

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 14/RP/2017

In

Petition No. 293/GT/2014

Coram

**Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member**

Date of Order: 31.8.2017

In the matter of

Review of Commission's order dated 16.2.2017 in Petition No. 293/GT/2014 in the matter of approval of tariff of Talcher Super Thermal Power Station, Stage-II (2000 MW) for the period from 1.4.2014 to 31.3.2019

And

In the matter of

NTPC Ltd
NTPC Bhawan,
Core-7, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110003

.....Petitioner

Vs

1. AP Eastern Power Distribution Company Ltd.
Corporate office, P& T Colony, Seethammadhara
Visakhapatnam-530013
2. AP Southern Power Distribution Company Ltd.
Back side Srinivasa Kalyana Mandapam,
Tiruchhanur Road, Kesavayana Gunta,
Tirupathi- 517503
3. Telangana State Northern Power Distribution Company Ltd
H.No.2-5-31/2, Vidyut Bhavan,
Nakkalagutta, Hanamkonda
Warangal- 506001
4. Telanagana State Southern Power Distribution Company Ltd
Mint Compound, Corporate office,
Hyderabad (AP) - 500063
5. Tamil Nadu Generation & Distribution Corporation Ltd.
144, Anna Salai,
Chennai- 600002
6. Bangalore Electricity Supply Company Ltd.
Krishna Rajendra Circle,
Bangalore- 560009



7. Mangalore Electricity Supply Company Ltd.
Paradigm plaza, A.B.Shetty Circle
Mangalore- 575001

8. Chamundeshwari Electricity Supply Corp. Ltd.
927, L.J.Avenue, New Kantharaja urs Road
Saraswathipuram,
Mysore- 570009

9. Gulbarga electricity Supply Company Ltd.
Main road Gulbarga- 585102, Karnataka

10. Hubli Electricity Supply Company Ltd.,
Corporate office, P.B.Road,
Navanagar, Hubli- 580025

11. Kerala State Electricity Board
Vaidyuthi Bhavanam, Pattom,
Thiruvananthapuram- 695004

12. Electricity Department,
Government of Puducherry
137, NSC Bose Salai,
Puducherry- 605001

13. Grid Corporation of Orissa Limited
Vidyut Bhavan,
Janpath, Bhubaneswar- 751022

....Respondents

Parties present:

Ms. Poorva Saigal, Advocate, NTPC
Shri V.K. Garg, NTPC

ORDER

This petition has been filed by the petitioner, NTPC for review of order dated 16.2.2017 in Petition No 293/GT/2014, whereby the Commission had determined the tariff of Talcher Super Thermal Power Station, Stage-II (2000 MW) ("the generating station") for the period from 1.4.2014 to 31.3.2019 in accordance with the provisions of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2014 ('the 2014 Tariff Regulations').

2. Aggrieved by the order dated 16.2.2017, the petitioner has sought review of the order on the limited issue of "*Disallowance of expenditure of `12500 lakh incurred towards Wagon Tipler and Associated works*".



3. The petitioner in the petition has sought review of the order and has submitted as under:

(a) In the order dated 16.2.2017, the Commission had calculated the annual requirement of coal of the generating station as 13.28 MTPA approx (at 100% availability) in terms of the 2014 Tariff Regulations. The Commission has then proceeded to hold that the supply of 14.5 MTPA from MCL shall meet the coal requirement of the generating station and that there is no further requirement to source coal from alternate sources to necessitate the installation of the wagon tippler and associated works.

(b) While reaching the above conclusion, the Commission has proceeded on the assumption that the entire quantum of coal sourced from MCL shall be utilized/ consumed at the generating station. Whereas, in fact, the Fuel Supply Agreement (FSA) dated 26.6.2009 entered into by NTPC with MCL caters to the coal requirement of the entire generating station i.e. Talcher Station, Stages-I and II with a cumulative capacity of 3000 MW. In this regard, the relevant extract of the FSA dated 26.6.2009 reads as under:

“3.1 Annual Contracted Quantity (ACQ):

3.1.1 The Annual Contracted Quantity of coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser, shall be 173.00 Lakh Tonnes per Year (Talcher Super Thermal Power Station, Kaniha) and 25.00 Lakh Tonnes per Year (Talcher Thermal Power Stations) from the Seller's mines and/ or from international sources, as per Schedule I.....”

