

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 13/RP/2018 in
Petition No. 187/MP/2015 with IA No 13/IA/2018**

Coram:

**Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member**

Date of Order : 09.04.2019

Petition No. 13/RP/2018

In the matter of:

Review Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of Central Electricity Regulatory Commission (Conduct of business) Regulations, 1999 seeking review of the order dated 11.10.2017 in Petition No. 187/MP/2015.

And in the matter of:

Power Grid Corporation of India Limited,
'SAUDAMINI', Plot No-2,
Sector-29, Gurgaon – 122001 (Haryana)

....Review Petitioner

Vs

Essar Power Gujarat Limited (EPGL)
Equinox Business Park
5th Floor, Tower-2, Bandra-Kurla Complex
L.B.S. Marg, Kurla (W)
Mumbai-40070

.....Respondent

I.A. No. 13/IA/2018

In the matter of:

Powergrid Corporation of India Limited

..... Applicant

Vs.

Essar Power Gujarat Limited

.....Respondent



In the matter of:

Application seeking condonation of delay in filing the Review Petition.

For Petitioner: Shri S. B. Upadhyay, Senior Advocate, PGCIL
Ms. Swapna Seshadri, Advocate, PGCIL
Ms. Parichita Choudhary, Advocate, PGCIL
Shri S. K. Venkatesan, PGCIL
Shri Pankaj Sharma, PGCIL
Shri V. P. Rastogi, PGCIL
Shri Vivek Kumar Singh, PGCIL
Shri Zafrul Hasan, PGCIL

For Respondents : Shri Alok Shankar, Advocate, EPGL
Ms. Astha Sharma Advocate, EPGL
Ms. Shilpa Singh, Advocate, EPGL
Ms. Shruti Verma, EPGL

ORDER

Power Grid Corporation of India Limited (PGCIL) has filed the instant Petition No. 13/RP/2018 seeking review and modification of order dated 11.10.2017 in Petition No. 187/MP/2015. The prayer of the Review Petitioner is as under:-

- a. Admit the review petition;
- b. Review Paras 44 & 45 of the Order dated 11.10.2017 in so far as it directs the adjustment of Rs. 112 crores from the capital cost of the Essar-Bachau transmission line;
- c. Decide Petition No. 64 / TT / 2015 on its merits and based on the full capital cost incurred by Power Grid;
- d. Direct Power Grid to recover the tariff through POC and adjust Rs. 112 crores recovered from encashment of CBG towards transmission charges
- e. Pass any further order or orders as may deem just and proper.”



Background

2. Petition No. 187/MP/2015 was filed by Essar Power Gujarat Limited (EPGL) for adjudication of disputes and differences arising under the Transmission Service Agreement dated 3.1.2011 between EPGL and PGCIL for keeping in abeyance the connectivity in respect of Essar Gujarat-Bachau 400 kV D/C (Triple) line and extension of Bachau Sub-Station. The Commission heard together Petition Nos. 187/MP/2015 filed by EPGL and Petition No. 64/TT/2015 filed by PGCIL for determination of tariff. The Commission in order dated 11.10.2017 in Petition No. 187/MP/2015 held that EPGL's project was not affected by force majeure and that the subject transmission line was executed by PGCIL on account of failure of EPGL to provide clarity whether the transmission line was required or not. The Commission in the said order permitted PGCIL to encash the bank guarantee given by EPGL to it and adjust the same against the capital cost of the subject transmission project. Aggrieved by the order of the Commission dated 11.10.2017, EPGL preferred Appeal No.333 of 2017 before the Appellate Tribunal for Electricity wherein the Review Petitioner is Respondent. The appeal is pending disposal before the Appellate Tribunal for Electricity.

3. Review Petitioner has submitted that the observations of the Commission in the impugned order dated 10.11.2017 has impacted and pre-judged Petition No. 64/TT/2015 and it is for this reason that it has filed the instant Review Petition.

