

JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION RANCHI
(Case No. 07 of 2014)

Dated the 26th August, 2014

QUORUM: Hon'ble Mr.T Munikrishnaiah, Member (E)
Hon'ble Mr. Sunil Verma, Member (F)

IN THE MATTER OF

An application for review of APR order for FY 2012-13 of Tata Power Company Limited (TPCL)

M/s Tata Power Company Limited (TPCL) Petitioner

Present for the Petitioner: Shri Aweek Chatterjee Group Head Corp. Regulation, TPCL
Shri Ashok Kumar Lodh, Head Operation
Shri Satish Kumar, Head (F&A)
Shri Shubhayu Sanyal, Corp. Regulation

(ORDER)

1. M/s Tata Power Company Limited, hereinafter referred to as "the Petitioner or TPCL" has filed a petition for review of the Tariff Order dated April 28, 2014 for the year 2012-13. The Petitioner has requested to review the said Tariff Order on two counts viz. (i) Disapproval of HO expenses and (ii) Disapproval of Heat Rate.

2. The Petitioner has filed the review petition under provisions of the JSERC (Conduct of Business Regulations) 2011 as quoted below.

"36. Review of the decisions, directions and orders

(1) The Commission may at any time, on its own motion, or on an application of any of the person(s) or parties concerned, within 30 days of the making of such decision, directions or order, review such decision, directions or orders and pass such appropriate orders as the Commission deem fit;

Provided that power to review by the Commission on its own motion under this clause may be exercised only for correction of clerical or arithmetical mistakes arising from any accidental slip or omission.

(2) An application for such review shall be filed in the same manner as a petition under Chapter II of these Regulations."

3. It is important to understand that while dealing with an application for a review of an Order, it is very necessary to process the application with utmost caution as the powers of review are not ordinary powers.

4. The provisions relating to review of an Order constitute an exception to the general Rule to the effect that once a judgement is signed and pronounced, it cannot be altered. Therefore, the Orders are not generally interfered with, till there are circumstances as defined under the law which make it necessary for a Court to alter or modify or reverse its original judgement. The application and the scope of the review of an Order are circumscribed under Order 47, Rule 1, of Code of Civil Procedure. The power of review is not inherently vested with a Court or a Tribunal or a Commission. The right and power of review does not exist unless conferred by law expressly or by necessary implication.

5. With the enactment of the Electricity Act, 2003, the State Electricity Regulatory Commissions have been vested with powers for reviewing its decision, directions and Orders by virtue of sub-Section 1(f) of Section 94 of the Electricity Act, 2003. The application, made before the Commission, for the review of its decision, directions and Orders, therefore, derives its scope and authority from the aforesaid section of Electricity Act, 2003, read with Order 47, Rule 1, of the Code of Civil Procedure.

6. The Commission is of the view that the scope of review is more restricted than an appeal. The Court of review has only a limited jurisdiction and limited by the unqualified language of Order 47, Rule 1. The review power, under the aforesaid provision is re-produced as below :-

“Application for review of judgement – (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) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgement of the Court which passed the decree or made the order.”

7. The above mentioned provisions of CPC mandate that a Court of review may allow a review only on three specific grounds which are as under :-

- i. Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the aggrieved person or such matter or evidence could not be produced by him at the time when the order was made; or
- ii. Mistake or error apparent on the face of the record; or
- iii. For any other sufficient reason which is analogous to the above two grounds.

ISSUES RAISED

Disapproval of HO Expenses for FY 2011-12

Petitioner's Submission

8. The Petitioner in the APR petition for FY 2012-13 requested for the approval of HO expenses at Rs 5.58 Cr for Unit 2 and Rs 3.95 Cr for Unit 3 of the Jojobera Power plant of the Petitioner. Such HO expenses were in addition to the Normative O&M expenses, ash disposal expenses and application fees & publication expenses as approved by the Commission in the MYT order dated May 31, 2012.

