing up in terms of the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009.

2. Aggrieved by the said order dated 24.3.2017, the Review Petitioners have pointed out that there are certain errors apparent on the face of the said order and have sought review on the following grounds:

- (i) UPCL is not entitled to additional fuel cost over and above the cost after commission of the Jetty;
- (ii) Disallow the charges which are not provided under Regulation 21 of the 2009 Tariff Regulations as claimed by the UPCL in the monthly invoices;
- (iii) Revise the ECR calculation as per Regulation 21 (6) of the 2009 Tariff Regulations and consider the GCV at load port 'as received' basis;
- (iv) UPCL to refund the excess payment made by the ESCOMs towards carrying cost;
- (v) Exclude jetty from auxiliary consumption and treat as consumer of the MESCOM or reduce auxiliary percentage of jetty;
- (vi) Revise the Erection, Testing and Commissioning expenses in additional BOP;
- (vii) Disallow the claim of upfront fees in capital cost as well as in the fuel invoices;
- (viii) Disallow excess Interest during Construction of `80.50 crore in the Capital Cost.



- (ix) Revise the infirm power payment of ₹98.50 crore and reduces ₹35.14 crore from the capital cost as revenue earned over and above the fuel cost.
- (x) Revise the un-discharged liabilities and the capital cost.

3. By interim order dated 31.7.2017, the Review Petition was admitted on the above issues and notice was issued to the Respondents with directions to complete the pleadings in the matter. The Respondent No.1, UPCL vide affidavit dated 17.8.2017 has filed preliminary reply and has raised the issue of 'maintainability' of the Review Petition. The Review Petitioners have filed their rejoinder to the said reply vide affidavit dated 21.8.2017 and have submitted that the Review Petition is maintainable. The Commission after hearing the parties on 20.2.2018 reserved its orders on 'maintainability' of the Review Petition. We now examine the question of 'maintainability' of the Review Petition as stated in the subsequent paragraphs.

4. The Respondent, UPCL in its reply affidavit dated 17.8.2017 has mainly submitted that the Review Petition is not maintainable on the following two grounds:

(A) the Petitioners have filed appeal in defect (DFR No.1565/2017) before the Appellate Tribunal for Electricity (the Tribunal) against the said order dated 24.3.2017 prior to the filing of the Review Petition before the Commission; and

(B) the Petitioners have raised the very same issues in both the Appeal and the Review Petition and has also sought the same relief before the said forums.

#### **Ground No. (A)**

5. The Respondent, UPCL has submitted that the Review Petitioners have filed the present Review Petition and an appeal before the Appellate Tribunal for Electricity (the Tribunal) on the same day i.e. 12.5.2017 against the Commission's order dated 24.3.2017. The Respondent has submitted that the Review Petitioner's appeal is lying in defect since 12.5.2017 in the Registry of the Tribunal. Referring to the Review Petitioner's submission in para 1.4 of the Review Petition that "...the



*Petitioner is also preferring an appeal before the Appellate Tribunal for Electricity against the order dated 24.3.2017.....”*, the Respondent, UPCL has submitted that similar submissions as regards filing of review petition before this Commission have been made by the Review Petitioners in the appeal filed before the Tribunal. The Respondent, UPCL has submitted that the Review Petitioners cannot seek the same remedy before two forums and accordingly, the Review Petition is not maintainable. The Respondent has further submitted that since the Review Petitioners have filed appeal in the Tribunal against order dated 24.3.2017 prior to the filing of the present Review Petition before the Commission, the Review Petition is not maintainable in terms of Order 47 Rule (1)(a) of the CPC.

6. By rejoinder affidavit dated 21.8.2017, the Review Petitioners have clarified that the Review Petition was physically filed before the Commission on 8.5.2017 since the process of registration of the Review Petitioners for e-filing the Petition was pending before the Commission as on that date. The Review Petitioners have also clarified that after completion of the registration process, the Review Petition could only be filed on 12.5.2017 and thereafter, the appeal was filed before the Tribunal on 12.5.2017. Accordingly, the Review Petitioners have submitted that the Review Petition has been filed before the Commission prior to the filing of the appeal and therefore, the Review Petition is maintainable before the Commission in terms of Order 47 Rule 1(a) of the CPC.

