

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.1/RP/2013**

**in**

**Petition No. 27/2011**

**Coram:**

**Shri V.S.Verma, Chairperson**

**Shri M.Deena Dayalan, Member**

**Date of Hearing: 23.5.2013**

**Date of Order: 22.8.2013**

**IN THE MATTER OF**

Review of the order dated 16.1.2013 in Petition No. 27/2011 pertaining to revision of annual fixed charges of Nathpa Jhakri Hydro Power Station (6 x 250 MW) considering the impact of additional capitalization for the period from 1.4.2004 to 31.3.2009.

**AND**

**IN THE MATTER OF**

SJVN Limited, New Shimla

**...Petitioner**

**Vs**

1. Punjab State Power Corporation Ltd, Patiala
2. (i) Haryana Power Generation Corporation Ltd, Panchkula  
(ii) Haryana Vidyut Prasaran Nigam Ltd, Panchkula
3. (i) Delhi Transco Ltd, New Delhi  
(ii) North Delhi Power Ltd, Delhi  
(iii) BSES-Rajdhani Power Ltd, New Delhi  
(iv) BSES-Yamuna Power Ltd, New Delhi
4. (i) Jaipur Vidyut Vitaran Nigam Ltd, Jaipur  
(ii) Ajmer Vidyut Vitaran Nigam Ltd, Ajmer  
(iii) Jodhpur Vidyut Vitaran Nigam Ltd, Jodhpur
5. Himachal Pradesh State Electricity Board, Shimla
6. Power Development Department, Government of J&K, Jammu
7. Engineering Department, Union Territory of Chandigarh, Chandigarh
8. Uttar Pradesh Power Corporation Ltd, Lucknow
9. Uttaranchal Power Corporation, Dehradun
10. Government of Himachal Pradesh, H.P. Secretariat, Shimla      **... Respondents**

**Parties Present:**

1. Shri M.G.Ramachandran, Advocate, SJVNL
2. Shri Rajeev Agarwal, SJVNL
3. Shri Satyabad Sahoo, SJVNL
4. Shri H.B Sahay, SJVNL
5. Shri R.K.Bansal, SJVNL
6. Shri R.Kapoor, SJVNL
7. Shri A.S. Bindra, SJVNL
8. Shri R.B. Sharma, Advocate, BRPL
9. Shri Manish Garg, UPPCL

## ORDER

Petition No. 27/2011 was filed by the petitioner SJVN Ltd for revision of annual fixed charges for Nathpa Jhakri Hydroelectric Power Station, (6x250 MW) (*hereinafter referred to as "the generating station"*) for the period from 1.4.2004 to 31.3.2009, based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 ("the 2004 Tariff Regulations") and the Commission by its order dated 16.1.2013 disposed of the said petition.

2. Aggrieved by the said order, the petitioner has filed this review application on the ground of error apparent on the face of the order raising the following issues:

- (a) The additional capital expenditure including discharge of liabilities upto the cost approved in RCE-III should have been allowed and considered for tariff;
- (b) Capital cost to be determined in accordance with the 2004 Tariff Regulations instead of the 2009 Tariff Regulations and capital cost to be serviced from the date of COD of the respective units;
- (c) Consideration of un-discharged liabilities in respect of this generating station in line with the judgments of the Appellate Tribunal for Electricity pertaining to the generating stations of NTPC; and
- (d) Correction of inadvertent error on the part of the petitioner in the calculation of FERV of ₹15.67 crore for the year 2005-06.

3. By order dated 16.4.2013, the Commission admitted the review petition on the above issues and issued notice on the respondents. The respondent, BRPL vide affidavit dated 17.5.2013 has filed its reply to the petition. The matter was heard on 23.5.2013 and orders were reserved by the Commission with a direction to the parties to file their written submissions by 20.6.2013. In compliance, the petitioner has filed its written submissions on 20.6.2013 and the respondent, TDPPL vide affidavit dated 24.6.2013 has filed its reply to the petition.

4. Heard the parties and examined the documents available on record. We now consider the issues raised by the petitioner in the subsequent paragraphs.