9. The Petitioner submitted that the Commission in the APR order dated April 28, 2014 disapproved such HO expenses.

10. The Petitioner aggrieved by such disapproval has filed this review petition citing the following reasons for the approval of the HO expenses under O&M expenses:

a. The Petitioner has stressed upon the fact that few services like engineering, legal, regulatory, environment, etc. are provided by the Corporate office of the Petitioner located at Mumbai and Noida to all the divisions of the Petitioner and the costs pertaining to such services are allocated to all such divisions. Further, the Petitioner also submitted that in case such services had not been utilized by Jojobera units from Head Office (HO) and Shared Services (SS), such service would have been provided in house and hence would have entailed additional expenditure for Unit 2 and Unit 3.

b. The Petitioner has also stressed upon the approval of the O&M expenses for the control period FY 2012-13 to FY 2015-16 in the MYT order dated May 31, 2012 wherein the actual of previous 5 years were considered and hence claims that such HO expenses is not a new category of expenses.

11. The Petitioner has also cited the following excerpts from the Tariff order of OHPC stations for FY 2012-13 passed by the Hon'ble Odisha Electricity Regulatory Commission(OERC) dated March 23, 2012 :

“ 120. The Commission has examined the above O&M expenses proposal of OHPC and considering the suggestion of various stake holders and consumer association approves the O&M expenses as under :

- i. O&M expenses allowed for the year 2011-12 escalated @ 5.72 % to arrive at O&M expenses for the FY 2012-13 and if n addition to it :*
- ii. 30% arrear salary paid by OHPC during FY 2011-12 which is to the tune of Rs 15.63 Cr is allowed to be included in the O&M expenses for FY 2012-13.*
- iii. Arrear terminal liabilities of Rs 78.01 Cr as on 31/03/2009 claimed over a period of seven years starting from 2010-11*
- iii. 30% arrear salary and terminal liabilities of corporate office amounting to Rs 2.67 Cr has been apportioned to different units and included in the O&M expenses for the tariff proposal for FY 2012-13-Allowed”*

12. The Petitioner also submitted in the Review Petition that Unit 2 and Unit 3 of the Petitioner were commissioned with a total project cost of Rs 849.48 Cr whereas the project cost approved by the CEA in the Techno Economic Clearance was Rs 1025.19 Cr. The Petitioner has also submitted that if the project cost would have been the same as that approved by the CEA i.e. at Rs 1025.19 Cr, the additional normative expenses (i.e. at 2.5% of Capital cost) would be Rs 8.11 Cr which amounts to 85% of such HO expenses (Rs 9.52 Cr).

13. Hence, the Petitioner in its review Petition has again requested to exercise Power of relaxation as per regulation 17.4 of the Generation Tariff Regulations 2010 and approve the HO expenses at Rs 9.53 Cr for FY 2011-12 for Unit 2 and Unit 3 of the Jojobera Power Plant.

Commission's Analysis

1. The Commission in the APR order dated April 28, 2014 has disallowed the HO expenses; the excerpt of such order is quoted below:

“As per Regulation 7.41 of the Generation Tariff Regulation, 2010, for the Existing Thermal Generating Stations, the O&M expenses for the Transition Period i.e. FY 2011-12 shall be as per the JSERC (Terms

and Conditions of Determination of Generation Tariff) Regulations, 2004. The said Regulations lay down the following norm for O&M expenses:

“21 (iv) Operation and Maintenance expenses

(i) The Operation and Maintenance expenses (hereinafter referred to as O&M expenses) shall include the following:

- Consumption of Stores and Spares*
- Administration expenses*
- Repair and Maintenance*
- Employee cost*
- Corporate Office Expenses allocated proportionately*
- Insurance*

(ii) The O&M expenses will be limited to 2.5 % of Capital Cost (for plants set up prior to 1.04.2004.) escalated at 6% per annum from the year of Commissioning”.

