

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 17/RP/2022

in

Petition No. 452/MP/2019

Coram:

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri Pravas Kumar Singh, Member

Date of Order: 30th November, 2022

In the matter of

Petition for review of the order dated 24.3.2022 and corrigendum order dated 26.4.2022 in Petition No. 452/MP/2019 relating to approval for revision of Lignite Transfer Price of NLCIL Mines for the 2014-19 tariff period as per Ministry of Coal guidelines dated 2.1.2015.

And

In the matter of

NLC India Limited,
135/73, EVR Periyar Salai, Kilpauk
Chennai – 600 010,

...Review Petitioner

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited,
NPKRR Maaligai, 144, Anna Salai,
Chennai – 600 002.
2. Transmission Corporation of Andhra Pradesh,
Vidyut Soudha, Khairatabad,
Hyderabad-500 082.
3. Southern Power Distribution Company of Andhra Pradesh Limited,
D.No:19-13-65/A, Srinivasapuram, Tiruchanoor Road, Tirupathi,
Andhra Pradesh – 517501.
4. Eastern Power Distribution Company of Andhra Pradesh Limited,
P&T Colony, Seetammadhara, Vishakapatnam,
Andhra Pradesh – 503013.
5. Transmission Corporation of Telangana,
Vidyut Soudha, Khairatabad,
Hyderabad-500 082.



6. Northern Power Distribution Company of Telangana Limited,
H. No. 1-1-504, Opposite NIT petrol pump, Chaityanayapuri Colony,
Hanmkonda, Warangal (Telangana) - 506 004.

7. Southern Power Distribution Company of Telangana Limited,
2nd Floor, H.No.6-1-50, Mint Compound,
Hyderabad – 500 063.

8. Power Company of Karnataka Limited,
KPTCL Complex, Kaveri Bhavan,
Bangalore – 560 009.

9. Bangalore Electricity Supply Company Limited,
Krishna Rajendra Circle,
Bangalore - 560 001.

10. Mangalore Electricity Supply Company Limited,
Corporate Office, MESCOM Bhavana, Bejai, Kavour Cross Road,
Mangalore 575 004.

11. Chamundeshwari Electricity Supply Company Limited
Corporate office No.CA 29, Vijayanagar, 2nd Stage, Hinakal,
Mysore -570017.

12. Gulbarga Electricity Supply Company Limited,
Station main road, Gulbarga -585 102, Karnataka.

13. Hubli Electricity Supply Company Limited,
P.B.Road, Navanagar, Hubli - 580 025.

14. Kerala State Electricity Board Limited
Vaidyuthi Bhavanam, Pattom,
Thiruvananthapuram – 695 004.

15. Puducherry Electricity Department,
137, NSC Bose Salai,
Puducherry - 605 001

...Respondents

Parties present:

Shri Kulamini Biswal, Advocate, NLCIL
Shri Ajitesh Garg, Advocate, NLCIL
Shri Adarsh Tripathi, Advocate, NLCIL
Shri P. Vasughi, NLCIL
Shri P. Ravikumar, NLCIL
Shri A. Srinivasan, NLCIL
Shri S. Vallinayagam, Advocate, TANGEDCO
Ms. B. Rajeswari, TANGEDCO
Ms. R. Ramalakshmi, TANGEDCO
Ms. R. Alamelu, TANGEDCO



ORDER

Petition No. 452/MP/2019 was filed by the Review Petitioner seeking approval for revision of Lignite Transfer Price of NLCIL mines for the period 2014-19, on account of truing-up of additional capitalisation for 2014-19, O&M expenses, overburden removal and consequent depreciation and return on equity as per Ministry of Coal (MOC) guidelines dated 2.1.2015, and the Commission disposed of the same vide Order dated 24.3.2022. Subsequently, the said order was revised vide corrigendum order dated 26.4.2022. Aggrieved by the orders dated 24.3.2022/ 26.4.2022 (in short, 'the impugned orders'), the Review Petitioner has filed this review petition, on the ground that there are errors apparent on the face of record, limited to the following issues:

- A. *Disallowance of additional capitalization in respect of 'New Assets' under heads of SI no. 6 to SI no. 9 (para 27);*
- B. *O&M Expenses*
 - (i) *Non-executive Wage revision impact for the period 2012-14 was not considered in trued up order for 2009- 14 and 2013-14 trued up price has been considered as the base rate for 2014-19 truing up (para 35).*
 - (ii) *Imposition of escalation rate ceiling at 11.5% year on year mine wise contrary to the stipulation of MOC guidelines with respect to pooled mines for the period 2014-19 (para 39).*
- C. *Disallowance of Stores for the purpose of interest on working capital instead allowed stores and spares. Also, the methodology adopted for arriving the Mines portion of spares is not in line with the actual consumption Stores & Spares in Mines (para 58).*
- D. *Applicability of Surcharge/Interest on truing up from NLCIL to Beneficiary.*

2. The Petitioner vide its affidavit dated 15.6.2022, has submitted additional information to take on record the clarification letter dated 9.6.2022 issued by MOC, GOI, with regard to the Lignite Transfer Price guidelines 2014-19.



Hearing dated 24.6.2022

3. During the hearing of Review Petition on 24.6.2022, the learned counsel for the Review Petitioner, made detailed oral submissions. However, the learned counsel for the Respondent TANGEDCO, raised preliminary objections, on the 'maintainability' of the Review Petition, stating that the MOC, GOI clarification letter dated 9.6.2022, issued after the impugned order dated 24.3.2022, and relied upon by the Review Petitioner, cannot be considered. The Commission, after hearing the parties permitted the Respondent TANGEDCO, to file its reply on 'maintainability' and the Review Petitioner to file its rejoinder to the same. In response, the Respondent TANGEDCO vide affidavit dated 11.7.2022, has filed its reply on 'maintainability' of the Review Petition, and the Review Petitioner has filed its rejoinder to the same vide affidavit dated 21.7.2022.

Hearing dated 12.8.2022

4. During the hearing of the Review Petition on 'maintainability', the learned counsel for the Review Petitioner made detailed oral submissions, stating that the Review Petition was 'maintainable' and prayed that the same, may be admitted and heard on merits. The learned counsel for the Respondent TANGEDCO, made detailed submissions, contending that the Review Petition was not maintainable. The Commission after hearing the parties reserved its order on 'maintainability', after permitting the parties to file their written submissions. In compliance thereof, the Review Petitioner has filed its written submissions on 25.8.2022 and the Respondent TANGEDCO has filed its written submissions on 31.8.2022. Based on the submissions of the parties and the documents available on record, we proceed to examine the issues raised in the Review Petitioner 'on maintainability' in the subsequent paragraphs.



Maintainability

MOC Clarification letter dated 9.6.2022

5. The Review Petitioner vide affidavit dated 15.6.2022, has enclosed the copy of the clarification issued by MOC, GOI dated 9.6.2022, with regard to the pooling of Neyveli Mines, additional capitalisation of assets and components of working capital, in the computation of interest on working capital, based on the clarification sought by the Review Petitioner and has prayed to take the same on record, while considering the prayers in the Review Petition.

