

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Review Petition No. 23/RP/2019
in Petition No. 171/TT/2018

Coram:

Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member

Date of Order : 05.06.2021

In the matter of:

Review petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking review of order dated 30.9.2019 in Petition No. 171/TT/2018.

And in the matter of:

Power Grid Corporation of India Limited
"Saudamini" Plot No.2,
Sector- 29, Gurgaon- 122001 (Haryana)

.... Review Petitioner

Vs

1. Bihar state Power (Holding) Company Ltd.,
Formerly Bihar State Electricity Board,
Vidyut Bhawan, Bailey Road, Patna – 800001.
2. West Bengal State Electricity Distribution Company Ltd.,
Bidyut Bhawan, Bidhan Nagar, Block DJ, Sector-II,
Salt Lake City, Calcutta – 700091.
3. Grid Corporation of Orissa Ltd.,
Shahid Nagar, Bhubaneswar – 751 007.
4. Damodar Valley Corporation,
DVC Tower, Maniktala, Civic Centre,
VIP Road, Calcutta – 700054.
5. Power Department,
Government of Sikkim,
Gangtok – 737101

6. Jharkhand State Electricity Board,
Doranda, Ranchi – 834002.

..... Respondents

For Petitioner : Ms. Ranjitha Ramachandran, Advocate, PGCIL
Ms. Srishti Khindaria, Advocate, PGCIL
Shri A. K Verma, PGCIL
Shri V. P Rastogi, PGCIL

For Respondents : None

Order

The Review Petitioner, Power Grid Corporation of India Ltd., has filed the instant review petition seeking review of the order dated 30.9.2019 in Petition No. 171/TT/2018, under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, wherein the transmission tariff was determined by the Commission for the new 500 MVA ICT at Maithon Sub-Station from its COD to 31.3.2019, installed as a replacement for the existing 315 MVA 400/220 kV Interconnecting Transformer (ICT), and decapitalised the replaced 315 MVA 400/220 kV (ICT).

Background

2. The Review Petitioner filed Petition No. 171/TT/2018 for determination of transmission tariff of the 500 MVA 400/220 kV ICT at Maithon Sub-station (hereinafter referred to as the “subject asset”) under “Eastern Region Strengthening Scheme-IX in the Eastern Region” for the 2014-19 tariff period under Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as “the 2014 Tariff Regulations”). The existing 315 MVA

400/220 kV (ICT) at Maithon Sub-station is replaced with 500 MVA ICT. The 315 MVA ICT was originally installed under Kahalgaon Associated Transmission System (ATS). The Commission in the impugned order dated 30.9.2019 had de-capitalised the 315 MVA ICT and observed that the said ICT would not recover any tariff as the same is not in use. Accordingly, the cost of the replaced 315 MVA ICT was deducted from the capital cost of the subject asset while allowing tariff for it from its COD to 31.3.2014. The Review Petitioner has sought review of the said findings of the Commission in the order dated 30.9.2019 in Petition No. 171/TT/2018 in the instant Review Petition. The relevant extract of the impugned order is placed below:

“33. We have considered the submissions of the petitioner. The instant petition covers Installation of a new 400/220 kV 500 MVA ICT at Maithon S/S by replacing the existing 315 MVA ICT (2nd), originally installed under Kahalgaon Associated Transmission System (ATS). The petitioner has proposed to use the dismantled ICT as regional spare. The existing ICT was originally commissioned on 1.6.1994 and dismantled on 24.10.2017. Accordingly, the age of the transformer is about 23 years and the petitioner has already recovered 90% of the asset value as depreciation.

34. Further, Clause 6 of Regulation 9 of the 2014 Tariff Regulations provides as under: “(6) The following shall be excluded or removed from capital cost of the existing and new project: (a) The assets forming part of the project, but not in use; (b) Decapitalisation of Asset;

35. From the above it is clear that assets not in use or assets which has been decapitalised from the books shall be excluded from the admitted/admissible capital cost. Accordingly, we are of the view that, the original cost of replaced/de-capitalised asset shall be removed from the cost of instant asset.”

3. The Review Petitioner has made the following prayers:

“a) Allow the Review Petition and modify the Order dated 30.09.2019 passed in Petition No. 171/TT/2018 to the extent stated in the present Review Petition;

b) Allow the tariff as applicable for the replaced 315 MVA ICT to be used in regional spare;

c) pass any such further order or orders as this Hon’ble Commission may deem just and proper in the circumstances of the case.”