5. In accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), a person aggrieved by an order may apply for a review under the following circumstances:

- (a) On discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at a time when the order was made;
- (b) An error apparent on the face of the record;
- (c) For any other sufficient reason.

**As regards issues in Para 2(a) and (b)**

6. The issues raised in clause (a) and (b) under paragraph 2 above are similar and has been dealt with together. In support of its prayer for review of order dated 16.1.2013, the petitioner has mainly submitted as under:

(a) that the Commission in its order dated 31.12.2008 in Petition No. 20/2008 had taken the gross block of assets upto 1.4.2007 and determined tariff accordingly. The Commission in the said order had observed that as and when the claims were finally settled by the petitioner, the petitioner may take up the above amounts with the Central Government and if the same were approved by the Central Government it was open to the petitioner to claim additional capital expenditure for the purpose of tariff. Accordingly, the petitioner has submitted that Petition No. 27/2011 was filed claiming revision of tariff for the period 2004-09 based on the total capital cost of ₹8593.412 crore as per Revised Cost Estimate, including an amount of ₹13983.44 lakh as on 18.5.2004, ₹12359.00 lakh as on 1.4.2005, ₹11346.16 lakh as on 1.4.2006 and ₹11338.602 lakh as on 1.4.2007 deferred by the Commission, as additional capital expenditure for 2004-09.

(b) That out of the total capital cost of ₹8454.85 crore as on 31.3.2009, the Commission has so far approved the capital cost of ₹7990.8019 crore for determination of tariff and the capitalization over and above the said approved capital cost, subject to some marginal adjustments on account of settlement of claims and counter claims need to be considered by the Commission. In terms of the provisions of the 2004 Tariff Regulations and the 2009 Tariff Regulations, the capital expenditure incurred as well as other elements are to be serviced through tariff from the date of commercial operation and the effective servicing of the capital expenditure cannot be postponed or deferred to a future date.

(c) The capital assets are put to use from the date of commercial operation and the respondent beneficiaries derives the benefit of use of such capital asset, namely the electricity generated from the above date on regular basis and therefore the respondent beneficiaries are required to service the capital assets and other elements of tariff from the date of commercial operation.

(d) The additional capital expenditure incurred by the petitioner would relate to the period from the date of commercial operation (COD) of the respective units and need to be considered as per the regulations applicable for the relevant period upon the RCE-IV as and when approved by the Central Government. The delay in grant of RCE cannot change the applicability of the regulations related to the said period. Merely because the claim will be taken up for consideration by Commission after 1.4.2009, it

will not result in the claim to be considered in terms of the provisions of the 2009 Tariff Regulations framed by the Commission.

(e) The observations of the Commission, if considered, would mean that the petitioner will not get any tariff till 31.3.2009 on account of additional capital expenditure, only on the ground that it has not been approved by the Ministry of Power, Government of India and not on merits. The observations made by the Commission in applying the 2009 Tariff Regulations cannot be construed to be a mere erroneous decision but is an error apparent on the face of the record and permitting the order to stand will lead to failure of justice.

7. The respondent, BRPL in its reply dated 17.5.2013 has submitted as under:

(a) that the alleged error, even if presumed to be an error, is an error in judgment and not an error apparent on the face of the record, which cannot be cured in a review petition. In support of this contention reliance has been placed in the judgments dated 12.8.2011 and 24.3.2009 of the Appellate Tribunal for Electricity in Review Petition No. 2/2011 in Appeal No. 26/2008 and Review Petition No. 1/2009 in Appeal No. 64/2008.

(b) The non-consideration of capitalization of expenditure till approval of RCE by the Central Government is perfectly justified as it is the authority competent for investment approval. The project estimates were originally approved by the Ministry of Power and subsequently three Revised Cost Estimates were also approved by the Ministry of Power.

(c) The expenditure is related to advances to contractors on account of extension of time, Dispute Review Board and other claims in respect of major civil works. All these are disputed bills and whether the dispute is on account of wrong doings/omission or commission on the part of the petitioner or the contractor is required to be examined and any negligence on the part of either of the parties cannot be passed on to the beneficiaries.