(c) Accordingly, the requirement of 13.28 MTPA of coal (approx), as calculated by the Commission for the generating station cannot be entirely met out of the 14.5 MTPA (out of the 17.3 MTPA) being supplied by MCL for both the Stages of the generating station (Talcher Stage-I and Talcher Stage-II combined). Thus, in order to meet the shortfall of coal, NTPC was constrained to make arrangements to procure coal from alternate sources, namely, through railway rakes, necessitating the installation of wagon tippler. The Petitioner, as a prudent utility, was required to take such steps and incur the capital expenditure. Hence, the conclusion reached by the Commission i.e. the computation of the coal requirement for 2000 MW, as against the cumulative 3000 MW constitutes an error apparent on the face of record or otherwise sufficient reason for review of the order dated 16.2.2017.

(d) The Railways are planning to phase out the use of BOBR wagons in favour of BOXN wagons. The intent of the Railways to phase out the use of BOBR wagons, in order to avoid operational bottlenecks, is clear from the contents of the letter dated 20.7.2004, which read as under:



“.....Even in respect of Talcher area, railways are moving coal by rail to TTPS power station and, recently, there is a request from NTPC to move coal by rail from Talcher siding to NTPC, Talcher which again is a pithead power station having its own MGR system”

“.....it would be appropriate to plan proper infrastructure in the shape of layouts such that movement of coal rakes by rail takes place in forward direction not only from the linked coalfields but also from other coalfields in case coal requirement is to be met from other than the linked coalfields. Coal over long distances by rail is always moving in BOXN wagons. NTPC should also plan for tippers in addition to track hoppers so that coal transported by rail from distant coalfield in BOXN wagons rakes gets released without any hindrance”

(e) The above document was not placed on record as the Hon'ble Commission never enquired into or asked NTPC to produce any documentary evidence in support of its claim in the validation proceedings. In terms of Regulation 55 of the CERC (Conduct of Business) Regulations, 1999, had this Commission required more justification / submissions for substantiating its claim regarding the Wagon Tippler, NTPC would have provided the same.

(f) In any event, it is open to the Commission to examine the relevancy and sufficiency of the document produced even at the stage of review. In this regard, NTPC would crave reference of the judgment of the Appellate Tribunal for Electricity in the case of Western Electricity Supply Co of Orissa Ltd vs OERC & ors 2009 ELR (APEL) 648.

4. Accordingly, the petitioner has submitted that there are errors apparent on the face of record and there are otherwise sufficient cause for reviewing the order dated 16.2.2017 passed by the Commission.

5. The review petition was heard on 23.5.2017 on “admission”. During the hearing, the learned counsel for the petitioner reiterated the submissions made in the petition and prayed that the order dated 16.2.2017 may be reviewed.

6. Heard the learned counsel for the petitioner. Based on the submissions of the petitioner and documents available on record, we proceed to examine the issue raised in the petition as stated in the subsequent paragraphs.

Disallowance of expenditure of `12500 lakh incurred towards Wagon Tippler and Associated works

7. The petitioner in the original petition had claimed additional capital expenditure of Rs 11250.00 lakh in 2016-17 and Rs 1250.00 lakh in 2017-18 towards Wagon Tippler and Associated works and had submitted as under:



“At present MCL is not able to meet the supply of coal upto FSA quantity (14.5 MT coal is being received in place of FSA quantity of 17.5 MT) extra coal requirement is being met by import coal as well as for other domestic sources, for which TSTPS remains dependent of Railways through BOBR wagons. However, Railways is planning to phase out BOBR rakes and use only BOXN wagon Rakes and handling of BOXN Wagon rakes at track hoppers take very long time involving large number of manual labours apart from causing widespread dust pollution. Hence, to handle the BOXN rakes at station in an efficient and environment friendly manner, Wagon Tippler along with associated track, conveyor, crusher etc., is essentially required. Further, due to delay in unloading of BOXN type Indian Railway Wagons, total receipt of coal at station shall further reduce. Hence, Hon’ble Commission may please allow capitalization of the same under Regulation 14(3)(x)”

