



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

MONDAY, THE 19TH DAY OF JUNE
TWO THOUSAND TWENTY THREE

PRESENT

Justice C.V. Nagarjuna Reddy, Chairman
Sri Thakur Rama Singh, Member

Review Petition No. 8 of 2022 in O.P.Nos.21 of 2015 and 19 of 2016

Between

Hinduja National power corporation Limited

... Petitioner

And

Eastern Power Distribution Company of AP Ltd. (APEPDCL) and others

... Respondents

This Review Petition (R.P) has come up for final hearing on 03.05.2023 in the presence of Sri Avinash Desai, learned Senior Counsel assisted by Sri P. Ravi Charan, learned Counsel for the Petitioner; Sri P. Shiva Rao, learned Standing Counsel for the Respondents; and Sri M. Venugopala Rao, learned Objector; that upon carefully considering the material available on record and after hearing the arguments of both parties, the Commission passed the following:

ORDER

1. The Petitioner is the owner of a 2x520 MW coal-based thermal power project at Visakhapatnam in Andhra Pradesh State. The Commercial Operation Dates (CODs) of unit-1 and unit-2 of the project were declared on 11.01.2016 and

03.07.2016 respectively. On 01.08.2022, the Commission vide its Common Order determined the Capital Cost and the Multi-Year Tariff (O.P.No.21 of 2015) of the project from the date of commercial operation of its units I & II to the end of FY 2023-24 and also approved the Power Purchase Agreement (PPA) entered into by the Respondents with the Petitioner subject to certain amendments (O.P.No.19 of 2016). Seeking review of the said Common Order, the Petitioner has filed the present Petition.

2. In the Review Petition, the Petitioner prayed the Commission to review and modify the Common Order dated 01.08.2022, with regard to the following aspects:

- A. Alleged non-furnishing of reports to the Respondents from time to time on Capital Costs incurred.
- B. Determination of Capital Cost.
- C. Comparison of Capital Costs with benchmark costs.
- D. Interest During Construction (IDC) and Financing Charges(FC).
- E. Tariff for the period up to 31.07.2022.
- F. Modification of norms.
- G. Amendments to the PPA.

3. The Petitioner submitted the following in support of its prayers:

- A. Alleged non-furnishing of reports to the Respondents from time to time on the Capital Costs incurred.**

The Commission's Common Order dated 01.08.2022 stated that the Petitioner had not submitted progress reports to the Respondents, thereby denying them the opportunity to verify the veracity of the expenditure incurred during the relevant period. However, the amended and restated Power Purchase Agreement (PPA) dated 15.04.1998, was not implemented until the year 2013, and the Memorandum of Agreement

(MOA) for the supply of 100% of power from the project was entered into with the Respondents on 17.05.2013. Therefore, there was no requirement to submit progress reports on activities until 2013. Additionally, the Respondents were fully aware of the status of the project in 2013.

The Hudhud cyclone in October 2014 impacted the outstanding work, which the Respondents were fully aware of. The Respondents raised the issue of non-submission of a status report as an afterthought. The Respondents were not prejudiced or adversely affected by the non-receipt of progress reports for the period prior to May 17, 2013. Furthermore, the Respondents never raised any such allegations when signing the MOA.

B. Determination of Capital Cost

The Commission observed in the Common Order dated 01.08.2022 that the Capital Cost claimed by the Petitioner at Rs.7.46 crores/MW is higher than that of other projects. However, this comparison is not fair because it does not take into account the breakdown of the hard cost, interest, and financing cost. Additionally, the project was delayed due to force majeure events such as the Hudhud cyclone and the delay in land allotment by the government authorities for Seawater Intake System, Railway Siding, etc. These events were beyond the control of the Petitioner and should not be attributed to them. The cost overrun on account of the delay in the commissioning of the project was entirely due to these events and resulted in an increase in the IDC and financing costs by Rs. 935.66 crores.

The Commission did not consider the expenditure on initial spares, construction and pre-commissioning activities, and overheads incurred by the Petitioner, even though they submitted all the necessary details,

including a certificate from a chartered accountant and annual accounts.

The Commission did not conduct a prudent check of these claims.

The Commission observed in the Common Order dated 01.08.2022 that the Petitioner was unable to provide copies of contracts and proof of payment to various firms for verification by the Commission or the Respondents. However, the Petitioner submitted copies of contracts entered into with contractors, including the contracts with BHEL for the main plant and Balance of Plant (BOP) in O.P.No. 21 of 2016. Regarding the submission of proof of payments/vouchers, the Petitioner submitted to the Commission in its Affidavit dated 28.06.2022, that it would be impractical and unnecessary to provide these documents. Instead, the Petitioner proposed that an authorized officer of the Respondents may visit the Petitioner's offices to examine the relevant documents.

The Petitioner submitted the expenses incurred under various heads in the format specified by the Commission in the applicable Tariff Regulations. The Petitioner was willing to provide any specific information, but the Respondents, the Objectors, and the Commission did not request any.

