IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
NEW DELHI

(APPELLATE JURISDICTION)

REVIEW PETITION NO. 1 OF 2019
IN
APPEAL NO. 175 of 2015

Dated: 28th January, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

Pragati Power Corporation Ltd. (PPCL)
Himadri Rajghat Power House Complex,
New Delhi - 110002 …. Petitioner

Versus

1. **Central Electricity Regulatory Commission (CERC)**
3rd& 4th Floor, Chanderlok Building,
35, Janpath, New Delhi- 110001 …. Respondent No.1

2. **BSES Yamuna Power Limited (BYPL)**
Shakti Kiran Vihar
Karkardooma …. Respondent No.2
New Delhi – 110 092

3. **New Delhi Municipal Council (NDMC)**
Palika Kendra,
Sansad Marg,
New Delhi – 110 001 …. Respondent No.3

4. **North Delhi Power Ltd. (NDPL)**
Grid Substation,
Hudson Road …. Respondent No.4
Kingsway Camp, Delhi – 110 009

5. **BSES Rajdhani Power Limited (BRPL)**
BSES Bhawan, Nehru Place
Nehru Place
New Delhi – 110 019 …. Respondent No.5

6. **Punjab State Power Corporation Ltd. (PSPCL)**
PSEB Head Office
The Mall, Patiala – 147 001 …. Respondent No.6

7. **Haryana Power Purchase Centre (HPPC)**
Shakti Bhawan, Sector – IV
Panchkula, Haryana – 134 109 … Respondent No.7

8. **Garrison Engineer**
Military Engineering Services (MES)
GopiNath Market,
Delhi Cantt – 110 010 …. Respondent No.8

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan

Counsel for the Respondent(s) : Mr. Mohit Mudgal for R-2

Mr. Manish Kumar Srivastava
Mr. Rahul Gupta
Ms. Niharika Khanna
Mr. Prachi Johri for R-4

Mr. R.B. Sharma for R-5

O R D E R

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. The Petitioner, Pragati Power Corporation Ltd. is a Generating Company, second to fifth and eighth Respondents being Distribution

Licensees in NCT of Delhi, sixth & seventh Respondents being procurers of power on behalf of the Distribution Licensees in the States of Punjab and Haryana respectively and all the said respondents, thus, being beneficiaries of electricity generated by the Petitioner at its Pragati-III Combined Cycle Power Plant (1371.20 MW) (*"Pragati-III"*, for short).

2. It is stated that Pragati-III was set up primarily with the objective of it being commissioned around the time of Commonwealth Games (CWG) held in Delhi in October 2010. In the Investment Approvals granted by the Board of Directors, no specific Scheduled Commercial Operation Date (*"SCOD"*) was indicated. As per the EPC contract, however, Block-I was to be commissioned within 28 months and Block-II was to be commissioned within 32 months from the date of award of the main plant package (i.e. 30.04.2008). Thus, the Petitioner took the SCOD of the two Blocks as 31.07.2010 and 30.11.2010 respectively. There was concededly delay in execution, two Gas Turbines (GTs) and one Steam Turbine (ST) of Block-I being completed on 14.12.2012 followed by completion of two GTs and one ST of Block-II being completed on 27.03.2014.

3. In exercise of its jurisdiction, the first Respondent, Central Electricity Regulatory Commission (CERC) determined the tariff of

Pragati-III for the period from the date of COD of GT-I of Block-I up to 31.03.2014 by its Order dated 26.05.2015 in Petition No. 257 of 2010 disallowing the time overrun and corresponding Interest During Construction (IDC), Incidental Expenses During Construction (IEDC) and Foreign Exchange Rate Variations (FERV) besides non-consideration of IDC on normative debt : equity ratio, claim of additional water charges and municipal tax. The said order was challenged before this Tribunal by Appeal No. 175 of 2015 titled, "*Pragati Power Corporation Ltd. vs Central Electricity Regulatory Commission & Ors.*

4. One of the issues raised and addressed in the Final Order dated 12.07.2018, by which the appeal was disposed of, posed the question as to whether the Central Commission in computing the interest on loan had acted in violation of Regulation 12 of the CERC (Terms and Conditions of Tariff) Regulations, 2009 (*"Tariff Regulations 2009"*, for short). Since the issue was answered against the Petitioner (appellant) and, by the Review Petition at hand, exception is taken to some part of the reasoning set out for the said decision, it is proper to extract (verbatim) the relevant part of the same herein below:

> *"11. .....*
>
> *(c) Now we let us take the question of law related to second issue regarding normative debt: equity ratio for the purpose of IDC until SCOD. On Question No. 6. c) i.e. Whether the Central Commission in computing the interest on loan has acted in*

violation of Regulation 12 of the Tariff Regulations 2009 which provides for normative debt : equity ratio of 70:30?, we consider as below:

i. *To address this issue let us first analyse the provisions of the Tariff Regulations 2009 relied upon by the Appellant. The relevant extract is reproduced below:*

> *"12. **Debt-Equity Ratio**. (1) For a project declared under commercial operation on or after1.4.2009, if the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan:*
>
> *Provided that where equity actually deployed is less than 30% of the capital cost, the actual equity shall be considered for determination of tariff:"*

From the above it can be seen that for projects where COD is on or after 1.4.2009 if equity deployed is more than 30% of the capital cost then the equity in excess of 30% shall be treated as normative loan andwhere equity actually deployed is less than 30% of the capital cost, the actual equity shall be considered for determination of tariff.

> *"16. Interest on loan capital. (1) The loans arrived at in the manner indicated in regulation 12 shall be considered as gross normative loan for calculation of interest on loan."*

From the above it can be seen that the Interest on Loan (IOL) component of the fixed charges is calculated based on the loans arrived in accordance with Regulation 12 of the Tariff Regulations, 2009.

ii. ***We note that the above provisions of the determination of tariff on normative basis comes into picture from the COD of the unit/ station for year on year tariff purpose. In the***

present case, the Appellant has applied this principle of normative debt: equity ratio during the construction period. The Respondent Nos. 4 & 5 are relating the issue from the COD of GT(s)/ Block (s) of Pragati-III, which in our view seems to be correct. We are proceeding to analyse the issue in light of the said contention of the parties.

iii. Now let us examine the findings of the Central Commission in the Impugned Order. The relevant extract is reproduced below:

*"**Interest During Construction***

36. The petitioner has submitted that the tariff filing forms filed earlier have been revised considering IDC on actuals, on payment basis, as on the dates of COD of the individual blocks. The petitioner has also submitted that it had earlier signed a loan agreement with PFC for 70% of the project cost and the loan drawl schedule was to commence from the fourth quarter of financial year 2009-10. It has also submitted that due to the delay in supplies and services, the overall project has been delayed and accordingly the loan drawl schedule was revised on several occasions. The petitioner has further stated that during the intervening period the petitioner had utilized its own Reserves & Surplus for the release of initial advance to the EPC contractor, payment of running bills for supply and services for a considerable period and that the payment has been totally on equity expenditure. Accordingly, it has submitted that no IDC is payable for the said period. The petitioner has therefore requested the Commission to allow IDC as per actuals, without deduction of the LD retained by the petitioner, since the issue of LD has not been settled between petitioner and M/s. BHEL. Therefore, while finalizing the book of accounts, the LD amount has been shown as retained amount in book of accounts though deducted from the EPC contractor and the

same has not been adjusted while working out final amount for IDC and Capital cost.

37. The petitioner has raised debt from Power Finance Corporation (PFC) and PFC vide letter dated 9.4.2009 has sanctioned debt amounting to `3637.00 crore. The petitioner has also availed loan amounting to `500.00 crore from the Govt. of NCT of Delhi. The details regarding the debt raised by the petitioner is as follows:

		Amount (₹ in lakh)
I	**PFC Loan**	
	Loan disbursement started from 5.2.2010	
	Loan drawn up to 31.3.2014	191558.00
	Loan amount drawn till COD of station (27.3.2014)	191558.00
	Repayment instalment (starting from 15.4.2013– Quarterly)	3420.68
II	**GoNCTD Loan**	
	Loan disbursement started from 30.11.2011	
	Loan drawn up to 31.3.2014	50000.00
	Loan amount drawn till COD of station (27.3.2014)	50000.00
	Repayment instalment (starting from 29.11.2012 –Yearly)	1333.33
III	**Total Interest During Construction claimed**	**43478.00**