8. The Commission, after considering the submissions of the parties, on prudence check, disallowed the said claim of the petitioner, on merits, by order dated 15.2.2017, observing as under:

“49. ... Though the petitioner has submitted that the Railways has been planning to phase out BOBR rakes, no documentary evidence has been furnished by the petitioner with regards to the same. It has also submitted that it has been receiving only 14.5 MTPA in place of 17.5 MTPA from MCL mines and the remaining coal is being met by importing coal as well as other domestic sources and Wagon tipplers are required to receive coal through rakes of Indian Railways which are in BOX-N types of wagons. However, from the data furnished by the petitioner considering 85% Availability, Station Heat rate of 2375 kCal/kWh and as fired GCV of coal of 3127.66 kCal/kg (in the absence of as received GCV) in terms of the 2014 Tariff Regulations, the annual requirement of coal for the generating station is found to be 11.29 MTPA. Even if 100% availability is considered, the annual coal requirement of the generating station would be 13.28 MTPA (approx.) which is lower than 14.5 MTPA as submitted by the petitioner. In view of this, we are of the considered view that the petitioner has not made out a fit case to allow the additional capital expenditure towards Wagon Tipplers and associated works. Accordingly, the claim of the petitioner under this head is not allowed.”

9. Thus, the Commission while rejecting the claim of the petitioner had observed that the petitioner has not furnished any documentary evidence in support of its submission that the Railways have been planning to phase out BOBR rakes. The petitioner in this petition has enclosed a copy of the letter dated 20.7.2004 of the Ministry of Railways addressed to the petitioner and has submitted that the said document was not placed on record as the Commission never enquired into or asked NTPC to produce any documentary evidence in support of its claim in the validation proceedings. Referring to Regulation 55 of the CERC (Conduct of Business) Regulations, 1999, the petitioner has submitted that had the Commission required more justification/submissions for substantiating its claim regarding Wagon Tippler, it would have provided the same. This submission of the petitioner though attractive, cannot be accepted. Section 101 of the Evidence Act, provides as under:-



"Burden of proof: Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

10. The above provision provides that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In other words, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Thus, the burden of proof for substantiating the claims for Wagon Tippler lies with the Petitioner and the onus cannot be shifted on the Commission, stating that the document would have been furnished had the Commission asked or called for the same. The petitioner, having not furnished the document as proof / justification of its claim, cannot now contend that the order dated 15.2.2017 is erroneous. Also, the non-exercise of the Power by the Commission to call for documents/materials from the petitioner in terms of Regulation 55 of the Conduct of Business Regulations, do not in any manner, absolve the petitioner from the production of documentary evidence justifying its claim, in the original petition. The review on this count is therefore not acceptable.

11. The petitioner has referred to the judgment of the Appellate Tribunal for Electricity in WESCO Vs OERC & ors (2009 ELR (APTEL) 648 and has contended that it is open to the Commission to examine the relevancy and sufficiency of the documents produced even at the stage of review. It is noticed that in the said case, the State Commission had rejected the review petition without considering the documents, even though the appellant therein had taken a specific stand before the State Commission that the relevant documents came to its knowledge only later and the same could not be produced before the State Commission despite due diligence. It is in this background that the Tribunal in terms of Order 47 Rule 1 of the Civil Procedure Code held that the State Commission should have considered the documents to decide the issue in review petition. No such ground has been raised by the petitioner in the instant case. On the contrary, the stand of the petitioner in the review petition is that the document was not produced as the Commission had not enquired or asked for the same from the petitioner. Hence, the said judgment is not applicable to the present case, as the petitioner was fully aware of the existence of the said document but had not submitted the



same in support of its claims. Hence, the rejection of the claims of the petitioner on the ground of non-submission of documentary evidence by the petitioner is perfectly valid.

12. Even otherwise, a perusal of the contents of the letter dated 20.7.2004 of the Ministry of Railways, do not also support the claim of the petitioner. Though, the petitioner in the petition has contended that Railways are planning to phase out the use of BOBR wagons in favour of BOXN wagons, a plain reading of the said letter indicates that coal was already being transported in BOXN Wagons. This is evident from the following lines:

“....Coal over long distances by rail is always moving in BOXN rakes. NTPC should also plan for tippers in addition to track hoppers so that coal transported by rail from distant coal fields in BOXN rakes gets released without any hindrance...”

