

WEST BENGAL ELECTRICITY REGULATORY COMMISSION

WEST BENGAL

Petition No. OA-392/21-22

Date of hearing: 05th May, 2022

Time of hearing: 15.15 hours

Quorum:

Shri Sutirtha Bhattacharya, Chairperson

Shri Pulak Kumar Tewari, Member

In the matter of

Petition for implementation of judgement dated 16th December, 2021 of the Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeals No. 70 of 2014 and 329 of 2021.

And

In the matter of

**India Power Corporation Limited
Plot – X-1, 2 & 3
Block – EP, Sector – V
Salt Lake City
Kolkata 700 091.**

..... Petitioner

Representatives attended:

India Power Corporation Limited (IPCL) [Petitioner]

- 1. Sri B. Ranganath, Senior Advocate**
- 2. Sri Prabal Mehrotra, Advocate**
- 3. Sri Karn Pallav, General Manager (Regulatory),**

CASE IN BRIEF

- 1.0 India Power Corporation Limited has applied for fresh consideration and decision of the Commission in respect of five claims viz., i) Rental Income, ii) Other Finance Charges (NCD issue expenses), iii) Legal and Professional Charges, iv) Capacity Charge for Dishergarh Power Station determined by the Commission in tariff order dated 14.02.2013 of IPCL for the years 2011 – 2012, 2012 – 2013 and 2013 – 2014 and v) the Quality and Quantity assurance incentive (paid to the coal transporter) rejected by the Commission in FPPCA order dated 30.06.2010 of IPICL for the year 2008 – 2009 and order dated 04.06.2012 for the year 2009 – 2010. This application is submitted by IPCL in terms of order dated 16th December passed by the Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeals no. 70 of 2014 and 329 of 2021.
- 2.0 The contention of the petition submitted by IPCL is that the Commission had passed Orders dated 30.06.2010 and 04.06.2012 pertaining to determination of Fuel and Power Purchase Cost Adjustment (FPPCA) for FY 2008-09 and FY 2009-10 respectively. Being aggrieved by the said Orders, in as much that the same lead to the disallowance of genuine costs incurred, IPCL preferred appeals before the Hon'ble APTEL, New Delhi being Appeal no. 217 of 2012 & Appeal no. 7 of 2013 against Orders passed by the Commission in determining the Fuel and Power Purchase Cost Adjustment for the FY 2008-2009 and 2009-2010 respectively. The issue in these Appeals was limited to the disallowance of the expenses of quality and quantity assurance incentive paid by IPCL to its transporters of coal during the respective years.
- 3.0 The Commission also passed Order pertaining to Multi Year Tariff (MYT) Determination for FY 2011-12 & 2012-13 on 14.02.2013 and Annual Performance Review (APR) for FY 2011-12 on 10.09.2013. Being aggrieved by the said Tariff order, the Petitioner had preferred Appeal, being Appeal No 287 of 2013 before the APTEL, New Delhi, in part, against disallowance of legitimate O&M expenses in MYT Order dated 14.02.2013 & Review Order dated 08.05.2013.

- 4.0 The Hon'ble APTEL New Delhi, allowing the appeals in part with directions had remanded all the matters for adjudication by the Commission.
- 5.0 In the meantime, the Commission issued the Annual Performance Review (APR) Order for FY2011-12 on 10.09.2013 which was also challenged by IPCL before the APTEL, New Delhi being Appeal No 70 of 2014 on the disallowances with respect to Legal & Professional Charges, R&M and A&G expenses, Capacity Charges for DPS, Interest on Working Capital, Other finance charges (NCD issue expense) and Rental Income from Corporate Office.
- 6.0 IPCL approached the Commission for implementation of APTEL judgments dated 01.04.2014, 23.05.2014 and 27.10.2014 vide Case No. OA-293/18-19 in respect of – i) Coal Quality & Quantity Assurance incentives paid during FY 2008-09 & 2009-10, ii) Legal & Consultancy Charges for Tariff Order FY 2011-12 and iii) Coal Transportation cost for FY 2010-11 & 2011-12. The Commission vide order dated 16.04.2021, dismissed the matter with respect to Coal Quality & Quantity Assurance Incentives paid during FY 2008-09 & 2009-10 and the Legal & Professional Charges paid during FY 2011-12.
- 7.0 Being aggrieved by the said order dated 16.04.2021, IPCL preferred Appeal, being Appeal No 329 of 2021 before the APTEL, New Delhi. Since one of the issues in Appeal No. 329 of 2021 was common with Appeal No. 70 of 2014, the Hon'ble APTEL was pleased to club both the appeals and issued a common judgment on 16.12. 2021, allowing remand on issues of – i) Rental Income, ii) Other Finance Charges (NCD issue expenses), iii) Legal and Professional Charges, iv) Capacity Charge for Dishergarh Power Station determined by the Commission in tariff order dated 14.02.2013 of IPCL for the years 2011 – 2012, 2012 – 2013 and v) the Quality and Quantity assurance incentive (paid to the coal transporter) for DPS & CPS rejected by the Commission in FPPCA order dated 30.06.2010 of IPICL for the year 2008 – 2009 and order dated 04.06.2012 for the year 2009 – 2010.
- 8.0 Accordingly, IPCL has submitted an application coupled with necessary documents to justify its prayer as is made in the application under consideration. It has also filed separate application for condoning delay stating that it took time