38. As stated, the total time overrun involved in the commissioning of the project has not been allowed and accordingly the cost overrun due to time overrun has not been allowed. Therefore, IDC has not been allowed for the time over run period of 21 months, 26 months, 28½ months, 39 months, 41 months, 40 months in the commissioning of GT-I, GT-II, Block-I, GT-III, GT-IV and Block-II respectively. Despite directions of the Commission, the petitioner has not furnished the detailed calculations for unit-wise allocation of the total IDC. Therefore, the interest amount of `4941 lakh worked up to 30.11.2010 (scheduled COD of the generating station) has been apportioned between capital and revenue, based on the same proportion as considered by the petitioner vide affidavit dated 5.12.2014.The petitioner is however directed to furnish the detailed calculations for unit-

wise allocation of the total IDC at the time of revision of tariff based on truing-up exercise in terms of Regulation 6(1) of the 2009 Tariff Regulations.

39. On the basis of the above, out of total interest of `4941 lakh, an amount of `2709.40 lakh has been treated as IDC and the same has been allocated to the various units based on the total IDC vis-a vis the unit-wise IDC claimed by the petitioner. Accordingly, the unit-wise IDC has been worked out and allowed as under:

(Rs. Lakh)

	GT-I	STG-I & HRSG-I	GT-II	ST/HRS G-I & II	GT-III	GT-IV	STG-II/ Project	**Total**
IDC	403.90	258.26	327.81	124.19	464.14	405.45	725.65	**2709.40**

From the above it can be seen that the Central Commission has held that the Appellant in the tariff filing prescribed forms has considered IDC on actuals, on payment basis, as on the dates of COD of the GT(s)/Blocks(s). The Central Commission has further held that the Appellant initially had made payments to the EPC Contractor from the equity as loan drawdown was rescheduled due to delay in the project and hence submitted that no IDC is payable to it for the said period. No IDC has been allowed for the time overrun period. The Appellant has not furnished the detailed calculations for unit-wise allocation of the total IDC. In absence of the same the Central Commission has worked out IDC as Rs. 49.41 Cr. until SCOD and apportioned it between capital and revenue based on proportion submitted on the affidavit dated 5.12.2014 by the Appellant. The Central Commission has also directed the Appellant to furnish the detailed calculations for unit-wise allocation of the total IDC at the time of revision of tariff based on truing-up exercise in terms of Regulation 6(1) of the Tariff Regulations 2009. Thereafter the Central Commission has proceeded to calculate IDC, which

according to the Central Commission works out to Rs. 27.09 Cr.

iv. *We observe that the Regulation 12 and 16 of the Tariff Regulations 2009 relied by the Appellant provides for consideration of equity invested beyond 30% as normative debt from COD for the purpose of tariff determination. The Appellant has contended to apply the same principle during the construction period also, which in our opinion is flawed. However, from the submissions of the Appellant it is clear that the Appellant has been deploying only equity since 2008-09 before first drawal of loan on 5.2.2010. However, it is observed that the Central Commission has taken actual interest on loan on payment basis during construction for the purpose of capitalisation as on COD of GT(s)/ Block(s) based on the claim of the Appellant vide revised forms submitted by it on affidavit dated 5.12.2014.* ***Further, in absence of details of IDC apportionment as on COD of GT(s)/ Block (s) which are not provided by the Appellant the Central Commission has arrived at the figure of Rs. 27.09 Cr. as allowable IDC, which in any case would be adjusted as and when the Appellant provides the details as directed by the Central Commission during truing up exercise****.*

v. *..... ....*"

[Emphasis supplied]

5. Having regard to the above quoted observations, the Tribunal concluded that the view taken by CERC in the impugned order was justified and reasonable, there being no perversity, the matter not meriting any interference. Thus, the appeal was dismissed as "*devoid of merits*".

6. It may be mentioned here that both the learned Members of the Bench which rendered the decision dated 12.07.2018 in Appeal No. 175 of 2015 in the case of Pragati Power Corporation Ltd vs Central Electricity Regulatory Commission (supra) and for review of part of which the instant Petition has been filed, have since demitted office. Hence, the Review Petition has been heard by us for adjudication.