6. The Respondent TANGEDCO has mainly submitted that the Review petition is not maintainable for the following reasons:

- (i) The clarification dated 9.6.2022 issued by the MOC are post the judicial decision of this Commission under its adjudicatory functions in terms of the Electricity Act, 2003 (Act). The present clarification sought by the Review petitioner and granted by MOC, specifically referring to this order amounts to an appeal being filed before MOC, against the findings of this Commission, which is not permissible in law.
- (ii) The Hon'ble Supreme Court has repeatedly held that the Electricity Act, 2003 does not provide for any interference by the Government in the tariff determination process by the Regulatory Commission. In these circumstances, no clarification can be given by any government instrumentality which interferes with the tariff already determined by the Regulatory Authority under its adjudicatory jurisdiction as conferred under the Act.
- (iii) The MOC clarification dated 9.6.2022 has many deviations from the existing guidelines dated 2.1.2015 in respect of (i) pooling of mines (ii) additional capitalization and (iii) components of working capital. The orders of this Commission are sought to be modified by making major deviations from the existing guidelines in the name of clarification, which are post the judicial determination of the dispute by a Regulatory Commission.
- (iv) Any new guideline /order issued after the issue of order by this Commission, should be considered as post facto material and cannot be considered by means of a review petition. The impugned orders were issued based on the existing MOC guidelines dated 2.1.2015. It is settled proposition of law that rules and regulations have prospective application. Otherwise, on every clarification of a rule or guideline, the adjudicatory process already undergone



and decided upon will have to be reopened and there will be no finality to the issues under dispute.

- (v) In terms of the judgment of the Hon'ble Supreme Court in *UOI vs Tushar Ranjan Mohanty* no legislation enacted after the passing of an order by an adjudicating authority can invalidate an order. In this case, MOC has issued clarification referring to orders of this Commission, after three months of passing the adjudicatory order, with an intent to override the effect of the order of this Commission.

7. Accordingly, the Respondent TANGEDCO has submitted that the Review Petition is liable to be dismissed with costs.

8. The Review Petitioner, vide its rejoinder affidavit dated 21.7.2022 has submitted the following:

- a) Prior to 1.4.2019, the transfer pricing of lignite was governed by the guidelines issued by the MOC. Thereafter, MOC on 2.1.2015, after conducting detailed consultations with all the Discoms, issued the said guidelines. After the impugned orders of this Commission, the Review Petitioner, in the interest of justice and in the bonafide manner approach the MOC and sought clarification with respect to the guidelines dated 2.1.2015, limited to the observations made by the Commission, against which the Review Petitioner has preferred the Review Petition.
- b) MOC has issued the said clarification pertinently in terms of its guidelines dated 2.1.2015. The same is not subsequent/new notification/direction issued by the MOC, but the same merely clarifies the aspects elucidated within the said guidelines. Therefore, the same can in no manner be said to be an Appeal or reference taken by the Review Petitioner against the impugned order, before the MOC. The Review Petitioner has neither intended to challenge nor assailed the impugned orders before the MOC, but has merely sought clarification in terms of the guidelines, on the basis of which the claims are to be adjudicated by the Commission.
- c) The Commission ought to consider that the clarification issued by the MOC is only an explanation of the existing guidelines issued by the MOC on the basis of which the tariff of the Petitioner has to be determined for the relevant periods. It is evident from order dated 15.9.2005 in Petition No. 5/2022 that the clarification issued by the MOC is merely an explanation towards the existing guidelines.
- d) The Review Petitioner has mentioned in the Review Petition that all deviations made by this Commission from the guidelines issued by the MOC in terms of which the Lignite Transfer Price of NLCIL mines has to be determined, clearly comes out to be errors apparent on the face of record.



- e) A bare perusal of guidelines dated 2.1.2015 as well as the clarification dated 9.6.2022 issued by MOC makes it clear that the observation of this Commission in the impugned orders are in deviation from the said guidelines on the basis of which the tariff had to be determined, which is prima facie an error apparent face on the record.
- f) Any deviation from the guidelines while determining the tariff of the Review Petitioner for the concerned period in itself a mistake/error apparent on the face of record qualifying as a ground for Review. There lies no question of prospective/ retrospective effect of the clarification dated 9.6.2022 as the same is neither anew direction or a new guideline, but is simply an explanation issued by the MOC. Therefore, the submission of the Respondent is a post judicial clarification is denied and holds no ground.