to analyze the order of Hon'ble APTEL and delay was also due to unavoidable circumstances for pandemic situation.

- 9.0 Upon going through the application, the Commission felt that IPCL may be heard before issuing any order and accordingly, an e-hearing was scheduled on 5th May, 2022 at 15.15 hours. The hearing was held on 5th May, 2022, as scheduled when the representatives from IIPCL were present.

SUBMISSION DURING HEARING

- 10.0 Sri B. Ranganathan, the Ld. Advocate, on behalf of IPCL, submitted that IPCL has confined their prayer for revisiting on the five issues viz. 1) rental income, 2) other finance charges (NCD issue expenses), 3) legal and processional charges (under major head of O&M expenses), 4) capacity charge for Dishergarh power station for the financial year 2011 – 2012 and 5) coal quality and quantity assurance incentive paid for both DPS & CPS during 2008 – 2009 and 2009 – 2010, emanating from the judgement of Hon'ble APTEL against the different orders of the Commission, as detailed in Case in Brief above.

10.1 **Issue on not to consider rental income from corporate office:**

The contention of the petitioner is that if the cost of the asset building is not considered by the Commission, then the income out of the said asset should also not be considered by the Commission. The Commission in APR order dated 10.09.2013 for FY2011-12 in case No. APR-33/12-13 (Paragraph 2.7.2) has not considered the expenses such as depreciation, interest and ROE of the Corporate Office and its three floors at Sector-V, Salt Lake, but, has considered the rent revenue earned through the said building as other miscellaneous income from the regulated segment of the distribution licensee and used in deduction from gross ARR of the licensee as indicated in para 2.23.1 of the said APR order. In this connection IPCL has referred a judgement dated 10th April, 2008 passed by the Hon'ble APTEL in the case of Maharashtra State Power Generation Co. Limited -vs- Maharashtra Electricity Regulatory Commission wherein the Hon'ble APTEL opined that –

"....We feel that in cases where the Commission allows a cost to be recovered after prudent check, any deviation in the amount of such expenditure or recovery of income relating to such expenditure would be eligible to be taken up for trueing up. In our view the objective of the Tariff Regulations is broadly to ensure a pre-determined return on the investments made by the utility on the one hand and to ensure availability of electricity with reasonable operational efficiency to the consumer. If in the process the utility is subjected to losses beyond its control or earns extra profits, the Commission has inherent powers to take necessary steps after prudence check. However, if the income cannot be reasonably linked to any cost item allowed by the Commission as part of the ARR, the same should not be adjusted against the ARR of the Appellant, in the absence of specific Regulations...."

In light of the above submissions, it is prayed before the Commission to exclude the rental income of Rs 86.89 Lakhs from other miscellaneous income for FY 2011 - 12 as approved in the APR Order dated 10.09.2013 for FY2011-12.

10.2 Non-convertible debentures issue expenses under other finance charges for the year 2011 – 2012.

The Petitioner had issued Non-Convertible Debentures (NCD) on 03.11.2010 for raising low cost funding for bridge financing the various capital projects till such time loans for specific projects are disbursed by the Banks and ensuring working capital availability. The tenure for these NCDs were 10 years with redemption in 5 instalments starting from the end of 6th year and ending at the end of 10th year. In view of the NCD tenure of 10 years, the expenses towards issuance of these NCDs were amortized over 10-year period instead of considering all the expenses in FY2010-11 alone. But, the Commission has not considered the NCD issue expenditure in APR order dated 10.09.2013 with comments that the said expenditure is not allowable as the expenditure has not been justified.