C. Comparison of Capital Costs with benchmark costs

According to the Central Electricity Regulatory Commission's (CERC) order dated 04.06.2012, the benchmark hard cost for a 500 MW coal-fired thermal power plant as of December 2011 is Rs.4.71 crores per MW. After considering the Mandatory and Optional Packages, the entire base cost of 4.71 crores per MW must be escalated until December 2015. The CERC's methodology does not allow for the exclusion of annual escalation for firm packages. However, the Commission has only

considered escalation on 10.19% of the base cost of Rs.4.71 crores per MW.

Further, the CERC stated in the above order that the benchmark cost is only indicative and not absolute. In its order dated 08.04.2021 in Review Petition No. 2 of 2019 in OP No. 47 of 2017, the Commission noted the limitations of the applicability of the above order with respect to the benchmark Capital Cost.

Therefore, the Petitioner's project should also be treated similarly and CERC benchmark Capital Cost should not form the sole basis for the determination of Capital Cost and verification of the Capital Cost claims on merits should be taken up.

D. Interest During Construction (IDC) and Financing Charges(FC)

The project was delayed due to two reasons:

- I. The Government of Andhra Pradesh (GoAP) delayed the handing over of land to the Petitioner for the construction of the Sea Water Intake Outfall System and Railway Corridor.
- II. APTRANSCO delayed the construction of the transmission line for the supply of start-up power and for evacuating the power generated from the project.

These delays were not the fault of the Petitioner. GoAP allotted the land to the Petitioner on 10.09.2014, and the Petitioner proceeded with construction. However, in October 2014, cyclone Hudhud struck Andhra Pradesh, causing extensive damage to the project and further delaying its commissioning. The Appellate Tribunal for Electricity (APTEL) in its order dated 14.07.2021 in Appeal No. 360 of 2019 has allowed the force majeure claim on account of the delay in the construction of the transmission system.

E. Tariff for the period up to 31.07.2022

The Commission's view that the ad-hoc tariff determined earlier should be the final tariff up to 31.07.2023 on the premise that certainty/uncertainty as to whether the PPA between the parties would come through is not correct. The Petitioner has been seeking the determination of the Capital Cost and tariff since March 2014. Thereafter, when the orders were reserved in the said matter, the Respondents unilaterally decided not to implement the PPA, and the Hon'ble Supreme Court passed strictures on their conduct and imposed costs on them. The Commission's reasoning is also contrary to the Regulations notified by it and the true-up exercise carried out in the case of APGENCO.

F. Modification of norms

The Commission has adopted the norms for State Heat Rate (SHR), Auxiliary Consumption, Specific Fuel Oil Consumption and Threshold Plant Load Factor (PLF) from the CERC tariff Regulations for the control period FY 2014-2019 as the norms for unit size exceeding 500 MW are not specified in Regulation 1 of 2008 notified by the Commission. However, the Petitioner's unit size of 520 MW is relatable and identifiable with the 500 MW unit size. This is because the excess capacity of 20 MW is less than 5% of the 500 MW capacity unit. Additionally, the tolerance for 500 MW units can be in the range of plus or minus 5% at the time of commissioning, according to the OEMs. But, the Commission considered the benchmark Capital Cost determined by CERC for 500 MW capacity units in its order dated 04.06.2012, when determining the Capital Cost of the project.

There is inconsistency in the approach of the Commission as can be seen from its adoption of some parameters such as the Return on Capital Employed (RoCE) and the incentives as per its Regulation 1 of

2008 and other parameters as per CERC Tariff regulations. The Petitioner has obtained the coal linkage based on the target PLF of 80% and has been operating its plant on the above basis since the commissioning of Unit-1. However, the Commission increased the target PLF to 85%.

G. Amendments to the PPA

In its Common Order issued on 01.08.2022, the Commission stated that the norms approved in the order are subject to periodic review during each control period at the time of tariff determination of the project, taking into account the project's performance. However, if the operating norms are changed for each control period, this could create uncertainties for the Petitioner in terms of how it will service the project cost.

The Commission reduced the duration of the Power Purchase Agreement (PPA) from 30 years to 25 years without considering the fact that the Petitioner planned the project based on a PPA period of 30 years. This included factors such as spreading the admissible depreciation over a period of 25 years. A longer PPA duration would also benefit consumers.

The Commission has not allowed the Petitioner to pass through taxes and duties that it will have to pay if Mega Power Project Status(MPPS) is not granted to its project. These taxes and duties are beyond the control of the Petitioner and should be allowed.

The Commission held in its Common Order dated 01.08.2022 that the Petitioner shall not raise any claims in the future on the Respondents for the expenses incurred on the railway corridor, as the Capital Cost approved in the order includes these costs. However, the Petitioner stated in its affidavit dated 18.04.2022, that it has not yet incurred any capital expenditure on the Railway Siding. Therefore, the above direction of the Commission would be detrimental to the interests of the Petitioner.

The Commission also held that the Petitioner should complete the railway corridor works within one year, failing which the cost incurred towards road transport would be disallowed. This condition imposed by the Commission is too stringent. The Petitioner is making all efforts to complete the works within the said period of one year as soon as consent is given by NTPC, Railways and other authorities. Therefore, the Commission may relax the above condition as there is no delay on the part of the Petitioner in completing the railway corridor.