In accordance with the Clause 21(iv) of the Generation Tariff Regulations, 2004, as quoted above, the Commission has approved the normative O&M expenses for FY 2011-12, by providing an escalation of 6% p.a. from the year of Commissioning till FY 2011-12 on 2.5% of the approved Original Capital Cost.

It is clear from the Clause 21(iv) of the Generation Tariff Regulations, 2004 that the O&M expenses are to be allowed to the Petitioner on a normative basis. Further the O&M expenses allowed on the normative basis includes any “Corporate Office Expenses allocated proportionately”. The Commission has therefore not allowed any additional expenses on account of HO as claimed by the Petitioner as the same are already included in the normative O&M expenses allowed to the Petitioner.”

2. As noted in the tariff order, as per the Generation Tariff Regulations of the Commission O&M expenses for the petitioner for FY 2011-12 are to be approved on a normative basis @ 2.5% of the actual capital cost (escalated by 6% per annum). Further, as is clear from Regulation 21 (iv) (i) of the Generation Tariff Regulations, 2004, the normative O&M expenses allowed include expense for Corporate Office or HO. Therefore, the Commission has not dis-allowed the corporate or HO expenses as such. However, an overall normative limit has been imposed on the O&M expenses (inclusive of HO expenses) in accordance with the provisions of the Generation Tariff Regulations, 2010.

3. The Petitioner has asked for relaxation of the Generation Tariff Regulations, 2010 for allowance of O&M expenses higher than the norm. The Commission may relax the regulations under Clause 17.4 of the Generation Tariff Regulations, 2010 as cited below:

“Power of Relaxation

17.4 The Commission may in public interest and for reasons to be recorded in writing, relax any of the provision of these Regulations”

4. Therefore the Commission may exercise its power to relax any clause pertaining to the Generation Tariff Regulations, 2010 only if such relaxation is in the public interest and where there are justified and acceptable reasons for such relaxation.

5. The Petitioner has failed to establish before the Commission the element of any public interest involved in favour of approving HO expenses over and above the normative O&M expenses. Further the power of relaxation of Regulations has to be exercised very sparingly and with circumspection. The relaxation is to be exercised only in exceptional circumstances which is exception to the general rule. This implies that there has to be sufficient reason to justify relaxation which is lacking in this case and

hence the Commission cannot allow the HO expenses amounting to Rs 9.53 Cr for both units of the Jojobera Power plant of the Petitioner.

Relaxation of Normative Heat rate

Petitioner's Submission

14. The Petitioner in the APR petition for FY 2012-13 sought for approval of actual heat rate for Unit 2 and Unit 3 of the Jojobera Power Plant i.e. at i.e. 2611 kCal/kWh for Unit 2 and 2615 kCal/kWh for Unit 3.

15. The Commission in the APR order dated April 28, 2014 disallowed such heat rate citing the following grounds:

“5.28 In view of the Judgement of APTEL in Appeal No. 189 of 2011, the previous orders of the Commission in this regard and the reasons noted above, the Commission does not deem it appropriate to allow the actual SHR for Unit 2 and Unit 3 as requested by the Petitioner. The Commission therefore approves the station heat rate specified in the Generation Tariff Regulations, 2010 i.e. at 2567 kCal/kWh for Unit 2 and 2577 kCal/kWh for Unit 3.”

16. The Petitioner has cited the following excerpts from the judgement of Hon'ble Tribunal dated September 20, 2012 :

“The Appellant has failed to establish before the State Commission the element of any public interest involved in favour of granting of relaxation in the Station Heat Rate norms. In fact, the Appellant did not make out the ground for relaxation. It is settled law that the power of relaxation of Regulations must be exercised very sparingly and with circumspection. The relaxation to be exercised only after exceptional circumstances which is exception to the general rule. This implies that there has to be sufficient reason to justify relaxation. In the instant case, no such sufficient reason was given to the State Commission warranting for the invocation of Regulation 17.4 for relaxation of the norms.”

