

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 205/MP/2021

Coram:

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

Date of Order: 28th May, 2022

In the matter of

Petition for recovery of additional expenditure incurred due to Ash transportation charges consequent to Ministry of Environment and Forest & Climate Change, Government of India Notification dated 3.11.2009 and Notification dated 25.1.2016 on a recurring basis.

And

In the matter of

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

.....**Petitioner**

Vs

1. Uttar Pradesh Power Corporation Limited,
Shakti Bhawan, 14, Ashok Marg,
Lucknow.
2. Jaipur Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur-302005
3. Ajmer Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Panchsheel Nagar, Makarwali Road,
Ajmer- 305004
4. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Area,
Jodhpur-342003
5. Tata Power Delhi Distribution Limited,
NDPL House, Hudson Lines, Kingsway Camp
Delhi-110009

6. BSES Rajdhani Power Limited,
BSES Bhawan, 2nd Floor, B-Block, Nehru Place,
New Delhi – 110019
7. BSES Yamuna Power Limited,
2nd Floor, B Block, Shakti Kiran Building, Near Karkardooma Court,
New Delhi-110092
8. Haryana Power Purchase Centre,
Shakti Bhawan, Energy Exchange,
Room No. 446, Top Floor, Sector-6,
Panchkula- 134109
9. Punjab State Power Corporation Limited,
The Mall,
Patiala-147001
10. Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Kumar House Complex Building-II
Shimla-171004
11. Power Development Department,
Govt. of J&K, SLDC Building, 1st Floor,
Gladani Power House, Narwal,
Jammu -190009
12. Power Department,
Union Territory of Chandigarh, Sector 9-D,
Chandigarh-160019
13. Uttarakhand Power Corporation Limited,
Urja Bhawan, Kanwali Road, Near Balli Wala Chowk,
Dehradun -248001
14. Madhya Pradesh Power Management Company Limited,
Block No-11, Ground floor, Shakti Bhawan, Vidhyut Nagar, Rampur,
Jabalpur-482008
15. Maharashtra State Electricity Distribution Company Limited
Prakashgad, 4th Floor, Bandra (East),
Mumbai-400051
16. Gujarat Urja Vikas Nigam limited
Vidhyut Bhawan, Race Course,
Vadodara - 390 007
17. Chhattisgarh State Power Distribution Company Limited
P.O Sunder Nagar, Dangania,
Raipur-492013,

18. Goa Electricity Department,
Government of Goa, Aquem Alto, Margao,
Goa – 403601
19. Electricity Department,
Administration of Daman and Diu
Plot No. 35, OI DC Complex, Near Fire Station, Somnath,
Daman -396210
20. Electricity Department
Dadar and Nagar Haveli 66kV, Aml i Industrial Estate,
Silvassa- 396230
21. West Bengal State Electricity Distribution Company Ltd,
Vidyut Bhawan, Bidhan Hagar, Block DJ, Sector-II, Salt Lake City,
Kolkata-700 091
22. Bihar State Electricity Board,
Vidyut Bhawan, Bailey Road,
Patna-800021
23. Jharkhand State Electricity Board,
Main Secretariat, Doranda,
Ranchi-834002
24. GRIDCO Ltd.
Janpath,
Bhubaneswar-751 022
25. Power Department,
Government of Sikkim, Kaji Road,
Gangtok-737101
26. Eastern Power Distribution Company Ltd.
P&T Colony, Seethmmadhara, Vishakapatnam,
Andhra Pradesh-530013
27. Southern Power Distribution Company Ltd.
SrinivassaKalyana Mandapam Backside,
Tiruchanoor Road, Kesavayanagunta,
Tirupati-517501
28. Northern Power Distribution Company Ltd.
Opp. NIT Petrol Pump, Chaitanapuri,
Warangal-506004
29. Central Power Distribution Company Ltd.
Mint Compound,
Hyderabad-500063

30. Electricity Department, Govt, of Pondicherry,
137, Nethaji Subhash Chandra Bose Salai,
Pondicherry - 605 001
31. Tamil Nadu Generation and Distribution Corporation Ltd.
NPKRR Maaligai, 144, Anna Salai,
Chennai-600 002
32. Kerala State Electricity Board
Vaidyuthi Bhavanam, Pattom,
Trivandrum – 695004
33. Bangalore Electricity Supply Company,
K.R. Circle, Bangalore-506001,
Karnataka
34. Mangalore Electricity Supply Company,
Paradigm Plaza, AB Shetty Circle,
Mangalore-575001
35. Chamundeshwari Electricity Supply Corporation,
927, L J Avenue, GF, New Kantharaj Urs Road, Saraswatipuram,
Mysore-570009
36. Gulbarga Electricity Supply Corporation,
Station Road, Gulbarga,
Karnataka-585102
37. Hubli Electricity Supply Company
Navanagar, PB Road, Hubli,
Karnataka- 580025
38. Assam State Electricity Board
Bijulee Bhawan, Paltan Bazar,
Guwahati- 781001

....Respondents

Parties present:

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. Ranganathan, Advocate, BPRL & MSEDCL
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, Karantaka Discoms
Ms. Bhabna Das, Advocate, Karnataka Discoms
Shri Anup Jain, Advocate, MSEDCL
Shri Akash Goel, Advocate, MSEDCL
Shri D.H. Agarwal, MSEDCL

ORDER

The Petitioner, NTPC has filed this petition with the following prayers:

'INTERIM PRAYER'

Allow the Petitioner to raise Monthly Bills for recovery of ash transportation expenditure during the pendency of the present Petition."

FINAL PRAYER

- A. *Admit the present Petition;*
- B. *Permit recovery of additional expenditure on account of ash transportation already incurred by the Petitioner upto FY 2020-21;*
- C. *Allow the Petitioner to raise Monthly Bills for reimbursement of the additional expenditure for ash transportation for the remaining period of the control period FY 2019-24;*
- D. *Pass such further Order(s) as this Hon'ble Commission may deem fit in the facts and circumstances of the case."*

Submissions of the Petitioner, NTPC

2. In support of the above prayers, the Petitioner, in the petition, has submitted the following:

- (a) The additional capital expenditure being incurred on account of Ash transportation from the generating stations of the Petitioner Company to the end user of ash, pursuant to the Notification dated 3.11.20009 and Notification dated 25.1.2016 issued by the Ministry of Environment, Forest & Climate Change (in short 'MOEF & CC') has already been recognised as a 'change in law' event by this Commission.

- (b) The Petitioners is seeking permission to recover the said expenditure in the following manner:
- (i) Ash transportation expenditure incurred during 2019-20 and 2020-21 may be reimbursed by the beneficiaries pending disposal of the tariff petitions filed by the Petitioner for tariff period 2019-24.
 - (ii) For the future period, reimbursement of ash transportation charges may be allowed on a monthly basis from the various beneficiaries of the generating station of the Petitioner Company;
 - (iii) In the interim, Petitioner may be allowed to raise monthly bills to recover ash transportation expenditure which may be incurred during the pendency of the petition.
- (c) On 3.11.2009, MoEF&CC issued a Notification and allowed for sale of Fly Ash by the generating stations to user agencies and also mandated thermal generating station to utilise 100% Ash in a phased manner. On 25.01.2016, MoEF&CC once again amended its earlier Notification dated 14.9.1999, whereby sub paragraphs (8) to (14) under paragraph (2) and a new para (5) were inserted, mainly to the effect that the TPPs were required to bear the cost of transportation of fly ash to user industry within a radius of 100 kilometres and cost for transportation of fly ash to the user industry beyond 100 kilometres and up to 300 kilometres, shall be shared equally by the TPPs and the user.
- (d) Further, the TPPs are required to bear the entire cost of transportation within a radius of 300 KM if ash is transported to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government. In addition to the foregoing, the time period to comply with the 100% utilisation of fly-ash was also duly extended to 31.12.2017.
- (e) This Commission in Petition No.172/MP/2016 passed order dated 5.11.2018 and recognised the MOEF&CC Notification dated 25.1.2016, as a 'change in law' event and allowed the recovery of expenditure on account of such event. On 22.4.2021, MOEF&CC issued draft notification on ash utilization which mandates all the thermal power plants to ensure 100% ash utilization.
- (f) In terms thereof, the Petitioner has been incurring additional expenditure on account of transportation of ash. The Petitioner has already claimed the expenses for ash transportation charges for 2019-20 and 2020-21 in the tariff petitions for the 2019-24 tariff period. However, due to Covid-19 pandemic the overall progress of the petitions before this Commission is likely to take some time. The Petitioner is facing severe under recovery as the fly ash transportation expenditure is constantly being incurred by the

