

**IN THE JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION
AT RANCHI**

**Case No. 21 of 2018 &
I A No. 01 of 2019**

Tata Power Company Limited (TPCL) Petitioner

Versus

Tata Steel Limited (TSL) Respondent

**CORAM: HON'BLE MR. (DR) ARBIND PRASAD, CHAIRPERSON
HON'BLE MR. R.N. SINGH, MEMBER (ENGINEERING)**

For the Petitioner : Mr. Venkatesh, Advocate,
Mr. Pankaj Prakash, Representative

For the Respondent (TSL): Mr. Manish Mishra, Advocate

ORDER

Date - 13th May, 2019

1. The petitioner- Tata Power Company Limited (hereinafter referred to as 'TPCL') which is a Generating Company and operates two units (unit 2 and unit 3) of 120 MW each of Jojobera Power Plant, which supplies power to Tata Steel Limited has filed a petition under Section 86 of the Electricity Act, 2003 read with Regulation 7.6 (ii) and Regulation 6.13 (b) and other applicable regulations of the JSERC (Terms and Conditions of Determination of Generation Tariff) Regulations, 2015 for approval of capital expenditure on installation of various Emission Control System as detailed, for compliance of Ministry of Environment and Forests and Climate Change (MoEFCC), Government of India, Notification dated 7th December, 2015 mandating compliance with revised Environmental norms for Thermal Power Stations.

Brief facts of the case as submitted by the petitioner

2. Learned Counsel for the petitioner submitted that the MoEFCC vide its notification no. S.O. 3305(E) dated 7th December, 2015 notified the Environment (Protection) Amendment Rules, 2015 ("**MoEFCC Notification**")

amending/introducing the standards for emission of environmental pollutants to be followed by all existing as well future thermal power plants (units). He further submitted that by the said MoEFCC Notification, all thermal power plants (**TPP**) are mandatorily required to comply with the revised norms within the period of two years from the date of the said MoEFCC Notification.

3. Learned Counsel for the petitioner submitted that on the basis of said MoEFCC Notification, the Central Pollution Board (**CPCB**) issued directions to Jojobera Power Plant of Tata Power vide its letter dated 6th April, 2018, under Section 5 of the Environment Protection Act, 1986 regarding compliance of emission limit notified vide the MoEFCC Notification dated 7th December, 2015 setting the revised deadline for meeting the environmental norms as December, 2020 after deliberation with all stakeholders.

4. Learned counsel for the petitioner submitted that on 30th May, 2018 Government of India, through Ministry of Power (**MoP**) issued a direction under Section 107 of the Electricity Act, 2003 vide letter no. 23/22/2018-R & R with the subject '*Mechanism for implementation of New Environmental Norms for Thermal Power Plants (TPP) supplying power to distribution licensees under concluded long term and medium-term Power Purchase Agreement (PPA)*'.

5. Learned Counsel for the petitioner submitted that on 10th April, 2018, Central Electricity Authority (**CEA**) issued a letter no. 44/FGD/UMPP/CEA/2018 with the subject, '*Adherence to Environmental norms as per Environmental (Protection) Amendment Rules 2015 for Thermal Power Stations-Implementation of FGD reg*' to TPP's requesting them to approach concerned regulator with a '*Detailed Feasibility Report of the Emission Control Systems*' required to meet the notified norms.

6. Learned Counsel for the petitioner submitted that the petitioner Tata Power currently operates unit 2 and 3 of its Generating Station at Jojobera within new limits prescribed by MoEFCC for water consumption, particulate matter and NOx. Learned Counsel submitted that the other metrics except Sulphur Dioxide are currently within the new limits and the petitioner shall have to carry out modifications in the project in order to comply with the norms prescribed for Sulphur Dioxide.