It is submitted that other finance charges, particularly towards issuance of Non-Convertible Debentures (NCD) is a necessary adjunct to a borrowing and nonpayment of the same adversely impacts the ability of the licensee to borrow. It is also submitted that the other loans availed during the concerned period were

much higher than the 10.75% coupon rate of the NCD. The benefit of such low-cost funding is enjoyed by the consumer in form of timely commencement of operations and projects without waiting for specific loan disbursement from banks.

The regulation 5.6.4 (iv) specifies that "the Commission shall also allow all financing charges relating to loan capital viz. front-end fees, bank charges, commitment charges, foreign exchange rate variations in case of loan repayments, guarantee fees, etc.," which allows the petitioner to borrow through NCD.

In the APR order dated 10.09.2013, the Commission had commented that "it is not clear to the Commission whether such drawal of loan is related to its core business and will serve the interest of consumers in the long run". The petitioner confirmed that such drawal of loan through NCD is related to its core business and will serve the interest of consumers in the long run. In this connection, the petitioner has submitted a list of disbursements from NCD proceeds during FY 2011-12 by dint of which it is established that entire proceeds of Rs. 100 crores of NCD have been utilized for various ongoing projects and working capital requirement for core business of the petitioner.

The petitioner submitted that it is a prudent practice to amortize the expenses related to issuance of NCD or cost of obtaining a loan across the entire term of the loan or NCD rather than front loading the expenses in a single year at the start of the term. This helps in minimizing the impact across the years rather than huge impact in a single year. Therefore, the petitioner has amortized the expenses related to issuance of NCD across the entire term period of NCD starting from FY 2010-11, when the NCD was actually issued. Thus, the amortized amount for NCD issue expense for FY 2011-12, i.e. Rs 53.36 Lakhs is a part of the total NCD issue expense amortized over 10-year period from FY 2010-11 onwards.

In light of the above submissions, it is humbly prayed before the Commission to approve the NCD issue expense of Rs 53.36 Lakhs under other financing charges in addition to Rs. 23.13 lakh towards bank charges for FY 2011-12 as approved in the APR Order for FY 2011-12 dated 10.09.2013.

10.3 Re-determination of legal and consultancy / professional charges (under the major head of O&M expenses) for the year 2011 – 2012.

It is submitted that as a matter of fact the tariff order for FY 2011-12 was issued much after the conclusion of FY 2011-12 and adoption of annual accounts of the IPCL. Therefore, the expenses were already incurred and it was not possible for IPCL to know as to what benchmark expenses will be fixed for IPCL in the year FY 2011-12. However, the expenses were justified and prudent.

It is also submitted that post disinvestment of DPSC Limited, the new management had taken over the charge during the late 2009-10 and given the MYT filing for 3rd control period was due and other strategic plan formulation for activities like preparation of MYT, land acquisition for setting up power plant/distribution sub-station, construction of lines, distribution system study, exploration of imported coal mining opportunities, other allied activities such as financial restructuring, financial advisory, etc. was considered of utmost importance, the new management decided to take assistance of consultants/experts in such activities. The reliance on consultants/experts during the said period helped the new management to streamline its filings, success in few important litigations in the interest of its consumers, etc. The expenses have been largely being incurred to benefit the consumers' long-term interests at large.

IPCL has placed the details of the expenses incurred on account of consultancy charges for the purposes as enumerated therein in order to substantiate the prudence of the expenses. However, it is further mentioned that professional / consultancy fees paid to professional/experts generally do not guarantee result every time for the purpose it is envisaged. IPCL has also submitted the details of the legal expenses incurred during the year 2011-12.

In light of the above submissions, IPCL prayed before the Commission to re-determine the Legal & Consultancy charges (as a major head under O&M expenses) for FY2011-12 in Tariff order as well as APR order based on actual details subject to prudence check in this matter.

The Commission advised IPCL to explain the co-relation of the expenses on account of consultancy and legal services with the core business of the licensee

so that the Commission can find out the justification of the expenses for consideration.