Petitioner. Therefore, the Petitioner is constrained to file the present Petition. The said expenditure incurred by the Petitioner may separately be permitted to be recovered from beneficiaries, as delay in recovery, attracts carrying cost, in terms of the Regulations framed by this Commission.

- (g) This Commission, under Power to Relax and Power to remove difficulties, has the power to allow the claim of the Petitioner, which would be in the interest of the stakeholders.

Allowance of ash transportation expenses in a recurring manner on monthly basis

- (h) The Environment Protection Act, 1986 (in short 'the EP Act') was enacted by the Government of India on 23.5.1986 to provide for the protection and improvement of environment and for matters connected there with. Section 3(2)(v) of the EP Act provided the power to the Central Government to take such measures which include the restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.
- (i) Thereafter, on 19.11.1986, the Central Government notified the Environment (Protection) Rules, 1986 ('the EP Rules'). Rule 5(3)(d) provides that the Central Government shall impose prohibition or restriction on location of such industries and the carrying on of any process or operation in any area after considering the objections received against such notification. Subsequently, MoEF&CC in exercise of its powers under Section 3(2)(v) and Section 5 of the EP Act, issued directions for "Utilisation of fly ash from coal or lignite based thermal power plants" vide the Fly Ash Notification. The said Notification prescribed amongst others the mechanism for utilisation of fly ash generated from coal or lignite based thermal power plants and the achieve the target of fly ash utilisation.
- (j) MoEF&CC by notification dated 3.11.2009, allowed for sale of fly ash by the generating stations to the user agencies and also mandated generating stations to utilise 100% Ash in a phased manner. However, the said notification did not contain any provision for sharing of the transportation cost with the users of fly ash. Thereafter, MoEF&CC vide its Notification dated 25.1.2016 in exercise of its powers under the EP Act and EP Rules, made certain amendments to the Fly Ash Notification 1999. The said Notification mandated bearing of ash transportation charges by coal/ lignite based thermal generating stations.

- (k) The Petitioner has claimed the said expenses incurred for the 2014-19 tariff period in the truing-up petition filed before this Commission. However, the ash transportation charges being recurring in nature, the Petitioner is incurring expense in the 2019-24 tariff period as well. The ash transportation expenses incurred, after adjusting ash sale proceeds, during 2018-19, 2019-20 & 2020-21 is tabulated as follows:

ASH TRANSPORTATION CHARGES (Rs in crore)			
Generating Stations	2018-19	2019-20	2020-21
Rihand	-	-	31.25
Singrauli	-	-	61.95
Unchahar	93.64	74.86	144.89
Tanda	-	57.32	-
Korba	-	-	5.85
Vindhyachal	-	-	20.71
Sipat	4.75	3.86	38.00
Farakka	-	219.19	202.65
Kahalgaon	-	-	113.04
Talcher Super	10.71	75.63	191.07
Talcher TPS	0.67	0.16	0.094
Simhadri	49.07	151.28	74.16
Mauda	20.44	65.25	37.99
Lara	-	0.02	82.15
Total	179.28	647.57	1003.80

- (l) It is evident from the above table that the expenses on account of ash transportation charges are increasing on a year-to-year basis and is likely to further increase in the coming years. It is in this context, the Petitioner has filed the present petition seeking recovery of the aforesaid charges, on a monthly basis, rather than recovering the same at the time of truing up of tariff during 2019-24. The methodology proposed by the Petitioner is in interest of all the stakeholders for the following reasons:

- (i) Tariff spike/shock if recovery is deferred to the end of control period: In case the reimbursement is allowed to be deferred till truing up, entire expenditure towards ash transportation for the period 2019-24, along with carrying cost/ interest shall be paid by the beneficiaries in one go. This would result in a tariff spike and would cause unnecessary and avoidable burden on the beneficiaries.
- (ii) Cash flow disruption: If reimbursement is allowed to be deferred till the stage of truing up, it will create cash flow crunch for the Petitioner till truing up and for the beneficiaries also during the year when truing up orders are issued.

- (m) In view of the above, and in order to avoid financial implication on all the parties involved, it is proposed that the reimbursement of ash

transportation expenses may be permitted for the expenditure incurred for 2019-20 and 2020-21.

- (n) In terms of the order dated 5.11.2018 in Petition No.172/MP/2016, the details of actual ash transportation expenses incurred in the generating stations during the years 2019-20 & 2020-21, after adjusting the ash sale proceeds, are attached. Further, the Petitioner may be permitted to recover such expenditure, on monthly basis, for the balance period of the 2019-24 tariff period, based on self-certification. Such reimbursement would then be subject to final adjustment at the time of truing up of tariff by the Commission at the end of the said period.

Commission can allow such expenses by exercising its power to Relax/ Power to Remove difficulty.

- (o) the additional costs claimed by the Petitioner is not on account for any failure, deficiency or imprudence attributable to the Petitioner. The said expenditure is being incurred on account of a change in law event which has been allowed and recognised by this Commission. The Petitioner is only seeking disbursal of such expense incurred upto 31.3.2021 and for future period, on a monthly basis, to avoid unnecessary and avoidable financial implications on the parties involved.
- (p) this Commission has the requisite jurisdiction to deal with such situations. The 2019 Tariff Regulations, empowers this Commission to exercise its Power to Relax/Power to Remove Difficulties in terms of Regulations 76 and 77 of the 2019 Tariff Regulations.
- (q) The ambit and scope of 'Power to Relax' provisions of a delegated legislation have been interpreted by various Courts and the Appellate Tribunal in a catena of cases. It is settled position of law that 'Power to relax' can be invoked if the Regulations in any manner cause hardship to a party.
- (r) The issue of monthly recovery and the procedure for recovery of costs is now no more res-integra as this Commission in order dated 22.3.2021 in Petition No. 405/MP/2019 (GKEL & anr v DHBVNL & ors) has already put in place a robust mechanism of monthly recovery with annual reconciliation. In the said matter, the Commission, has, directed the recovery of expenditure on transportation of fly ash, on a monthly basis, with reconciliation, on an annual basis. Similar dispensation may be permitted in the case of the Petitioner, to recover the 'change in law' expenditure, on a monthly basis.

Accordingly, the Petitioner has prayed for the reliefs as stated in paragraph 1 above.