4. The brief submissions of the Review Petitioner are as under:-

- (a) The Commission has erred in the impugned order dated 11.10.2017 by observing that the Review Petitioner is to reduce the amount of ₹112 crore



from its capital cost and it amounts to pre-judging the tariff Petition No.64/TT/2015 filed by the Review Petitioner which is yet to be decided. This approach of the Commission is de hors the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as “the 2014 Tariff Regulations”). The well settled principle of tariff determination requires that the capital cost incurred needs to be serviced through the tariff. Any amount recovered cannot be deducted from capital cost and tariff has to be determined based on the full capital cost incurred.

- (b) There is no provision in the 2014 Tariff Regulations which requires that the capital cost will be reduced by certain amount and thereafter tariff will be determined. The Hon’ble Supreme Court in the matter of PTC India Limited V. Central Electricity Regulatory Commission (2010) 4 SCC 603 has regarded the supremacy of statutory regulations and observed that notified regulations are binding on all including the Commission.
- (c) Regulation 9(1) and (6) of 2014 Tariff Regulations provide the modus operandi to deal with grant/assistance received from agencies which is reproduced as follows:-

“9. Capital Cost:

(1) The Capital cost as determined by the Commission after prudence check in accordance with this regulation shall form the basis of determination of tariff for existing and new projects.”

“(6) The following shall be excluded or removed from the capital cost of the existing and new project:

- (a) The assets forming part of the project, but not in use;



- (b) De-capitalisation of Asset;
- (c) In case of hydro generating station any expenditure incurred or committed to be incurred by a project developer for getting the project site allotted by the State government by following a two stage transparent process of bidding; and
- (d) the proportionate cost of land which is being used for generating power from generating station based on renewable energy:

Provided that any grant received from the Central or State Government or any statutory body or authority for the execution of the project which does not carry any liability of repayment shall be excluded from the Capital Cost for the purpose of computation of interest on loan, return on equity and depreciation;”

- (d) Impugned order dated 11.1.2017 falls under Regulations 6 and 7 of 2014 Tariff Regulations which deal with the tariff determination and application for determination of tariff respectively. Since Petition No. 64/TT/2015 is complete in all respects, the Commission should determine tariff in terms of Regulation 7(6) of 2014 Tariff Regulations.
- (e) Orders of the Commission must have regulatory back up. The impugned order dated 11.10.2017 to the extent it holds that the Review Petitioner has to reduce the amount of ₹112 crore from its capital cost is erroneous as the tariff is required to be determined at full capital cost.

5. On the aforementioned pleadings, the Review Petitioner has sought review of the impugned order dated 11.10.2017 on the aspect of (i) directing the Review Petitioner in paragraphs 44 and 45 for adjustment of ₹112 crore, (ii) adjudicate Petition No. 64/TT/2015 on its own merits with full capital cost as incurred by the Review Petitioner, (iii) direct the Review Petitioner to recover the tariff through PoC mechanism and adjustment of ₹112 crore recovered by way of encashment of bank guarantee towards transmission charges.



6. Review Petitioner filed IA No. 7 of 2018 for expunction of certain portions of paras 42 and 46 of the order dated 11.10.2017 in Petition No. 187/MP/2015. After hearing the parties at length on the said IA, the Commission vide its order dated 18.1.2019 clarified the intent of the Commission in para 42 and expunged certain portions from para 46 of the order dated 11.10.2017 by a detailed order. I.A. No. 7 of 2018 was accordingly disposed of.

7. The Review Petitioner has also filed IA No. 22 of 2018 entreating the Commission to keep in abeyance the directions given in the impugned order in paragraph 45 regarding adjustment of ₹112 crore towards the capital cost incurred by it till the Review Petition is decided. The Commission vide its order dated 26.4.2018 disposed of the said I.A. with the observation that para 45 of the order dated 11.10.2017 in Petition No. 187/MP/2015 to the extent that the adjustment of encashed bank guarantee against the capital cost shall not be given effect till further order in the Review Petition. The Commission further directed the Respondent to file its reply on the maintainability as well as on merits.

8. The Review Petitioner has also filed I.A. No. 13 of 2018 for condonation of 70 days delay in filing the Review Petition. The Review Petitioner has submitted that in the present case the concerned generator had abandoned its generation due to which it was impossible to raise the bill on it and that it was a unique case which was handled by it for the first time. On account of legal consultations and absence of similar precedent caused delay in filing the instant Review Petition. The Respondent has raised objections regarding condonation of delay in filing the Review Petition and its



maintainability. We have dealt with IA No. 13 of 2018 in the subsequent paragraphs of this order.