IPCL also raised additional points for consideration related to R&M expenses under O&M expenses viz., 1) SAP ISU system which resulted in efficiency, prompt regulatory compliance and better consumer service, 2) consumption of stores and spares, which has been disallowed by the Commission by virtue of approval of lower R&M expense to the extent of amount approved under MYT order, etc. IPCL prayed before the Commission to consider the same based on the actual expenditure incurred considering the fact that the expenses were incurred before the tariff order for the year 2011-12 was come out.

10.4 Re-determination of capacity charge for Dishergarh Power Station for FY 2011-12.

It is submitted that the old Dishergarh power station was envisaged to be shut down on account of environmental norms and generation was intermittent due to outdated technology and lack of suitable quality of coal. In fact, DPS unit was in dead throes and therefore it was impossible to achieve the PLF set in Regulations. IPCL prayed before the Commission to sympathetically re-determine the capacity charges for old Dishergarh Power Station unit for 2011 – 2012, whose actual PLF was very low than normative PLF but more than approved target PLF. The similar principle under Reg 6.4.3 was adopted in APR order for FY 2009-10, wherein the actual PLF of Chinakuri Power station (68.92%) was lower than the normative PLF (80%) for determination of allowable capacity charge for Chinakuri Power Station.

The Commission enquired as to whether IPCL can produce any supporting documents in support of their prayer where similar treatment has been made by any Commission.

10.5 Approval of quality and quantity assurance incentive for FY 2008-09 and quantity assurance incentive for FY 2009-10.

During the FY 2008-09 and 2009-10, the Petitioner used to pay incentives to Coal Transporter for arranging better quality (GCV) and better quantity of coal

with respect to the benchmark indicated in the Coal Transporter Agreement. Despite receiving better GCV of coal and higher quantum of coal during FY 2008-09 and 2009-10, the Commission did not allow the Quality & Quantity assurance incentive for FY 2008-09 and Quantity Assurance incentive paid in FY 2009-10 in FPPCA orders for 2008-09 & 2009-10 respectively. In this connection, IPCL presented the position of minimum weighted average heat value of coal received as against the minimum weighted average heat value of coal as per regulation 4.8 of the Tariff Regulations, which substantiate that the Heat Value of coal actually received at Dishergarh has been more than the minimum value as per the Regulations 4.8. Similarly, it is evident from the table presented during the hearing that the Coal Transporter could arrange higher quantity of coal as compared to guaranteed quantity and minimum requirement. But, the Commission did not allow the Quality assurance incentive for FY 2008-09 in case of Dishergarh and Quantity assurance incentive for 2008-09 and 2009-10 for both Dishergarh and Chinakuri Units.

It is also submitted that the minimum guaranteed quantity of coal supply was fixed at 8000 MT per month based on the requirement of coal i.e., 60% of the monthly requirement of 13395 MT coal as per the guidelines of Eastern Coalfields Limited. It is apparent from the table presented that during the year 2008 – 2009 and 2009 – 2010, coal transporter supplied the coal much more than the guaranteed quantity of coal supply. The cost benefit analysis has been produced by IPCL to substantiate the fact that in both the years, cost of fuel (including quality/quantity assurance incentive) was beneficial from consumer benefit point of view compared to additional power purchase cost or e-auction coal cost, which justifies payment of quantity and quality incentive to transporter considering market situation prevailing during 2008 – 2009 and 2009 – 2010.

In light of the above, IPICL prayed before the Commission to re-determine the quality and quantity assurance incentive for both Dishergarh and Chinakuri Power Stations for the years 2008 – 2009 and 2009 – 2010.

Moreover, according to the regulation 4.8.1 (iv) read with definition of 'Fuel Cost' of the Tariff Regulations. Fuel cost would include the fuel quality assurance service cost and fuel delivery assurance cost. Therefore, IPCL is entitled to claim

the expenses incurred on these services, subject to prudence check by the Commission.

OBSERVATIONS OF THE COMMISSION

- 11.0 The Commission observes that detailed justifications / clarifications are required on some of the submissions, and therefore, an opportunity be given to IPCL to submit notes on arguments with such justification.

ORDER

- 12.0 In view of above, the Commission directs that IPCL shall submit a written note of argument giving detailed justifications / clarifications on their claims as well as the observations of the Commission during the course of hearing within 10 days from the date of receipt of the order, upon receipt of which the Commission will decide the next course of action.

Sd/-
(PULAK KUMAR TEWARI)
MEMBER

Sd/-
(SUTIRTHA BHATTACHARYA)
CHAIRPERSON

DATE: 30.05.2022

Sd/-
SECRETARY