Hearing dated 12.10.2021

3. The Petition was heard 'on admission' through video conferencing on 12.10.2021. During the hearing, the learned counsel for the Petitioner reiterated the submissions made in the petition. He however submitted that the ash transportation charges incurred during the 2019-24 tariff period, for its generating stations, after adjustment of sale proceeds, is Rs.2000 crore (approx.) and the delay in recovery of the said expenditure, apart from creating cash flow problems to the Petitioner, will result in carrying cost/ interest burden on the beneficiaries. He also submitted that the ash transportation charges incurred during the years 2019-20 and 2020-21 which has been claimed in some of the tariff petitions filed by the Petitioner for the 2019-24 tariff period, is substantial and, therefore, the recovery of the same from the beneficiaries, on monthly basis, may be permitted. The learned counsel, pointed to the interim prayer made in the petition and submitted that the Petitioner may be allowed to raise monthly bills, to recover the ash transportation expenditure incurred, during the pendency of the present petition.

4. The learned counsel for the Respondent, TANGEDCO raised preliminary objections on the 'maintainability' of the petition and submitted the following:

(a) Since additional O&M expenses towards recovery of ash transportation charges, form part of tariff, the same cannot be claimed through a separate petition. As the recovery of ash transportation charges claimed by the Petitioner in some of the petitions for the 2019-24 tariff period, is pending before the Commission, filing of a separate petition, for the same relief, is not maintainable.

(b) Though MOEF&CC notifications have been declared as a 'change in law' event by order dated 5.11.2018 in Petition No.172/MP/2016, the expenditure claimed, is subject to prudence check, on a case to case basis. Moreover, the Petitioner has not furnished any details/ additional information, as sought for by the Commission in the said order dated 5.11.2018.

(c) The Petitioner has also not furnished any particulars as to (i) whether the transportation of fly ash is within the radius of 100 km or is for a distance

beyond 100 km and upto 300 km or is beyond 300 km range (ii) the quantum of ash being sold and (iii) the contracts executed by the Petitioner with procurers and /or transporters and the charges involved.

5. The learned counsel for the Respondent, MSEDCL submitted that the interim prayer of the Petitioner may be considered only after the submissions of the Respondents are placed on record. The representative of the Respondent, UPPCL submitted that since the tariff petitions filed by the Petitioner for the 2019-24 tariff period are pending, the claim for one component of tariff (O&M expenses) by the Petitioner, by a separate petition may not be entertained.

6. The Commission after hearing the parties, issued notice on 'admissibility' of the petition and directed the parties to complete pleadings in the matter. In response, some of the Respondents have filed reply in the matter and the Petitioner has filed its rejoinder to the said replies.

Submission of the Respondents

7. The Respondent UPPCL vide reply affidavit dated 23.10.2021 has submitted that this matter form part of the various tariff petitions for the 2019-24 tariff period and orders have been reserved. It has also submitted that Petition No. 405/MP/2019 deals with competitive tariff determined under Section 63 of the Act. The Respondent has submitted that just as Regulation 60(2) of the 2019 Tariff Regulations allow the sharing of gains on annual basis, the expenditure for ash transportation may be recovered on annual basis.

8. The Respondent KSEBL vide reply affidavit dated 30.10.2021 has submitted that as per Commission's order dated 5.11.2018 in Petition No. 172/MP/2016, the Petitioner can raise the claim only at the time of truing up of tariff with all details, as specified in the order. It has submitted that the Petitioner has already raised the

claim in the truing-up petition, which is under consideration of the Commission and therefore, filing another petition, for a matter, which is already under consideration is not in order. The Respondent has also submitted that the case involved in Petition No.405/MP/2019 was pursuant to competitive bidding under Section 63 of the Act, unlike the present case, where PPAs are signed as per Section 62 of the Act. It has further submitted that even if the claim of the Petitioner for monthly recovery is allowed, such recovery can only be subject to the conditions in the said order dated 5.11.2018. The Respondent has pointed out that MOP, GOI vide Notification dated 25.9.2021 has formulated the procedure to be adopted by generating stations in fixing and claiming of ash transportation charges. In view of the above, the present petition is not maintainable.

9. The Respondent, TANGEDCO vide reply affidavit dated 30.10.2021 has submitted that the petition is not maintainable for the following reasons:

(a) The Petitioner has filed tariff petitions for the period 2019-24 in respect of all the thermal power stations. In the absence of determination of tariff petitions for the period 2019-2020 and 2020-2021, wherein, the additional O&M is a component of tariff and is yet to be determined in the said tariff petitions, the present petition seeking recovery of the additional O&M up to 2020-2021, pending disposal of tariff determination is not maintainable.

(b) There is no provision under the Tariff Regulations (2014-19 or 2019-24), which provides for such quick fix method for recovery of a particular component of tariff. The entire tariff is a bundle of charges consisting of all components of tariff, which are considered in the process of determination of tariff.

(c) There are no documents to show the transparent competitive bidding procedure was conducted by the Petitioner. Also, there are no details of the scheduled rates of the respective State Governments, as applicable for transportation of fly ash. No details of the actual additional expenditure incurred on Ash transportation after 25.1.2016, duly certified by auditors. The Petitioner has not provided any document to show the revenue generated from sale of fly ash/ fly ash products and the expenditure incurred towards Ash utilisation up to 25.1.2016 and from 25.1.2016 to till date, separately.

There is no document brought on record to show the details of revenue generated from fly Ash sales maintained in a separate account as per the MoEF&CC notification.

(d) This order dated 5.11.2018 only stated that the actual additional expenditure incurred by the petitioner towards transportation of ash in terms of MOEFCC Notification is admissible under Change in Law as additional O&M expense. It did not give any finding that the petitioner had incurred any such expense. In the absence of any such finding, the petitioner cannot seek a relief of reimbursement or to raise invoice. The present petition is premature apart from being not maintainable. The entitlement to claim the additional O&M under the tariff will arise, only if the direction in the said order is complied with.

(e) This Commission had been working throughout the pandemic. Various other petitions of the petitioner itself were heard and disposed of during the pandemic. Moreover, when the regular tariff petitions are pending determination, a separate petition seeking to recover / reimburse a particular component of tariff, prior to its determination and quantification under the regular tariff petitions, under power to relax is not maintainable at all.

(f) The Petitioner has not furnished any such details despite clear instructions from the Commission in order dated 5.11.2018 in Petition No. 176/MP/2016. The orders relied upon by the Petitioner relate to Section 63 of Act, whereas the determination of tariff for the Petitioner is under Section 62.

(g) The Petitioner has to abide by the MOP Notification dated 25.9.2021 and cannot ask for pass through of ash transportation charges without prudence check of the Commission. Therefore, the prayer of the Petitioner that it may be permitted to raise monthly bills on ash transportation is not admissible and hence the Petition is not maintainable.

10. The Respondent, GRIDCO vide reply affidavit dated 8.11.2021 has mainly submitted the following:

(a) The Petitioner has not brought out the basic facts and figures which are necessary for ascertaining the reimbursement of Ash Transportation charges. Since the cost of transportation charges has to be borne by the beneficiaries and ultimately the consumers, it is incumbent upon the generating company to justify the cost, performance and benefit of the said process. The Petitioner, may, therefore, be directed to furnish the above information failing which the present petition is liable to be dismissed summarily.

- (b) No utilisation certificate given by the Petitioner for different generating stations for utilisation of fly ash. Petitioner has failed to comply with the Notification dated 25.1.2016 of MOEF&CC based on which it has preferred the present claim. The Petitioner has only provided the station-wise details of opening balance towards sale of fly Ash and total expenses towards Ash Transportation charges for 2019-20 and 2020-21. However, it has failed to provide station-wise percentage of ash utilization such as for brick, road construction, soil conditioning etc.
- (c) there is no provision for reimbursement of expenditure towards Transportation of Fly Ash as the Transportation of Fly Ash comes under the nature of earning Revenue. The Petitioner has only produced generating station wise self-proclaimed cost towards transportation of Fly Ash. Such action of the Petitioner is in complete violation of the order dated 5.11.2018 in Petition No.172/ MP/ 2016 and the claim is, therefore, liable to be rejected.
- (d) Petitioner has been failed to produce documents regarding award of Contract through transparent competitive bidding process at scheduled rates of the respective states. The Petitioner has failed to utilize the Fly ash within the premises or vicinity of the generating station/s so as to reduce the cost of Fly Ash transportation as mandated in paragraphs 2 (11) and (12) of MOEF & CC Notification dated 25.1.2016.

