

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

- 1. Shri Ashok Basu, Chairman**
- 2. Shri K.N. Sinha, Member**

**Review Petition No. 103/2002
in
Petition No. 72/2000**

In the matter of

Review of order dated 24.6.2002 in Petition No. 72/2000 of Talcher STPS
(1000 MW)

And in the matter of

National Thermal Power Corporation Ltd. Petitioner

Vs

1. Bihar State Electricity Board, Patna
2. Grid Corporation of Orissa Ltd, Bhubaneswar
3. Damodar Valley Corporation, Kolkata
4. Power Department, Govt of Sikkim, Gangtok
5. Assam State Electricity Board, Guwahati
6. APTRANSCO, Hyderabad
7. Madhya Pradesh State Electricity Board, Jabalpur
8. Tamil Nadu Electricity Board, Chennai
9. Kerala State Electricity Board, Trivandrum
10. Karnataka Power Transmission Corp. Ltd., Bangalore
11. Uttar Pradesh Power Corp. Ltd, Lucknow
12. Gujarat Electricity Board, Baroda
13. Union Territory of Pondicherry, Pondicherry
14. Jharkhand State Electricity Board, Ranchi
15. Rajasthan Rajya Vidyut Prasaran Nigam Ltd, Jaipur
16. Haryana Vidyut Prasaran Nigam Ltd., Haryana
17. Power Department, Union Territory of Chandigarh,
Chandigarh Respondents

The following were present:

1. Shri M.G. Ramachandran, Advocate NTPC
2. Shri K.V. Balakrishnan, Advocate, NTPC
3. Shri M.S. Chawla, AGM, NTPC
4. Shri S.S. Mendiratta, NTPC
5. Shri M.K.V. Rama Rao, NTPC
6. Shri R.S. Sharma, NTPC
7. Shri S.N. Goel, NTPC

8. Shri M. Saxena, NTPC
9. Ms. Ranjana Gupta, NTPC
10. Shri S.K. Samui, NTPC
11. Shri S.K. Johar, NTPC
12. Shri T.R. Sohal, NTPC
13. Shri A. Dua, NTPC
14. Shri S. K. Aggarwal, NTPC
15. Shri D.K. Salpeku, NTPC
16. Shri E. Surendra, NTPC
17. Shri K.K. Garg, GM(Comml.), NTPC
18. Shri R. Day, NTPC
19. Shri C.K. Mandol, NTPC
20. Shri S.K. Sharma, NTPC
21. Shri M.K. Adhikary, EE (Comm.), ASEB
22. Shri B.S. Chandrasekar, KPTCL
23. Dr. S.C. Bhattacharyya, WBSEB
24. Shri P.C. Saha, WBSEB
25. Shri D.D. Chopra, Advocate, UPPCL
26. Shri T.K. Srivastava, EE, UPPCL
27. Shri Jayant Varma, AE, UPPCL
28. Er. V.A. Kumar, UPPCL
29. Shri D.P. Chirania, CE(Comml.), RVPNL
30. Shri K.K. Mittal, XEN (ISP), RVPNL
31. Shri M.P. Aggarwal, DGM (Comml.), DTL
32. Shri D. Khandelwal, MPSEB
33. Shri V.K. Gupta, PSEB
34. Shri K. Gopalakrishnan, KSEB
35. Shri R. Balachandran, KSEB
36. Shri R.K. Arora, HVPN
37. Shri C.K. Sahajeevani, HVPN

ORDER
(DATE OF HEARING: 22.10.2003)

Through this application filed under Section 12(f) of the Electricity Regulatory Commissions Act, 1998 read with Regulation 103 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, the petitioner seeks review of the Commission's Order dated 24.6.2002 in Petition No. 72/2000, hereinafter referred to as "the impugned order".

2. In the first place, the factual background needs to be noted in brief.

3. The Central Government in Ministry of Power had accorded its investment approval for Talcher Super Thermal Power Station (for short, Talcher STPS) vide its letter dated 4.10.1996 at a revised cost of Rs.2543.03 crore, including IDC of Rs.400.56 crore. The tariff for the electricity supplied from Talcher STPS was notified by Ministry of Power vide its notification dated 5.5.1999 by considering the project cost of Rs.2511.48 crore, though the opening gross block as on 1.4.1998 was only Rs.2451.70 crore.