The Commission ordered the deletion of clause No. 6.10 of the Power Purchase Agreement (PPA), which provides for an Escrow Account. The Commission instead directed that the Petitioner be provided with a Letter of Credit (LC) mechanism in accordance with the Ministry of Power Guidelines.

However, the inclusion of the Escrow Account in the Continuation Agreement was agreed to by the parties in place of the Government Guarantee, as provided in the Amended and Restated PPA dated 15.04.1998. Additionally, the current Ministry of Power Guidelines call for an Escrow mechanism to be used in the event of a default by the Respondents in maintaining the LC.

4. The Respondents submitted the following in their counter:

The Review Petition is not maintainable because it does not meet the following statutory grounds for review:

- I. Discovery of new facts which could not be produced at the time of hearing in spite of due diligence.
- II. Mistakes apparent on the face of the record.
- III. Any other sufficient reason.

The Petitioner is simply canvassing the decisions given by the Commission in the Common Order dated 01.08.2022. Therefore, the Review Petition is not maintainable and is liable to be dismissed.

A. Alleged non-furnishing of reports to the Respondents from time to time on the Capital Costs incurred.

The amended and restated Power Purchase Agreement (PPA) dated 15.04.1998, states that the Petitioner must provide the Respondents with half-yearly reports certified by the company's independent auditors. The reports must include the status of the Capital Cost that the company has actually incurred in completing the project. However, the company has not complied with this requirement, even after achieving financial closure. In particular, the company has not complied with this requirement since 17.05.2013, when the Respondents entered into a Memorandum of Understanding (MOU) to continue the PPA of 1998.

Despite repeated requests, the Respondents have been denied the right to inspect material documents containing details and reasons for the increase in Capital Cost. The failure of the company to submit status reports of the project to the Respondents from time to time has caused prejudice to the Respondents. Therefore, the contention of the company in this regard is not correct.

B. Determination of Capital Cost

The Petitioner's claimed Capital Cost of Rs. 7.46 per MW is much higher than that of other similar projects. The continuation agreement dated 28.04.2016 states that the first unit's COD must be achieved on or before 28.02.2014. The Petitioner's reasons for the delay in achieving the scheduled COD are all controllable factors and cannot be attributed to the Respondents.

C. Comparison of Capital Costs with benchmark costs.

Para 5.3 of the Tariff Policy states that the Appropriate Commission must ensure that the total Capital Cost of a project is reasonable and to achieve this, Regulatory Commissions must develop benchmarks for Capital Costs. In its order dated 04.06.2012, the CERC stated that the variables used in the model are considered adequate to provide a reasonable cost figure. This clearly indicates that the hard cost is sufficient for any similar project to determine the Capital Cost of the project. Therefore, the Petitioner's contention that the CERC benchmark Capital Cost is only indicative is incorrect.

D. Interest During Construction (IDC) and Financing Charges(FC)

The Petitioner stated in their application dated 12.03.2014 that, according to the Lenders Independent Engineer's Construction Monitoring Report in November 2013, 93% of the project had been completed and that the remaining 6.9% of work, which related to the Seawater Intake System and Railway Siding, could be completed in another 6 months, subject to the Government of Andhra Pradesh (GoAP) handing over the land to the Petitioner by 30.09.2014. The land for the Seawater Intake System and Railway Siding was handed over to the Petitioner on 12.09.2014 and 04.12.2014, respectively. However, the Petitioner failed to complete the remaining 6.9% of the work by 03.07.2016, i.e., 18 to 21 months after the land was handed over. The Petitioner's failure to identify the Seawater Intake System as one of the critical elements of the project and their failure to complete it within the stipulated time frame demonstrates negligence and inefficient planning on their part.

The Petitioner cannot use the HUDHUD cyclone as an excuse for the delay in completing the Seawater Intake System. The cyclone happened 175 days after the Scheduled Commercial Operation Date

(SCOD). The land acquisition for the Railway Siding was not necessary, as the Petitioner was able to achieve the Commercial Operation Date (COD) without completing much work on this front. The project is currently operating without any problems, even without the completion of the Railway Siding. Therefore, the delay in implementing this element cannot be attributed to the increase in the project's IDC.

The transmission line for evacuating power was not planned at the time of MOA. APTRANSCO, the state-owned power transmission company, required nearly two years to construct and commission the required transmission line from the project to the substation. Therefore, it has been informed to the Petitioner that the transmission line cannot be commissioned before the COD of the project which was accepted by the Petitioner.

E. Tariff for the period up to 31.07.2022

The Petitioner's claim that the commission's reasoning for setting the ad-hoc tariff as the final tariff until 31.07.2022, is in violation of the Regulations issued by the Commission/CERC is incorrect. The Commission considered various parameters submitted by the parties when determining the ad-hoc tariff and set the tariff in accordance with CERC Regulations. Additionally, when setting the ad-hoc tariff as the final tariff, the commission took into account the Respondents' financial situation, their obligation to purchase renewable energy from plants with must-run status, the significant financial losses they incurred as a result of the COVID pandemic, and the ultimate financial burden on the end consumer.