11. The Respondent, BSPHCL vide reply affidavit dated 9.11.2021, has mainly submitted as under:

- (a) The Petitioner has failed to comply with the procedure stipulated by this Commission in its order dated 5.11.2018 in Petition No.172/ MP/ 2016 and therefore, the present Petition is liable to be dismissed as 'not maintainable' on this ground alone. In order dated 5.11.2018, there has been neither any finding to substantiate that the Petitioner has actually incurred such expenses nor any determination of such expenses on a generic basis. The Petitioner reliance on said order is, highly misplaced, more so, in absence of details which the Petitioner should have provided in terms of the said order.
- (b) The directions contained in order dated 5.11.2018 in Petition No.172/MP/ 2016 were never challenged by the Petitioner and hence, have attained finality. The Petitioner now cannot circumvent the established legal position, whereby the claims of the Petitioner, can only be entertained on actuals, pursuant to prudence check on case-to-case basis, through truing-up exercise only.

- (c) The Petitioner has already filed the tariff petitions for the period 2019-24 for all of the stations, which also include the claim for additional O&M expenses towards ash transportation charges incurred. The action of the Petitioner to file a separate Petition altogether under the provisions of 'power to relax' of the 2019 Tariff Regulations, is nothing but an abuse of the process of law and waste of precious time and resources of this Commission.
- (d) There is no provision in the Tariff Regulations which allows for the relief that has been asked for by the Petitioner. The reliefs sought by the Petitioner fall outside the four corners of the regulations issued by this Commission.
- (e) The claim relating to cost of fly ash transportation has to be determined as an additional O&M expenses, on a case-to-case basis, as per procedure stipulated in Commission's order dated 5.11.2018 in Petition No.172/ MP/ 2016. Neither the procedure stipulated in the order dated 5.11.2018 nor the regulations issued by this Commission allow any claims without actual quantification in respect of additional O&M expenses.
- (f) It is mandatory for the Petitioner to follow the steps/directions stipulated as per the MOP Notification dated 25.9.2021. The Petitioner cannot seek recovery of charges as a change in law, without any prudence check by the Commission

12. The Respondent, MPPMCL vide reply affidavit dated 10.11.2021, has mainly submitted the following:

- (a) MoEF& CC Notification dated 25.1.2016 was issued much prior to the 2019 Tariff Regulations, which was issued on 7.3.2019. The Commission did not find it justified to consider the Ash transportation expenditure as pass through in tariff and therefore the same has not been provided in the 2019 Tariff Regulations.
- (b) The 2019 Tariff Regulations, is very specific in regard to what is recoverable under the head of O&M expenses. Regulation 3 (45) of the 2019 Tariff Regulations, defines O&M expenditure. Regulation 35 of the 2019 Tariff Regulations, provides for O&M expenses and Regulation 35 (6) of the 2019 Tariff Regulations specifically provides for the items recoverable in addition to normative O&M expenses. The Commission has considered additional O&M expenditure on account of implementation of revised emission standards to be recovered separately in addition to normative O&M expenses. However, the Commission has not allowed separate recovery of additional expenditure on Ash transportation. Thus, all other expenses which are not allowed to be recovered separately in

Tariff Regulations, in addition to the normative O&M norms are deemed to be included in normative O&M expenses.

- (c) The Petitioner has filed various tariff petitions for determination of tariff of its various thermal generating stations for the 2019-24 tariff period. In all these petitions, the Petitioner has prayed for recovery of additional expenditure on Ash transportation in view of MoEF&CC notification dated 25.1.2016. The petition is not admissible on this count as the matter raised is already *sub judice* under various other petitions.
- (d) The MOEF&CC Notification dated 14.9.1999 does not provide for any sharing of transportation cost of lifting the fly ash from the thermal generating stations and if the petitioner could have ensured full utilization of its fly ash by cement manufacturers, brick manufacturer and tiles manufacturers etc. by providing ash at reasonable prices or free of cost the situation of sharing of transportation of fly ash might not have arisen. The natural law of justice suggest that polluter should pay and accordingly the transportation cost should be borne by the generating companies themselves and it may not be allowed to as a pass through.

Accordingly, the aforesaid Respondents have submitted that the petition is not maintainable.

Rejoinder of the Petitioner, NTPC

13. In response to the above replies of the Respondents, the Petitioner has filed its rejoinders and has mainly submitted the following:

- (a) The Petitioner in all its tariff petitions has sought the separate recovery of the expenditure for fly ash transportation. it is not the case of the Petitioner that the expenditure in relation to fly ash transportation be made part of the O&M expenses of the Petitioner. The submission of the Respondent that Commission has reserved orders in most of the tariff petitions is of no consequence, as the expenses claimed would not be doubly claimed. This is on account of the fact that the bills for ash transportation expenditure would be substantiated by a certificate by the Petitioner and would be subject to truing-up by the Commission. This dispensation is in terms of the principle laid down in order dated 5.11.2018 in Petition no. 172/MP/2016.
- (b) In order dated 22.3.2021 in Petition No.405/MP/2019 filed under Section 63 of the Act, no mechanism was suggested in the PPA and it was the Commission, keeping in mind the nature of expenditure, devised a mechanism for expeditious recovery of such expenditure to avoid

unnecessary burden on the stakeholders. There is no prohibition either in the 2019 Tariff Regulations or otherwise, which restricts this Commission's power to adopt or devise a mechanism similar to the mechanism formulated in order dated 22.3.2021.

- (c) Sharing of gains due to variations in norms has been envisaged to be on annual basis as this component is subject to reconciliation of operational norms, which would be cumbersome if done on monthly basis (para 16.12 of the SOR to the 2019 Tariff Regulations). Whereas, ash transportation expense is a revenue expenditure which is recurring in nature and are easily quantifiable, and would be recovered on actual basis, backed by supporting documents. Further, ash transportation expenses, if recovered on annual basis, would result in accumulation of carrying cost, to be ultimately paid by the end consumers.
- (d) The Petitioner is not denying that it would not follow the procedure laid down under the MOP Notification dated 25.9.2021. However, the present petition has been filed seeking recovery of charges in an expeditious manner so as to avoid adverse financial implication on stakeholders. The said notification is prospective in nature and is applicable on the Petitioner from the date it has been notified.
- (e) The Petitioner, in the present petition, is seeking relaxation, because of compelling circumstances, created due to Covid-19 pandemic as well as pendency of the tariff petitions. The prudence of the cost claimed by the Petitioner, is subject to the same scrutiny as available to the Commission in the tariff proceedings, and can be carried out at the time of truing-up of these expenditures.
- (f) The fly ash transportation expenses are being self-certified by the Petitioner and is subject to prudence check, by this Commission, at the time of truing-up of tariff. The Petitioner will submit all records and calculations, leading to such expenses, as and when directed by this Commission. In any event, any under recovery or over recovery, if any, will be adjusted by this Commission and the grant of the Petitioner's claim will not cause any prejudice to any parties involved.
- (g) The Commission in its order dated 5.11.2018 in Petition No.172/MP/2016 has decided the principle issue that the MOEF&CC Notification dated 25.1.2016 is a change in law event, and that the expenditure on this account is admissible as additional O&M expenses. Once the principle issue has been decided, the natural sequitur is that any expenditure incurred on account of ash transportation ought to be allowed and recovered from the beneficiaries. The Petitioner is under an obligation to

incur such expenses, as per MOEF&CC Notification dated 25.1.2016 and has the right to claim the same as per order dated 5.11.2018.