4. Petition No. 72/2000 was filed by the petitioner for approval of the revised fixed charges based on additional capital expenditure and FERV for the years 1998-1999, 1999-2000 and 2000-2001 for Talcher STPS. On scrutiny of the petitioner's claim, the additional capitalisation worth Rs.48.11 crore was ex-facie found to be in order. By adding Rs.48.11 crore to the gross block of Rs.2451.70 crore as on 31.3.1998, the total gross block as on 31.3.2001 would have been Rs.2499.81 crore. However, Ministry of Power while notifying the tariff in respect of Talcher STPS vide its notification dated 5.5.1999, considered the project cost of Rs.2511.48 crore. It was submitted by the petitioner that the project cost of Rs.2511.48 crore considered by Ministry of Power included initial spares of Rs.59.78 crore over the gross block of Rs.2451.70 crore. However, no evidence to the effect that the gross block of Rs.2451.70 crore did not include component of initial capital spares was produced by the petitioner. In view of the fact that

after allowing the additional capitalisation of Rs.48.11 Crore, over the project cost of Rs.2511.48 crore considered by Ministry of Power, the gross block of Rs.2559.59 crore (Rs.2511.48 crore + Rs.48.11 crore) would have exceeded the sanctioned project cost of Rs.2543.03 crore, the Commission did not allow any additional capitalisation. The Commission also observed that in view of the differences in the base figure of the capital cost, the component of base foreign exchange could not be determined and therefore, the revised fixed charges on account of FERV could also not be determined. The petition was dismissed by the impugned order. The relevant part of the order is extracted below:

“7. The respondents in their replies have raised a number of issues. We do not consider it necessary to examine those issues in detail since the petition can be disposed of on a brief point. We find from the petition that the gross block as on 31.3.1998 was Rs.2451.70 crores. The additional capitalisation for three years works out to Rs.48.11 crores. Thus the gross block as on 31.3.2001 would be Rs.2499.81 crores (Rs.2451.70 crores + Rs.48.11 crores) in case additional capitalisation is allowed. But Ministry of Power while notifying tariff on 5.5.1999, considered the project cost of Rs.2511.48 crores. Thus, the tariff notified by Ministry of Power is already with a higher capital cost. Therefore, we feel that there was no justification for allowing additional capitalisation of Rs.48.11 crores, since with the additional capitalisation of Rs.48.11 crores, the capital cost would exceed the sanctioned capital cost of Rs.2543.03 crores, approved by Ministry of Power vide its letter dated 4.10.1996. The petitioner has clarified that the project cost of Rs.2511.48 crores includes initial spares of Rs.59.78 crores over the gross block of Rs.2451.70 crores as on 31.3.1998. However, the petitioner has not placed any evidence on record to substantiate its claim that the gross block of Rs.2451.70 crores did not already include any component of capitalised initial spares. We are, therefore, satisfied that the additional capitalisation as claimed by the petitioner cannot be allowed. In view of the differences in the base figure of capital cost, the component of base foreign exchange cannot be determined and, therefore, revised fixed charges on account of FERV cannot also be determined”.

5. Feeling aggrieved, the petitioner has filed the present application review of the impugned order. It has been submitted that the project cost of Rs.2543.03 crore was approved by Ministry of Power vide its letter dated 4.10.1996, which excluded any foreign exchange liability on foreign loan. The petitioner has submitted that an amount of Rs.2.02 crore capitalised during 1.4.1998 to 31.3.2001 was on account of FERV. Further, according to the petitioner, an expenditure of Rs.3.07 crore was incurred during the period from 1998-1999 to 2000-01, mainly on operators cabin in main plant, township administrative building, construction of Nursery School, construction of Auditorium and additional sewerage system, etc. A further expenditure of Rs.4.72 crore was stated to have been capitalised during 1999-2000 on account of Y2K compliance to meet the mandatory requirement. It is stated that the necessary approvals for the expenditure were accorded by the Board of Directors, competent to do so under its delegated powers. Based on the above noted facts, the petitioner has claimed that the total approved project cost adds up to Rs.2552.84 crore, which ought to have been considered and the revised fixed charges were to be approved based on the project cost of Rs.2552.84 crore. Accordingly, the petitioner has sought review of the impugned order with a further prayer that the revised fixed charges due to additional capital expenditure and FERV for the years 1998-1999 to 2000-2001 as claimed in Petition No. 72/2000 by considering the total project cost of Rs.2552.84 crore, be approved.