9. No reply to the Review Petition was filed by the Respondent. However, both the Review Petitioner and Respondent have filed their respective written submissions. The Review Petitioner has also filed the reply to the written submissions filed by the Respondent, EPGL.

Submissions by the Review Petitioner and Respondents

10. Learned senior counsel for the Review Petitioner has contended that the observation of the Commission in the impugned order dated 11.10.2017 permitting the Review Petitioner to encash the bank guarantee for adverse progress of the generating station of the Respondent and on its recovery by adjusting the capital cost of the subject transmission project is erroneous. He further contended that the said observation of the Commission has no regulatory backup in the 2014 Tariff Regulations. He contended that cardinal principle for tariff determination requires that the capital cost incurred needs to be serviced through the tariff. He emphasized that any amount recovered cannot be deducted from the capital cost, and that tariff has to be determined on the full capital cost incurred. He contended that Regulation 9(1) and (6) of the 2014 Tariff Regulations provide for reduction of the grant, if any, received from Central or State Government or any statutory body or authority for the execution of the project which does not carry any liability of repayment, from the capital cost of the project for the purpose of computation of interest on loan, return on equity and depreciation. He contended that there is no provision in 2014 Tariff Regulations which requires that the



capital cost will be reduced by certain amount and thereafter tariff will be determined. He further contended that apex Court in the matter of PTC India Limited V. Central Electricity Regulatory Commission (2010) 4 SCC 603 has regarded supremacy of statutory regulations and observed that notified regulations are binding on all including the Commission. He also placed reliance on the case of GUVNL Vs. Essar Power Limited (2008) 4 SCC 755 and Mathura Prasad Vs. Union of India & Ors. (2007) 1 SCC 437. He submitted that the impugned order is required to be modified to the extent it observes that the Review Petitioner should reduce the amount of ₹112 crore from its capital cost and requested that the tariff should be determined at the full capital cost.

11. In response, learned counsel for the Respondent submitted that in terms of Section 10 of CPC, multiple proceedings before two different forums relating to the same issue are barred. He further contended that in terms of Order 47 Rule 1 of CPC, the Review Petition filed before the lower forum cannot be entertained when the appeal is already pending before the Appellate forum. He submitted that in the present case, the Respondent has challenged the impugned order before the Appellate Tribunal for Electricity in Appeal No. 333 of 2017 which is pending adjudication. He submitted that to avoid multiplicity of proceedings, the present Review Petition filed by the Review Petitioner is not maintainable. He contended that in terms of Article 5 of the Transmission Service Agreement (TSA), the encashment of bank guarantee shall be utilized to compensate any losses or damages which the Review Petitioner may have sustained on account of any default on the part of the Respondent but the Review Petitioner has failed to show the actual loss or damage being suffered by it on account



of default of the Respondent. He further contended that allowing a higher capital cost will increase the tariff and it will be against the interest of the general public. He contended that in terms of Article 5 of the TSA, encashment of bank guarantee is required to be adjusted against the losses sustained by the Review Petitioner on account of default of the Respondent and not otherwise. He submitted that the Review Petition has no merits and it may be disposed of with costs. He further submitted that the delay of 70 days in filing the Review Petition cannot be condoned.

12. In response, the Review Petitioner has contended that Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Conduct of Business Regulations, 1999 empowers the Commission to entertain any Review Petition including condonation of delay in filing the Review Petition. The Review Petitioner has further contended that Respondent herein has preferred appeal in the instant case before the Appellate Tribunal for Electricity on entirely different issues. The Review Petitioner has not filed any appeal before the Appellate Tribunal for Electricity. However, Review Petitioner has contended that there is no bar in maintaining the Review Petition before this Commission if it is able to establish an error apparent on the facts on record. Review Petitioner has further contended that the same party can file both review and appeal simultaneously. The only restriction for the review Court is that if the Appellate Court has already decided the appeal on merits, then the Review Petition cannot proceed. Regarding maintainability of a Review Petition and Appeal filed by the same party, Review Petitioner has relied upon the case of Thungabhadra Industries Ltd. Vs. Government of Andhra, AIR 1964 SC 1372. Referring to the contention of the