- (h) Power to relax is a discretionary power to be exercised reasonably by the Commission, considering the submissions of the parties and taking a considerate view thereof. The 2019 Tariff Regulations empowers the Commission to exercise its power to relax/power to remove difficulties in terms of Regulation 76 and Regulation 77. The ambit and scope of power to relax provisions of a delegated legislation have been interpreted by various Courts and the Appellate Tribunal in catena of cases. Power to relax can be invoked if the Regulations in any manner cause hardship to any party. Reliance is placed on the APTELS judgment dated 21.3.2018 in Appeal No. 107& 117/2015 (HPPC V HERC)
- (i) Carrying cost is applicable from the day the expenses have been incurred by the Petitioner and the same have not been recovered. In the present case, the Petitioner has incurred the expenses on account of ash transportation due to MOEF&CC notification, which is a statutory mandate. Therefore, any deferment in recovery of the expenses incurred by the Petitioner has a time value of money attached to it. The Petitioner's prayer for monthly recovery of fly ash transportation expenses will prevent the burden of carrying cost/interest on beneficiaries.
- (j) The present proceedings are in no way meant for the determination of procedures to be followed, and are exclusively for timely recovery of the incurred expenses on account of fly ash transportation, which is in the interest of all parties, including the Respondents.
- (k) The Commission in its order dated 5.11.2018 had held that the MOEF&CC Notification dated 25.1.2016 is a 'change in law event' and the expenditure incurred by the generating stations towards ash transportation expense (in excess of amount in ash fund) is to be paid by the beneficiaries to the generating stations. Therefore, the import of 'change in law' is not subject to cost, performance and benefit analysis as per the Regulations framed by this Commission.
- (l) While fixing tariff, this Commission, is to be guided by the principle enshrined under the Section 61 of Act. Further, the above principles have also been incorporated under the National Tariff Policy, 2016 framed by the Central Government under Section 3 of the Act, which lays emphasis on the interest of consumers, while conducting the tariff determination process and the same is evident from the objectives of the Policy. The Hon'ble Supreme Court in *Reliance Infrastructure Ltd. v. State of Maharashtra & Ors.* [(2019) 3 SCC 352] has interpreted Section 61 of the

Act and the objectives of National Tariff Policy 2016, to observe that consumers interest must be kept in mind while determining tariff.

- (m) The Hon'ble Supreme Court in *Energy Watchdog v. CERC & Ors.* [(2017) 14 SCC 80] has categorically held that the Hon'ble Commission has the power to frame a procedure, if the Regulations are silent or do not provide a specific methodology. It is evident that the process of tariff determination must be conducted keeping in mind the commercial principle and the interest of consumers at large. In the present case, the dispensation sought by the Petitioner, is in the overall interest of consumers. In case the recovery so sought is deferred/delayed, the above stated object of the Act will be defeated.
- (n) In the absence of appropriate provisions under the 2014 Tariff Regulations for claiming Fly Ash transportation charges, this Commission, while exercising its regulatory powers, allowed the cost of fly ash transportation under change in law in terms of Regulation 3(9) (ii) of the 2014 Tariff Regulations. Therefore, if the Commission by way of an order has taken a particular view under the 2014 Tariff Regulations, there exists no reason as to why a similar view ought not to be taken in the 2019 Tariff Regulations, particularly when the position of law (*MoEF&CC Notification in the present case*) remains the same.
- (o) The present petition, has been filed to ensure the timely recovery, so as to prevent tariff shock, but is in no way meant to gain the same benefit twice. The 2019 Tariff Regulations, do not have separate provisions for every expense to be incurred by the generating companies. The expenses incurred on account of various grounds might not be mentioned separately, but can be decided by the Commission by way of orders in the petitions filed before it.
- (p) The Petitioner, by way of the present Petition is seeking relaxation, because of compelling circumstances, created due to the Covid-19 pandemic, resulting in pendency of the tariff petitions. The Petitioner has sought recovery of the said expenditure separately from the beneficiaries, as delay in recovery attracts carrying cost, in terms of the Regulations framed by this Commission.
- (q) The prudence of the cost claimed by the Petitioner is subject to the same scrutiny as available to the Commission in the tariff proceedings and can be carried out at the time of truing up of these expenditures. This would be in the overall interest of the Petitioner as well as beneficiaries.
- (r) The beneficiaries in Petition No. 172/MP/2016 had raised the very same objection *qua* the non-utilisation of the fly ash in terms of the MoEF&CC

Notification. However, this Commission, while duly recording the said contentions in the order dated 5.11.2018, did not give any heed to the said contention raised by the beneficiaries and disregarded the same. Therefore, the same contention cannot be raised again before this Commission in different proceedings concerning the same issue.

Hearing dated 7.12.2021

14. The matter was heard through video conferencing on 7.12.2021. During the hearing, the learned counsel for the Petitioner and the learned counsel for the Respondent BRPL and Respondent MSEDCL made detailed submissions in the matter, mainly on the lines of their respective submissions in the petition/replies and rejoinders, as above. The learned counsel for the Petitioner however pointed out that the Commission vide its order dated 17.11.2021 in Petition No.444/GT/2020 had decided that the claim of the Petitioner for fly ash transportation in the pending tariff petitions for 2019-24 tariff period will be governed by the decision in this petition.

Hearing dated 17.2.2022

15. The matter was further heard through video conferencing on 17.2.2022. During the hearing, the Commission directed the learned counsel for the parties to make submissions on the 'maintainability' of the petition. The learned counsel for some of the Respondents namely GRIDCO, TANGEDCO and Karnataka Escoms made oral submissions on 'maintainability' of the petition. The learned counsel for the Respondent MPPMCL and Respondent Bihar Discoms adopted the oral submissions made by the above said Respondents. In response, rebuttal submissions were made by the learned counsel for the Petitioner. However, at the request of the learned counsel for Respondents GRIDCO, MSEDCL and Karnataka Discoms, the Commission permitted these Respondents to file their written submissions and accordingly, reserved its orders on 'maintainability' of the petition.

Written Submissions of Respondents

16. The Respondent TANGEDCO in its written submissions dated 18.12.2021 has mainly reiterated the submissions made in its reply. However, the Respondent has further submitted that the present petition is premature, since the truing up exercise is pending adjudication in the petitions filed by the Petitioner, before this Commission. It has also submitted that carrying cost is not applicable as the Petitioner has completely failed in its responsibility to file proper application with all relevant details. Also, there is no provision for carrying cost in the tariff determined under Section 62 of the Act. The Respondent has added that 'Power to relax' does not permit the amendment of the Tariff Regulations and that the Petitioner has not indicated the regulations which is required to be relaxed. The Respondent has added that the expenses to be incurred after 25.9.2021 are to be strictly in accordance with the rules stipulated therein.

17. The Respondents Karnataka Escoms in their written submissions dated 26.2.2022 have submitted the following:

(a) The Petition is not maintainable as per Regulations 76 and 77 of the 2019 Tariff Regulations. There is no specific provision in the 2019 Tariff Regulations enabling the Petitioner to claim fly ash transportation cost nor the Petitioner pointed out the regulation for which relaxation is sought for. Power to relax is a discretionary power which must be sparingly exercised and in exceptional situations after recording cogent reasons for the same. [SC judgment in M.U.Sinai v UOI (1975) 2 SCR 640) and APTEL judgment dated 25.3.2011 in Appeal No.130/2009 referred to]

(b) The 'difficulty' must relate to the process of giving effect to the tariff Regulations. The 'difficulty' must not be extraneous to the Regulations or arising out of application of the Regulations or a general hardship faced by the Petitioner. The power cannot be invoked to address mere financial hardship/cash flow crunch allegedly caused to the Petitioner for being out of pocket, for fly ash transportation.

