

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 57/RP/2016

Coram:

Shri Gireesh B.Pradhan, Chairperson

Shri A.K.Singhal, Member

Shri A.S.Bakshi, Member

Dr. M.K. Iyer, Member

Date of order: 29th of November, 2017

In the matter of

Petition seeking review of the order dated 8.3.2016 in Petition No. 13/MP/2014 seeking recovery of Energy Charge shortfall during the period of 2009-14 as well as the modification of design energy for the succeeding years for calculation of ECR till the energy charge shortfall of the previous years has been made up for the Ranganadi Hydro-electric plant, where actual energy generated by the station during a year is less than its approved design energy for reasons beyond the control of the generating company.

And

In the matter of

Assam Power Distribution Company Limited
Bijulee Bhawan, Paltanbazar,
Guwahati-781 001

....Review Petitioner

Vs.

North Eastern Electric Power Corporation Limited
Brookland Compund, Lower New Colony,
Shillong-793 003 and others

...Respondents

The following was present:

Shri M.K.Adhikari, APDCL

ORDER

The Review Petitioner, Assam Power Distribution Company Limited, has filed the present petition under Regulation 54 (Power to Relax) and Regulation 55 (Power to

remove difficulty) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as the 2014 Tariff Regulations) seeking review of the order dated 8.3.2016 in Petition No.13/MP/2014.

The Review Petitioner has made the following prayers:

“(a) Admit the review petition of CERC order dated 8.3.2016 under the provisions of Regulation 54 (power to relax) and Regulation 55 (Power to Remove difficulty) of CERC (Terms and Conditions of Tariff) Regulations, 2014;

(b) Request NEEPCO to present records of rain fall in the catchment areas of RHEP authenticated by a neutral third party and review this order based on the records;

(c) To consider the prayers made before the Commission in Point (6) of this Review Petition and allow for the same in the greater interest of the consumers of APDCL.”

2. North Eastern Electric Power Corporation Limited (NEEPCO) had filed the Petition No.13/MP/2014 to allow recovery of energy charges shortfall during the period of 2009-14 and modification of design energy for the succeeding years for calculation of ECR till the energy charge shortfall of the previous years have been made up for the Ranganadi Hydro Electric Plant. The Commission, after considering the submissions of the Review Petitioner and NEEPCO, vide order dated 8.3.2016 in Petition No.13/MP/2016 allowed NEEPCO to recover the energy charge loss of 2010-11, 2011-12 and 2012-13 based on modified design energy/ECR subject to reconciliation of data related to saleable scheduled energy (MUs) and energy charge recovered during the said years between the beneficiaries and the Petitioner.

Relevant portion of the said order dated 8.3.2016 is extracted as under:

“17. (a) In view of the above decision, the prayers of the petitioner are disposed of as under:

(a) With regard to the petitioner`s first and second prayers to allow it to bill and recover the energy charge short fall amounting to Rs. 122.87 crore for the years 2009-10 to 2011-12 and approve the modified design energy, the petitioner is

allowed to revise the billing of energy charges for the years 2010-11, 2011-12 and 2012-13, based on the above modified design energy/ECRs till the loss of previous years amounting to Rs. 4788.19 lakh, Rs. 503.96 lakh and Rs. 5310.52 lakh totaling to Rs. 10602.67 lakh is recovered subject to re-conciliation of data related to Saleable scheduled energy (MUs) and energy charge recovered during the years 2009-10, 2010-11 and 2011-12, between the beneficiaries and the petitioner.

(b) With regard to the petitioner's third prayer to allow the petitioner to apply similar methodology for recovery of energy charge shortfall for less generation during 2012-13 and 2013-14, reasons beyond the control of the petitioner, it is clarified that in case any dispute arises during the said period mentioned, the petitioner is granted liberty to approach the Commission for resolution of dispute in accordance with law."