4. The impugned order dated 30.9.2019 was heard by coram of Chairperson, Dr. M. K. Iyer, Member and Shri I. S. Jha, Member. Dr. M. K. Iyer, Member has demitted his office and, hence, the instant review petition is heard by coram of Chairperson and Shri I.S. Jha, Member.

5. The matter was heard through video conference on 16.7.2020 and was admitted vide order dated 24.7.2020 and notice was issued to the Respondents. However, none of the Respondents have filed any reply in the matter. The matter was finally heard on 27.4.2021 and order was reserved. None of the Respondents appeared in the matter despite notice.

Submissions of Review Petitioner

6. The gist of the submissions made by the Review Petitioner in the review petition and in its written submissions dated 13.5.2021 in support of its plea for review of order dated 30.9.2019 is as follows:

a) The impugned order fails to consider that the replaced 315 MVA ICT is still in use and, therefore, entitled to tariff. When the asset is being used and has agreed to be used, it is entitled for tariff components as per the applicable Tariff Regulations, other than those which are no longer applicable such as interest on loan after full repayment of loan or depreciation beyond 90% of the value of the assets.

b) The Eastern Regional Power Committee has specifically approved the use of the old ICT as regional spare. Therefore, having accepted the extended life, the applicable tariff elements cannot be denied.

c) The use of asset as regional spare has been recognized by the Commission in other Petitions and the Commission vide order dated 23.3.2016 in Petition No. 232/TT/2015 and order dated 5.3.2021 in Petition No. 250/TT/2020 has allowed for continued recovery of tariff for such assets.

- d) The useful life of the replaced 315 MVA ICT is not yet over and the ICT had only completed 23 years. Even otherwise, it is not correct that the assets beyond useful life are not allowed the recovery of tariff at all.
- e) The disallowance of tariff for transmission assets which are in use amounts to use of such assets for free which is not only contrary to Section 61 of the Electricity Act, 2003 but also contrary to the equity and justice as the Review Petitioner has put the asset to use without recovery of its expenses.
- f) The impugned order is contrary to the provisions of the 2014 Tariff Regulations and the 2019 Tariff Regulations whereby the assets are entitled to tariff for their useful life and in fact the assets (transmission or generation) can continue beyond useful life and there is no bar in use of such assets and for recovery of tariff so long they are in use.
- g) The impugned order would discourage the economical and efficient use of resources by using the transmission assets nearing the end of their useful life or beyond their useful life and compel the licensees to procure new assets which would increase the burden on the beneficiaries/ consumers.
- h) There was no fault in the 315 MVA ICT and the same were replaced only due to the need for augmentation of the transformation capacity to 500 MVA. If the 315 MVA ICT had continued at Maithon Sub-station, the tariff for such ICT would not have been stopped on the basis that it had completed 23 years. If the ICT had continued to be in the Maithon Sub-station, it would have continued to recover tariff as per the Tariff Regulations. There is no reason to deny tariff merely because the ICT has been used as regional spare.
- i) The Tariff Regulations only envisage decapitalisation of assets which are not in use. So long as the assets are in use, they must be allowed to recover tariff.
- j) The 2014 Tariff Regulations recognizes extended life of assets and additional costs to be incurred for renovation or modernisation of the assets for

purpose of extension of life. Similarly, the 2019 Tariff Regulations also recognizes use of an asset beyond its useful life.

k) Even though there is no additional capital cost for renovation and modernisation and the depreciation and interest on loan are nil, there are other elements of tariff which are applicable such as O&M expenses, return on equity and the consequent interest on working capital etc. The said elements of tariff cannot be denied merely because the depreciation may be nil.

l) It is established principle that assets when used beyond their useful life would recover tariff as applicable. Once the above principle is accepted, there is no reason to deny such tariff to the assets whenever they are removed from one sub-station and used as regional spare.

m) It is in the interests of all the beneficiaries for the Review Petitioner to use such ICTs even beyond their useful life as this would involve substantially lower tariff as transmission tariff after its useful life consists of only ROE, O&M Expenses and IWC component. However, there is no incentive for the Review Petitioner to continue an asset beyond the useful life if no recovery of tariff is permitted for such asset.

n) The use of replaced ICTs as regional spares is done by the Review Petitioner to avoid additional capital cost of new ICTs and thereby, incurring unnecessary expenditure. On each augmentation/ upgradation of transmission capacity, if the lower capacity power transformer is decommissioned and new transformer is purchased, it will lead to unnecessary burden on the consumers. Therefore, the beneficiaries had agreed to use of old ICT as regional spare.

