

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 172/MP/2016

- Subject : Petition under Section 62 (a) and 79(1)(a) of the Electricity Act, 2003 read with Regulation 8(3) (ii) and 8(7) of the CERC (Terms and Conditions of Tariff) Regulations, 2014 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 for recovery of additional expenditure incurred due to sharing of transportation cost of fly ash consequent to Ministry of Environment and Forest, Govt. of India Notification dated 25.1.2016 as 'Change in Law' event.
- Date of hearing : 20.7.2017
- Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member
- Petitioner : NTPC Limited
- Respondents : Uttar Pradesh Power Corporation.Ltd. and Others
- Parties present : Shri Sanjay Sen, Senior Advocate, NTPC
Shri Venkatesh N. Bhattacharya, NTPC
Shri Ajay Dua, NTPC
Shri S. Mohanty, NTPC
Ms. Swapna Seshadri, Advocate, GUVNL
Shri R.B. Sharma, Advocate, BRPL, BYPL and GRIDCO
Shri Aashish Anand Bernad, Advocate, MPPMCL
Shri Rishabh Donnel Singh, Advocate, MPPMCL
Shri R. Mansingh, GRIDCO
Shri S.R. Sarangi, GRIDCO
Shri Nand Kishore, PSPCL

Record of Proceedings

At the outset, learned senior counsel for the petitioner submitted that the present petition has been filed inter-alia seeking recovery of additional expenditure incurred due to sharing of transportation cost of fly ash consequent to Ministry of Environment and Forest, Government of India's Notification dated 25.1.2016. Learned senior counsel for the petitioner further submitted as under:

a). On 14.9.1999, the Central Government in exercise of powers vested under the Environment Protection Act (EPA) and Environment Protection Rules (EP Rules) notified the Utilisation of Fly Ash from coal or lignite based Thermal Power Plants (Fly Ash Notification). The Fly Ash notification prescribed the mechanism by which Fly Ash generated from Thermal Power Plants would be utilized. However, at that point in time, there was no onerous condition on sharing of transportation cost with the users of Fly Ash.

b). Subsequently, on 25.1.2016, a notification had been issued by the Ministry of Environment and Forests (MoEF) under the statutory provisions of Environment Protection Act, 1986 which stipulated that the cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity with radius of 100 km of any coal based power plant shall be borne by such coal based thermal power plant and the cost of transportation beyond the radius of 100 km and upto 300 km shall be shared equally between the user and the coal based thermal power plant.

c). The said notification also stipulated that the coal based thermal power plants shall within the radius of 300 km bear the entire cost of transportation of ash to the site of road construction projects and coal based thermal power plants shall comply with the above provisions in addition to 100% utilization of fly ash generated by them before 31.12.2017.

d). In order to achieve 100% ash utilization on sustainable basis and to comply with the amended Fly Ash Notification, generating stations will have to incur additional expenditure for transportations of ash upto 300 km radius from the Thermal Power Plant. At present, the distance to which Fly Ash will be transported and the quantum that will be picked up is not known. The petitioner's obligation is to utilize 100% ash. However, in certain thermal power plants, 100% Fly Ash utilization is not possible. In view of the same, the said Notification qualifies as an event of 'Change in Law'.

e). The fund created by sale of Fly Ash by the petitioner is being kept in separate account as per MoEF guidelines. The additional expenditure incurred in respect of sharing of transportation cost of fly ash due to Fly Ash Amendment Notification over and above amount accumulated in ash fund through sale of ash at certain generating stations and the petitioner's additional expenditure ought to be permitted to be billed and recovered additionally on actual basis from the beneficiaries as an additional component under revenue expenditure from the respondents.

f). The Notification dated 25.1.2016 prescribes for sharing of transportation cost with the users of Fly Ash and is in the nature of a statutory expense being imposed upon the petitioner, which is beyond the control of the petitioner and hence the same must be a pass through.

g). Regulation 8(3) of the 2014 Tariff Regulations provides that 'Change in Law' is an uncontrollable factor, which will impact the generator and the same can be trued up by the Commission. In the present case, since, it is a mandatory additional expenditure to be incurred as mandated in Fly Ash Amendment Notification and cannot be met through the ash fund generated due to sale of ash and therefore, accordingly, Regulation 8 of the 2014 Tariff Regulations get attracted.