(c) The Commission's order dated 5.11.2018 in Petition No. 172/MP/2016 to claim additional expenditure on account of fly ash transportation as a change in

law event is of no assistance to the Petitioner in the present case, as the MOEF &CC notification dated 25.1.2016 was already in force prior to the commencement and coming into force of the 2019 Tariff Regulations. Despite the order dated 5.11.2018, no specific provision was made for recovery of fly ash transportation charges separately in the 2019 Tariff Regulations. The Petitioner cannot be permitted to file a separate petition for recovery of the fly ash transportation charges and must claim the same as part of its O&M expenses in the relevant tariff petitions filed by it.

(d) The Commission in its order dated 5.11.2018 had deemed it fit not to grant the recovery of monthly billing of the additional expenditure incurred on account of fly ash transportation. The Petitioner cannot keep filing petitions again and again asking for same relief or place reliance on order dated 5.11.2018 for the same.

(e) The issue fly ash transportation charges for the period 2019-24 is already *subjudice* before this Commission in various tariff petitions filed by the Petitioner. Hence, if the Commission were to issue notice on merits of the matter, then in terms of the principles of Section 10 of the Civil procedure Code., 1908, the present petition would in fact, be stayed, till the tariff petitions in which the fly ash transportation charges claimed are decided. Each tariff petition must be decided on the facts and circumstances of that case and the issue of one of the components of tariff cannot be decided desperately in a different manner.

(f) In Petition No.29/GT/2021 filed by the Petitioner with respect to Kudgi STPS Stage-I for the period 2019-24, the Petitioner has prayed for reimbursement of fly ash transportation charges from beneficiaries quarterly, on net basis, which is different from what is sought in the present petition. The Respondent has also filed objections to the said petition, which cannot be foreclosed or effectively adjudicated upon in the present petition.

(g) There is no supporting documentation/invoices for the alleged expenses incurred by it (in 2019-20 and 2020-21), no auditor's certificate as required as per order dated 5.11.2018 or proof that the Petitioner has complied with the conditions under the MOEF&CC notification dated 25.1.2016 and MOP letter dated 22.9.2021.

18. The Respondent, MSEDCL in its written submissions dated 8.3.2022 has raised preliminary objections, stating that there is no provision under the Tariff Regulations for recovery of a particular component of tariff component separately, only because the determination of all components of tariff is taking a longer time. It has also submitted that the Petitioner has not submitted any documentary evidence

as per order dated 5.11.2018 in Petition No.172/MP/2016 and also no documents have been brought on record to show details of revenue generated from fly ash is maintained in a separate account as per MOEF&CC Notification. Hence, the petition is therefore premature. It has further submitted that if the generators tariff is being trued up with this component, then it will be much easier for the Discoms to pass through the claim. Therefore, without truing-up the generators claim, the present prayers should not be allowed per se.

19. The Respondent, GRIDCO in its written submissions dated 9.3.2022 has mainly submitted that the petition is liable to be rejected as not maintainable, since the prayer of the Petitioner for recovery of fly ash transportation charges, on monthly basis, was rejected by order dated 5.11.2018 in Petition No.172/MP/2016, which has attained finality. It has also submitted that there is no provision in the regulations for recovery of ash transportation charges on monthly basis and the power of relaxation /removal of difficulties cannot be invoked contrary to the regulations. The Respondent, while pointing out that there is no bar for the Commission to decide the issue of maintainability at the preliminary stage, has submitted that the Petitioner has not complied with the conditions laid down in order dated 5.11.2018 in Petition No.172/MP/2016 and the MOEF&CC Notification dated 25.1.2016.

20. The Respondent, BRPL in its written submissions dated 10.3.2022 has mainly submitted as under:

(a) The Petitioner, by the present petition, has sought to pre-empt the statutory procedure for passing of tariff orders as envisaged under Section 62 and 64 of the Act read with Regulation 8, 9 and 10 of the 2019 Tariff Regulations. The Petitioner has already filed tariff petitions for the 2019-24 tariff period in respect of all its stations. Additional O&M expenses is a component of tariff and is yet to be determined in the said tariff petitions by this Commission.

(b) The present expenditure on ash transportation is not a change in law for the 2019-24 tariff period at all. This petition seeking recovery of the additional O&M expenditure, pending disposal of the tariff determination process, is not maintainable.

(c) Regulation 3(10) of the 2019 Tariff Regulations contemplates change in law event as a prospective event which occurs after the notification of the 2019 Tariff Regulations. (i.e 7.3.2019). There is no provision under the 2019 Tariff Regulations which allow the recovery of additional O&M expenses over and above the normative values specified therein. The exercise of 'power to relax' and 'power to remove difficulties' is a judicial discretion and the same cannot be invoked to validate the Petitioner's illegal act of not complying with the notifications dated 14.9.1999 and 3.11.2009.

(d) The Hon'ble Supreme Court in M.U.Sinai v UoI & ors held that the power to remove difficulty must be exercised in a conditioned and restricted manner and such exercise of power should not change the basic structure, scheme and essential provisions of the statute. The Petitioner has failed to satisfy any of the conditions laid down by APTEL to substantiate its prayer for invocation of Power to relax and removal of difficulty by this Commission. (APTEL judgment dated 6.5.2011 in Appeal No. 170/2011 (MPPGCL v MPERC & ors) and APTEL judgment in TPCL v JSERC (2012 SCC OnLine APTEL 155 referred to).

(e) The present petition is barred by the Order 2 Rule 2 of the CPC as the claim of the Petitioner is already pending adjudication in the tariff petitions filed by the Petitioner. The purpose behind this as elucidated by the Hon'ble Supreme Court in Coffee Board v Ramesh Exports (P) Limited (2014) 6 SCC is to ensure that no party is vexed twice for the same cause of action. This has been considered by this Commission in order dated 28.1.2021 in Petition No. 292/MP/2019. Similar view was taken by the Hon'ble Supreme Court in Alka Gupta v Narender Kumar Gupta (2010) 10 SCC 141, wherein, it held, that a party is barred from splitting the claims and remedies, based on the same cause of action.

(f) The Notification dated 25.1.2016 may have been a 'change in law' in the 2014-19 tariff period, but the same principle cannot hold good for the 2019-24 tariff period. This is for the reason that the said notification was already in existence as on 1.4.2019, on which date the tariff period had commenced. If the law has not changed from what it was as on 1.4.2019, it would not qualify as change in law.

(g) The Commission in its order dated 5.11.2018 in Petition No. 172/MP/2016 had held that admissibility of the claim of the Petitioner, is subject to prudence check, on a case to case basis, for each station. As such, the claim of the

Petitioner, in the present petition, is pre-mature and cannot be allowed. Allowing the claims of the Petitioner for additional O&M expenses, amounts to truing up of the normative O&M expenses specified by the Commission in the 2019 Tariff Regulations.

Written Submissions of the Petitioner

21. The Petitioner in its written submissions dated 17.3.2022 has mainly submitted the following:

(a) A petition is considered to be maintainable before a forum, as long as a valid cause of action is disclosed and the forum has the requisite jurisdiction. Order 7 Rule 11 of the CPC prescribes that maintainability of a petition/suit can be challenged on limited grounds of (i) jurisdiction of the Court (ii) Non-disclosure of cause of action (iii) averments made in the petition and (iv) impermissibility under law.