7. The learned counsel for the Respondent raised the preliminary issue of impermissibility of review petition to be entertained beyond the period of limitation and referred in this context to the decision rendered by a Bench of this Tribunal on 28.05.2013 in IA No. 46 of 2013 in R.P. (DFR) No. 165 of 2013 in Appeal No. 24 of 2011 in the case of *Odisha Power Transmission Corporation Ltd vs Odisha Electricity Regulatory Commission & Ors.* We do not wish to entertain the said objection at this stage for the reason the application, being IA No. 1643 of 2018, for condonation of delay in filing of the Review Petition was allowed by the Order dated 24.01.2019, the said order having since become final and binding

8. It was pointed out at the hearing that the expression "*capital cost*", as is relevant for determination of the debt-equity ratio and also the consequential benefits in the nature of IDC, IEDC, etc is defined by

Regulation 7 of the CERC Tariff Regulations, 2009, which reads thus (extracted to the extent relevant here):-

> *"7.* ***Capital Cost***
>
> *(1) Capital cost for project shall include:-*
>
> *(a) the expenditure incurred or projected to be incurred, including interest during construction and financing charges, any gain or loss on account of foreign exchange risk variation during construction on the loan – (i) being equal to 70% of the funds deployed, in the event of the actual equity in excess of 30% of the funds deployed, by treating the excess equity as normative loan, or (ii) being equal to the actual amount of loan in the event of the actual equity less than 30% of the funds deployed, - up to the date of commercial operation of the project, as admitted by the Commission, after prudence check;*
>
> *(b) capitalised initial spares subject to the ceiling rates specified in regulation 8; and*
>
> *(c) Additional capital expenditure determined under Regulation 9;*
>
> *Provided that the assets forming part of the project, but not in use shall be taken out of the capital costs.*
>
> *..... ....*

9. It was highlighted that the above quoted meaning of the expression "capital cost" was neither noted nor its effect on the issue expressly commented upon in the judgment of which review is sought.

10. The main grievance of the Petitioner seeking review concerns the observations in sub-para (iii) of para 11(c) of the decision on appeal,

which portion we have highlighted (in bold). It has been argued on behalf of the Petitioner that the observation in the said para denying the abovementioned benefits, upholding the approach of CERC to be "*correct*", would clinch the issue finally against it, to its disadvantage at the stage of truing-up exercise in the relevant period, rendering the later observations in sub-para (iv) that there would be adjustment as and when requisite details are provided meaningless. It is also submitted that since the Appeal was "*dismissed*" as devoid of merits, there is an apprehension that CERC at the stage of truing-up may decline to consider the relevant data or the contentions of the Petitioner based on conjoint reading of Regulations 7 and 12.

11. On careful scrutiny of the matter, we find that CERC was unable to give consideration to the actuals because the relevant details were not provided. The lament of the Commission about default on the part of the Petitioner in furnishing the requisite details compelling it to proceed on normative basis runs through the impugned order. Mercifully, the Commission clearly observed, as has been duly noted in the order under review, that necessary adjustment on account of IDC apportionment would be provided "*during truing up exercises*" subject to the Petitioner furnishing the details as directed.

12. We must note here that the Petitioner has not offered any justification whatsoever for failure on its part to furnish the detailed information in absence of which the Commission was constrained to take restricted view. It is not the case of the Petitioner that information was not available or that the information, which was called for, had no relevance to the issues. Undoubtedly, by the time the truing-up exercise comes up, the audited accounts would be available.

13. We are confident that the Commission, hopefully having the benefit of the requisite data to be furnished by the Petitioner, while undertaking truing-up exercise and, of course, tariff determination for subsequent periods will bear in mind the Tariff Regulations in entirety including the width and scope of the expression "*capital cost*", as defined by Regulation 7.

14. We do not have the least doubt that the Commission would abide by the assurance held out to the above noted effect in the order which was challenged by the Appeal, at the stage of truing-up. Mere fact that the appeal was dismissed as devoid of merits does not mean the said assurance of the Commission is rendered nugatory. Apprehensions of the Petitioner to such effect as noted earlier are unfounded and misplaced.

15. We do not find any good reason to modify the Order under review. With these observations the instant petition, being Review Petition No. 1 of 2019 in Appeal No. 175 of 2015, is disposed of.

PRONOUNCED IN THE OPEN COURT ON THIS 28TH DAY OF JANUARY, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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