**CENTRAL ELECTRICITY REGULATORY COMMISSION**
**NEW DELHI**

**Review Petition No. 21/RP/2016**
**in**
**Petition Nos. 59/MP/2015**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson**
**Shri A.K. Singhal, Member**
**Shri A.S. Bakshi, Member**

**Date of Order: 29.8.2017**

**In the matter of**

Review of the Commission's order dated 15.2.2016 in Petition No. 59/MP/2015 with regard to in-principle approval for capitalization of expenditure on funding provided to Indian Railways in the capital cost of power projects

**And**

**In the matter of**

NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110003 **….Petitioner**

**Parties Present:**

Shri Matrugupta Mishra, Advocate, NTPC
Shri Nimesh Kumar Jha, Advocate, NTPC

**ORDER**

This petition has been filed by the petitioner, NTPC Limited for review of Commission's order dated 15.2.2016 in Petition No 59/MP/2015 seeking in-principle approval for capitalization of expenditure on funding provided to Indian Railways in the capital cost of power projects. Aggrieved by the said order, the petitioner has sought review on the ground that there are errors apparent on the face of record with regard to the following:

a) *The finding of the Commission that participation under the Customer Funding Policy is not mandatory is factually incorrect because of want of an alternative mechanism for creating the required railway infrastructure;*

b) *The impugned order results in under recovery for the review petitioner;*

2. The petition was listed on 8.6.2016 for admission. Heard the learned counsel for the petitioner. Based on the submissions of the petitioner and the documents available on record, we proceed to examine the issues raised in the petition as detailed in the subsequent paragraphs.

**Jurisdiction of the Commission**

3. The petitioner has submitted that the Commission has necessary powers under Section 94(f) of the 2003 Act to review the order dated 15.2.2016 in terms of the principles enumerated under Order 47 of the Civil Procedure Code. The petitioner has also submitted that that the Courts ought not to hesitate to review their own earlier order when there exists an error on the face of the record and the interest of justice so demands in appropriate cases. Accordingly, it has submitted that in the present case, the review petitioner cannot be left devoid of cost which it has bonafidely incurred for generation of power. The submissions have been considered. A perusal of Order 47 Rule 1 shows that review of a judgment or an order could be sought: (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason. It is settled law that an error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. Keeping in view the broad principles of review, the grounds adduced by the petitioner has been examined hereunder.

**Issue 1 (a)**

4. The Commission in order dated 15.2.2016 had held as under:

> "*6. We have perused the said order dated 29.7.2010. In our view, the said order does not support the case of the petitioner. It is not mandatory for the petitioner to participate in the scheme under the Customer Funding Model as per the Policy of Ministry of Railways."*

5. The petitioner in this petition has submitted that the Commission has failed to recognise that the scheme under the Customer Funding Policy (CFP) leaves no choice to the review petitioner in the said matter. It has also stated that the participation of the petitioner in the scheme under CFP is not an option and is effectively mandatory, as there is no other alternative available for creating the required railway infrastructure. The review petitioner has further submitted that the development of rail network, and associated works, was required in order to ensure fuel security to the projects of the petitioner, which would enable the said petitioner to achieve normative availability. It has further stated that in the event the normative availability of the Review Petitioner is maintained and/ or improves on account of timely, and adequate, delivery of fuel in a cost effective manner, the same is for the ultimate benefit of the end consumers. It has stated that without the railway infrastructure, the power plant will be unviable and will suffer huge loss. Accordingly, the petitioner has stated that it has no option but to participate in the CFP because of want of another viable alternative. During the hearing, the learned counsel for the petitioner reiterated the submissions made in the petition and prayed that the order dated 15.2.2016 may be reviewed accordingly.

6. We have examined the matter. The petitioner in the original petition had prayed for in-principle approval for capitalization of expenditure under the CFP scheme and had submitted that to ensure sustained supply of coal from the capital mines to the power plants, creation of new rail infrastructure or substantial capacity addition to existing rail network would be required as the existing rail connectivity infrastructure was grossly inadequate to meet the fuel requirement of the generating stations. It had also submitted that in order to ensure timely availability of rail infrastructure for supply of coal to upcoming projects of the petitioner, it was decided by the Board of the Petitioner's Company to participate in the CFP of Railways. The Commission after examining the submissions of the petitioner including the policy dated 10.12.2012 of the Ministry of Railways had concluded that it was not mandatory for the petitioner to participate in the CFP scheme as per policy of the Ministry of Railways. The submissions of the petitioner in this petition justifying that the participation of the petitioner was effectively mandatory and that it had no option in the absence of alternative mechanism is not

acceptable. In our view, the petitioner has raised grounds and has sought to re-argue the case on merits and the same is not permissible in review. It is noticed that Clause 6.4 of the Ministry of Railways policy dated 10.12.2012 deals with the participating models for rail connectivity and capacity augmentation with funding provided by customer (opted by the review petitioner) as under:

> *"6.4.This model addresses doubling/ multiple line projects where some customers are beneficiaries of capacity addition and may be interested in funding the project for expeditious completion/ commissioning.*
>
> *The project will be sanctioned as a Railway project on the basis of an MOU/ agreement entered into between Railways and Customers wishing to fund the project in full or part. It will be constructed, maintained and operated by Railways. IR shall ensure that the funds advanced by the customers will be treated as deposits and used solely for timely execution of the concerned project by appropriate ring fencing. The ownership of the line and its operation and maintenance will always remain with Railways. In return Railways will pay upto 7% of the amount invested through freight rebate on freight volumes every year till the funds provided by the project beneficiary is recovered with interest at a rate equal to the prevailing rate of dividend payable by Railways to General Exchequer at the time of signing of the agreement. The interest shall be payable on the reducing balance."*

7. It is clear from the above that the participation of the Petitioner n the CFP scheme as per Railway Policy was not mandatory and the petitioner on its own volition has participated in the same. Moreover, the ownership and operation and maintenance of lines would remain with Indian Railways and as such the asset would not be owned by the petitioner. Also, as per the policy, the petitioner shall be refunded by Railways a rebate in the freight which is upto 7% of the amount invested every year. Further, the petitioner will receive interest on funds provided by it to railways at the rate equal to the prevailing rate of dividend payable by railways to the general exchequer. In this background, the Commission by a conscious decision had rejected the prayer of the petitioner for capitalization of expenditure incurred by NTPC in order dated 15.2.2016. In our considered view, the petitioner has sought to reargue the case on merits and the same is not permissible in review. It is settled law that review cannot be an appeal in disguise. In our view, there is no error apparent on the face of the order dated 15.2.2016 and accordingly, the submissions of petitioner are rejected and review on this ground fails.

**Issue 1 (b)**

8. The petitioner in the review petition has submitted that the impugned order results in under recovery for the petitioner. It has also submitted that though the principal amount invested is

recovered through rate rebate of 7%, there is however an under recovery of the interest component after considering the following:

a. *interest rate towards the debt component of the funding provided by the Review petitioner to the Railways*
b. *return on equity towards the equity component of the funding provided by the Review Petitioner to the Railways; and*
c. *the overall cost of capital for discounting, which comes about 9.3%.*

9. The petitioner has submitted that the calculation of under recovery has been done on illustrative payment made to Railways for ₹1000 crore. In the light of illustration, the petitioner has submitted that the net under recovery in terms of difference between interest provided by railway in the form of dividend and cost of capital of fund, after considering the above mentioned parameters comes to about 5.3% which corresponds to about ₹390 crore. According to the petitioner, any investment made for the project has to be recovered as per provisions of section 61 of the Electricity Act, 2003. It has further stated that in the absence of specific regulations, the Commission is guided by tariff parameters enumerated in section 61 of the Act and it is settled law that regulations are not necessary for exercising statutory jurisdiction. The petitioner has stated that the Commission has overlooked the above aspects while passing the impugned order and hence there is an error apparent on the face of the record which is required to be corrected in review proceedings.

10. Another contention of the petitioner in justification of the prayer for capitalization of expenditure is that any amount advanced by the petitioner to its contractors or suppliers for creation of an asset is always booked under the capital expenditure of the power plant. The petitioner has further submitted that though the asset is not owned by the petitioner, the said asset is meant for use of the petitioner for the purpose of generation of power and as such it is necessary for the petitioner to recover the cost incurred for creation of the said asset by treating the payments made to IR as payment towards contractors/ suppliers. The petitioner has stated that the Commission was in error by failing to hold that the expenditure incurred in construction/ augmentation of the rail network is an inevitable cost as part of the overall cost of the generation of electricity. Accordingly, the petitioner has stated that the Commission was

required to allow any under recovery to the petitioner by taking recourse to section 61 of the Act as the cost towards rail infrastructure was a necessary requirement for optimum generation of power. In the above background, the petitioner has prayed that the impugned order is required to be corrected in the present proceeding.