7. Learned Counsel for the petitioner submitted that in order to achieve the norms prescribed for Sulphur dioxide as applicable for Jojobera units 2 and 3, an initial estimate has been developed that indicates a substantial investment required besides having impact on O&M expenses and some of the operational parameters having impact on available energy and the resultant costs of generation from both the units. Hence, the petitioner proposed to take

up and commission the scheme '*Installation of Flue Gas De-Sulphurization (FGD) plant along with associated Electrical System Modification and Civil Foundations*' and through this petition seeks approval of this Commission.

8. Learned Counsel for the petitioner submitted that the detailed description of the proposed scheme is given out in Detailed Feasibility Report **(FR)**.

9. Learned Counsel for the petitioner submitted that the MoEFCC would clearly constitute a 'change in law' event as specified under Regulation A2 (14) of Tariff Regulations. Learned Counsel expressed that the MoEFCC Notification is a mandatory 'change in law' which requires the petitioner to carry out major capital works/modification for it to be able to operate the project and supply power to the beneficiary viz Tata Steel Limited and the petitioner is obliged to incur substantial one-time capital expenditure apart from recurring operational expenditure and additional increase in cost due to operational parameters.

10. Learned Counsel for the petitioner submitted that the cost of installation of FGD system which consist of Flue Gas Duct system, Absorber system, Booster fan, Limestone Handling system, etc. is estimated to be approx. Rs. 0.92 crore/MW approx, i.e. about Rs. 110.1 crore/unit (Rs. 220.20 crore for both the units)

11. Learned Counsel for the petitioner in the mean time, through an interim application being I.A. No. 01/2019 filed on 28.02.2019 has sought for a declaration that MoEFCC Notification dated 07.12.2015 may be declared as an event of change in Law under Regulation 2 (14) of the JSERC (Terms and Condition for Determination of Generation Tariff) Regulations, 2015

12. Learned Counsel for the petitioner submitted that supply of power from Jojobera unit 2 & 3 to Tata Steel limited can be specifically ascertained only after the approval of the proposed scheme by this Commission.

13. Learned Counsel for the petitioner submitted that against the above background the petitioner prays for the following:

- a) To allow the capital cost of approximately Rs. 0.92 crore/MW for Jojobera unit 2 and Jojobera unit 3, totaling to Rs. 220.20 crores required to be incurred by the petitioner towards installation of the FGD system.
- b) To allow incremental auxiliary consumption of 2.0% for computation of tariff post commissioning of the ECS and other associated facilities at Jojobera unit 2 and unit 3 respectively.

- c) To allow incremental operation and maintenance cost of approximately 8.25% of the capital cost for installation of ECS and other associated facilities at Jojobera unit 2 and unit 3 resp.
- d) To allow shutdown period required for installation and commissioning of ECS at the project as deemed availability for payment of capacity charges.
- e) To allow increased expenditure on water cost required for operation of the ECS and other associated facilities.
- f) To allow procurement cost of limestone for operation of ECS at actuals as part of O&M cost.
- g) To allow disposal cost of Gypsum (byproduct) to be recovered at the actual as part of O&M cost.
- h) To allow to approach this Commission for remaining ECS which is not being implemented presently, but may be required in future based on actual assessment to comply revised environmental norm.
- i) To allow to go ahead for tendering for installation of FGD as per corporate policy for open tendering/competitive bidding and grant liberty to approach this Commission with actual cost as and when it is finalized.
- j) To pass any other relief as this Commission deems just and proper in the nature and circumstances of the present case.

Submission of the Respondent

14. Learned Counsel for the respondent – Tata Steel Ltd. in its preliminary objection filed on behalf of the respondent challenged the maintainability of the petition and stated that the petition is not maintainable and is fit to be rejected.

15. Learned Counsel for the respondent submitted that the petitioner operates two units (unit 2 and unit 3) of 120 MW each at Jojobera Power Plant were set up in the year 2000 and 2001 respectively and the said units supply power to the respondent exclusively for its use as distribution licensee and in this regard a PPA duly approved by this Commission has been executed between the parties to the instant case.

16. Learned Counsel for the respondent challenged the maintainability of the instant petition in terms of Clause 7.6 of the JSERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2016 and in terms of the conditions mentioned in PPA duly approved by this Commission.