Respondent regarding damages/losses as contemplated under Article 5 of the TSA, Review Petitioner has contended that the recovered amount of ₹112 crore shall be refunded to the DICs as soon as tariff is determined and consequential issues are decided. Review Petitioner has submitted that it is not seeking a higher capital cost but only the capital cost which has been incurred by it in setting up the transmission project. Review Petitioner has submitted that in most of the cases the Commission has taken a view that transmission charges should be paid by the defaulting party if the transmission asset is not used due to reasons attributable to defaulting party.

Analysis and Decision

13. The Review Petitioner filed I.A. No. 13 of 2018 for condonation of delay of 70 days in filing the Review Petition. The Respondent has submitted that the Commission is not empowered to entertain and condone the delay in filing the Review Petition. After considering the rival submissions of the parties, we find that the Commission is empowered under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Conduct of Business Regulations, 1999 to entertain and decide the Review Petitions. Considering the facts mentioned in I.A. No. 13 of 2018 which is supported by the affidavit of Review Petitioner, we condone the delay in filing the instant Review Petition. Accordingly, I.A. No. 13 of 2018 is disposed of.

14. After going through the detailed submissions of the Review Petitioner, we find that it is mainly aggrieved by the impugned order to the extent of adjustment of recovered amount of bank guarantee of the Respondent against the capital cost of the subject transmission project. The relevant excerpts of the impugned order are as under:-



“44. We have considered the submissions of the Petitioner and Respondent. The subject transmission line has been constructed as a connectivity line for evacuation of power from the Phase II of the generating station of the Petitioner. The Petitioner has claimed force majeure conditions for delay in the commissioning of the generation project. We have rejected the claim of the Petitioner for force majeure. Since the transmission system has been executed based on the connectivity granted and Transmission Agreement signed and the letter of the Petitioner dated 16.8.2011, the Petitioner has to either use it and pay the transmission charges or continue to pay the transmission charges till the transmission line is utilized or pay the relinquishment charges if it intends not to use the connectivity line. PGCIL is also entitled to encash the bank guarantee in terms of the Article 5.0 (c) of the Transmission Agreement on account of adverse progress of the generation project. There is no provision for keeping the connectivity and LTA of the transmission line in abeyance which will result in non-recovery of the investment made. Further, the Petitioner cannot be exempted from paying the transmission charges for the subject transmission line. Accordingly, we reject prayers at para 5.2 and 5.3.

45. It has emerged during the analysis of various pleadings that the Petitioner was exploring utilization of the subject transmission line by connecting to the bays in Phase I of the generation project. Since Phase I is dedicated to GETCO, the Petitioner is required to get consent of GETCO. We also notice that a number of wind and solar generation projects are coming up in Bachau area. CTU in consultation with CEA, GETCO and the Petitioner may explore the possibility of optimum utilization of the Essar Gujarat TPS-Bachau 400 kV D/C (Triple) Line. Till alternative arrangements for utilization of the said transmission line, the Petitioner shall continue to pay the transmission charges as determined by the Commission. As already held, PGCIL is at liberty to encash the bank guarantee for adverse progress of the generating station of the Petitioner and the same on recovering shall be adjusted against capital cost of the subject transmission projects.”

15. As per the impugned order, the Review Petitioner was permitted to encash the bank guarantee and it was required to be adjusted against the capital cost of the subject transmission project. Review Petitioner has submitted that the aforesaid observation of the Commission is not backed by 2014 Tariff Regulations and any observation which is not backed by Regulation is erroneous. In support of its plea, the Review Petitioner has placed reliance on PTC India Limited Vs. Central Electricity Regulatory Commission (2010) 4 SCC 603 (supra) contending that notified regulations are binding on all including the Commission. The Review Petitioner has also submitted that by reduction of the amount of ₹112 crore from its capital cost, recovered by way of encashment of



bank guarantee from the Respondent, amounts to pre-judging the tariff Petition No.64/TT/2015 filed by the Review Petitioner which has not yet been decided.

