

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 205/MP/2021

Subject: Petition under Section 62(a) and 79(1)(a) of the Electricity Act, 2003 read with Regulation 76 and 77 of the CERC (Terms and Conditions of Tariff) Regulations, 2019 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 for recovery of Additional Expenditure incurred due to ash transportation charges consequent to Ministry of Environment, Forest & Climate Change, Government of India Notification dated 03.11.2009 and notification dated 25.01.2016 on a recurring basis

Petitioner: NTPC Ltd.

Respondents: UPPCL & ors

Date of Hearing: **17.2.2022**

Coram: Shri I.S Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Parties present: Shri Shri Venkatesh, NTPC
Shri Ashutosh K. Srivastava, Advocate, NTPC
Ms. Mehak Verma, Advocate, NTPC
Ms. Isnain Muzami, Advocate, NTPC
Shri Anand Sagar Pandey, NTPC
Shri Manoj Kumar, NTPC
Shri R.K. Mehta, Advocate, GRIDCO
Ms. Himanshi Andley, Advocate, GRIDCO
Shri Durga M Sahoo, GRIDCO
Shri Mahfooz Alam, GRIDCO
Shri Buddy A. Ranganadhan, Advocate, BPRL
Shri Anupam Varma, Advocate, BPRL
Shri Rahul Kinra, Advocate, BPRL
Shri Aditya Ajay, Advocate, BPRL
Ms. Megha Bajpeyi, BPRL
Shri Aashish. A. Bernard, Advocate, MPPMCL
Shri Paramhans Sahani, Advocate, MPPMCL
Shri Anurag Naik, MPPMCL
Shri S. Vallinayagam, Advocate, TANGEDCO
Ms. B. Rajeswari, TANGEDCO
Ms. R. Ramalakshmi, TANGEDCO
Ms. R. Alamelu, TANGEDCO
Shri P V.Dinesh, Advocate, KSEBL
Shri Shashwat Kumar, Advocate, BSPHCL
Shri Rahul Chouhan, Advocate, BSPHCL



Shri Arunav Patnaik, Advocate, Karnataka Discoms
Ms. Bhabna Das, Advocate, Karnataka Discoms
Shri Buddy Ranganathan, Advocate, MSEDCL
Shri Anup Jain, Advocate, MSEDCL
Shri Akash Goel, Advocate, MSEDCL
Shri D.H. Agarwal, MSEDCL

Record of Proceedings

The case was called out for virtual hearing.

2. During the hearing, the learned counsel for the Respondent GRIDCO, while submitting that the petition is not maintainable, made the following submissions:

- (a) Though the Commission in its order dated 5.11.2018 in Petition No.172/MP/2016 had declared the MOEF Notification dated 25.1.2016 as a change in law event, and the admissibility of fly ash transportation cost was subject to prudence check on a case to case basis, the prayer of the Petitioner for monthly reimbursement of such expenses was, however, not granted;
- (b) The 2019 Tariff Regulations notified by the Commission do not provide for reimbursement of fly ash transportation cost, despite the order dated 5.11.2018 in Petition No.172/MP/2016 for the period 2014-19. In terms of the judgment of the Hon'ble Supreme Court in M.U.Sinai v UOI & ors, the power to relax or removal of difficulties cannot be invoked contrary to the regulations;
- (c) The Petitioner has not complied with the conditions laid down by the Commission in its order dated 5.11.2018 in Petition No.172/MP/2016. It has also not complied with the provisions of the MOEF Notification dated 25.1.2016 or the various other notifications for the period from 2009 to 2016, towards achieving 100% ash utilization. Moreover, the claim of the Petitioner towards ash transportation cost is higher.

3. The learned counsel for the Petitioner pointed out that since the Respondents are raising issues on 'maintainability' and on 'merits', the Commission may hear the matter on merits too, and reserve its orders. The Commission clarified that the petition has been listed for hearing the parties on 'admissibility' and, accordingly, directed the Respondents to put forth their submissions only on the 'maintainability' of the petition.