7. During the hearing, the learned counsel for the Respondent, UPCL conceded that the Review Petition was filed prior to the filing of the appeal before the Tribunal and accordingly, did not press on the question of ‘maintainability’ of the Review Petition on this ground. However, learned counsel for the Respondent reiterated that Review Petition and Appeal against the same issues cannot be



simultaneously maintainable before two forums. In view of this submission, the Review Petition is taken up for consideration on the issue of maintainability on the second ground raised by the Respondent.

**Ground No. (B)**

8. The Respondent, UPCL has contended that the Review Petition is not maintainable as the Review Petitioners have raised the very same issues and sought same relief in the Appeal as well as the Review Petition. Referring to the judgment dated 11.9.2014 of the Tribunal in Appeal No. 41/2014 (Steel Authority of India v CERC &ors), wherein it was held that *'there is no bar in filing an appeal before the Tribunal as well as review petition before the Commission at the same time provided the grounds raised in these petitions are different'*, the Respondent, UPCL has submitted that since the Review Petitioners have raised same issues in Appeal as well as in the Review Petition and have sought the same reliefs before both the forums, this Review Petition is not maintainable. During the hearing, the learned counsel for the Respondent, UPCL furnished a copy of the appeal filed by the Review Petitioners before the Tribunal and referred to the relevant paras in the Appeal and in the Review Petition in support of his contention that identical issues have been raised in the Appeal as well as the Review Petition. Learned counsel submitted that in view of the bar in the CPC to raise the same issues in the review as well as the appeal, the Review Petition is liable for rejection on the ground of maintainability.

9. The Review Petitioners in their rejoinder have clarified that the present Review Petition is confined only to the issues which were specifically pleaded by them, but was not dealt with by the Commission in order dated 24.3.2017. The Review Petitioners have further clarified that the Appeal filed by them before the Tribunal is in respect of only two issues namely, Infirm Power and Un-discharged



liabilities. Accordingly, the Review Petitioners have submitted that the contention of the Respondent, UPCL that the Review Petitioners are agitating the very same issues in the Review Petition as well as the Appeal is erroneous and unfounded. During the hearing, the learned counsel for the Review Petitioners referred to the relevant paras in the Appeal and the Review Petition and reiterated that the Review Petition filed before the Commission is only in respect of the issues which were specifically pleaded, but were not dealt with by Commission in order dated 24.3.2017. He accordingly submitted that the Review Petition was maintainable and the matter may be decided on merits.

10. Taking into consideration the submissions of the parties in the Review Petition and the submissions in the Review Petitioners appeal filed before the Tribunal, we examine whether the issues raised by the Review Petitioners in the Review Petition are identical and similar to the issues raised by them in Appeal filed before the Tribunal.

11. In Para 3.2 of the Review Petition, the Review Petitioners have referred to the issues which have been specifically pleaded by them in Petition No. 7/GT/2016 (filed by UPCL), but had not been dealt with by the Commission in order dated 24.3.2017. These issues are as under:

- (i) Commissioning of jetty;
- (ii) Interest during Construction and weighted Average Interest computation;
- (iii) Upfront fees-NMPT/Lease Rent-NMPT and Insurance;
- (iv) Erection, Testing and Commission expenses;
- (v) Auxiliary Consumption;
- (vi) Variation in Gross Calorific Value between load port and discharge port; and
- (vii) Reimbursement of other expenditure etc;



12. In support of the above issues, the Review Petitioners have made elaborate submissions from Paras 3.3 to 3.10 of the Review Petition.

13. The Review Petitioners in Para 7(g) of the Appeal have raised the very same issues and have submitted that these issues have been raised in the appeal in larger public interest and also by way of abundant caution. Also, under the heading “Questions of Law’ in Para 8(B) of the Appeal, the Review Petitioners have raised the following:

“(C) Whether the Commission is correct in not dealing with the issues specifically pleaded/raised and argued by the parties.”

14. In addition to this, the Review Petitioners in Para IX of the Grounds of Appeal have raised the aforesaid issues and have made elaborate submissions from sub-paras (a) to (m) in support of their prayer to set aside the Commission’s order dated 24.3.2017. The following are the extracts from Para IX of the Grounds of Appeal:

### **Grounds of Appeal**

“IX. It is submitted that the Hon’ble Commission has erred in not dealing with these issues raised by the appellant herein, while deciding the truing-up petition even though the same were specifically pleaded and argued by the parties. In this regard it is submitted as follows:

(a) Appellants herein had earlier also submitted that jetty was commissioned on 24.11.2011 and prayed the Commission that UPCL is not entitled to claim the additional fuel cost over and above the cost after commission of the Jetty due to delay in commissioning of Jetty or.....