6. The respondents have opposed the prayer of the petitioner. Respondent No.1 in its reply has opposed the petitioner's claim for additional capitalisation and consequently the revision of fixed charges without offering any comments on the maintainability of the review petition. Respondent No.2, GRIDCO has disputed the petitioner's claim that additional capitalisation of Rs.48.11. crore was accepted by the Commission. It has contended that unless the excess expenditure beyond the sanctioned project cost of Rs.2543.03 crore is approved by CEA, this cannot be taken into consideration for approval of the revised fixed charges. According to this respondent, the revised fixed chargers could be determined based on the actual expenditure within the ceiling of Rs.2543.03 crore, the project cost approved by the Central Government, subject to the clarification that the gross-block of Rs.2451.70 crore as on 31.3.1998 did not include any component of initial spares. Respondent No.5, ASEB has supported the impugned order and has not found any merit in consideration of capitalisation of Rs.48.11 crore. Similar plea has been taken by Respondent No.7, MPSEB. According to this respondent the claim raised by the petitioner in the application for review does not qualify for review in the light of law declared by the Hon'ble Supreme Court as the facts narrated are not covered by the provisions of Section 114 read with Order 47, Rule 1 of the Code of Civil Procedure. Respondent No.8, TNEB has submitted that the expenditure incurred by the petitioner on minor works cannot be said to be connected with power generation, but is incurred to provide additional facility to the member of its staff and their wards. Accordingly, such an expenditure could not be considered to be reasonable and justifiable for

the purposes of capitalisation. It is submitted that such an expenditure should be incurred by the petitioner out of its own profits and should not be passed on to the beneficiaries. As regards the expenditure of Rs.4.72 crores incurred on Y2K compliance, this respondent has contended that the expenditure should have been charged to O&M expenditure instead of capitalising the same. Respondent No. 11, UPPCL in its reply opposing the prayers made in the review petition has submitted that the petitioner has not placed any evidence on record to substantiate its claim that gross block of Rs.2451.70 crore as on 31.3.1998 did not already include any component of capitalised spare parts. It is further submitted that the applicant has now claimed additional capitalisation of Rs.9.81 crore against the original claim since it has prayed for approval of revised fixed charges based on capital cost of Rs.2552.84 crore. It is further submitted that the petitioner's claim for review does not fall within the scope of Order 47, Rule 1 of the Code of Civil Procedure.

7. The respondents in their responses to the present review petition have generally opposed review of the order on the ground that the additional capitalisation claimed by the petitioner cannot be allowed for want of justification. The contentions raised by the respondents are on merits of the petitioner's claim contained in the original petition and are, therefore, outside the scope of the present application for review. Accordingly, the submissions on merits of the claims for additional capitalisation are not being considered here. The question of admissibility of review is to be examined on the touchstone of the statutory

provisions contained in Order 47, Rule I of the Code of Civil Procedure and the settled legal position. Respondents No.7 and 11, in their submissions have made just bald statements that the review petition was not maintainable, without supporting their contention in the context of peculiar facts applicable.

8. In order to appreciate the scope of the present application for review in proper perspective, it is appropriate to advert to basic provisions governing review of order and recapitulate the settled principles on the subject evolved through the judgements of the superior courts.

9. In accordance with Rule 1 Order 47 of the Code of Civil Procedure, a person considering himself aggrieved by an order may apply for a review under the following circumstances:

- (a) On discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at a time when the order was made;
- (b) An error apparent on the face of record;
- (c) For any other sufficient reason.

10. In *MMB Catholicos Vs M.P. Athanasius* (AIR 1954 SC 526), it was held by the Supreme Court that the “misconception” of the Court must be regarded as sufficient reason analogous to an error apparent on the face of record for the

purpose of review under order 47 of the Code. In *Grindlays Bank Vs Central Industrial Tribunal* (AIR 1981 SC 606), the Supreme Court held that when a review is sought due to procedural defect, the inadvertent error committed by the tribunal must be corrected *ex debito justitiatae* to prevent the abuse of its process and such power inheres in every court or tribunal. Long back, in *Mt. Rukmabai Vs Ganpat Rao* (AIR 1932 Nagpur 177) it was held that the omission to consider important facts which are on record and which the Judge himself immediately on passing his order realised that he had overlooked and which in his opinion would have led him to pass an order materially different, is a justified ground for entertaining an application for review. The Federal Court in *Jamna Quer Vs Lal Bahadur* (AIR 1950 FC 131) expounded the law in the terms that “where there is an error on the face of the record, whether error occurred of reason of the counsel’s mistake or it crept in by reason of oversight on the part of the court, is not a circumstance which can affect the exercise of jurisdiction of the court to review its decision.” There is also a decision of the Division Bench of Pepsu High Court reported as *Naurata Vs Anokha* (AIR 1954 Pepsu) to the effect that where an important documentary evidence already on record was not brought to notice of the court and referred to by either party, the documents being already there, the error is apparent on the face of record qualifying for review by the court. The decision of a Division Bench of Allahabad High Court in *S. Banwari Lal Vs Bihari Lal* (AIR 1964 Allahabad 516) also takes a similar view in the matter. In the light of these reported decisions of the superior courts, it can be safely concluded that omission of the court to consider an important fact is a ground for review.