7. The Review Petitioner has also submitted that the issue of using the replaced assets as regional spare was considered by a Committee constituted by the Commission vide order in Petition No. 38/TT/2017, which stated that the dismantled/ replaced asset used as a regional spare with the consent of the concerned RPC should get tariff.

8. During the hearing on 27.4.2021, learned counsel for the Review Petitioner reiterated the submissions made in the review petition. The Review Petitioner was permitted to file Written Submissions (WS) on its request during the hearing.

9. Accordingly, the Review Petitioner filed the WS. The Review Petitioner referring to judgements of Hon'ble Supreme Court and other authorities submitted in the WS that the review jurisdiction is broad and can be used to correct the error and prevent miscarriage of justice or consider the aspects which have not been considered earlier. The Review Petitioner has further submitted that the Commission in order dated 23.3.2016 in Petition No.232/TT/2015 and order dated 5.3.2021 in Petition No.250/TT/2020 had allowed tariff for spare assets. The Review Petitioner has further re-emphasised the submissions made in the review petition and during the hearing on 27.4.2021. The other submissions reiterated by the Review Petitioner in the WS in short are that the ICT is in use; it has remaining useful life and hence cannot be denied tariff; asset is entitled for tariff even beyond useful life; ICT cannot be used as regional spare or in sub-stations for free; 2019 Tariff Regulations recognised the use of asset beyond its useful life; use of old assets is in the interest of all beneficiaries; and denial of tariff would discourage their use. Therefore, disallowance of tariff for the 315 MVA ICT which is in use as a regional spare is an apparent error.

Analysis and Decision

10. We have considered the submissions of Review Petitioner and the material available on record. The grievance of the Review Petitioner is the disallowance of tariff for the replaced 315 MVA ICT at Maithon Sub-station. The Review Petitioner has sought review of the impugned order basically on the three following grounds (a)

that the tariff for the ICT was recovered only for 23 years and the ICT is due for tariff for two more years of its useful life, (b) the 315 MVA ICT at Maithon Sub-station was replaced not due to fault in the ICT but for augmentation of the transformation capacity and (c) the replaced ICT is being use as a regional spare with the consent of the beneficiaries in the ERPC. The Review Petitioner has contended that the Commission has not considered these aspects in the impugned order, which is an apparent error.

11. Let us examine whether these issues were not considered in the impugned order as contended by the Review Petitioner. The relevant portion of the impugned order is extracted hereunder again for ease of reference:

“33. We have considered the submissions of the petitioner. The instant petition covers Installation of a new 400/220 kV 500 MVA ICT at Maithon S/S by replacing the existing 315 MVA ICT (2nd), originally installed under Kahalgaon Associated Transmission System (ATS). The petitioner has proposed to use the dismantled ICT as regional spare. The existing ICT was originally commissioned on 1.6.1994 and dismantled on 24.10.2017. Accordingly, the age of the transformer is about 23 years and the petitioner has already recovered 90% of the asset value as depreciation.

34. Further, Clause 6 of Regulation 9 of the 2014 Tariff Regulations provides as under:

“(6) The following shall be excluded or removed from capital cost of the existing and new project: (a) The assets forming part of the project, but not in use; (b) Decapitalisation of Asset;

35. From the above it is clear that assets not in use or assets which has been decapitalised from the books shall be excluded from the admitted/admissible capital cost. Accordingly, we are of the view that, the original cost of replaced/de-capitalised asset shall be removed from the cost of instant asset.”

12. Perusal of the impugned order shows that the Commission has considered the submission of the Review Petitioner regarding its proposal to use the replaced 315 MVA ICT as a regional spare and the fact that the ICT has completed its useful life of 23 years and has recovered 90% of the value of the ICT as depreciation,

thereby meaning that the Commission was conscious of the fact that there was no fault with the ICT and that the ICT has 2 remaining years of its useful life. Therefore, the contention of the Review Petitioner that the Commission did not consider the submissions in the impugned order is not correct. Further, taking into consideration Regulation 9 of the 2014 Tariff Regulations, which provides for exclusion of the capital cost of the asset not in use, the Commission held that the capital cost of the replaced 315 MVA ICT shall be removed from the capital cost of the new 500 MVA ICT at Maithon Sub-station.