9. Accordingly, the Review Petitioner has submitted that the Review Petition may be admitted on the issues raised above.

10. The Respondent TANGEDCO and the Review Petitioner in their written submissions have mainly reiterated the submissions made in their reply and rejoinder, as above.

Analysis and Decision

11. We have examined the matter. The Review Petitioner has sought review of the impugned orders dated 24.3.2022/26.4.2022, on the issues raised in paragraph 1 above, on the ground that the Commission has deviated from the MOC guidelines dated 2.1.2015 and the findings in the said order, is also not in terms of the MOC clarification dated 9.6.2022. This has been objected by the Respondent TANGEDCO, stating that the clarification sought by the Review Petitioner and granted by MOC, specifically referring to the impugned orders, amounts to an appeal filed before MOC against the findings of this Commission and the same is not permissible in law. Per contra, the Review Petitioner has contended that the clarifications issued by MOC on 9.6.2022 are a mere explanation to the MOC guidelines dated 2.1.2015 and is neither a new direction or a new guideline.



12. It is pertinent to note that in the present case, the impugned order was issued on 24.3.2022. Subsequently, the Review Petitioner had approached the MOC, GOI (vide its letters dated 4.5.2022, 23.5.2022 and 24.5.2022) against the findings of the Commission in the impugned order dated 24.3.2022 (in Petition No. 45/MP/2019), seeking clarification on issues namely (i) pooling of Neyveli mines (ii) additional capitalisation of assets and (iii) components of working capital for the purpose of interest on working capital. The MOC, GOI, had after examining these issues has given its clarification on 9.6.2022, and the same has been relied upon by the Review Petitioner, in support of its grounds for review of the impugned order. In our view, the MOC clarification dated 9.6.2022, is a subsequent event, which cannot be taken into consideration, for review of the impugned order dated 24.3.2022. In other words, the said MOC clarification cannot have any retrospective application, for reviewing the impugned order dated 24.3.2022. Even otherwise, the MOC, GOI is not an appellate authority, to review the findings of this Commission in the impugned order dated 24.3.2022 and therefore, the clarification issued by it on 9.6.2022, cannot be taken into consideration in the present case. Therefore, the reliance placed by the Review Petitioner upon the clarification dated 9.6.2022, to contend that there are errors in the impugned order dated 24.3.2022 is misconceived and is not tenable. As rightly pointed out by the Respondent TANGEDCO, the MOC clarification dated 9.6.2022, issued at the request of the Review Petitioner, cannot be considered in review, to override the impugned orders. In this background, we find no reason to take on record the MOC clarification dated 9.6.2022, to review the impugned orders with respect to the issues raised by the Review Petitioner in paragraph 1 above. In simple terms, the issues raised in the Review Petition shall be considered *dehors* the MOC clarification dated 9.6.2022. Therefore, the prayer of the Review Petitioner to consider and allow the prayers in terms of the MOC clarification dated 9.6.2022, is not maintainable.



O&M Expenses

13. The Review Petitioner has submitted that as per the MOC guidelines for fixation of transfer price for NLCIL mines for the period 2014-19, the actual O&M expenses incurred in 2013-14 with 11.5% escalation shall be the base O&M for the first year of the tariff period (2014-15) and thereafter, the O&M expenses shall be escalated at 11.5% per annum, to be trued up at the beginning of the next tariff period. It has also submitted that the year on year escalation on 11.5% on mine-wise truing up of O&M expenses for 2013-14 as considered by the Commission, in the impugned order, is not in line with the Lignite Transfer Price guidelines applicable for the period 2014-19, as the said guidelines is specified only for pooled lignite mines. It has further submitted that the wage revision impact based on the Commission's order dated 9.7.2018 in Petition No. 32/MP/2018, has also not been considered. The Review Petitioner has added that the adoption of year-wise and mine-wise O&M expenses, has adversely affected the determination of lignite transfer price. The Respondent TANGEDCO has submitted that the Review Petitioner has not brought on record any error apparent on the face of record which warrants the review of the impugned orders, on this ground.