16. On the other hand, learned counsel for the Respondent has submitted that in terms of Order 47 Rule 1 of CPC, Review Petition filed before this Commission cannot be entertained when the appeal is already pending before the appellate forum. He further submitted that in the present case, the Respondent has challenged the impugned order before the Appellate Tribunal for Electricity in Appeal No. 333 of 2017 but the same has not been decided so far. He submitted that the present Review Petition filed by the Review Petitioner is not maintainable.

17. As regards the legality of maintaining both the Review Petition and Appeal simultaneously by the same party, we are of the view that the law is well settled on this aspect by the Hon'ble Apex Court in Thungabhadra Industries Ltd. Vs. Government of Andhra reported in AIR 1964 SC 1372. However, the issue in the present case is somewhat different. The Appeal against the impugned order in the present case is preferred by the Respondent herein who filed Petition No. 187/MP/2015 and the Review Petitioner is Respondent in the said petition. To set at rest this controversy, we feel it proper to reproduce Order XLVII Rule 1 of Code of Civil Procedure, 1908 which provides as under:-

“Review

(1) Any person considering himself aggrieved-

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed, or



(c)

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant, or when being Respondent, he can present to the Appellate Court the case on which he applies for review.”

18. On perusal of the provision of Order XLVII Rule 1, we find that any aggrieved person can approach for review against any decree or order from which an appeal is allowed but from which no Appeal has been preferred. Further, as per order XLVII Rule 2 of the CPC a party who is not appealing from a decree or order may apply for a review of judgment despite the fact that there is an Appeal pending by some other party but the grounds of Appeal and review should not be the same. In the present case, against the impugned order, an Appeal has been preferred by the Respondent, EPGL against encashment of BG.

19. However, the Review Petitioner has categorically stated that it filed the Review Petition for review of the order with regard to adjustment of the amount against the capital cost. The prayer in appeal filed by the Respondent in APTEL are as under:-

“a) Allow the present appeal and set aside the Impugned Order dated 11.10.2017 passed by the Hon’ble Commission in Petition No187/MP/2015 to the extent the same has been challenged in terms of the facts and grounds indicated above;”

Thus, we find that the grounds of review filed by the Review Petitioner are different from the grounds of appeal filed by the Respondent in APTEL. We, therefore, are of the view that the Review Petition is maintainable before this Commission.

20. As regards the adjustment of the encashed BG against the capital cost, we find merit in the contention of the Review Petitioner that as per the 2014 Tariff Regulations,



only the grants received from the Central Government or the State Government or any statutory body or authority are reduced from the capital cost. The Regulation 9(1) and 9(6) of the 2014 Tariff Regulations is reproduced hereunder:-

“9. Capital Cost:

(1) The Capital cost as determined by the Commission after prudence check in accordance with this regulation shall form the basis of determination of tariff for existing and new projects.”

“(6) The following shall be excluded or removed from the capital cost of the existing and new project:

(a) The assets forming part of the project, but not in use;

(b) De-capitalisation of Asset;

(c) In case of hydro generating station any expenditure incurred or committed to be incurred by a project developer for getting the project site allotted by the State government by following a two stage transparent process of bidding; and

(d) the proportionate cost of land which is being used for generating power from generating station based on renewable energy:

Provided that any grant received from the Central or State Government or any statutory body or authority for the execution of the project which does not carry any liability of repayment shall be excluded from the Capital Cost for the purpose of computation of interest on loan, return on equity and depreciation;”

There is no provision for adjustment of lump sum amount recovered from the LTTCs.

To this extent, we are of the view that the impugned order needs to be reviewed.

21. Accordingly, we direct that the encashed BG alongwith the interest accrued therein from the date of encashment shall be adjusted against the annual transmission charges of the subject transmission system after the tariff for the said transmission line is determined in Petition No. 64/TT/2015. The order is accordingly modified.



22. Review Petition No. 13/RP/2018 alongwith IA No. 13/IA/2018 is disposed of in terms of the above.

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(P.K. Pujari)
Chairperson