(b) The Commission has the jurisdiction under Section 79(1)(a) of the Act, as the Petitioner is a central generating station and its tariff is regulated by this Commission. The jurisdiction of the Commission under Section 79(1)(a) has been affirmed by the Hon'ble Supreme court in CPDCL & ors v CERC & ors (2007) 8 SCC 197 and recognised by this Commission in its order dated 5.11.2018 in Petition No.172/MP/2016 and therefore the issue of jurisdiction is no more *res integra*.

(c) The present petition discloses the cause of action, based upon which the Commission can proceed to grant appropriate relief to the Petitioner. In order to assess whether the Petition discloses a cause of action or not, only the plaint needs to be seen, not the response from other side. It has been consistently held by the Hon'ble Supreme Court that vide Order 7 Rule 11 of CPC, a duty is cast on the court to determine whether the plaint /petition discloses a cause of action by scrutinising the averments in the plaint/petition. In the present case, the Commission may not rely upon the averments other than what has been made in the petition to assess whether a cause of action has been disclosed or not. (judgments of the Hon'ble Supreme Court in Dahiben v Arvindbhai K. Bhabusali (2020) 7 SCC 366 and in Rajendra Bajoria & ors v Heman Kumar Jalan & ors (CA NO. 5819-5822/2021 referred to).

(d) The following submissions made in the petition as well as the rejoinders filed discloses the cause of action, for the Commissions to pass order.

(i) The Petitioner has raised the claim for fly ash transportation expenses in the pending tariff petitions. Due to impact of Covid-19 pandemic and considering the tariff determination is a complex procedure, which require

assessment of multiple components, adjudication of the petitions will take time.

(ii) The Petitioner is facing severe financial crunch on account of delay in recovery. The same is not in the interest of any party, as it defeats the requirement under Section 61 (c) & (d) of the Act. Reliance is placed upon Hon'ble Tribunal's Judgement dated 23.09.2016 in *TNGDCL v Century Flour Mills* in Appeal No. 53 of 2016.

(iii) Change in law is not limited to a particular cut-off date/control period, and is considered from the time of issuance of notification. This Commission had allowed MoEF&CC Notification as Change in law in Petition No. 172/MP/2016, in terms of the definition under the 2014 Tariff Regulations. The said definition is *pari materia* to the definition of change in law contained in Regulation 3(10) of the 2019 Tariff Regulations.

(iv) This Commission has already taken a view that the issue of fly ash transportation expense is pending in the present petition and the decision taken herein would govern the issue of reimbursement of said charges. Also, MoEF&CC Notification dated 31.12.2021 has declared the fly ash utilisation obligation as a change in law event.

(e) In addition to above, the present Petition is not impermissible/barred under the provisions of law, because, (i) There exists no bar in filing the present petition, as the bar under Order 2 Rule 2 of CPC, is applicable on splitting of claims and remedies, based on the same cause of action. Whereas the Petitioner, in the present Petition, has only claimed recovery of fly ash transportation charges subject to truing-up by the Commission. The present claim is on account of delay in recovery of the said expenses which is detrimental to both the Petitioner as well as the end consumers. (ii) Section 11 of CPC cannot operate as a bar, as under the principle of *res judicata*, the matter in question is to be directly and substantially the same as the matter previously decided (iii) the present Petition is in no manner similar to Petition No. 172/MP/2016, as the relief claimed is entirely different. While Petition No.172/MP/2016 was filed seeking declaration of change in law during the 2014-19 tariff period, the present petition has been filed for the 2019-24 tariff period governed by different set of regulations, after duly complying with the requirements in order dated 5.11.2018 in Petition No.172/MP/2016. Moreover, the expenses claimed in Petition No.172/MP/2016 were projected expenses, the expenses claimed in the present petition, have already been incurred by the Petitioner.

(f) The Petitioner is not splitting the claims, rather is claiming the expense which had already been incurred, subject to truing-up. Section 11 of the CPC will not operate as a bar, since under the principle of *res judicata*, the matter in question

is to be directly and substantially the same as the matter previously decided. The present petition is no way similar to Petition No.172/MP/2016.

(g) The present petition filed under Section 79(1)(a) of the Act, is for seeking the Commission's exercise of its statutory powers, read with the relevant regulations to fashion a relief which is advantageous to all stakeholders.

(h) Since fly ash transportation charges do not form part of O&M expenses during 2019-24, fixed charges or energy charges, the Petitioner has sought the separate recovery of the same as a line item, subject to truing-up. There is no embargo under the regulations which prohibits the relief sought by the Petitioner.

'Admissibility' of the Petition

22. The Petitioner has filed this petition under Section 62(a) and Section 79(1)(a) of the Act read with Regulation 76 and Regulation 77 of the 2019 Tariff Regulations for recovery of fly ash transportation charges for the 2019-24 tariff period, based on the MOEF & CC Notification dated 25.1.2016, on a recurring basis. Per contra, some of the Respondents (TANGEDCO, GRIDCO, MSEDCL, BRPL, MPPMCL, Karnataka Escoms and UPPCL) have raised issues on the 'admissibility' of the petition and also on 'merits' on various grounds. Since orders have been reserved on the question of 'admissibility' of the present petition, we examine the same, as stated in the subsequent paragraphs.

23. The Petitioner in its written submissions has stated that the Petition is considered to be maintainable before a forum, as long as a valid cause of action is disclosed and the forum has the requisite jurisdiction. Referring to the principles prescribed under Order 7 Rule 11 of the CPC, the Petitioner has submitted that maintainability of a petition can be challenged only limited to the grounds of (a) jurisdiction (b) non-disclosure of cause of action and (c) impermissibility under law. As regards jurisdiction, the Petitioner has submitted that the Commission has the jurisdiction under section 79(1)(a) of the Act, as the tariff of the generating stations of

the Petitioner are regulated by this Commission. It has also submitted that the Commission is bound by the principles enshrined under clauses (b), (c), (d) of Section 61 of the Act. The Petitioner has submitted that though the provisions of CPC are not applicable to the discharge of the statutory functions of the Commission, the present petition meets the tests prescribed under Order 7 Rule 11(a) of CPC. As regards cause of action, the Petitioner has submitted that the submissions made in the petition as well as the rejoinders filed, clearly disclose the cause of action. The Petitioner has further submitted that the present petition is not barred by law, as Order 2 Rule 2 of CPC is applicable on splitting of claims and remedies based on the same cause of action. It has stated that section 11 of CPC cannot operate as a bar, as the matter in question is not directly and substantially the same as the matter previously decided.

Analysis and Decision

Jurisdiction

24. The matter has been examined. Section 79(1)(a) of the Act provides the Commission with the power to regulate the tariff of generating companies owned or controlled by the Central Government. The Petitioner, which is a central generating company, has filed this petition for recovery of additional expenditure on account of fly ash transportation charges, for its generating stations for the 2019-24 tariff period, under Section 79(1)(a) of the Act read with Regulation 76 and 77 of the 2019 Tariff Regulations. As Commission has the jurisdiction to regulate the tariff of the generating stations of the Petitioner, in terms of Section 79(1)(a) of the Act, the petition is maintainable, on this count.