11. The petitioner's plea for review is to be considered in the light of above noted legal position. The ground urged by the petitioner in its review petition is that an expenditure of Rs.9.81 crore was incurred with the approval of the competent authority and, therefore, it had the effect of increasing the approved cost of the project and thus should qualify for approval of the revised fixed charges. However, no averment to this effect was made in the original petition, nor any evidence to that effect was placed on record to support the contention raised in the present review petition. The plea taken in the review petition seems to be an after thought. Therefore, the petitioner's plea for seeking a review of the order cannot be considered to be an error apparent on the face of record. We also notice that the petitioner has nowhere in the application for review averred that these facts were not within its knowledge when the original petition was filed. Therefore, this is not a case where new material or evidence has come to the knowledge of the petitioner after disposal of the original petition. In our considered opinion, the ground taken in the review petition does not fall within the scope of Order 47 Rule 1 and the judicial decisions noted above.

12. The cognate ground for rejection of petitioner's claim for revised fixed charges was that there was not any evidence to suggest that the gross block of Rs.2451.00 crore as on 1.4.1998 did not already include any component of capitalised initial spares. The petitioner has not made any ground for review of the decision on this account. During the course of hearing of the review petition, the petitioner has been changing its position. The petitioner in its affidavit dated

24.12.2002 has placed on record letters dated 3.3.1998 and 26.4.1999 from CEA addressed to Ministry of Power, which contain the basic calculations of tariff in respect of Talcher STPS. An analysis of the tariff calculations annexed to these letters leads to the following inference in regard to project cost:

	Unit I (as on 31.3.1997) (Rs.in crore)	Unit II (as on 31.3.1998) (Rs. In crore)	Total (Rs.in crore)
Gross block considered for tariff	1494.35	957.35	2451.70
Initial Spares	59.77	-	59.77
Total	1554.13	957.35	2511.48

13. At the hearing on 11.3.2003, it was submitted on behalf of the petitioner that initial spares of Rs.59.77 crore considered by the Central Government in Ministry of Power for the purpose of computation of tariff were maintained in the revenue account. The petitioner filed the necessary details duly supported by Auditors' Certificate vide its affidavit dated 13.10.2003. It has also placed on record the certificate dated 9.10.2003 from its statutory auditors. As per the certificate, the initial spares of Rs.47.608 crore were capitalised in the gross block of Rs.2451.70 crore as on 31.3.1998 and initial spares worth Rs.79.66 crore were kept in inventory. The petitioner has clarified that CEA while forwarding computation of tariff to Ministry of Power had allowed initial spares of Rs.59.77 crore, in addition to the gross block as on 31.3.1998. The position that emerges from the perusal of the details placed on record by the petitioner is as under:

(Rs. in crore)

Gross Block	Spares capitalized in Gross Block	Spares in Inventory	Spares considered by Gol from Inventory	Total spares considered by Ministry of Power
2451.70	47.61	79.66	59.77	107.38

14. We notice discrepancies in the claim of the petitioner so far as the actual amount of initial spares is concerned. In the proceedings before the Commission in the original petition it was submitted by the petitioner that Ministry of Power while approving the tariff had considered initial spares of Rs.59.78 crore over the gross block of Rs.2451.70 crore. However, during the course of the proceedings in the present review petition, the petitioner has produced affidavits and audited accounts to the effect that initial spares worth Rs.107.38 crore were considered by Ministry of Power. Thus, there is an obvious inconsistency and discrepancy between what was stated by the petitioner in the original petition and what has emerged during the course of proceedings in the present review petition. No effort whatsoever has been made by the petitioner to explain the inconsistency or the discrepancy. Therefore, in our opinion, the evidence now placed on record in the proceedings in review petition itself cannot be considered to be a sufficient ground for review of the impugned order in the light of the settled legal position governing review of order.

15. The upshot of the above discussion that the review petition is not maintainable and is accordingly dismissed, with no order as to costs.

Sd/-
(K.N. SINHA)
MEMBER

New Delhi dated the 18th May, 2004

Sd/-
(ASHOK BASU)
CHAIRMAN