(d) The petitioner can approach the Commission in respect of the claims only after the Ministry of Power approves the investment and the Commission after prudence check will allow the claims as per the Tariff Regulations. The argument of the petitioner that there is no need for RCE and the capital expenditure incurred is to be admitted from the COD is flawed and without any basis. The argument, if accepted, would amount to putting fetters on the powers of the Commission and obstructing the scrutiny of the project cost estimates in regard to the reasonableness of the capital cost for tariff determination.

(e) The Commission has not permitted any FERV in order dated 16.1.2013 and hence any correction on this count, does not arise.

8. The respondent, TPDDL (*erstwhile North Delhi Power Ltd*) in its reply dated 24.6.2013 has submitted as under:

(a) The petitioner has failed to demonstrate the existence of any circumstances necessitating the intervention by way of review and cannot also seek re-hearing / reconsideration of the issues in dispute. In case the petitioner is aggrieved, the proper remedy is lies in an appeal.

(b) In the present review petition, the findings in order dated 31.12.2008 have been challenged and the present proceedings appear to be an appeal against the earlier order of the Commission.

(c) The question of FERV has not been gone into by the Commission in the impugned order and is not part of the impugned order.

(d) The present petition is an abuse of the process and is liable to be dismissed.

9. The project was originally approved by the Central Government by letter dated 5.4.1989 at an estimated cost of ₹167802 lakh including IDC of ₹20602 lakh (September, 1988 price level) with the completion schedule of March, 1996. The Revised Cost Estimate (RCE-III) of the project was approved by the Central Government vide Ministry of Power Letter dated 14.8.2007 at a cost of ₹818771 lakh, including IDC of ₹195181 lakh but excluding expenditure of ₹14500 lakh which had already been incurred as advances to contractors on account of Extension of Time (EOT), Dispute Review Board (DRB) and other claims in respect of major civil works.

10. In Petition No. 20/2008 filed by the petitioner for determination of tariff of the generating station for the period from 1.4.2009 to 31.3.2009, the petitioner, in addition to the claim for ₹14500 lakh as above, had claimed expenditure of ₹13983.44 lakh as on 18.5.2004, ₹12359 lakh as on 1.4.2005, ₹11346 lakh as on 1.4.2006 and ₹11338.60 lakh as on 1.4.2007 on account of advances paid to contractors, capitalized, but not approved by the Govt. of India in RCE-III. As regards the expenditure of ₹14500 lakh which had already been incurred as advances to contractors on account of Extension of Time (EOT), Dispute Review Board (DRB) and other claims in respect of major civil works, the Commission in its order dated 31.12.2008 in Petition No. 20/2008 did not admit the same for the purpose of tariff, but had granted liberty to the petitioner to approach the Commission to claim the said additional capital expenditure in accordance with the prevailing regulations as and when the disputes related to claims were finally settled and approved by the Central Government. The relevant portion of the order dated 31.12.2008 is extracted as under:

*"14. Since the Central Government while approving the RCE-III had not approved the expenditure of ₹14500 lakh incurred as advances to contractors on account of extension of time (EOT), Dispute Review Board (DRB) and other claims in respect of major civil works, this expenditure has not been admitted for the purpose of tariff. As and when disputes related to these claims are finally settled, the petitioner may take up the case with Central Government for approval and, if approved by the Central Government, the petitioner may approach the*

*Commission to claim the expenditure as additional capital expenditure in accordance with the prevailing regulations"*

11. Similarly, in respect of the expenditure of ₹13983.44 lakh as on 18.5.2004, ₹12359 lakh as on 1.4.2005, ₹11346 lakh as on 1.4.2006 and ₹11338.60 lakh as on 1.4.2007 claimed by the petitioner on account of advances paid to contractors, capitalized, but not approved by the Govt. of India in RCE-III, the Commission in its order dated 31.12.2008 disallowed the same with liberty to the petitioner to claim the same in accordance with law as and when the said expenditure is approved by the Central Government. The relevant portion of the order dated 31.12.2008 is extracted as under:

*"30. As already noted, the petitioner is at liberty to claim in accordance with law the amount of ₹13983.44 lakh as additional capital expenditure as and when the said expenditure is approved by the Central Government as part of the project capital cost"*

12. The above observations of the Commission in order dated 31.12.2008 had not been challenged by the petitioner. While so, in Petition No.27/2011 filed by the petitioner for revision of tariff of the generating station for the period 2004-09, the petitioner had submitted that since most of the Extension of Time (EOT)/Dispute Review Board (DRB) claims in respect of major contracts have been settled, Revised Cost Estimate for ₹8593.412 crore had been approved by the competent authority of SJVNL (the petitioner) subject to final approval of the Ministry of Power, Govt. of India. Also, based on the RCE of ₹8593.412 crore approved by its Board, the petitioner claimed additional capitalization of the amount of ₹13983.44 lakh as on 18.5.2004, ₹12359 lakh as on 1.4.2005, ₹11346 lakh as on 1.4.2006 and ₹11338.60 lakh as on 1.4.2007 on account of advances paid to contractors, capitalized, but not approved by the Govt. of India in RCE-III. Considering the fact that most of the claims have been settled by the petitioner and since the matter was pending for approval of RCE-IV by the Central Government, the Commission by its order dated 16.1.2013 disposed of the said petition by observing as under:

*"It is noticed that most of the expenditures have been incurred after discharging the liabilities/settling the claims during the 2004-09 period and some expenditure have been incurred during the 2009-14 tariff period. Moreover, some more liabilities are yet to be discharged. The petitioner has taken up the matter with the Central Government for approval of RCE-IV which is still awaited. At such long distance of time, it will not be prudent to keep the tariff for the period 2004-09 open to be finally determined after approval of RCE-IV. This will also delay the process for determination of the tariff for the period 2009-14 for which petition*

*has already been filed by the petitioner. In our view, the petitioner should approach the Commission for capitalisation of additional expenditure included in the present petition after approval of RCE-IV in accordance with the provisions of the 2009 Tariff Regulations, which is consistent with our order dated 31.12.2008 granting liberty to the petitioner to approach the Commission in accordance with the prevailing regulations"*

13. The petitioner in this petition has submitted that it does not dispute the fact that the additional capital expenditure claimed which has not been included in the RCE-III approved by the Central Government can be claimed only when the Central Government approves RCE-IV to such extent of approval. However, it has submitted that the capitalization over and above the said approved capital cost of ₹7990.8019 crore in order dated 31.12.2008, subject to some marginal adjustments on account of settlement of claims and counter claims need to be considered by the Commission for determination of tariff. The petitioner has also submitted that since tariff calculation of the petitioner relates to the period 2004-09, the same will necessarily have to be considered and done in terms of the 2004 Tariff Regulations and not the provisions of the 2009 Tariff Regulations which relate to the period from 1.4.2009 and not prior thereto. It has also been submitted that the tariff regulations applicable which is prevalent regulations is the one related to the date of Commercial operation (COD) and not the date of grant of RCE final approval. The petitioner has reiterated that the expenditure which has been incurred during the tariff period 2004-09 and has been deferred for consideration only on account of approval of RCE-IV by the Central Government, the consideration of such additional capital expenditure should also be in terms of the tariff regulations that apply for the period 2004-09 and not on the 2009 Tariff Regulations. The respondent, UPPCL during the hearing submitted that the petitioner should approach the Commission for capitalization of additional capital expenditure after approval of RCE-IV in accordance with the provisions of the 2009 Tariff Regulations which is consistent with the Commission's order dated 31.12.2008.