Analysis and Decision

14. We have examined the matter. The main grievance of the Review Petitioner is that the truing-up of O&M expenses on year-wise and mine-wise basis, is not in line with the lignite transfer price under the 2014-19 guidelines, as the said guidelines provide for the consideration of O&M expenses on pooled lignite mine basis. The Review Petitioner has submitted that the Commission had allowed the pooling of mines concept since 1998, as evident from Commission order dated 15.9.2005 in Petition No. 5/2022. It is however noticed that in the Commission's order dated 20.3.2017 in Petition No. 149/MP/2015 (approval of revised lignite transfer price of NLCIL mines for the period 2009-14 on account of truing up of additional capitalisation,



O&M expenses, etc as per MOC guidelines, 2009), the prayer of the Review Petitioner to consider O&M expenses on pooled lignite mines basis was rejected. Against this order the Review Petitioner has filed Appeal No. 185 of 2017 before the Appellate Tribunal for the Electricity ('the Tribunal') and the same is pending. Since the guidelines with regard to the computation of O&M expenses for the period 2009-14 and 2014-19 are similar, and the findings of the Commission on the issue of O&M expenses in order dated 20.3.2017, has been challenged by the Review Petitioner and is *subjudice* before the Tribunal, we find no reason to consider the issue of O&M expenses in this Review Petition. This is however subject to the final decision of the Tribunal in Appeal No. 185 of 2017.

15. The remaining issues for consideration in the Review Petition are the following:

- a) *Disallowance of additional capitalization in respect of 'New Assets' under heads of SI no. 6 to SI no. 9 (para 27);*
- b) *Disallowance of Stores for the purpose of interest on working capital instead allowed stores and spares. Also, the methodology adopted for arriving the Mines portion of spares is not in line with the actual consumption Stores & Spares in Mines (para 58).*

16. As regards issues (a) and (b) above, the Review Petitioner has submitted that the MOC guidelines stipulated additional capitalisation based on annual budget plans as the same ought to be submitted at the time of truing up of tariff. It has also referred to the Commission's order dated 4.6.2008 in Petition No. 118/2007 and pointed out that the expenditure on other assets or ancillary equipment was allowed by the Commission. The Review Petitioner has also submitted that the Commission in its earlier orders for the tariff period 2004-09 and 2009-14 had allowed both stores and spares in the computation of interest on working capital. It has further submitted that in the 2019 Tariff Regulations, as amended on 13.9.2021, the Commission has considered both stores and spares for the computation of interest on working capital.



17. We have examined the matter. The main contention of the Review Petitioner is that the Commission has deviated from the MOC guidelines dated 2.1.2015 (which was similar to the 2009 MOC guidelines) on these issues and the findings of the Commission are also not in line with its earlier orders issued for the periods 2004-09 and 2009-14. This according to us, is an error apparent on the face of the order and the Review Petition is 'maintainable' on these issues. Accordingly, the Review Petition is admitted on the issues (a) and (b) above.

18. As regards issue (d) regarding the applicability of surcharge and interest, (as prayed in para 1 above), the same will be guided by the provisions of the 2014-19 Tariff Regulations.

19. As regards the submission of the Review Petitioner (in para 13 above) that the wage revision impact based on the Commission's order dated 9.7.2018 in Petition No.32/MP/2018 has not been considered, we direct that the same shall be considered on merits, after hearing the parties.

20. Having held that the Review Petition is 'maintainable' on the issues (a) and (b) in paragraph 15 and in paragraph 18 above, we direct the Respondents to file their replies, on merits, on or before **19.12.2022**, after serving copies to the Petitioner, who may, file its rejoinders, if any, by **31.12.2022**. The parties shall ensure that pleadings are completed by them within the due dates mentioned and no extension of time shall be granted for any reason.

21. Matter shall be listed for hearing on **19.1.2023**.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S. Jha)
Member

