

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 11 of 2008

Dated: January 19, 2009.

Present: - Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Shri H.L. Bajaj, Technical Member

M.P. Power Trading Company Limited
(Erstwhile M.P.State Electricity Board)
Block No. 2, Ground Floor, Shakti Bhawan
Rampur
Jabalpur-482008

.....Appellant

Versus

1. Torrent Power Limited
Through its Chairman
Torrent House of Ashram Road
Ahmedabad-380009
2. PTC India Limited
through its Senior Vice President
IInd floor, NBCC Tower
Bhikaji Cama Place
New Delhi-110066
3. Central Electricity Regulatory Commission
through its Secretary
3rd and 4th floor, Chanderlok Building
36, Janpath
New Delhi-110001

.....Respondents

Counsel for the appellant: Mr. Daleep Kumar Dhayani
for Mr. Pradeep Misra
Mr. A.K. Garg-MPPTC

Counsel for the respondent: Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms Swapna Seshadri for R-I

Judgment

Per Hon'ble Mr. H.L. Bajaj, Technical Member.

The present appeal has been preferred against the order dated September 26, 2007 passed by the Central Electricity Regulatory Commission (Commission in short) whereby the Commission has relaxed Regulation 17 of the Tariff Regulations, 2004 relating to initial spares to be allowed in the capital cost of the 1100 MW SUGEN Combined Cycle Power Project proposed to be set up by the first respondent, Torrent Power in the state of Gujarat.

2. The facts of the case are stated in brief as below:
3. The Commission had initially approved, in-principle, a capital cost of Rs. 1448.83 crores which included the cost of initial spares of Rs. 111.86 crores calculated on the basis of

4% of the original project cost in accordance with the Regulation 17 of the Tariff Regulations, 2004. The first respondent filed an application being IA No. 80 of 2006 before the Commission for reconsideration of the initial spares approved by it and to allow spares cost of Rs. 167.41 crores in place of Rs. 111.86 crores already approved during the in-principle approval stage. The Commission vide its Impugned Order dated September 26, 2007 exercised its power under Regulation 13 to relax the Tariff Regulations, 2004 and allowed the cost of initial spares of Rs. 167.41 crores. Aggrieved by this order of the Commission, the appellant has filed this appeal.

4. Learned counsel Mr. Misra appearing for the appellant contended that by granting the cost of spares of Rs. 167.41 crores (@ 5.87% of hard cost of project) the Commission has in fact reviewed its own earlier orders of August 22, 2006 vide which it had allowed the cost of initial spares of Rs. 111.86 (4% of the project cost) thereby hurting the interest of the consumers.

5. Mr. Misra contended that while according the in-principle approval of the project, all the facts were available to the Commission and despite that they had allowed only 4% initial spares and if the Commission was to allow initial spares corresponding to 5.87% of the project cost they could have allowed the same during the in-principle stage itself. Therefore, it is clear, he alleged that the Commission has reviewed its own decision by enhancing the prescribed percentage from 4 to 5.87.

6. Per contra Mr. M.G. Ramachandran, learned counsel appearing for the first respondent contended that the Commission has only exercised power vested under Regulation 13 of the Tariff Regulations, 2004 and has relaxed the provisions of Regulation 17 by allowing the initial spares of Rs. 167.41 crores. He further pleaded that this Tribunal in case of NTPC Ltd. v/s M.P. State Electricity Board and Ors., 2007 APTEL 7, has already recognized the power of the Commission under Regulation 13 to relax the provisions of the

Tariff Regulations, 2004. The relevant portion of the judgment is extracted below:-

“.....It is, however, not necessary to examine the argument of the learned counsel for the appellant based on Regulation 2(2) and its implication as Regulation 13 of the Regulations of 2004 empowers the Commission to vary the provisions of the Regulations on its own motion or on an application made before it. This power has been conferred on the Commission to relax the rigor of the Regulations in appropriate cases (para 23).