4. The learned counsel for the Respondent TANGEDCO circulated the written submissions and mainly submitted as under:

- (a) The prayer of the Petitioner in the present petition, for monthly reimbursement of fly ash transportation charges, is similar to the prayer made by the Petitioner in Petition No.172/MP/2016. Since the



rejection of the prayer (for monthly billing) by order dated 5.11.2018 in Petition No.172/MP/2016 had attained finality, similar prayer in this petition is not maintainable;

- (b) The Petitioner has not complied with any of the provisions of the MOEF Notification dated 25.1.2016. It has also not complied with any of the conditions imposed by order dated 5.11.2018 in Petition No. 172/MP/2016, despite grant of liberty.

5. The learned counsel for the Respondent, MPPMCL adopted the submissions of the Respondents GRIDCO and TANGEDCO, on maintainability.

6. The learned counsel for the Respondent, Karnataka Discoms made the following submissions:

- (a) Since the prayer of the Petitioner for monthly billing was rejected by order dated 5.11.2018 in Petition No.172/MP/2016, the present petition claiming the same relief is barred by the principle of *res judicata*, in terms of explanation 5 and 6 to Section 11 of the Civil Procedure Code, 1908 ('CPC');
- (b) As the issue of recovery of fly ash transportation cost is pending consideration of this Commission, in the tariff petition filed by the Petitioner in respect of Kudgi Thermal Power Station for the 2019-24 tariff period, the Commission may not proceed to consider the same issue raised in the present petition, in terms of Section 10 of the CPC;
- (c) The Commission may grant time to file written submissions on 'maintainability'.

7. The learned counsel for the Respondent, Bihar Discoms adopted the oral submissions made by the above said Respondents.

8. The learned counsel for the Respondent, MSEDCL prayed that it may be granted time to file written submissions on maintainability.

9. In response, the learned counsel for the Petitioner submitted the following:

- (a) Since none of the Respondents have raised issues on 'jurisdiction' of this Commission to decide the petition, the same is maintainable.
- (b) The principles of *res judicata* in terms of Section 11 of CPC is not applicable as the issues are directly and substantially not the same in both the petitions. Petition No.172/MP/2016 pertains to declaration of MOEF Notification dated 25.1.2016 as change in law and recovery of projected expenses towards fly ash transportation for the 2014-19 tariff period. However, the present petition is for recovery of the actual amount incurred or to be incurred by the Petitioner for



transportation of fly ash for the 2019-24 tariff period.

- (c) The Petitioner had already provided the data for consideration of the Commission with regard to recovery of fly ash transportation cost for the 2014-19 tariff period and the Commission in some of its orders had allowed the relief, on prudence check.
- (d) The Commission, in some of its tariff orders for the 2019-24 tariff period, had held that the claim of the Petitioner for fly ash transportation cost, will be governed by the decision in the present petition. Therefore, Section 11 of CPC is not applicable and the claim for fly ash transportation cost in the pending tariff petitions for the 2019-24 tariff period cannot bar the consideration of the said claim in the present petition.
- (e) The ash transportation charges to be incurred by the Petitioner for its generating stations, during the 2019-24 tariff period, are approximately Rs.2600 crore and the delay in recovery of the said charges, apart from creating cash flow problems to the Petitioner, will result in carrying cost/ interest burden on the beneficiaries.
- (f) The non-compliance of the provisions of the MOEF notification dated 25.1.2016 and the non-submission of data etc., as raised by the Respondents, are issues on merit, which cannot be considered at this stage.
- (g) The Petitioner may also be granted time to file its response to the written submissions to be filed by the Respondents.

10. At the request of Respondents GRIDCO, MSEDCL and Karnataka Discoms, the Commission granted time to these Respondents to file their written submissions, by 10.3.2022, after serving copy to the Petitioner, who may file its response to the same by 17.3.2022.

11. Subject to the above, the Commission reserved its order on 'maintainability' of the petition.

By order of the Commission

Sd/-

(B. Sreekumar)
Joint Chief (Law)