Cause of action

25. As regards Cause of action, the Petitioner has relied upon the principles laid down in Order 7 Rule 11(a) of CPC and contended that the averments made in the Petition and in its rejoinders, disclose a cause of action. Though the Act provides for a limited application of the provisions of the CPC to the proceedings before the Commission, we deem it fit to examine, if the petition discloses the cause of action, in line with the principles under Order 7 Rule 11(a) of CPC. In *A.B.C. Laminart (Pvt) Ltd & anr. v. A.P. Agencies*, (AIR 1989 SC 1239) the Hon'ble Supreme Court has held that :

12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

26. It is noticed that the Petitioner has claimed fly ash transportation charges for its generating stations in the tariff determination petitions filed before this Commission, for the 2019-24 tariff period. From the averments made in the petition, it is evident, that the Petitioner, due to impact of Covid-19 and considering that the tariff determination process was likely to take time, due to severe financial crunch faced by it on account of the delay in recovery of the expenditure, was constrained to file the present petition, with the prayers as quoted in paragraph 1 above. We notice, that the Petitioner, in support of the said prayers, has placed reliance on the MOEF & CC notifications dated 3.11.2009 and 25.1.2016, the Commission's order dated 5.11.2018 in Petition No. 172/MP/2016 recognising the notification dated 25.1.2016 as a change in law event, the definition of change in law in Regulation 3(10) of the

2019 Tariff Regulations and the judgments of the Hon'ble Supreme Court and the Appellate Tribunal for Electricity, with regard to the exercise of 'power to relax' by this Commission. Referring to section 61(c) and (d) of the Act which provide for tariff determination guided by factors encouraging efficiency, safeguarding consumer interest and recovery of cost in a reasonable manner, the Petitioner has stated that the delay defeats the said requirements and the expeditious recovery of such expenses not only benefits the Petitioner, but is also beneficial to end consumers. The Petitioner has also submitted that it has complied with the directions given in order dated 5.11.2018 in Petition No. 172/MP/2016 and the recovery of fly ash transportation charges are subject to truing up by the Commission. Further, the Commission in its order determining tariff of Ramagundam STPS, Stage-III, for the 2019-24 tariff period had taken a view that the issue of fly ash transportation charges claimed in the tariff petitions are to be governed by the decision of the Commission in this petition. In the light of the above submissions, we are of the considered view that the Petitioner has established a 'cause of action' for the Commission to adjudicate the reliefs sought for by the Petitioner and to pass orders, on merits. The Petition is therefore maintainable on this count.

Impermissibility under law

27. On the question as to whether the petition filed by the Petitioner is impermissible/ barred by the provisions of law, the Respondent BRPL has submitted that the present petition is barred by Order 2 Rule 2 of CPC, as the claim of the Petitioner is already pending adjudication in the tariff petitions filed by the Petitioner. It has also submitted that the Petitioner is barred from splitting the claims and remedies, based on the same cause of action. The Respondent Karnataka Escoms have also submitted that since the issue of fly ash transportation charges for the

period 2019-24 is *subjudice*, before this Commission in the various tariff petitions filed by the Petitioner, then in terms of the principles of Section 10 of the CPC, the present petition would in fact be stayed, till the tariff petitions are decided. Similar submissions have been made by the Respondent TANGEDCO, Respondent, MPPMCL, Respondent UPPCL, Respondent MSEDCL and the Respondent BSPHCL. The Petitioner has submitted that the present claim is only on account of the delay in recovery of the fly ash transportation charges, which is detrimental to both the Petitioner and the consumers.

28. The matter has been examined. Order 2 Rule 2 of CPC, provides that if different reliefs and claims arise out of the same cause of action, then the plaintiff must place all his claims before the Court in one suit and cannot omit one of the reliefs or claims, except without the leave of the Court. The effect of Order 2 Rule 2 of CPC is to bar a plaintiff who had earlier claimed certain remedies with regard to a cause of action, from filing a second suit with regard to other reliefs, based on the same cause of action. We notice that, in the present case, the Petitioner has only claimed the recovery of fly ash transportation charges incurred or to be incurred for the 2019-24 tariff period, in terms of its prayers in paragraph 1 above, subject to truing up and has not split any of its claims, as contended by the Respondents. Moreover, the claim of the Petitioner for fly ash transportation charges in some of the tariff petitions filed by the Petitioner for the 2019-24 tariff period, had already been disposed of with the observation that the recovery of the said charges, will be governed by the decision taken in this petition. This decision will also be applicable to the remaining tariff petitions in respect of some of the generating stations of the Petitioner, for the 2019-24 tariff period, which are pending. In view of this, the submissions of the Respondents are not acceptable. Therefore, the objection of the

Respondents that the claim of the Petitioner is barred by the principles contained in Order 2 Rule 2 of CPC is rejected.

29. Further, the Respondent KSEBL has submitted that as per Commission's order dated 5.11.2018 in Petition No. 172/MP/2016, the Petitioner can raise the claim only at the time of truing up of tariff with all details, as specified in the order. It has submitted that since the Petitioner has already raised the claim in the truing-up petition, which is under consideration of the Commission, the filing of another petition, for a matter, which is already under consideration is not in order. The Respondent Karnataka Escoms have submitted that 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 CPC. The Respondent BSPHCL has submitted that the directions contained in order dated 5.1.2018 in Petition No. 172/MP/2016, were never challenged by the Petitioner and hence, have attained finality. Similar submission has been made by the Respondent GRIDCO. The Respondent, TANGEDCO has submitted that the present petition is premature, since the truing up exercise is pending adjudication in the petitions filed by the Petitioner. In response, the Petitioner has submitted that 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. It has also submitted that while Petition No.172/MP/2016 pertains to declaration of MOEF Notification dated 25.1.2016 as change in law and recovery of the projected expenses towards fly ash transportation for the 2014-19 tariff period, 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.

30. The matter has been examined. Section 11 of the CPC stipulates as under:

“11. Res judicata-No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.-For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.-The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.-Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.-The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

31. Thus, Section 11 of CPC mandates that any suit or issue in which matter directly and substantially in issue has been heard and finally decided on merits by the competent Court, cannot be tried again by any Court provided the matter directly and substantially in issue is same between the same parties to the suit. In our view, the principles of res judicata in terms of Section 11 of CPC is not applicable to the present case, as the issues are directly and substantially not the same in both the petitions. While Petition No.172/MP/2016 filed by the Petitioner 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, 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, based on a different set of regulations. Moreover, the recovery of fly ash transportation charges for the 2014-19 tariff period had been allowed by the Commission in some of its orders, based on prudence check of the data furnished by the Petitioner, in those petitions. But, in cases where the recovery of fly ash transportation charges has not been allowed for the 2014-19 tariff period, the Petitioner has been directed to approach the Commission by a separate petition, along with relevant data/information for consideration. Therefore, the objection of the Respondents that the claim of the Petitioner is barred by the principles of res judicata under Section 11 of the CPC is rejected. The Petition is therefore maintainable.

Other issues

32. Some of Respondents have raised issues like (a) absence of a provision under the Tariff Regulations for recovery of additional O&M expenses over and above the normative values specified (b) failure of the Petitioner to comply with the procedure stipulated in order dated 5.11.2018 in Petition No. 172/MP/2016 (c) exercise of the 'power to relax' to be used sparingly and for cogent reasons (d) no provision for carrying cost etc., Since the Commission, after hearing the parties on 17.2.2022, has reserved its order on 'maintainability' of the petition, the issues raised on merits, have not been considered, in this order.

33. In view of the above discussions, we hold that the present petition filed by the Petitioner is maintainable. Accordingly, the petition is 'admitted'. The Respondents are directed to file their replies on merits, on or before 17.6.2022, after serving copy

to the Petitioner who shall file its rejoinders, by 28.6.2022. The parties shall ensure the completion of pleadings within the due date mentioned. No extension of time shall be granted for any reason.

34. The Petition shall be listed for hearing 'on merits', in due course for which separate notice will be issued.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I. S. Jha)
Member