17. Learned Counsel for the respondent submitted that the power plant operated at Jojobera qualifying to be existing generating stations within the meaning of Regulation 2.1 (26) and is operational since the past 17 years.

18. Learned Counsel for the respondent submitted that the term 'additional capitalization' is defined in the Tariff Regulation to be such expenditure which is proposed to be incurred or is incurred after the commercial date of operation and is regulated by Clause 7.5 and 7.6 of the Tariff Regulations.

19. Learned Counsel for the respondent submitted that power conferred upon this Commission under Clause 7.6 of the Tariff Regulations is vested with jurisdiction to only consider such capital expenditure incurred on or amongst any of the ground as stated in Clause 7.6 and such exercise of power under Clause 7.6 is not permitted in circumstances where the capital expenditure is to be incurred in future or proposed to be incurred and any proposed capital expenditure or capital expenditure to be incurred in future can only be considered in terms of Clause 7.5 of the Tariff Regulations. Hence, the instant petition seeking approval for proposed expenditure is not maintainable and is liable to be dismissed at the very outset.

20. Learned Counsel for the respondent submitted that the parties of the instant case entered into a PPA duly approved by this Commission and the said PPA is valid till 30th anniversary of COD of the respective unit i.e. till 31st January 2031 for unit 2 and 31st January, 2032 for unit 3 and the tariff for the sale and purchase of power under this PPA is determined by this Commission pursuant to Section 62 of the Electricity Act, 2003 read with Clause 7.1 of the Tariff Regulations.

21. Learned Counsel for the respondent submitted that the necessity of installation of emission control systems in the power plants shall not increase the existing capacity but could be said to be required for compliance of statutory requirements for operation of the plants. Learned Counsel further submitted that Clause 6 of aforesaid PPA is relevant for consideration of this Commission which is reproduced below:

Operation and Maintenance of Generating units.

6.1.1 *Seller at its own expense is required to ensure that the generating units are operated and maintained in accordance with all legal requirements including the terms of all statutory and regulatory approvals/consents and prudent utility practices so as to meet its obligation under this agreement.*

6.1.2 *Seller is required to keep in force all statutory and regulatory approvals/consents required for the operation of generating*

units at its own expense in accordance with this agreement throughout its validity period.

22. Learned Counsel for the respondent submitted that the petitioner is under a duty to maintain its generating power plants and operate the same in due compliance of all statutory norms at its cost and expense and petitioner shall solely be liable for the same.

Commission's observation and findings

23. Heard Learned Counsel for the petitioner as well as Learned Counsel for the respondents in detail and perused the records of the case. The fundamental issue to be decided is whether the prayer of the petitioner for in-principle approval of the expenditure on installation of various systems for compliance of MoEFCC Notification dated 7th December, 2015 is maintainable.

24. In this regard, we are inclined to rely on the order of the Central Electricity Regulatory Commission in petition no. 72/MP/2016 in the matter of Maithon Power Limited, a Joint Venture Company of the Tata Power Company Limited and Damodar Valley Corporation situated in District-Dhanbad in the State of Jharkhand in which the prayer for in-principle approval of the capital expenditure held not maintainable. The relevant extract of the order is reproduced hereunder:

“10. Since, the 2014 Tariff Regulations do not provide for the grant of in-principle approval for the capital expenditure, the prayer of the petitioner for in-principle approval of the Abstract scheme of capital expenditure by relaxing the provisions of the tariff regulations through invoking Regulation 54 of 2014 Tariff Regulations, is not maintainable.”

