



ORDER

OF THE

WEST BENGAL ELECTRICITY REGULATORY COMMISSION

IN THE MATTER OF

CASE NO: APR(R)-35/24-25

PETITION UNDER SECTION 94 (1) (F) OF THE ELECTRICITY ACT, 2003 READ WITH REGULATION 3.3 OF THE WEST BENGAL ELECTRICITY REGULATORY COMMISSION (CONDUCT OF BUSINESS) REGULATIONS, 2013 FOR REVIEW OF ANNUAL PERFORMANCE REVIEW ORDER OF INDIA POWER CORPORATION LIMITED FOR THE FY 2017-18 ISSUED BY THE COMMISSION ON 07.03.2024 IN CASE NO. FPPCA-105/21-22 AND APR-98/22-23

PRESENT:

DR. MALLELA VENKATESWARA RAO, CHAIRPERSON

DATE: 19.11.2024



Facts in brief:

- 1.0 India Power Corporation Limited (IPCL) has submitted a petition under section 94(1)(f) of the Electricity Act, 2003 read with regulation 3.3 of the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2013 seeking review of the order dated 06.03.2024 in Case No.FPPCA-105/21-22 and APR — 98/22-23 (hereinafter referred as 'APR Order') passed by the West Bengal Electricity Regulatory Commission for Annual Performance Review for the financial year 2017-18.
- 2.0 In their review petition, IPCL has submitted that, there are errors apparent on the face of the record in the order in case No. FPPCA-105/21-22 and APR-98/22-23 of the Commission and accordingly, they are filing the review petition with a prayer to admit the petition and review the APR order to the extent indicated in the petition. IPCL in their petition inter-alia put forward the following issues for review:
 - A. Erroneous computation of Capacity Charge Disallowance [Ref: Page 49, Para 3.28 of APR Order for 2017-18):]
 - B. Depreciation: [Ref: Page 33, Para 3.15.7 of APR Order for 2017-18]
 - C. Non-Tariff Income
 - D. Interest Credit: Erroneous consideration and Wrong computation of Interest Credit- (Ref: Page 40, Para 3.19.1 of APR order for 2017-18)
 - E. Request for consideration of some of the heads like Working capital requirement etc. meriting re-determination/Auto Adjustment:
- 3.0 IPCL has submitted that in view of all the above proposed changes, the figures of the interest on working capital, T&D gains, interest credit, reliability incentives etc. may also be revised accordingly.
- 4.0 The Commission observed that, after filing the review petition before the Commission, IPCL has preferred an appeal before the Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 1536 of 2024. Under Section 114 and Rule 1(2) of Order 47 of the Code of Civil Procedure, review of the issues is not allowed on which an appeal has been filed before the higher Court.



5.0 Issues A and C are raised in appeal before the Hon'ble APTEL and raised in the review petition pending before this Commission both in terms of letters and spirit. Therefore, the Commission has no jurisdiction to entertain the review petition in respect of which the appeal is pending before higher court of law, in terms of Section 114 and Order 47 rule 1(2) of the Code of Civil Procedure. Hence the commission proceeds to review issues B and D of the review petition.

Observations of the Commission:

6.0 Now, the Commission proceeds to find whether any case for review has been made out by the Review Petitioner in terms of Section 114 and Order 47 Rule 1 of CPC, according to which a person aggrieved by order of a Court can file review on the following grounds, if no appeal against the said order has been filed:

- (a) Discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him when the decree was passed or order made.
- (b) On account of some mistake or error apparent on the face of record; and
- (c) For any other sufficient reason.

In this connection, reference could be made to the following judgements:

- (a) In **Lily Thomas & Ors. vs. Union of India & Ors. [(2000) 6 SCC 224]** Judgment, the Hon'ble Supreme Court has held as under:
"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review...."
- (b) In **Union of India vs. Sandur Manganese and Iron Ores Limited & others {(2013) 8 SCC 337}**, the Hon'ble Supreme Court has held as under:



"23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In *Parsion Devi & Others Vs. Sumitri Devi & Others*, this Court held as under:

"9. Under Order 47 Rule 1 of CPC, a judgment may be open to review *inter alia* if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has limited purpose and cannot be allowed to be "an appeal in disguise."

(c) In **M/S Goel Ganga Developers India Pvt. Ltd. vs. Union of India 2018 SCC Online SC 930**, the Hon'ble Supreme Court has held as under:

"In this behalf, we must remind ourselves that the power of review is a power to be sparingly used. As pithily put by Justice V.R. Krishna Iyer, J., "A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon"

2. The power of review is not like appellate power. It is to be exercised only when there is an error apparent on the face of the record. Therefore, judicial discipline requires that a review application should be heard by the same Bench. Otherwise, it will become an intra-court appeal to another Bench before the same court or tribunal. This would totally undermine judicial discipline and judicial consistency"

7.0 The review sought by IPCL on the items mentioned in paragraph 2.0 above for the points B and D have been discussed below as issues A and C are raised in appeal before the Hon'ble APTEL .

B. Depreciation:

Submission of IPCL:

IPCL submitted that the commission has erroneously not approved the Amortization expenses while determining the total depreciation amount during FY 2017-18:

IPCL further stated that they have submitted the depreciation amount in form-B for FY 2017-18, which is inclusive of the depreciation & amortization. The amortization figure has also been submitted in form 1.18b of the APR Petition.



It can be observed that there is an error apparent in the Depreciation amount considered as per audited accounts. The Commission has erred in considering an amount of Rs. 1550.37 Lakhs instead of Rs. 1691.51 lakhs (including amortization) as mentioned in the audited accounts for FY 2017-18. The exact difference is on account of non-consideration of amortization figure, which is also available in form 1.1Bb.