14. The submissions of the parties have been considered. Admittedly, most of the disputes have been settled by the petitioner during the period prior to 31.3.2009 and the expenditure on this count has been considered in the RCE-IV which is pending for approval of the Central Government. Accordingly, the petitioner has submitted that in line with the



observations of the Commission, the prevailing regulations would be the 2004 Tariff Regulations applicable for the period 2004-09 and not the 2009 Tariff Regulations. We agree with the submissions of the petitioner. Though the petition for additional capitalization for the generating station for the period 2004-09 was filed by the petitioner after the said period was over, the same has been filed pursuant to capitalization of expenditures after settlement of disputes/claims, pending approval of RCE-IV by the Central Government. Moreover, the said expenditure claimed by the petitioner has actually been incurred by the petitioner and the beneficiaries-respondents have reaped the benefits of such expenditure during 2004-09. Denying the benefit of tariff to the petitioner for the assets which have been capitalized and put to use, would in our view, result in denying recovery of reasonable cost of supply of electricity by the petitioner. Also, the servicing of the expenditure incurred by the petitioner cannot be postponed to a future date and should be governed by the prevailing regulations at the time of the actual capital expenditure. These aspects have been lost sight of by the Commission at the time of passing the order dated 16.1.2013. This is an error apparent on the face of the order dated 16.1.2013 and review of order on this count is allowed. Accordingly, we are of the considered view that the claim of the petitioner for actual additional capital expenditure incurred during the period 2004-09 is to be governed by the 2004 Tariff Regulations, and not the 2009 Tariff Regulations. We direct accordingly. However, since RCE-IV is yet to be approved by the Central Government, the revision of tariff of the generating station for 2004-09 shall be considered by the Commission after submission of the approved RCE by the petitioner, through an appropriate application. However, the petitioner shall not be entitled for any carrying costs till the approval of RCE-IV by the Central Government.

**As regards issue in Para 2(c)**

15. One more submission of the petitioner is that the Commission had disallowed the claim of the petitioner for allowing un-discharged liability for the period 2004-09. In justification of this, the petitioner has submitted that though the Commission had not considered un-discharged liabilities under the 2004 Tariff Regulations, subsequently, by its



various orders considered the same in case of generating stations of NTPC and DVC, subject to the decision of the Hon'ble Supreme Court in the second appeals filed by the Commission. We have examined the matter. Under the 2004 Tariff Regulations, applicable for the period 2004-09, additional capitalization in respect of thermal and hydro generating stations are governed by separate provisions namely, Regulation 18 (for thermal stations) and Regulation 34 (for hydro stations). Against the disallowance of "un-discharged liabilities" by the Commission in its various orders pertaining to tariff of the generating stations of NTPC for 2004-09, the Appellate Tribunal for Electricity (the Tribunal), interpreted the provisions of Regulation 18 and had directed the consideration of 'un-discharged liabilities' for capitalization by its judgments dated 10.12.2008 and 16.3.2009. Against these judgments, second appeal has been filed by the Commission and since no stay was granted by the Hon'ble Supreme Court, the Commission has implemented the said judgment in the cases of NTPC, subject to the final outcome of the said appeals. DVC had also approached the Tribunal with similar relief, and based on the observations of the Tribunal, un-discharged liabilities was considered in the case of DVC. The submission of the petitioner in this petition that the judgment of the Tribunal same should be extended to this generating station also is not acceptable, since the implementation of the said judgment of the Tribunal in respect of the thermal generating stations of NTPC and DVC is subject to the final outcome of the second appeals filed by the Commission in the said matters. In the absence of any direction of the Tribunal in respect of other generating stations including the hydro generating stations, the said judgment has not been extended to the generating station of the petitioner. Thus, there is no error apparent on the face of the order and review on this ground is rejected.

**As regards issue in Para 2(d)**

16. On more issue for consideration is the correction of inadvertent error on the part of the petitioner as regards calculation of FERV of ₹15.67 crore for the year 2005-06. The petitioner has submitted that the said amount was not a negative figure to be deducted, but a positive figure to be added to the capital cost. The respondents have submitted that the said

prayer cannot be considered as it does not form part of the order dated 16.1.2013. We agree with the submissions of the respondents. However, on this issue, it is noted that the Commission in its order dated 31.12.2008 in Petition No. 20/2008 had directed the petitioner to mutually settle the matter with the beneficiaries. Thus, this issue is disposed of in terms of the observations contained in our order dated 31.12.2008.

17. Based on the above findings, the prayer of the petitioner for review of order is disposed of.

Sd/-  
**[Deena Dayalan]**  
**Member**

Sd/-  
**[V.S.Verma]**  
**Member**