.....Reading the Regulation in the light of its Heading, it must be held, that the power comprised in Regulation 13 is essentially the “power to relax”. In case any Regulation causes hardship to a party or works injustice to him or application thereof leads to unjust result, the Regulation can be relaxed. The exercise of power under Regulation 13 of the Regulations is minimized by the requirement to record the reasons in writing by the Commission before any provision of the Regulations is relaxed. Therefore, there is no doubt that the Commission has the power to relax any provision of the Regulations.” (para 24).

Analysis and decision

7. The issues before us are the following:
- i) Does the Commission have the power to review its initial order of approving spares @ 4% of the capital cost?
 - ii) Is the Commission justified in raising the approval to 5.8% of the capital cost?

8. It will be useful to extract the relevant provisions of the Regulations as below:-

17. Capital Cost: Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the generating station and shall include capitalized initial spares subject to following ceiling norms as a percentage of the original project cost as on the cut off date.

- | | |
|------------------------------------------------------------|-------------|
| (i) Coal-based/lignite-fired generating stations | 2.5% |
| (ii) Gas Turbine/Combined Cycle generating stations | 4.0% |

Provided that where the power purchase agreement entered into between the generating company and the beneficiaries provides a ceiling of actual expenditure, the capital expenditure shall not exceed such ceiling for determination of tariff.

Provided further that in case of the existing generating stations, the capital cost admitted by the Commission prior to 1.4.2004 shall form the basis for determination of tariff.

Note

Scrutiny of the project cost estimates by the Commission shall be limited to the reasonableness of the capital cost, financing plan, interest during construction use of efficient technology, and such other matters for determination of tariff.

13. Power to relax: The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person.

9. It is contended by Mr. Misra, advocate appearing for the appellant that the review is unwarranted because there was no error apparent in the original order dated August 22, 2006 nor was any new fact brought to the notice of the Commission which could lead to the Commission's review of its earlier order. The Commission has reconsidered the order dated August 22, 2006 in view of the submissions made emphasizing the need for enhancing the approval for the cost of spares. This reconsideration is not in the nature of review as understood under order 47 Rule 1 of the Civil Procedure Code since the order was not passed in a lis of adversarial nature which would require adherence to the principles governing procedure before a court or a judicial body. In-principle

approval of the capital cost is granted to provide a guidance to the power generator as well as to the financing institution and to indicate the possible tariff which the new generator may expect. This approval is not a part of any adjudication. The Commission certainly had the power to review a decision which was purely technical and administrative provided however it is a bona fide exercise of its functions.

10. From the aforesaid Regulations of the Commission it is clear that the Commission has the power to relax its Regulations by recording reasons in its order on its own motion or an application made before it by an interested person. We need to examine that whether the Commission has in its order recorded the reasons or not and whether the reasons justified relaxation of the Regulations. Factually, the reasons are recorded by the Commission in the Impugned Order and are given below:

6 “We have perused the documents on record and heard the petitioner and respondents at length. The petitioner has approached the Commission in the interlocutory application for reconsideration of the decision regarding allowance of spare costs on the following grounds:

(a) The petitioner would use advanced class efficient gas turbines SGT5 4000F supplied by Siemens Power Generation, Germany for the first time in the country. The main features of the machines are high performance linked to operating efficiency

(availability around 93%), high reliability at competitive performance, higher thermal efficiency (above 57%) and low environmental emission. In the absence of experience of such machines, the petitioner has pleaded that spares recommended by the OEM supplier should be allowed by the Commission to meet any contingency arising out of forced outage and to reduce the idle time.