3. The Review Petitioner has filed the present review petition on the following grounds:

(a) NEEPCO has not yet submitted records of low rainfall and less water inflow authenticated by a neutral third party;

(b) NEEPCO has not provided information on the quantum of rainfall in the other catchment areas well as the extent of impact of each of these catchment areas.

(c) The bill of Rs. 52.20 crore raised by NEEPCO is not economically payable by Review Petitioner with immediate effect and the inclusion of this huge amount to the ARR of APDCL for only financial year will result in an exponential increase in consumer tariff leading to an overall tariff shock.

(d) Allow the recovery of shortfall of energy charges against RHEP with a prospective effect from the date of filing of the Petition, (ii) Waive the interest charged on principal amount since NEEPCO did not file the petition during or immediately after the prolonged three years period (2009-10 to 2011-12) of

low rainfall but almost three year after the crisis period on October, 2014; (iii) grant five years time to liquidate the outstanding principal amount of NEEPCO with easy installment so that retail consumer of APDCL do not have to suffer the brunt of abnormal tariff rates under Regulation 54 (Power to relax) and Regulation 55 (Power to remove difficulty).

4. The petition was listed for hearing on maintainability on 20.12.2016. The representative of the Review Petitioner reiterated its submissions made in the petition.

Analysis and Decision:

5. We have considered the submissions of the Review Petitioner. The Review Petitioner in the first prayer has prayed to review the impugned order dated 8.3.2016 under the provisions of the Regulation 54 (Power to Relax) and Regulation 55 (Power to remove difficulty) of the 2014 Tariff Regulations and in the fourth prayer has prayed to allow the recovery of shortfall of energy charges against RHEP with a prospective effect from the date of petition and to waive the interest charged on principal amount and to grant five years time to liquidate the outstanding principal amount with easy installment under Regulations 54 and 55 of the 2014 Tariff Regulations.

6. The issues in the present Review Petition need to be examined on the touchstone of clause (f) of sub-section (1) of Section 94 of the Electricity Act, 2003, wherein the Commission for the purpose of any enquiry or proceedings under the Act is conferred certain powers as are vested in a civil court under the Code of Civil Procedure (the Code). The powers conferred include the power for reviewing its

decisions, directions and orders. The powers of the civil court in regard to review are contained in Section 114 read with Order 47 of the Code. According to these provisions, any person feeling aggrieved by an order passed by the Commission may seek review under the following circumstances, namely:

(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 the time when the order was made;

(b) An error apparent on the fact of the record; and

(c) For any sufficient reason.

7. “Discovery” of new and important matter or evidence is the first essential condition for invoking the review jurisdiction. “Discovery” refers to discovery made after the order was passed, since the order sought to be reviewed was passed because sub-rule (1) of Order 47 of the Code allows review on the ground that the new and important matter or evidence was not within his knowledge or could not be produced “at the time the order was passed”. The Review Petitioner is seeking review the impugned order dated 8.3.2016 under Regulation 54 (Power to Relax) and Regulation 55 (Power to Remove difficulty) of the 2014 Tariff Regulations. The Review Petitioner has not denied for payment of outstanding dues and has projected its difficulty to pay the outstanding principal amount immediately. Considering the submissions of the Review Petitioner, it cannot be held to be the case of “discovery” of the documents after passing of the order dated 8.3.2016. In the present petition, the petitioner has prayed for recovery of shortfall of energy charges with prospective effect, waiver of the interest charged on principal amount, grant of five years time to liquidate the outstanding amount to NEEPCO in easy installments and for direction to

NEEPCO to provide information on the quantum of rainfall in the other catchment areas. It is noted that the grievances projected in the Review Petition are not scope of the original petition. Therefore, for the same reason, it cannot be held that the facts now being relied upon are “new” evidence. Therefore, the essential conditions for review are not satisfied.

8. Power of review granted to the Commission is similar to the powers of a civil court under Order 47 of the Code. The Hon`ble Supreme Court in the case of Ajit Kumar Rath vs. State of Orissa [(1997) SCC 473] held as under:

"The provisions extracted above indicate that the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the 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 the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. **A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier. That is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it.** It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."