F. Modification of norms

The Petitioner's claim that the commission should have applied the parameters applicable to a 500 MW unit as specified in Tariff Regulation 1

of 2008 is not valid. The Petitioner himself requested the commission to adopt the O&M norms specified in the relevant CERC Tariff Regulations. Therefore, the Petitioner cannot find fault with the Commission for adopting CERC norms. Additionally, Clause 10 of APERC Regulation 1 of 2008 allows for the adoption of CERC norms with or without modifications. Therefore, the Commission was right to adopt CERC norms wherever appropriate, in the absence of any norms for 500 MW units in Regulation 1 of 2008.

G. Amendments to the PPA

The national tariff policy requires that tariffs be reviewed every five years. The Commission has the authority to review these norms in the public interest. Therefore, the Commission's decision to review the norms for every control period is correct.

According to the Ministry of Power's notification dated 07.03.1994, and the CERC Tariff Regulations, the useful life of a thermal power plant is only 25 years. Even the most recent competitive bidding guidelines state that the duration of long-term PPAs should be 15 years. Therefore, the Petitioner's contention that the PPA duration should not be reduced is incorrect.

The benchmark Capital Cost determined by CERC for coal-based thermal stations in its order dated 04.06.2012, includes all expenditures related to the project's commissioning, regardless of whether it has been granted Mega Power Project Status (MPPS) status or not. Therefore, the commission has correctly decided that the Petitioner is not entitled to make any future claims if the project is not granted permanent MPPS status. In the public interest, the Commission has also correctly decided to disallow the cost of road transportation, if the railway corridor work is not completed within one year.

As regards the Escrow Account, the Commission, after taking into account the most recent Ministry of Power guidelines on the maintenance of the LC mechanism for payments to generators, has directed that the provision for the Escrow Account in the PPA be deleted.

5. Views/comments/objections from Sri M.Venugopala Rao

- A. The Commission's Common Order dated 01.08.2022, in O.P.No.21 of 2015 and O.P.No.19 of 2016, addressed all of the issues raised by the Petitioner in their current Review Petition. Therefore, the Review Petition deserves to be dismissed.
- B. It was learnt that the Petitioner approached the Respondents/GoAP for payment of the balance fixed charges amounting to Rs.1,200 Crores for the period from 21.08.2020 to 02.02.2022 against the tariff of Rs.3.82 per unit determined by the Commission. He questioned how the Petitioner could approach the Respondents/GoAP while this Review Petition is still pending before the Commission. He also stated that paying the fixed charges to the Petitioner by the Respondents would be a clear violation of the Commission's Common Order dated 01.08.2022. If the Petitioner wants to claim fixed charges for power that was not generated or supplied during the relevant period, it must first establish that adequate coal stocks were maintained during that time.
- C. On 16.02.2023, the GoAP issued G.O.Rt. No. 19, directing the Member Convener of the Andhra Pradesh Power Coordination Committee (APPCC) to submit loan applications to the Power Finance Corporation (PFC) and Rural Electrification Corporation (REC) for an additional amount of Rs.1,234.68 crores under the Late Payment Surcharge (LPS) Rules, 2022. The loan was to be used to pay the Petitioner. The GoAP also guaranteed the loan. Since the GoAP cannot interfere with the powers granted to the Commission under Section 86(1) of the Electricity

Act, 2003 (for short “the Act”), they cannot direct the Respondents to pay the fixed charges sought by the Petitioner.

D. In the RSTO for FY 2023-24, the Commission has stated as follows:

“Some stakeholders raised the issue of payment of the fixed cost to the Petitioner based on the ad-hoc tariff fixed by the Commission in its order dated 01.08.2022 for energy supplied during the period from 21st August 2020 to 2nd February 2022 and questioned the government’s intervention in the matter. In this regard, once the PPA and tariff are approved by the Commission, the DISCOMs are obligated to pay costs to HNPCL in terms of PPA and the Order dated 01.08.2022. If there is any dispute on the same, either party can approach this Commission for adjudication. So far no dispute has been raised before the Commission. If any payments are found to be made contrary to the order dt.01.08.2022, the same will be disallowed in FPPCA proceedings.”

E. If the Respondents pay the fixed charges as directed by the GoAP and then later approach the Commission for true-up claims under the Fuel and Power Purchase Cost Adjustment (FPPCA) and even if the Commission disallows such claims, the damage would have already been done by that time. The Respondents would have paid a higher price for power than they should have, and the public would have lost a significant amount of money. It was learnt that a bulk of the amount directed to be paid to the Petitioner had already been paid. That the Petitioner received this money under the condition that it would not give up its claim for almost double the amount directed by the GoAP.