- (b) The critical success factor for performance of these machines is dependent on spares being available on a time bound basis. Moreover, the spares proposed to be bought with the plant equipment have been mandated as essential for maintenance of these plants by the EPC Contractor, Siemens.*
- (c) More than 85% of the spares pertain only to the gas turbines and more than 75% of the spares are mandatory and/or insurance spares. Procurement of such spares requires long lead time and as technology changes rapidly. Off-shelf availability of these spares may be critical in the long run. In the absence of these spares, the highly capital intensive plant in the event of a breakdown, will remain idle for long time, depriving the whole grid of Western Region of much needed power particularly, when there is continuous deficit of power in the region*
- (d) The petitioner would supply power to the distributing areas of Surat, Ahmedabad and Gandhinagar. As the demand patterns in these areas as well as in the Western Region vary significantly during different times of the day as well as the different periods in the year, it is envisaged that the plant will be required to operate at a varying load conditions which may result into higher wear and tear necessitating more spares.*

- (e) *The Commission has allowed initial spares at the rate higher than the ceiling of 4% to some of the gas based power plants of NTPC and hence, the case of the petitioner may also be considered on similar lines.*
- (f) *The petitioner had followed the international Competitive Bidding (ICB) process for selection of EPC Contractor. The EPC Contractor was selected on the basis of overall lowest cost and the spares included in the EPC contract were part of the specifications. Having s elected the EPC Contractor on the basis of the lowest bid, the petitioner is not required to pay any additional amount for the spares. Moreover, even with inclusion of spares amounting to Rs. 167.41 crores at 5.87% of the original project cost, the per MW project cost works out to Rs. 2,74 crore which compares favourably with similar projects.*

7. *We note that the following facts now brought to our notice by the petitioner warrants reconsideration of the decision regarding spares while according in- principle approval for project cost:*

- (a) *The EPC Contractor was selected on the basis of overall lowest cost and the spares included in the EPC Contract were part of the specifications which were finalized after prolonged discussions.*
- (b) *The EPC Contractor provided the break-up of overall price into various components subsequently after the contract was signed; as a result, the petitioner had no opportunity to renegotiate the cost of spares.*

- (c) *The project capital cost of Rs. 3046.45 crores excluding working capital margin claimed by the petitioner including initial spares of Rs. 167.41 crores (US\$ 30.57 million (at the exchange rate of Rs. 45.42 per US\$) + Rs. 28.56 crore works out as Rs. 2.74 crore per MW which is very competitive on the basis of overall cost and compares favourably with the projects of similar type.*
- (d) *The lead time for procurement of spares for the gas turbine ranges between 3 to 9 months.*
- (e) *That the requirement of initial spares recommended by the EPC Contractor has also been vetted by the OEM Supplier and Technical Consultants viz. Tata Consulting Engineering Limited (TCE) and CRISIL during negotiation and award of the EPC contract. The list of spares included in the EPC contract has also been endorsed by the CEA and Ministry of Power while recommending the case of petitioner for exemption from import duty for grant of the Mega Power status to the project.*

11. We note that the respondent is deploying advanced class efficient gas turbines which work at extremely high temperatures. Hot Gas Path Components of these gas turbines require more frequent replacements. Therefore, timely availability of spares is critical to the successful performance of these machines at high availability factor. It is prudent to stock sufficient quantity of spares as per manufacturer's recommendations. One needs to guard

oneself against the excessive pricing by suppliers given that spares are proprietary items of the manufacturer who will be tempted to charge more for spares as the user has to necessarily depend on the Original Equipment Manufacturer. We observe that even this aspect has been taken care of by resorting to combined competitive bidding for equipment and spares and selecting the overall lowest bidder who quoted the lowest price for equipment and spares.

12. We notice from para 7 of the impugned order extracted above that certain new facts were also brought to its notice which were considered by the Commission.

13. In view of the aforesaid we conclude that there are sufficient reasons which justify the enhancement of the percentage of initial spares from 4 to 5.87. The Commission is vested with the power to relax its Regulations and therefore we decide not to interfere with the order of the Commission.

14. The appeal fails and is, therefore, dismissed.

No costs.

(H.L. Bajaj)
Technical Member

(Mrs. Justice Manju Goel)
Judicial Member