

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Subject:- Petition for review of Commission's order dated 07.04.2017 for true-up of FY 2015-16 in Petition No. 61 of 2016 determined by the Commission for MPPGCL's Power Stations.

Petition No. 23/2017

ORDER

(Date of Motion Hearing: 25th July' 2017)

(Date of Order: 02nd August' 2017)

**M.P. Power Generating Co. Ltd.,
Shakti Bhawan, Rampur, Jabalpur**

Petitioner

V/s

**M.P. Power Management Company Ltd, Jabalpur
Block No. 11, Shakti Bhawan, Rampur, Jabalpur – 482008**

Respondent

Shri S.K. Tripathi, Superintending Engineer, Shri Salil Choudhary, Executive Engineer and Shri. Vishwas Sullere, Account Officer appeared on behalf of the petitioner.

M.P. Power Generating Company Ltd., Jabalpur filed the subject petition on 31st May, 2017 under Proviso 40 of MPERC (Conduct of Business) (Revision-I) Regulations, 2016 read with Proviso 61 "Power to remove difficulties" of MPERC (Terms and Conditions for determination of Generation tariff) Regulation, 2012, (RG-26(II)) for review of Commission's order dated 7th April' 2017 for true-up of generation tariff for FY 2015-16 determined vide Multi-year tariff order dated 1st April' 2013 and order dated 7th January' 2016 for extension Unit No. 10 and 11 of STPS, Sarni PH-IV.

2. The subject review petition has been filed in the following backdrop:
 - (i) Earlier the review petitioner had filed a Petition No. 61 of 2016 for true-up of tariff order for FY 2015-16 determined vide Multi-Year Tariff order dated 01.04.2013 for its existing power stations and order dated 07.01.2016, for new Extension Unit 10 and 11 (PH-4) of Satpura Thermal Power Station, Sarni.
 - (ii) The aforesaid true-up petition was based on the Audited Accounts of MPPGCL for FY 2015-16 and MPERC (Terms and Conditions for determination of generation tariff) Regulations, 2012. Vide order dated 07.04.2017 in petition No. 61 of 2016, the Commission determined the true-up of generation tariff for FY 2015-16 in respect of Power Stations of MPPGCL.
3. In the aforesaid true-up order, the Commission considered the non tariff income of Rs.92.44 Crores with the following break-up as per the Annual Audited Accounts for FY 2015-16:

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Particular	Amount in Rs. Cr.
Other Income on 100% Basis considered in subject true up petition for FY 2015-16	72.80
Interest on fixed deposit created from sale of Fly Ash income	6.78
Fly Ash Income	9.90
Sale of Scrap	2.97
Total Non Tariff Income	92.44

4. The power station-wise break-up of Non-tariff income considered in the aforesaid true-up order was as given below:

Non -Tariff income Admitted for FY 2015-16 (Rs in Crores)

S. No.	Power Stations	Other Income	Interest on FD Created From Fly Ash Income	Fly Ash Income	Sale of Scrape	Total Non Tariff income
1	ATPS PH-3	7.15	0.38	1.23	0.00	8.77
2	STPS PH-2&3	14.40	0.23	2.44	2.97	20.05
3	STPS PH-4	12.30	0.14	1.36	0	13.80
4	SGTPS PH-1&2	14.84	3.77	2.39	0	21.01
5	SGTPS PH-3	8.83	2.25	2.47	0	13.55
6	Total Thermal	57.53	6.78	9.90	2.97	77.17
7	GANDHI SAGAR	1.17	0	0	0	1.17
8	PENCH	1.04	0	0	0	1.04
9	RAJGHAT	0.82	0	0	0	0.82
10	BARGI	4.17	0	0	0	4.17
11	BANSAGAR PH-1,2&3	7.13	0	0	0	7.13
12	BANSAGAR PH-4	0.35	0	0	0	0.35
13	BIRSINGHPUR	0.14	0	0	0	0.14
14	MADHIKHEDA	0.45	0	0	0	0.45
15	Total Hydro	15.27	0.00	0.00	0.00	15.27
	TOTAL	72.80	6.78	9.90	2.97	92.44

5. Aggrieved with the non-tariff income considered in aforesaid true-up order dated 07.04.2017, the subject petition is filed by the petitioner seeking review on the following two issues related to non tariff income:

- (i) Income of Rs. 9.89 Cr. from Sale of Fly Ash considered as Non-Tariff income.
- (ii) Income/gain of Rs. 2.97 Cr. from Sale of Capital Scrap considered as Non-Tariff income.