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(b) As regards the issue of Reimbursement of cost, it is submitted that, Regulation 21(6) of the Tariff Regulation 2009 provides for the weighted average landed fuel cost in the formula. Further, the Regulation 21 (7) provides as follows:

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(c) Appellants in their statement of objection to the Truing up petition has stated that the Tariff Regulation 2009 only provides for price of fuel corresponding to the grade and quality of fuel inclusive of royalty, taxes and duties as applicable, transportation cost by rail / road. Therefore, it is submitted that.....

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(d) As regards the issue of Gross Calorific Value (GCV), it is submitted that as per CERC 2009 Tariff Regulations, Gross Calorific Value (GCV) is to be considered "As fired basis?" for calculation of Energy Charge rate. Clause 21 Regulations 2009-14 reads as follows...



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(e) PCKL in its statement of objection to the Truing Up petition has submitted that Regulation 37 provides that.....

xx

(f) UPCL is a first thermal plant designed for 100% imported coal in India.....

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(g) In the statement of objections filed in the Truing Up Petition PCKL had requested the Hon'ble Commission to reject the interest claim of ₹970 Crore by UPCL....

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(h)..... As regards the issue of Auxiliary consumption, it is submitted that Jetty is located away from the generating station and drawing the power from MESCOM Distribution system....

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(i) UPCL has not fulfilled requirement of definition of "auxiliary energy consumption" as per Tariff Regulation, 2009 thereby "Declared Capacity" and "plant availability factor....

xx

(j) Presently, UI is not calculated for the consumption recorded in Jetty and also that UPCL is not declaring the schedule for the jetty also. However,.....

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(k) As regards the issue of Erection, testing and commission expenses, it is submitted that the petitioner 'herein in its reply affidavit has submitted and prayed to the Hon'ble Commission to revise the Erection.....

xx

(l) As regards the issue of Upfront fees-NMPT/Lease rent-NMPT and Insurance, of ₹ 28.76 Crores it is submitted that PCKL in its statement of objections to the Truing up Petition...

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(m). As regards the Issue of Interest during construction and weighted average Interest Computation, it is submitted that, PCKL in its statement of objections has submitted and prayed that excess IDC of ₹80.50 Crores in the Capital Cost be disallowed. However, the Hon'ble Commission has not dealt with this issue in the Order dated 24.3.2017.....

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15. The above submissions made by the Review Petitioners in the appeal are in support of the following prayer:

*“(iv) Either the Tribunal may decide the issues specifically raised pleaded and argued by the parties as detailed above, which have not been dealt by the Commission”*





16. It is evidently clear that the Review Petitioners' submissions in Paras 3.3 to 3.10 of the Review Petition are identical to the submissions made in sub-paras IX (a) to (m) of the Appeal. In this background, the Review Petitioners' contention that the Review Petition is only confined to issues specifically pleaded but not dealt with by the Commission in order dated 24.3.2017 is contrary to records and is untenable. In our considered view, the Review Petitioners have raised identical issues, both in Review Petition and Appeal and have also sought the same reliefs in both the forums. Accordingly, the submissions of the Review Petitioners are rejected on this ground.

17. The Review Petitioners have also submitted that only two issues namely Infirm Power and Un-discharged liabilities are being agitated in the Appeal and is therefore different from the issues agitated in the Review Petition. We now examine the same.

### **In Appeal**

18. The Review Petitioners in Para 7 (h) of the Appeal, have submitted the following:

“In so far as the issues dealt with by the Hon'ble Commission in the impugned order ,the Commission has with respect to 2 (two) issues namely, Infirm Power, Un-discharged liabilities has made upward revision contrary to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009”

19. The Review Petitioners have raised the issue of upward revision of infirm Power and Un-discharged liabilities in Para 8A (Facts in Issue) and in point (B) under Para 8B (Questions of Law) of the Appeal. Also, in the Grounds of Appeal under Para 9, Petitioners' have made elaborate submissions from sub-paras (I) to (VI) on the issue of Infirm Power and Un-discharged liabilities. The following are the extracts from sub-paras 9(I) to (VI) of the Grounds of Appeal:



I. It is submitted that as regards Infirm Power, the Commission has directed that appellants herein shall pay ₹127.92 crores....

II. In view of the above, Commission should have restricted infirm power payment only for six months.....

III. Thus, the amount payable as per the above calculation works out to ₹98.50 crore as against ₹127.92 crore.....

IV. As regards un-discharged liability, the Commission in the para 12 of the impugned order dated 24.3.2017 has allowed ₹144.83 crores for Unit-I and ₹105.20 crores allowed for Unit-II.....