17. The Petitioner in the APR Petition for FY 2012-13 has laid out the improvement initiatives undertaken by the Petitioner to improve the heat rate of Unit 2 and Unit 3 of the Jojobera Power plant of the Petitioner. The Petitioner further submits that implementation of such initiatives would require reasonable time and as the heat rate of both units are in reducing trend and show significant improvement such approval would not cause any undue hardship to the beneficiary.

18. The Petitioner further submitted that in FY 2011-12, Unit 2 has shown an improvement of 33 kCal/kWh and Unit 3 has shown an improvement of 6 kCal/kWh with respect to FY 2010-11 despite operating at a low PLF of 76% for Unit 2 and 78% for Unit 3.

19. The Petitioner also pointed out that disapproval of such heat rate would have an adverse financial impact of Rs 4.61 Cr on the Petitioner and further the Petitioner has filed an interlocutory application to the APR petition dated March 28, 2013 for relaxation of heat rate norms for Unit 2 and Unit 3 of the Jojobera power plant and introduction of provision for “sliding heat rate” in the Generation Tariff Regulations 2010.

Commission's Analysis

20. With regards to Station Heat Rate for FY 2011-12, the Commission in the APR order dated April 28, 2014 has also observed the following:

“5.20 The Petitioner filed an appeal (Appeal no 189 of 2011) before the Hon'ble APTEL for relaxation of the norm for station heat rate. The Hon'ble APTEL however upheld the decision of the Commission not to relax the norm for station heat rate. The relevant portions of the judgement of the APTEL are quoted below:

“31. The principles laid down in these authorities cited by the Appellant are as follows:

(a) If the Station Heat Rate allowed by the Commission is not achievable, then the same would not be in anybody's interest. The entity would suffer by not recovering its reasonable cost of supply of electricity and consumers would not get right signal about the pricing of the product, they would be using.

(b) The Station Heat Rate is one of the most important factors for the purpose of determination of the cost of generation. If the targets given to the generating company are not achievable, no purpose would be served by setting such targets, because such approach would adversely impact the financial position of the generator.

(c) The reasonable time has to be given for completion of the medium term measures required for the improvement of the Station Heat Rate. In case any Regulation causes hardship to a party or works injustice to him, the Regulation can be relaxed.

(d) The tariff determination shall be consistent with Section 61 of the Act as well as the Government of India guidelines which shall strike a balance between the transparency, fairness, consumer interest and viability.

32. On going through all the decisions, we are of the view that the principles which have been laid down by this Tribunal as well as Hon'ble Supreme Court as cited by the State Commission would squarely apply to the present case especially, when impugned order has given proper reasoning for not relaxing the norms. On the other hand, the reliance placed by the Appellant on 2010 DELR (APTEL) 0189 cited by him has no application to the present case. In that case, the Station Heat Rate was found to be unachievable and in that context the State Commission was not in a position to take a considered view on the subject. In the present case, the State Commission has fixed the norms of Station Heat Rate after studying in details the past performance for each plant in the State and after considering the data furnished by the Appellant for 2 units i.e. Unit No.2 and Unit No.3 of the Plant.

33. In the present case, the State Commission has considered the CPRI report in detail and studied that the major deviation between the design Heat Rate and the Test Heat Rate due to turbine deficiency. Similarly, in other cases also reported in 2011 ELR (APTEL) 1742, i.e. suo-moto action taken by this Tribunal and Essar Power Limited case reported in 2011 Energy Law Journal would not apply to this case since the issue in question has not been decided in those cases. In the present case, Station Heat Rate norms have been framed under the Regulation after studying the past performance of the Plants. That apart, the State Commission has given a detailed reasoning in the impugned order for not relaxing the norms laid down in the Regulation. Hence, we do not find any infirmity in the finding of the State Commission on this issue.