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6. The review petitioner has prayed the following in the subject petition:

- (a) *“Allow the recovery of income from Sale of Fly Ash considered as Non-Tariff income by the Commission in True up order for FY 2013-2014 & FY 2014-15, amounting to Rs. 38.21 Crores and for FY 2015-16 amounting to Rs. 16.67 Crores by deleting the phrase “income from sale of Ash” in the name of law, from the proviso 31 “Non-Tariff Income” of Regulation RG-26(II) of 2012 and provide relief to MPPGCL.*
- (b) *Allow the recovery of income from Sale of de-capitalized Assets amounting to **Rs.2.97** Crores of STPS PH-I, Sarni, erroneously considered as Non-Tariff income by the Commission in True up order for FY-2015-16.”*

7. Motion hearing in the matter was held on 25th July' 2017 when the representative appeared on behalf of the review petitioner reiterated its contention made in the subject review petition.

8. The Commission has examined the subject petition in light of the following:

- (i) The provisions under MPERC (Terms and Conditions for Determination of generation tariff) Regulations, 2012.
- (ii) The Consolidated Annual Audited Accounts of the company for FY 2015-16.

9. **Issue-wise contention of petitioner and observations of Commission are as given below:**

Issue No. 1: Income from Sale of Fly Ash considered as Non-Tariff income.

10. Regarding the issue of income from sale of Fly Ash, the review petitioner broadly submitted the following:

- (i) *MPPGCL would like to draw kind attention of the Commission towards the Extra Ordinary Gazette Notification issued by Government of India, Ministry of Environment and Forest dated 3rd November 2009 regarding the amendments made in **The Environment (Protection) Act, 1986** and **The Environment (Protection) Rules, 1986**, issued mandatory directives for utilization of Fly Ash (all category of Ashes) generated at the Thermal Power Plants (Annexure-5).*
- (ii) *The relevant amendment mentioned in the said notification at main Clause No. (11), sub clause No. 6 at page 19 is reproduced below:-*

“(6) The amount collected from sale of fly ash and fly ash based products by coal and/or lignite based thermal power stations or their subsidiary or sister concern unit, as applicable should be kept in a separate account head and shall be utilized only for

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development of infrastructure or facilities, promotion and facilitation activities for use of fly ash until 100% fly ash utilization level is achieved ; thereafter as long as 100% fly ash utilization levels are maintained, the thermal power station would be free to utilize the amount collected for other development programmes also and in case, there is a reduction in the fly ash utilization levels in the subsequent year(s), the use of financial returns from fly ash shall get restricted to development of infrastructure or facilities and promotion or facilitation activities for fly ash utilization until 100% fly ash utilization level is again achieved and maintained.”

- (iii) *It is to mention that MPPGCL is strictly complying with the directives as per its understanding explained above. In this process, MPPGCL have collected amount from sale of Ash and kept the same in separate account Head as “Fly Ash Reserve”. Further, all interest earned thereon is also credited to this Reserve. Few infrastructures for promoting sale of Fly Ash have also been created out of this reserve.*
- (iv) *The Circular No. A.D.(F&A)/MPPGCL/2011/5313 dated 07.03.2011 read with Accounting Procedure of Receipt & Utilization of fund received from Fly Ash adapted by MPPGCL, clearly demonstrates the seriousness of MPPGCL towards adaption of directives of MoEF. The copy of the same is annexed herewith as Annexure-6A & 6B.*
- (v) *Accordingly, MPPGCL has kept the revenue from sale of Fly ash as stipulated in Annual Statement of Accounts for FY 2015-16 Note No. 21.1 Sr. No. 4 page No. 42 (Annexure-7) read with Note No. 3.1 page No. 11 under the head Reserve & Surplus (Annexure-8), in the form of separate Fixed Deposit Receipts in Nationalized banks namely Bank of Baroda, Central Bank of India and Union Bank of India.*
- (vi) *The Commission, in the True Up orders for FY 2013-1 , FY 2014-15 & FY 2015-16 has deducted Non Tariff Income (including income from sale of Fly Ash and interest on Fixed Deposit created from such income) from the approved Annual Fixed Cost.*
- (vii) *Here, it is pertinent to mention that the Central Electricity Regulatory Commission while framing & notifying its Regulations for Tariff of Power Stations has categorically denied about treating the income from sale of Ash as part of revenue activities which is reproduced hereunder (relevant portion annexed as Annexure-12) :-*