13. In addition to this, the petitioner has sought the capitalization of Wagon Tippler during the period 2014-19, after much efflux of time, based on the letter dated 20.7.2004. No justification has been submitted by the petitioner for the same. The Commission had determined the tariff of the generating station for the period 2004-09 and 2009-14 and no claims appear to have been made by the petitioner during these periods. The petitioner has now contended that due to delay in unloading of BOXN wagons, the total receipt of coal at station shall further reduce. It is however noticed from the past operating performance that the generating station has not faced coal shortages and the average PAF during the past years (2011-12 and 2013-14) is above 85%, except in 2012-13 (82.88%) which is attributable to environmental issues rather than coal shortage. In this background, we are of the considered view, that no case has been made out by the petitioner, on merits. The petitioner has also not demonstrated the existence of any error in the order dated 15.2.2017. Accordingly, the submissions of the petitioner are rejected and the prayer of the petitioner for review of the said order fails.

14. Another submission of the petitioner is that the Commission had calculated the annual requirement of coal for this generating station (2000 MW) as 13.28 MTPA (at 100% availability) in terms of the 2014 Tariff Regulations and had proceeded to hold that the supply of 14.5 MTPA from MCL shall meet the coal requirement of this generating station, thereby rejecting the capitalization of expenditure towards Wagon Tippler. According to the petitioner,



the Fuel Supply Agreement dated 26.6.2009 entered into by the petitioner with MCL caters to the coal requirement of the entire generating station (Talcher Station Stage-I & II) with a cumulative capacity of 3000 MW and hence the requirement of 13.28 MTPA of coal (approx) for Stage-II (2000 MW) calculated by the Commission cannot be entirely met out of the 14.5 MTPA (out of 17.3 MTPA) supplied by MCL for both the stages of the generating station. We have examined the matter. The petitioner has submitted that the findings of the Commission that the supply of 14.5 MTPA from MCL shall meet the coal requirement of this generating station is an error apparent on the face of the order as it is based on the assumption that the entire quantum of coal sourced from MCL shall be utilized /consumed at Talcher-Stage-II (this generating station) instead of the entire generating station (combined stages of I & II). It is however noticed from the submissions of the petitioner, that the pro-rata share of coal in 14.5 MTPA for Stage-I (1000 MW) is 4.83 MTPA and for Stage-II (2000 MW) is 9.67 MTPA. Also, the annual coal requirement for Stage-II of the generating station works out to 8.22 MTPA at 85% availability, which is well below the quantum of coal of 9.67 MTPA (out of 14.5 MTPA) received by the generating station presently. It is further observed that the petitioner has not furnished the details of 'as received' GCV of coal for the period 2014-19 in terms of the 2014 Tariff Regulations and therefore, the Commission had computed annual coal requirement of 8.22 MTPA considering 85% availability, Station Heat Rate of 2375 kCal/kwh and 'as billed' GCV of 4095.15 kcal/kg. Accordingly, the annual requirement of 8.22 MTPA for Stage-II (this generating station) as computed by the Commission is far less than the requirement of quantum of coal of 11.53 MTPA as per FSA. Even otherwise, there would not be any difference between 'as billed' and 'as received' GCV of coal, as the generating station is a pit head station. In our view, the petitioner has sought to reargue the case on merits, by production of documentary evidence and the same is not permissible in review. The Commission by a conscious decision and on prudence check, had not allowed the capitalization of the expenditure claimed towards Wagon tipplers and associated works in the original petition. It is settled law that review petition cannot be an appeal in disguise. In our considered view, we find no error apparent on the face of the record necessitating review of



order dated 15.2.2017. In view of the above discussions, the prayer of the petitioner is rejected and review on this count fails.

15. Petition No. 14/RP/2017 is disposed of at the admission stage.

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

Sd/-
(A. S. Bakshi)
Member

Sd/-
(A. K. Singhal)
Member

Sd/-
(Gireesh B. Pradhan)
Chairperson