5.21 The Petitioner has again sought relaxation in the heat rate its petition for truing upon the following grounds:

a) The Petitioner claimed to achieve a reduction of 33 kCal/kWh and 6 kCal/kWh in Heat rate for Unit 2 and Unit 3 respectively within a span of one year owing to short-term measures like mill fineness optimization, turbine fin replacement and blade roughness reduction during Annual Shutdowns of the Units as recommended by Central Power Research Institute (CPRI), Bangalore during Energy audit.

b) The Petitioner has requested that such a huge reduction of Heat Rate to the tune of 50 kCal/kWh as envisaged in the above units is an uphill task and requires a certain time period to implement the identified measures.

5.22 Further, in the interlocutory application filed by it, the Petitioner has re-iterated that the Commission approve the actual Heat Rate achieved by the Units 2 and 3 for FY 2011-12 & FY 2012-13 for truing-up and revised estimate of Heat Rate for FY 2013-14 to FY 2015-16 at the actual Heat Rate achieved in FY 2012-13 subject to Truing-up at actual.

5.23 As mention earlier, the Commission has fixed the norms of operation for Unit 2 and Unit 3 after study of the past performance for each plant in the state and as per the data made available by the Generation companies including TPCL for the two units - Unit 2 and Unit 3 of Jojobera Plant. Before finalization of the norms, the Commission had also conducted a public hearing in which all the stakeholders, including TPCL, participated. The Commission after due deliberation finalized the Regulations.

5.24 It is to be noted that the Commission in its tariff orders prior to F 2011-12 allowed the Petitioner a higher heat rate for the years FY 2007-08, FY 2008-09, FY 2009-10 and FY 2010-11. Table 14 Heat rate allowed by the Commission for FY 2007-08, FY 2008-09, FY 2009-10 and FY 2010-11

Financial Year	Heat Rate allowed (kCal/kWh)	
	Unit 2	Unit 3
FY 2007-08	2645	2676
FY 2008-09	2569	2592
FY 2009-10	2632	2648
FY 2010-11	2644	2621

5.25 Simultaneously, however, the Commission also directed the Petitioner in its order to improve its operational performance. In the 'Tariff Order on ARR for FY 2007-08, 2008-09 & 2009-10 & Determination of Distribution Tariff for FY 2009-10 for TPCL', the Commission observed that "performance of the two Units of Jojobera plant with respect to some of the operational parameters is worse than other similarly placed plants in the country considering the age profile of the TPCL Units. In particular, the SHR, PLF, normative annual plant availability factor (as per CERC Tariff Regulations, 2009) and the auxiliary consumption can be improved further to the extent of CERC approved operational norms for thermal stations of such nature".

5.26 Further again in the 'Tariff Order on Annual Revenue Requirement and Determination of Generation Tariff for Financial Year 2010-11 for Tata Power Company Limited (TPCL)' the Commission directed "that the performance with respect to some of the operational parameters is lower

than those of the other similarly placed plants in the country. In particular, the SHR, the PLF, normative annual plant availability factor (as per CERC Tariff Regulations, 2009) and the auxiliary consumption can be improved further to the extent of CERC approved operational norms for thermal stations of such nature.”

5.27 Further, as pointed out by the Petitioner itself in its APR petition dated March 28, 2013, the capital expenditure schemes approved by the Commission in the order dated May 31, 2012 also included certain schemes for implementation of the measures for improvement of station heat rate. The financing cost and capital expenditure on account of this capital expenditure has already been allowed to the Petitioner in the tariff approved by the Commission”.

21. The Commission observes that the Petitioner has not provided any new information in the review petition filed by it and has only reiterated the information and arguments provided by it earlier in the APR Petition. As such the Commission does not find any merit in relaxing the norm for Station Heat Rate for FY 2011-12 as contained in the Generation Tariff Regulations, 2010 and as approved in Tariff Order dated April 28, 2014.

Sd/-
(T.Munikrishnaiah)
Member (Engg.)

Sd/-
(Sunil Verma)
Member (Fin)