In view of the above, the Review Petitioner's claim under the Powers of Relaxation and Removal of Difficulty is not tenable and is rejected.

9. The Review Petitioner has sought recovery of shortfall of energy charges against RHEP prospectively from the date of petition. We are of the view that recovery of the energy charge shortfall has been allowed by the Commission vide order dated 8.3.2016 in Petition No. 13/MP/2014 as per methodology specified in the

2009 Tariff Regulations for recovery of energy charges for the past period on year to year basis. Therefore, the prayer of the Review Petitioner to allow recovery of energy charges prospectively after the filing of the petition is not tenable as it will result in denial of energy charges for the past period which was found legitimately due to NEEPCO.

10. The Review Petitioner has sought waiver of the interest charged on principal amount. The Review Petitioner has submitted that NEEPCO did not file the petition during or immediately after the prolonged 3 year period of low rainfall (2009-10, 2010-2011 and 2011-2012) and filed the Petition almost 3 years after the crisis period on October 2014. It is noted that the issue of interest on principal amount was neither raised by NEEPCO nor the Review Petitioner during deliberations in the Petition No. 13/MP/2014. Therefore, the Review Petitioner's prayer for waiver of interest on Principal amount is outside the scope of review and hence rejected.

11. The Review Petitioner has prayed to grant five years time to liquidate the outstanding principal amount to NEEPCO in easy installments so that retail consumers of APDCL do not have to suffer the brunt of abnormal tariff rates. The Review Petitioner has submitted that APDCL is a loss making Distribution Company sustaining a burden of more than Rs. 500 crore loss every year. Therefore, it is not economically feasible for APDCL to release payment of Rs. 52.2 crore claimed by NEEPCO with immediate effect. The Review Petitioner has submitted that the inclusion of huge amount to the ARR of APDCL for one financial year will result in an exponential increase in consumer tariff leading to an overall tariff shock which would not be allowed to be implemented by Assam State Electricity Regulatory

Commission. In our view, the Review Petitioner should take up the matter regarding payment of outstanding dues in installments with NEEPCO.

12. The Review Petitioner, in the second prayer has sought direction to NEEPCO to present records of rainfall in the catchment areas of RHEP authenticated by a neutral third party. It is clarified that NEEPCO had placed on record (i) Machine outage data as certified by NERLDC; (ii) CWC's letter dated 10.8.2015 indicative of lower flows during 2009-2012 and (iii) the data sheet of District Rainfall (Lower Subansiri) during the period 2008 to 2012 from Hydromet Department of Indian Meteorological Deptt. which has been verified from the website of the Indian Meteorological Deptt, Shillong. We have acknowledged the same in Para 12 of our order dated 8.3.2016. Relevant portion of the impugned order is extracted as under:

"12. With regard to inflow data submitted by the petitioner, APDCL has submitted that the same is not supported by any authenticated neutral third party. In this regard, the petitioner has placed on record the data sheet of District Rainfall (Lower Subansiri) during the period 2008 to 2012 from Hydromet Department of Indian Meteorological Deptt. which has verified from the website of the Indian Meteorological Deptt, Shillong. As per CWC's letter dated 10.8.2015 the inflows during the years 2009-10 to 2011-12 were on lower side in comparison to previous years. It is noted that though the average water inflows have not been certified by any third party, the low rain fall leading to lower inflows is well supported by the data of Indian Meteorological Department. Perusal of the data indicated in CWC's letter dated 10.8.2015 also reveals that inflows during the years 2009-10 to 2011-12 were on lower side in comparison to previous years."

Since, the submission of the Review Petitioner had already been dealt in the above para of the order under review, we do not find any infirmity in the impugned order.

13. In view of the above discussion, the Review Petition is disposed of.

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

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K.Singhal)
Member

sd/-
(Gireesh B.Pradhan)
Chairperson