*“29.35 As regards the suggestion received from some of the stakeholders for deducting the amount of revenue collected from sale of fly ash, the Commission has not deducted the same from the O&M expenses because as per the direction of Ministry of Environment and Forests, **revenue collected from sale of fly ash needs to be utilized for betterment of environment.** The Commission, after taking cognizance of the direction of Ministry of Environment and Forests, **has not***

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considered revenue collected from sale of fly ash as well as the expenses under the head "ash utilization expenses" to be charged to O&M expenses "

(viii) *The Commission, while framing the Regulation RG-26(II) of 2012 under Section 61 & 62 of the Electricity Act- 2003 had perhaps over looked the provisions of "The Environment (Protection) Act, 1986, The Environment (Protection) Rules, 1986 read with Extra Ordinary Gazette Notification issued by Government of India, Ministry of Environment and Forest dated 3rd November 2009", while specifying the Non-Tariff Income at proviso 31 at page 20.*

(ix) *MPPGCL wish to submit that the proviso 22 & 24 of "The Environmental Protection Act, 1986" restricts Judicial bodies / Authorities to **interpret** the provisions of the said Act in any manner otherwise provide. The relevant clause is reproduced hereunder for kind reference of the Commission:-*

"22. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of anything done, action taken or order or direction issued by the Central Government or any other authority or officer in pursuance of any power conferred by or in relation to its or his function under this act.

24(1) Subject to provisions of sub section(2), the provisions of this act and rules or orders made there in shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this act..... "

(x) *The National Electricity Policy at Proviso 5.10.4 under **Environmental issues** provides for setting up of coal washeries will be encouraged. Suitable steps would also be taken so that utilization of fly ash is ensured as per environmental guidelines.*

The very purpose of setting Environmental guidelines by MoEF and National Electricity Policy by MoP, GoI is getting affected adversely by including income from the sale of Ash under the head Non-Tariff Income.

(xi) *The Commission in its order has mentioned that the treatment given by it is in line with the provisions of regulations. MPPGCL, since beginning has been submitting consistently that the income from sale of Ash should not be treated as non-tariff income, duly giving reasons and MoEF guidelines in its support. However, the requests made by MPPGCL have not been considered by the Commission so far being in line with regulations. Therefore, MPPGCL humbly request the Commission to kindly relook the same.*

(xii) *In the name of Law, MPPGCL, therefore humbly request the Commission to kindly exercise its power to remove difficulties at proviso 61 of the Regulation RG-26(II) of 2012 and delete the phrase "**income from sale of Ash**" from the proviso 31 "**Non-Tariff Income**" and provide relief to MPPGCL by allowing the recovery of income from Sale of*

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Fly Ash considered as Non-Tariff income by Hon'ble Commission in True up order for FY 2013-2014 & FY 2014-15 amounting to Rs. 38.21 Crores and for FY 2015-16 amounting to Rs. 16.67 Crores, through this Review Petition.

11. Regarding the Non-Tariff Income, Regulation 31 MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2012. provides as follows:

*“Any income being incidental to the business of the Generating Company derived from sources, including but not limited to the disposal of assets, income from investments, rents, **income from sale of scrap** other than the de-capitalized/written off assets, income from advertisements, interest on advances to suppliers/contractors, **income from sale of ash/rejected coal**, and any other miscellaneous receipts other than income from sale of energy shall constitute the non tariff income.*

The amount of Non-Tariff Income relating to the Generation Business as approved by the Commission shall be deducted from the Annual Fixed Cost in determining the Annual Fixed Charge of the Generation Company.”

12. The above Regulation explicitly provides that any income from **sale of fly ash shall be considered as non tariff income.**

13. Besides the impugned true-up order, the Commission had also issued true-up orders for FY 2013-14 and FY 2014-15 for MPPGCL's thermal power stations wherein, the Commission adopted the same approach for non-tariff income as adopted in the impugned order in accordance with the provisions under MPERC Tariff Regulations.