V. The un-discharged liabilities deducted as above shall be allowed as additional capital expenditure.....

VI. It is submitted that the Commission had earlier disallowed un-discharged liabilities of Rs 24132 lakhs and Rs 17431 lakhs towards Units-I and Unit-II respectively.....

xxx

20. The Review Petitioners' prayer on the issue of Infirm Power and Un-discharged liabilities in the Appeal filed before the Tribunal are as under:

(i) That the amount payable towards infirm power shall be ₹98.50 crore as per the calculation made by the appellant and not ₹127.92 crore as directed by the Commission.

(ii) Direct that the un-discharged liabilities be allowed in the subsequent period actually when it is incurred. Instead of Commission allowed ₹14483 lakh for Unit-I and ₹10520 lakh in the year of commissioning itself.

### **In Review Petition**

21. It is noticed that in the Review Petition filed before the Commission, the Review Petitioners have raised the issues of Infirm Power and Un-discharged liabilities and have also made elaborate submissions in Para 3.11 (a) and (b). The relevant portion is extracted hereunder:

“3.11. This Hon'ble Commission consider un-discharged liabilities and directed respondent to make payment for infirm power. However, commission erred in the calculation of above charges;

#### **a. Infirm Power:**

xxxx

According to the above order, this Commission should have restricted infirm power payment only for six months. The amount payable towards infirm power is as below:

X  
x



**b) Un-discharged liabilities**

Commission in the para 12 of order dated 24.3.2107 has allowed ₹144.83 Crores for Unit-1 and ₹105.20 Crores allowed for Unit-11 in respect of un discharged liabilities.

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The un-discharged liabilities deducted as above shall be allowed as Additional Capital Expenditure (ACE) during the year....

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The Commission earlier disallowed un-discharged liabilities of ₹24132 Lakhs and ₹17431 Lakhs towards Unit I and Unit-2 respectively. In the truing up petition, Commission should have allowed un-discharged liabilities during the year in which the same 1s discharged as payments by the UPCL. Instead, Commission allowed ₹14483 Lakhs for Unit-I and ₹10520 Lakhs in the year of commissioning of the project itself.....

xxxxxx

22. The Review Petitioners' prayer on the issue of Infirm Power and Un-discharged liabilities in the Review Petition are as under:

(a) Revise the infirm power payment [as stated in para 3.11(a)] of ₹98.50 crore and reduces ₹35.14 crore from the capital cost as revenue earned over and above the fuel cost.

(b) Revise the un-discharged liabilities calculation as submitted [in para 3.11(b)] and revise the capital cost.

23. It is therefore clear from the above that the issues regarding Infirm Power and Un-discharged liabilities have also been raised by the Petitioners' in the Review Petition before the Commission, in addition to the same being agitated by them in the appeal before the Tribunal. In view of this, the Review Petitioners submission that different issues are being agitated before the Tribunal is contrary to records and is untenable.

24. The Tribunal in its judgment dated 7.9.2014 in Appeal No.41 of 2014 (Steel Authority of India Ltd v CERC & ors) had held that 'if the issues raised before the Appellate forum are distinct from those raised before the Review forum then, in that case, the Appeal as well as the Review proceedings may simultaneously proceed'. However, the Tribunal in the said judgment also held that:



*“Since both the Appeals and the Review Petitions have been filed by the Appellant before the respective Forums raising the very same issues and having regard to the fact the Review Petition is still pending adjudication before the Central Commission this Appeal could not be maintained.”*

25. In the present case, the Review Petitioners have failed to demonstrate that the issues raised in the Review Petition are distinct from those raised by them in the Appeal. As stated, identical issues have been raised by the Review Petitioners in the Review Petition and Appeal and same reliefs have been sought for by the Petitioners’ in both the forums. In our view, the Review Petitioners cannot be permitted to pursue the same cause of action on the same issues before both the forums at the same time. Accordingly, in line with the above judgment, the submissions of the Review Petitioners are rejected and we hold that the Review Petition is not maintainable.

26. Petition No. 25/RP/2017 is disposed of as above.

**Sd/-**  
**(Dr. M.K.Iyer)**  
**Member**

**Sd/-**  
**(A. S. Bakshi)**  
**Member**

**Sd/-**  
**(A. K. Singhal)**  
**Member**