25. It is also observed that the petitioner has not come before us with clean hands and had suppressed in their petition the information available with them in regard to approval process of the capital expenditure for different thermal power plants relevant for this petition. Here it would be crucial to produce the submission of the Tata Power Delhi Distribution Limited (sister distribution company of the petitioner in this case) before the Central Electricity Regulatory Commission in petition No. 98/MP/2017 in the matter of NTPC Vs Tata Power Delhi Distribution Ltd. & Ors., where NTPC as a Thermal Power Station filed the petition for seeking approval of expenditure on installation of various Emission Control Systems for compliance of MoEFCC Notification dated 7th December, 2015 and Tata Power Delhi Distribution Ltd. as a distribution licensee (Respondent) filed affidavit opposing the prayer of the NTPC (TPP). The relevant extract is of the order in petition No. 98/MP/2017 is reproduced below:

“10. The Respondent No. 5, Tata Power Delhi Distribution Limited (TPDDL) vide affidavit dated 18.08.2017 has submitted the following:

- i. Since the petitioner has chosen to file the present petition with details in respect of two generating units only, i.e. Singrauli & Sipat, any decision given by the Commission in the present petition would equally be applicable to all other units of the petitioner and bind them. Thus, the petitioner ought to affirm that it is giving up its claim in respect of all other units whose details have not been furnished by choosing to pursue the present petition. In case, such affirmation is not given, the petition is not maintainable with details of the two generating stations only.*
- ii. The present petition has been made for approval of capital expenditure and truing up of tariff of the generating station. However, no proper application under Section 64 of the Electricity Act, 2003 has been made by the petitioner. The mandatory provisions under Section 62(2) have not been followed and hence the present petition is liable to be dismissed in limine.*
- iii. The petition is not maintainable since the 2014 Tariff Regulations do not provide for grant of any ‘in-principle’ approval for the capital expenditure or any other such associated reliefs claimed by the petitioner.*
- iv. The petition in the present form is premature and not maintainable. Whether there is change in law or not, it is for the petitioner to comply and incur expenditure as per prudent commercial discretion and practices. The Commission is only required to carry out prudence check once the expenditure has actually been incurred by the generating company.*
- v. In petition No. 72/MP/2016 filed by Maithon Power Ltd. seeking in-principle approval of the ‘Abstract Schemes’ of capital expenditure in compliance with the MoEFCC Notification, the Commission vide order dated 20.03.2017 disposed of the petition refusing to grant in-principle approval. Thus in terms of the said order, the prayer of the petitioner in the present petition is also not maintainable.*
- vi. The prayer of the petitioner for allowance of incremental auxiliary consumption, O&M cost, water cost, procurement cost of limestone, consumption cost of various reagents etc., shall not at all restore the position of the petitioner, prior to the occurrence of such ‘change in law’ event since the petitioner has not been incurring any such incremental costs.*
- vii. The prayer for allowance of shut down period for installation and commissioning of ECS as ‘deemed availability’ for payment of capacity charges has no legal basis since the 2014 Tariff Regulations do not provide for any such ‘deemed availability’ and there shall be no such declaration of readiness by petitioner during shut down. Only two elements*

O&M and Interest on loan as part of the annual fixed charges are entitled to be recovered by the petitioner.”

After the perusal of the above statement, it is crystal clear that the petitioner has a dual face on record i.e. when the petitioner acts as a distribution licensee it is against the in-principle approval of the capital expenditure whereas when it acts as a Generator (TPP), it prays for the in-principle approval of the capital expenditure.

26. Further, after closer examination of the submission of the parties along with PPA signed between them and JSERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015, it is observed that the Regulation do not provide for the grant of in-principle approval for the capital expenditure and the petition is premature and not maintainable at this juncture.

C O N C L U S I O N

27. In view of the above observations and findings, and in view of the objections raised by the respondent-Tata Steel Ltd., we are of the view that in the absence of provision for in-principle approval of capital cost in the JSERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 the prayers of the petitioner-Tata Power Company Limited as mentioned above including grant of in-principle approval of the capital expenditure for implementation of ECS cannot be allowed in this petition.

28. Accordingly, this petition and I.A. No. 01 of 2019 stands disposed of at no cost.

Sd/-
(R.N. Singh)
Member (Engg)

Sd/-
(Dr. Arbind Prasad)
Chairperson