F. He requested the Commission to dismiss the Review Petition and direct the Respondents to:

I. Not pay any additional amount to the Petitioner for the period till 31.7.2022, contrary to the Commission’s order dated 01.08.2022;

II. Recover any additional amount paid to the Petitioner, contrary to the Commission's order dated 01.08.2022;

III. Furnish copies of all representations that the Petitioner has made to the Respondents/Government of Andhra Pradesh (GoAP) for payment of additional amounts;

IV. Furnish copies of all decisions that have been taken, and the details thereof, in relation to seeking the "opinion" of the learned Advocate General of the High Court of Andhra Pradesh and of the Hon'ble retired judge of the Hon'ble Supreme Court;

V. Furnish the basis on which the GoAP directed the APPCC through the letter dated 19.12.2022 to consider the claims of the Petitioner and the details thereof; and

VI. Furnish a copy of decisions taken on this issue in the meeting of APPCC on 21.12.2022.

G. He further requested the Commission to identify the authorities who were responsible for paying the additional hefty amount to the Petitioner illegally contrary to the Commission's order dated 01.08.2022, fix responsibility on those authorities for their actions and take appropriate legally permissible action against them.

6. Views/comments/objections of Sri Ch. Babu Rao

A. During the hearings, Sri P Siva Rao confirmed that the Respondents are paying fixed charges to the Petitioner for deemed generation. Therefore, there is no doubt that the Respondents are paying the Petitioner an additional amount for supply/non-supply of power for the period prior to 01.08.2022.

B. The Petitioner supplied power to the Respondents during the period prior to 01.08.2022 on the basis of a specific quantum of power, specific interim tariffs and for specific periods as incorporated in the interim orders and

respective Retail Supply Tariff Orders (RSTOs) by the Commission. However, no reference has been made either before the Commission, APTEL or the Hon'ble Supreme Court about payment of fixed charges for deemed generation for the period prior to 01.08.2022. Nor has there been any direction from the Commission, APTEL or the Hon'ble Supreme Court to the Respondents to pay the fixed charges for deemed generation for the period prior to 01.08.2022.

- C. As per the FPPCA Regulation and the observation made in the RSTO for 2023-24, it seems that the Commission will scrutinise the FPPCA claims at the end of the financial year concerned. In the meantime, the Respondents will recover questionable sums of money paid illegally to the Petitioner from the consumers to the extent permitted by the Regulation, without the prior consent of the Commission, much to the detriment of the consumers of power at large.
 - D. He requested the Commission to take up suo-motu the issue of the Respondents paying hefty additional amounts to the Petitioner for the power supplied/not supplied during the period prior to 01.08.2022, in violation of the Commission's Common Order dated 01.08.2022.
7. As offered by Sri Avinash Desai, the learned Senior Counsel for the Petitioner during the hearings on 03.05.2023, brief points of the Review Petition were filed by the Petitioner on 12.05.2023 which included, among others, the following additional submissions:

The Commission has not allowed automatic pass-through of fuel costs, which will delay recovery of the amounts incurred by the Petitioner. The Respondents are allowing a maximum variable cost of Rs.2.81/unit, which is 15% higher than the base cost of Rs.2.44/unit. However, the Petitioner is not able to recover its actual variable costs and is incurring a loss of Rs.17 Crores to Rs.20 Crores per month. This is adversely affecting the Petitioner's ability

to procure coal from Mahanadi Coal Fields Limited (MCL) and maintain generation. Therefore, it is necessary to issue a clarification that the energy charges will be settled as per clause 13 of Regulation 1 of 2008.

The Petitioner also denied the contentions raised by the Respondents in their counter with regard to the non-furnishing of progress reports, the justification for the delay in the allocation of land to the Petitioner, etc.

As regards the objections of Sri M.Venugopala Rao and Sri Ch. Babu Rao, the Petitioner submitted that the interim tariff of Rs.3.82/kWh (fixed charge at Rs.1.06/kWh) was determined by the Commission vide order dated 14.06.2018 and the Petitioner raised the invoices in terms of the said order. In the order dated 01.08.2022, the Commission held that the payment of tariff for the period from the commissioning of the project to 31.07.2022 would be in terms of the interim tariff determined earlier. Therefore, the payment made by the Respondents to the Petitioner was not illegal.

8. Commission's analysis and decision

We have considered the respective pleadings and submissions of the parties. Before discussing the points raised by the learned Counsel for the petitioner, it is necessary to deal with the scope of review. This aspect was thoroughly discussed by this Commission in its Common Order dated 04.08.2020 in Review Petition No.1 of 2019 in O.P.No.30 of 2018 and Review Petition No. 3 of 2019 in O.P.Nos.28 and 29 of 2018 and order dated 08.04.2021 in Review Petition Nos.2 of 2019 and 1 of 2020 in O.P.NO.47 of 2017. It is useful to reproduce the relevant portions of the orders hereunder:

".. Section 94(1)(f) of the Electricity Act, 2003 (for short "the Act") confers power of review of its decisions, directions and orders on the Commission. However, neither the Act nor the Rules framed thereunder indicated any parameters for exercise of this power. In the absence of any indicia, it is not only apt but also permissible to follow the law laid down by the constitutional courts in this regard. In Sow Chandra Kanta & Another Vs. Sheik Habib (1975 SCC (4) 457) the Hon'ble Supreme Court held that a review of a judgement is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial

fallibility. In P.N. Eswara Iyer vs. The Registrar, Supreme Court of India (1980 AIR 808) a constitution bench of the Supreme Court reaffirmed the ratio in ChandraKanta (1 supra). In Shri Ravinder Kumar Vs. Kamal Sen Gupta (2008) 8, the Hon'ble Apex Court held that unlike in appeal, scope of review is grossly circumscribed to such cases where review seeker has made a discovery of a new and important matter of evidence, which, after exercise of due diligence, was not within his knowledge and could not be produced by him when the decree or order where some mistakes or errors apparent on the face of the record have been made or when the court has overlooked some obvious facts on the basis of which decision could be made. The court further held that for a review, one of the above three considerations should be established. In Devender Pal Singh vs. State of NCT of Delhi (2003)2 SCC 501, the Apex Court held that review is not a rehearing of appeal all over again and that scope of interference is very limited to aspects such as miscarriage of justice."

Keeping in view the limited scope of interference in review jurisdiction as per the dicta laid down by the authoritative pronouncements of the Apex Court as discussed above, we shall now consider the reliefs sought by the petitioner.

A. Alleged non-furnishing of reports to the Respondents from time to time on the Capital Costs incurred.

According to Article 8.1 (t) of the amended and restated PPA dated 15.04.1998, the Petitioner shall submit half-yearly reports ("Actual Cost Report") certified by the company's independent auditors to the Board, starting six months after financial closing. The PPA was revived by the MOA dated 17.05.2013. However, even after the revival of the PPA, the Petitioner failed to submit the said reports.

Further, as per the Continuation Agreement dated 28.04.2016 to the amended and restated PPA dated 15.04.1998, the Petitioner shall submit monthly progress reports to the Respondents. However, the Petitioner never submitted these reports. The learned Counsel for the Petitioner did not deny these facts during the hearings in O.P.Nos. 21 of 2015 and 19 of 2016, and the Commission recorded the same in its Common Order dated 01.08.2022 in these O.Ps.

Due to the non-furnishing of the reports, the Respondents could not verify the veracity of the expenditure incurred during the relevant period. Since the Respondents have to service the Capital Cost through the payment of fixed costs (which are ultimately passed on to the consumers), they have every right to ensure that the expenditure is incurred in an optimum manner. Therefore, the Petitioner's contention that the Respondents were not prejudiced or adversely affected by the non-receipt of progress reports for the period prior to the entering of MOA is incorrect.

B. Determination of Capital Cost

As regards the issue of breakdown of hard cost raised by the Petitioner in the Review Petition, the Commission in the Common Order dated 01.08.2022 already explained why a prudence check of the project cost item wise is not possible in the absence of correspondence by the Petitioner from time to time on the progress of the project and cost escalation during its execution and also the absence of breakup of the benchmark hard cost item wise for similar projects in the CERC order dated 04.06.2012. As far as the interest and financing costs are concerned, the Commission allowed the same in the Common Order dated 01.08.2022 to the extent permissible.

As regards the impact of the Hudhud cyclone, the Commission dealt with this issue at page 72 of the Common Order dated 01.08.2022 where the Commission after having considered the fact that the Hudhud cyclone occurred much later than the SCOD of the project, i.e. 30.09.2014, held that the Petitioner is solely responsible for not achieving SCOD and as a result, the alleged losses on account of such cyclone, though an uncontrollable factor, can not be fastened on the end consumers.

Regarding the handing over of the land for the construction of the Seawater Intake System, and Railway Siding, the Commission at page 71 of the Common Order dated 01.08.2022 elaborately discussed why it is not allowing cost escalation on the delayed acquisition of land as the same falls under controllable factors.

As regards the allowing of expenditure on initial spares, construction and pre-commissioning activities, and overheads incurred by the Petitioner, as held, these items are part of the benchmark hard cost determined by the Commission.

C. Comparison of Capital Costs with benchmark costs

The contention of the Petitioner is that though the CERC's methodology does not allow for the exclusion of annual escalation for firm packages, the Commission has only considered escalation on 10.19% of the base cost of Rs.4.71 crores per MW.

As out of the total firm contracts, Rs.4,440.87 Crores worth of contracts have been executed by the Petitioner by the end of FY 2011-12, i.e. before the CERC order was issued on 04.06.2012, the Commission excluded the escalation on this portion of firm contracts. The Commission has assigned elaborate reasons in support of its view, vide pages 68 and 69 of the Common Order dated 01.08.2022.

As regards the contention of the Petitioner that in the order dated 08.04.2021 in Review Petition No. 2 of 2019 in OP No. 47 of 2017, the Commission observed the limitations of the applicability of the benchmark Capital Cost, it needs to be noted that the Commission has not specifically stated anything about the limitation of the applicability of the CERC benchmark Capital Cost but merely observed in that order that if a case is made out that a particular feature/facility is peculiar to a project,

the Commission has to carry out prudence check and include the additional cost in the Capital Cost if it is satisfied on such check.