11. We have examined the submissions of the petitioner. The main contention of the petitioner is that the cost incurred by it for generation of power has to be allowed in tariff as per section 61 of the Act irrespective of the fact whether the Tariff Regulations have a provision for the said cost or not. These issues were neither raised in the original petition nor during the proceedings before the Commission, and hence these submissions of the petitioner in this petition are an afterthought. Nevertheless, Section 61 (d) of the 2003 Act provides that the Appropriate Commission while determining the tariff shall safeguard the interest of consumer's interest and at the same time allow the recovery of the cost of electricity in a reasonable manner. The Appellate Tribunal for Electricity in Appeal No. 134/2008 & others had by judgment dated 3.6.2010 observed as under:

> *"33. As per the provisions of section 61(d) of the Electricity Act, 2003, while determining the tariff, the consumers interest should be safeguarded. Hence the tariff should be so determined that it should be the cheapest at the consumers end. This is a basic object of the Electricity Act 2003. Every case of additional capitalization which will give rise to the tariff has to be seen in the light of the above-said objective"*

12. Para 6 of the Commission's order dated 15.2.2016, is extracted as under:

> *"6. We have perused the said order dated 29.7.2010. In our view, the said order does not support the case of the petitioner. It is not mandatory for the petitioner to participate in the scheme under the Customer Funding Model as per the Policy of Ministry of Railways. As per the policy, the petitioner shall be refunded by Railways to rebate in the freight which is upto 7% of the amount invested every year. Further, the petitioner will receive interest on funds provided by it to railways the rate equal to the prevailing rate of dividend payable by railways to the general exchequer"*

13. There is no merit in the argument of the petitioner that the capital invested in rail infrastructure has to be necessarily recovered through tariff. It is evident from the Policy of the Ministry of Railways dated 10.12.2012 that the petitioner will receive the interest on the funds provided by it to Railways at a rate equal to the rate of dividend payable by Railways to exchequer. In addition, the petitioner has been allowed to retain the rebate in freight charges in consideration of the said investment made, while the beneficiaries are charged the normal

freight charges without considering the rebate in freight charges. Thus, the petitioner has been permitted to recover the cost of the investment made in a reasonable manner, despite the expenditure made not being allowed to be capitalised. Accordingly, the Commission had considered it prudent not to allow the expenditure incurred by the petitioner and had rightly rejected the prayer of the petitioner in order dated 15.2.2016. We may hasten to add here that the petitioner, based on the policy decision of MOP, GOI permitting the capitalisation of expenditure towards creation of infrastructure for supply of electricity within 5 kms radius, had claimed capitalisation of such expenditure in the tariff petitions of some of its generating stations for the period 2009-14 and the Commission instead of capitalising the said expenditure in tariff, had allowed the same as one-time payment, to be recovered in instalments. In this background, we are not inclined to accept the submission of the petitioner that the cost incurred for generation of power has to be allowed in tariff as per section 61 of the Act irrespective of the fact whether the Tariff Regulations have a provision for the said cost or not. The review of order on this ground is therefore not permitted.

14. It is further noticed that the petitioner, after considering certain parameters (as in para 7 above) and based on an illustrative payment made to Railways for ₹1000 crore has calculated and submitted that the net under recovery in terms of difference between interest provided by railway in the form of dividend and cost of capital of fund, comes to about 5.3% which corresponds to about ₹390 crore. These submissions of the petitioner do not merit any consideration as the same was neither raised in the original petition nor put forward by the petitioner during the hearing of the original petition. The petitioner cannot justify its prayer based on factors/parameters which have not been put to test before the Commission by way of pleadings in the original petition. In our view, these submissions of the petitioner are an afterthought and are devoid of merit. The petitioner instead of pointing out apparent errors, if any, in the order dated 15.2.2016 has sought to raise additional grounds/issues in review, which were not raised earlier. In our view, the petitioner has sought to reargue the case on merits, which is not permissible in review. We find no error apparent on the face of the record

warranting the review of order dated 15.2.2016. Accordingly, the submissions of the petitioner are rejected and the review on these grounds fails.

15. Accordingly, Petition No.21/RP/2016 is disposed of at the admission stage.

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| ***Sd/-*** | ***Sd/-*** | ***Sd/-*** |
| **(A.S.Bakshi)** | **(A.K. Singhal)** | **(Gireesh B. Pradhan)** |
| **Member** | **Member** | **Chairperson** |