13. Moreover, in a similar case of Review Petitioner's claim for tariff for transformers which have completed useful life and used as "spare", APTEL in judgment dated 25.4.2016 in Appeal No.98 of 2015 disallowed the tariff as the Tariff Regulations do not provide for retention of the capital cost of the spare transformers not in use in the capital base. The relevant extract of the said judgment is as follows:

"17. It is to be noted that all the three Assets i.e. three of 1x50 MVA transformers have completed their useful life of 25 years and their capital costs were included by the Central Commission for tariff determination upto 31.03.2014 vide its Order dated 06.08.2013 in Petition No. 331/2010. Cost of new assets i.e. 3x160 MVA transformers replacing 3x50 MVA transformers has been allowed to be capitalized and as such, the replaced assets have to be de-capitalised by reducing the net value of replaced assets from the capital cost of new assets.

18. The Appellant has argued that when the transformers are used as spare transformers, it cannot be said that they are not in use and therefore, its claim for retention of capital cost of the replaced 3x50 MVA transformers with the consent of the beneficiaries does not violate the Regulations of the Central Commission as these replaced assets are to be considered as 'asset in use'. This submission of the Appellant does not have any merit in light of the fact that these 3x50 MVA transformers stand replaced and till the time they are requisitioned by any beneficiary State, they would remain as spare transformers and hence, it could be treated as spare transformers but 'asset not in use'. This Tribunal in its earlier judgment dated 08.05.2014 in Appeal No. 173/2013 (NTPC Ltd. Vs. Central Electricity Regulatory Commission & amp; Ors.) and judgment dated 01.05.2015 in Appeal No. 97/2013 (NTPC Ltd. Vs. Central Electricity Regulatory Commission & amp; Ors.) disallowed capitalization of spare/additional transformers. In judgment dated 01.05.2015, this Tribunal observed that unless there is a specific provision in the Regulations permitting capitalization of the cost of spare assets, such assets cannot be included in the capital base.

19. Since there is no provision in the statutory Regulations of the Central Commission in support of the Appellant's claim to permit retention of replaced assets not in use, in the capital cost of the new assets, we are of the considered view that the Appellant's claim in this regard is untenable. We are in agreement with the findings of the Central Commission in this regard in its Impugned order dated 6.1.2015. As such, both these issues are decided against the Appellant."

14. As regards the Review Petitioner's contention that the Committee constituted by the Commission in Petition No. 38/TT/2017 had recommended that the dismantled/ replaced asset used as a regional spare with the consent of the RPC concerned should get tariff, without going into the merits of the recommendations of the Committee, we would like to state that the Commission is not bound by the recommendations of the Committee. Moreover, it is pertinent to point out here that the Committee had also recommended that, *"A call may have to be taken by the Commission on the issue."*

15. As regards the Review Petitioner's contention that the Commission in order dated 23.3.2016 in Petition No. 232/TT/2015 and order dated 5.3.2021 in Petition No. 250/TT/2020 had allowed tariff for spares, it is observed that the Commission's order dated 23.3.2016 in Petition No. 232/TT/2015 was passed before APTEL's judgement dated 25.4.2016 in Appeal No. 98 of 2015. As the APTEL's judgement dated 25.4.2016 prevails over the Commission's order dated 23.3.2016, we set aside the contention of the Review Petitioner without going into the facts of the matter in Petition No. 232/TT/2015. As regards the second order quoted by the Review Petitioner dated 5.3.2021 in Petition No. 250/TT/2020, it is observed that the facts in the instant matter are different from the assets considered in Petition No. 250/TT/2020, on the aspect of the age of the asset(s) concerned. Moreover, a decision in a subsequent matter (order dated 5.3.2021 in Petition No. 250/TT/2020) cannot be a ground for review of an decision in earlier matter (order dated 30.9.2019

in Petition No. 171/TT/2018) as held in judgement of *J&K High Court in Abdul Salam vs State of J&K (AIR 1981 J&K 21)* and *Punjab and Haryana High Court judgement in Ram Chand vs State of Punjab and Others {(1971) ILR 2 Punjab and Haryana 184}*.

16. In view of the above discussion, we are of the considered view that there is no apparent error in the impugned order.

17. Accordingly, Review Petition No. 23/RP/2019 is disposed of in terms of the above.

sd/-
(I. S. Jha)
Member

sd/-
(P. K. Pujari)
Chairperson