2. In its rebuttal, learned counsel for BRPL, BYPL and GRIDCO submitted as under:

a). The MoEF Notification dated 25.1.2016 is the consequence of failure of the petitioner to attain 100% ash utilization within the timeline prescribed in the MoEF Notification dated 14.9.1999 in spite of huge money available from the sale of fly ash as well as the additional capitalization permitted by the Commission. The beneficiaries and ultimately the consumers of electricity cannot be penalized due to inaction of the petitioner.

b). The Notification dated 25.1.2016 also contained a dispute settlement committee ensuring unhindered loading and transport of fly ash in an environmentally sound manner. This indicates the fact that the parties operating to facilitate 100% ash utilization like the petitioner and representative of relevant construction and fly ash Brick Manufacturing Industry Association or Body, were not operating in a smooth manner.

c). The petitioner has been silent on the actions taken by it in compliance of Paragraphs 2(11) and 2 (12) of the amended Notification, within its premises and has chosen the option at paragraph 2(14) for ash utilization at a radius of 300 kms and load the transportation cost of such ash to the extent of Rs. 2957 crore/annum on the beneficiaries which clearly goes against the interest of electricity consumers. The petitioner may not be allowed any unreasonable relief as all these reliefs, so far, have resulted only in not complying with the statutory provisions of the Environment Protection Act, 1986.

d). Regulation 8(3) of the 2014 Tariff Regulations stipulates truing up of tariff of generating station based on uncontrollable parameters and the financial gain and losses arising out of the truing up of the uncontrollable parameters are set out under Regulation 8(7) of the 2014 Tariff Regulations. In the present case, the petitioner has not worked out as how it sets out the financial gain and losses.

3. Learned counsel for GUVNL adopted the submissions made by the learned counsel for BRPL, BYPL and GRIDCO and submitted as under:

a). The present petition is not maintainable as the petitioner has not given any clarity as to which generating stations will be affected, what is the cost to be incurred in respect of each generating station and how the ash utilization and transportation is being done and will be done in each of the generating stations. It is difficult for GUVNL to respond since it is not clear that which generating stations have achieved fly ash

utilization and to what extent and what is the cost which is sought to be passed on to GUVNL and what is the basis of the same.

b). As per the scheme of the 2014 Tariff Regulations, the application for tariff as per Regulation 7(1) needs to be made not in a general form but unit-wise and generating station-wise. After the due process, the Commission passes a tariff order. The avenue for the generating company to come back to the Commission is at the time of truing up wherein the claims under uncontrollable factors can be made. A generating company cannot disregard the above process provided in the 2014 Tariff Regulations and simply make a general petition claiming change in law and calling upon the Commission to adjudicate such a claim and pass on the tariff to the beneficiaries.

c). Regulation 8 of the 2014 Tariff Regulations does not permit the petitioner to file a general petition seeking compensation for change in law and a declaration to the said effect so as to simply pass on the costs to the beneficiaries without proper scrutiny or even giving the requisite details.

d). Regulation 8(7) of the 2014 Tariff Regulations mandate that all financial losses incurred by a generating company can be passed on to the beneficiaries. Regulation 8 of the 2014 Tariff Regulations has to be read in totality. Regulation 8 (7) is only a consequence or the natural corollary of Regulation 8. It cannot be read independently to make any claims on the beneficiaries.

4. The Commission directed the Chief (Engineering) and (Chief Finance) of the Commission to convene a meeting of the petitioner and the respondents to examine the technical issues and submit the report within one month.

5. After hearing the learned counsels for the parties at length, the Commission directed the petitioner to file on affidavit, on or before 14.8.2017, the complete facts involved in the petition and also to furnish the following information:

- i. Station-wise details of percentage of ash utilization such as for brick manufacturing for road construction projects, for soil conditioner in agricultural activities, etc. since 14.9.1999.
- ii. Station-wise quantum of ash generated, ash utilized and ash accumulated at generating stations since 14.9.1999.

6. The petition shall be listed for hearing after receipt of report from the Committee.

By order of the Commission
Sd/-
(T. Rout)
Chief (Legal)