In view to above IPCL prayed to consider amortization amount of Rs. 31.14 Lakhs for the year 2017-18.

Observation of the Commission:

IPCL furnished a figure of Rs 1595.18 lakhs in Form B of their original APR petition. However as per annual accounts depreciation figure was recorded as Rs 1560.37 and amortization figure was recorded as Rs 31.14 lakhs which makes a total claim of Rs 1591.51 lakhs for depreciation and amortization. Thus, gross claim for depreciation as claimed by IPCL in Form B for Rs 1595.18 was more than total claim for Rs 1591.51 towards depreciation and amortization taken together as recorded in the annual accounts for 2017-18. Over and above such claim IPCL also claimed an amount for Rs 31.14 lakhs towards amortization in Form 1.18 B. Thus, total claim for depreciation and amortization as per APR petition comes to Rs 1626.32 lakhs (1595.18 + 31.14) as against total depreciation and amortization of Rs 1591.51 lakhs as recorded in annual accounts. Thus, there was a gross mismatch between claim for depreciation and amortization as per APR petition and claim for the same as per annual accounts which has not been duly reconciled in the APR petition and hence failed the test of prudence. Commission accordingly proceeded to admit depreciation based on accounts considering due adjustments.

The commission has considered allowable depreciation as per tariff regulation 5.5.3 in APR order dated 07.03.2024 . The matter related to depreciation is clearly explained in para 3.15.2, 3.15.3, 3.15.4 and 3.15.4 of the order. There does not appear any error apparent on the face of the order.



Petition under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 3.3 of the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2013 for review of Annual Performance Review order of India Power Corporation Limited for the FY 2017-18 issued by the Commission on 07.03.24 in Case No. APR –98/22-23



D. Interest Credit: Erroneous consideration and Wrong computation of Interest Credit-

Submission of IPCL:

IPCL submitted that the Commission has erred in computation of the Interest Credit amount. The Regulation 5.5.3 allows interest Credit for excess depreciation over repayment for a single year. However, the Commission has erred by considering cumulative summation of excess depreciation over repayment for the period of FY 2010-11 to FY-2016-17 for the computation of Interest Credit for FY 2017-18. The Regulation clearly specifies that the repayment in “any” financial year is less than the approved depreciation shall be used for the computation of Interest Credit, i.e. excess depreciation over repayment of a particular financial year, however cumulative excess depreciation over repayment has been considered. .

IPCL further submitted that the past precedence in the APR Orders issued for the Petitioner and other Licensees operating in the State of West Bengal also shows that only the depreciation and repayment of that particular year was considered for the purpose of computation of Interest Credit. Hence, this is an error apparent on the face of record

IPCL prayed before the Hon'ble Commission to revise the Interest Credit based on the Tariff Regulations.

Observation of the Commission:

The commission has considered allowable depreciation as per tariff regulation 5.5.3 in APR dated 07.03.2024 . The matter is clearly explained in Para 3.19.1 of the order . Hence request to revise interest credit is not admitted.

E. Request for consideration of some of the heads like Working capital requirement meriting re-determination/Auto Adjustment:

Submission of IPCL:

IPCL submitted that It is humbly submitted that there are few heads in the APR determination which directly depends upon the other cost heads as allowed by Hon'ble Commission and overall revenue requirement as determined thereof. Upon re-determination of any of these heads, the same qualifies for changes accordingly including quantum of Working capital requirement, interest credit, maximum



allowable bad debt, gain sharing on allowable heads like T&D gains, Revenue adjustment etc. which also needs to be re-determined due to change in any of the other elements of ARR.

Observation of the Commission:

It is redetermined accordingly if required.

- 8.0 Thus, the review sought for on the issues raised as in points B and D above are prayers to review ratio of prudence adopted by the Commission and no ingredient for review on grounds permitting such reviews are manifest in the relevant submissions and the Commission keeping in mind that it is estopped from encroaching into the original jurisdiction of the Hon'ble Appellate Authority does not propose to entertain the above prayers on review. Issues raised in points no B and D have no merit for consideration in the affirmative as it is found from due consideration of the said issues and keeping in mind that the commission cannot sit in appeal on its own order or cannot substitute its view. Issues such as A and C are raised in appeal before the Hon'ble APTEL and raised in the review petition pending before this Commission both in terms of letters and spirit. Therefore, the Commission has no jurisdiction to entertain the review petition in respect of which the appeal is pending before higher court of law, in terms of Section 114 and Order 47 rule 1(2) of the Code of Civil Procedure.
- 9.0 No adjustment is considered over and above the adjustment considered in APR order dated 07.03.2024 .



Petition under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 3.3 of the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2013 for review of Annual Performance Review order of India Power Corporation Limited for the FY 2017-18 issued by the Commission on 07.03.24 in Case No. APR –98/22-23



Order:

- 10.0 Based on the foregoing analysis, issues such as A and C are raised in appeal before the Hon'ble APTEL and raised in the review petition pending before this Commission both in terms of letters and spirit. Therefore, the Commission has no jurisdiction to entertain the review petition in respect of which the appeal is pending before higher court of law, in terms of Section 114 and Order 47 rule 1(2) of the Code of Civil Procedure. issues no B and D are decided in the negative since having no merit.
- 11.0 The Commission does not consider any adjustment over and above the adjustment considered in APR order dated 07.03.24.
- 12.0 The review petition is thus disposed of.
- 13.0 A copy of the order shall be posted in the website of the Commission.
- 14.0 IPCL shall download the copy of the order from the website of the Commission and act on it. Certified copy of the order, if applied for, be given to the parties on completion of formalities laid down in the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2013, as amended and on submission of necessary fees.

Sd/-
(MALLELA VENKATESWARA RAO)
CHAIRPERSON

Dated: 19.11.2024

Sd/-
(SECRETARY)