D. Interest During Construction (IDC) and Financing Charges(FC)

The Order under review articulated in detail the reasons for not allowing the delayed period for the purpose of cost escalation on account of the Hudhud cyclone and the delay in handing over the land by GoAP for the construction of the Seawater Intake System and Railway Siding. As regards the delay in the construction of the transmission system by APTRANSCO, it may be noted that the alternate transmission system was already in place for evacuation and to demonstrate the COD test as observed by the Commission in the Common Order dated 01.08.2022. Hence, the Petitioner can not rely on the delay in the construction of the transmission line by APTRANSCO in support of its contention. The Commission dealt with these issues in detail at pages 69 to 73 of the Common Order dated 01.08.2022 and enumerated the reasons for disallowing the IDC and FC for the delayed period due to the Hudhud cyclone, delay in the handing over of the land by GoAP and the delay in the construction of the transmission line.

E. Tariff for the period up to 31.07.2022

The Petitioner cannot compare its project to APGENCO's stations as there are no disputes between APGENCO and the Respondents regarding the validity or uncertainty of the PPAs. In contrast, there was a great deal of uncertainty about whether the PPA between the parties in the Petitioner's project would come through. The Respondents even went so far as to withdraw the O.P. filed for its approval, effectively repudiating the PPA.

The Commission provided a detailed justification for setting the ad-hoc tariff fixed from time to time as the final tariff for the period from

the actual COD of unit-I till 31.07.2022 at page 74 of the Common Order dated 01.08.2022.

F. Modification of norms

Clause 12.3.2 of APERC Regulation 1 of 2008 specifies the norms for O&M charges for unit capacities up to 500 MW only. Clause 10 of the same Regulation specifies that tariffs shall be determined in accordance with the norms specified therein, guided by the principles and methodologies specified in CERC (Terms and Conditions of Tariff) Regulations 2004 as originally issued and amended by CERC (Terms and Conditions of Tariff) (First Amendment) Regulations, 2006, issued on 1 st June 2006 vide No. L-7/25/(5)12003-CERC and that any further amendments thereto shall be applicable on their adoption by the Commission, by means of a general or special order, with or without any modifications. Accordingly, the Commission fixed the norms for the project for the period up to the end of FY 2023-24.

In O.P.No.21 of 2015 and O.P.No.16 of 2016, the Petitioner itself requested the Commission to adopt the CERC norm in respect of O&M charges though there is an APERC norm for 500 MW units. However, the Petitioner's request to follow the Commission's norms was not acceded to as those norms were laid down for 500 MW units, vide APERC Regulation 1 of 2008. The Petitioner can not be selective in claiming application of either APERC or CERC norms, whichever suits them. Therefore, there is no inconsistency in the approach of the Commission while adopting the CERC norms. The Commission already provided detailed justification in the Common Order dated 01.08.2022 for each and every norm adopted.

G. Amendments to the PPA

It is the generally established practice of the Commissions to review the norms for every control period and modify them if necessary based on the past performance of the units, technological changes, etc. Even CERC also reviews the norms for every control period and modifies them appropriately. Further, as already stated supra, the Commission can adopt the CERC norms from time to time with or without any modification. The reasons for the reduction in the duration of the PPA are that the fair useful life of thermal power plants is only 25 years as notified in MoP's notification dated 27th March 1994 and also as per CERC tariff Regulations. The Commission already stated these reasons in the Common Order dated 01.08.2022.

As regards the implication of taxes if MPPS is not granted, the Commission held at page 85 of the Common Order dated 01.08.2022 that the Capital Cost of the project was determined based on the benchmark Capital Cost determined by the CERC for coal-based thermal stations in the order dated 04.06.2012 which factors all the expenditure relating to the Commissioning of the project in all respects irrespective of the MPPS status and held that the Petitioner is not entitled to raise any claims on the Respondents in future in the event of non-grant of permanent MPPS to the project. Further, the Senior Counsel for the Petitioner Sri Avinash Desai fairly submitted that HNPCL will not raise any claim in future as a non-MPPS plant.

As regards the future expenses on the railway corridor, the Commission already stated at page 85 of the Common Order dated 01.08.2022 that the total Capital Cost claim includes railway corridor work whose expenditure is yet to be incurred and that the company shall not raise any claims in future on the Respondents on this account. As regards

the completion of the railway corridor work, the same has been pending for a long time and the Petitioner should have completed it long back by obtaining the necessary consents from NTPC, Railways and other authorities. Therefore, the Commission keeping in view the additional burden on consumers due to road transport of coal, directed the Petitioner to expedite and complete the rail corridor work within one year from the date of the Common Order dated 01.08.2022 failing which the cost incurred towards road transport will be disallowed by the Commission.

Though both parties agreed on the inclusion of the Escrow Account in the PPA, it was for the Commission to decide whether to allow the clause or not after considering the relevant factors since section 86(1)(b) of the Electricity Act, 2003 provides for the State Electricity Regulatory Commissions to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from the other sources through agreements for the purchase of power for distribution and supply within the State.

H. Pass through of variable cost

The Commission imposed the cap of +15% over the base variable cost in order to scrutinize the claims that are over and above the 15% cap and only pass on the costs to the consumers that are legitimate in order not to burden them. The same conditions have been imposed on APGENCO's power plants also. Further, as per para 129(f) of the Retail Supply Tariff order for FY 2023-24, the Petitioner can approach the Commission through a proper petition if they incur extra expenditure over the variable cost approved in the said order for consideration of the same by the Commission and passing of necessary orders after a prudent check.

I. Payment of Rs.1,200 Crores of additional fixed costs

Sri M. Venugopala Rao stated that GoAP issued a GO on 16.02.2023 directing APPCC to submit loan applications to PFC/REC for an additional amount of Rs.1,234.68 crores under the LPS Rules, 2022 in order to pay the additional fixed charges claimed by the Petitioner for the period up to 31.07.2022 and he learned that bulk of the above amount was already paid to the Petitioner. He expressed concern that when Respondents later approach the Commission to claim the above amounts under FPPCA and if the Commission disallows such claims, the damage would have already been done by that time and the public would have lost a significant amount of money.

Sri M. Babu Rao questioned the legality of the additional fixed charges payment as there was no direction from the Commission, APTEL, or the Supreme Court for the Respondents to pay fixed charges for the deemed generation for the period prior to 01.08.2022. He also expressed concern that these payments would be detrimental to the interests of consumers. Both parties requested the Commission to take action on the issue of the Respondents' payment of additional fixed charges.

In this regard, the Petitioner, in the brief points submitted to the Commission on 03.05.2023, stated that they claimed the fixed charges for the period prior to 01.08.2022 at the fixed charges rate of Rs.1.06 per unit determined by the Commission in the interim tariff in 2018.

During the hearing, the Commission has made a pointed query to Sri M.Venugopal Rao, learned Objector, to draw the Commission's attention to the part of the order under review allegedly violated by the respondents by paying fixed charges from the date of COD. The learned Objector could not succeed in doing so. The issues before this

Commission in OP Nos.21 of 2015 and 19 of 2016 were the determination of tariff and approval of PPA. The question whether the petitioner was entitled to fixed charges from the date of COD towards deemed generation was never an issue, much less, any directions were issued by this Commission in this regard.

It may be noted in this context that Schedule J of the PPA provides for payment of fixed charges if the Purchaser does not take power in spite of the readiness of the Generator towards Deemed Generation. This Clause is, obviously, meant to safeguard the interests of the Generator by covering items of expenditures, such as interest on loans, return on equity, O & M Charges etc. will be incurred by the generator irrespective of whether power is generated or not. As noted above, neither the entitlement of the petitioner nor the liability of the respondents to pay fixed cost post COD was an issue before this Commission. The role of the Commission would not come into play unless either party to the PPA approaches it for dispute adjudication under Section 86(1)(f) of the Act. Unless the respondents acted in violation of the Common Order dated 01.08.2022 in OP Nos.21 of 2015 and 19 of 2016 or they have acted in violation of the provisions of the Act or the Rules and Regulations made thereunder, the Commission cannot intervene in a non-existent dispute. It is not as if the respondents have paid fixed cost to the petitioner at a rate higher than that fixed under the Commission's order dated 01.08.2022. It is also not as if the PPA does not provide for the payment of fixed cost. No specific plea has been raised by the Objectors that the PPA does not envisage payment of the fixed cost or that a higher fixed cost than what was determined was paid by the respondents. As noted earlier, the whole aspect of payment of fixed cost falls outside the scope and ambit of the above mentioned two OPs and also the Review Petition filed by the

petitioner. Therefore, any intervention by this Commission on the aspect of payment of fixed charges by the respondents in the present proceedings would be wholly without jurisdiction.

The Objectors have raised the same objection during the Tariff Hearings. This Commission in its Retail Supply Tariff Order dated 25.3.2023 passed in OP Nos.65, 66 and 67 of 2022 for FY 2023-24, while dealing with the said Objections stated as under:

“Para 131. Some stakeholders raised the issue of payment of the fixed cost to HNPCL based on the adhoc tariff fixed by APERC in its order dated 01.08.2022 for energy supplied during the period from 21st August 2020 to 2nd February, 2022 and questioned the government’s intervention in the matter. In this regard, once the PPA, and tariff are approved by the Commission, the DISCOMs are obligated to pay costs to HNPCL in terms of PPA and the order dated 01.08.2022. If there is any dispute on the same, either party can approach this Commission for adjudication. So far, no dispute has been raised before this Commission. If any payments are found to be made contrary to the order dated 01.08.2022, the same will be disallowed in FPPCA proceedings”.

The Commission reiterates the above view and while considering the True-up Claims, the Commission will examine the justification of the Claim with reference to the Common Order dated 01.08.2022 and the criteria applicable to justify payment of fixed charges.

Following the discussion as above, the Commission is of the view that the petitioner failed to satisfy the criteria warranting review of the Common Order dated 01.8.2022 in OP Nos.15 of 2015 and 19 of 2016. Therefore, the Review Petition is devoid of any merit and the same is, accordingly, dismissed.

Sd/-

Thakur Rama Singh
Member

Sd/-

Justice C.V. Nagarjuna Reddy
Chairman