14. With regard to other income, the Commission mentioned the following in its true-up order for FY 2015-16:

“In the above reply, the petitioner has submitted the break-up of income of Rs 150.24 Crores. Out of aforesaid income, Rs 26.39 Crores pertains to SSTPP PH 1 and Rs 6.78 Crore towards interest on fixed deposited from fly ash income. Further, the other income of shared portion have been factored to 100% basis, thus the petitioner has claimed other income of Rs 72.80 Crores.

With regard to interest on fixed deposit from the income of fly ash, the Commission has considered this income as non tariff income in light of the provisions under Regulations, 2012.

Further, the income from sale of fly ash is also captured in Audited Account under the

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head of operating income. Proviso 31 (a) of MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2012 provides that:

*“Any income being incidental to the business of the Generating Company derived from sources, including but not limited to the disposal of assets, income from investments, rents, income from sale of scrap other than the de-capitalized/written off assets, income from advertisements, interest on advances to suppliers/contractors, **income from sale of ash/rejected coal**, and any other miscellaneous receipts other than income from sale of energy shall constitute the non tariff income.” (emphasis supplied)*

15. In view of the above, the income from sale of fly ash considered by the Commission as non-tariff income is in line with the provision under Regulations, 2012 and Annual Audited Accounts for FY 2015-16 of MPPGCL. Therefore, the contention of review petitioner on this issue has no merit for review of Commission's order.

Issue No. 2: Income/gain from Sale of Capital Scrap considered as Non-Tariff income:

16. With regard to income from sale of capital scrap, the petitioner submitted the following;

(i) *“The Commission in its True up order for FY 2015-16 has erroneously considered the income from sale of de-capitalized capital Assets at STPS PH-I, Sarni amounting to Rs. 2.97 Crores as Non tariff Income and deducted the same from Fixed Cost approved in said order.*

(ii) *In this regard, the relevant portion of proviso 31 of MPERC Regulation 2012 towards Non Tariff Income reads as under:-*

*“Any income being incidental to the business of the Generating Company derived from sources, including but not limited to the disposal of assets, income from investments, rents, **income from sale of scrap other than the de-capitalized/written off assets**, income from advertisements, shall constitute the non tariff income.”*

(iii) *In light of above mentioned provision, following facts may kindly be appreciated:-*

(a) *The income from sale of Scrap amounting to Rs.2.97 Crores at STPS Sarni is Income/Gain from sale of Assets of units of STPS PH-1 Sarni already decommissioned during FY-2013-14 & FY 2014-15.*

(b) *The aforesaid fact/information was well reflected at Note No. 22.3 at Page No.43 of Audited Accounts for FY 2015-16. The copy of the same has already been submitted to the Commission vide MPPGCL's letter No.1321 dated 10.11.2016. The relevant portion is again annexed as Annexure -13.*

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- (c) Further, MPPGCL in reference to additional information desired vide letter dated 14.12.2016 has already submitted the details of Non-Tariff Income vide Annexure No. 23 of letter dated 04.01.2017. The same is again annexed as Annexure-14.
- (iv) Considering above, it is evident that the income from sale of de-capitalized Assets is not part of Non Tariff Income and it seems that the Commission has erroneously considered it as income from sale of Scrap.
- (v) Accordingly, MPPGCL humbly requests the Commission to kindly Allow the recovery of income from Sale of de-capitalized Assets amounting to Rs. 2.97 Crores considered as Non-Tariff income by the Commission in True up order for FY 2015-16."

17. Regulation 31 of MPERC (Terms and Conditions for Determination of generation tariff) Regulations, 2012 provides that the **"income from sale of scrap other than the de-capitalized/written off assets"**, shall be considered as non tariff income.

18. On perusal of Schedule 22.1 of the Annual Audited Accounts for FY 2015-16, it is observed that Rs. 4.35 Crores is the total **"profit on sale of Stores/Scrap"** during FY 2015-16. Further, Note 22.3 of the Annual Audited Accounts has mentioned the following:

*"MPPGCL has retired the last unit of 62.5 MW of PH I of STPS Sarni on 7.01.2014. After retirement, the plant (5X62.5 MW) along with its stores has been sold as scrap to M/s. Sikkim Ferro Alloys Ltd., Mumbai, following its standard e-Auction procedure at a total cost of Rs. 7775.00 Lakh excluding taxes. This power house was interstate project of MP and Rajasthan having 60% share of MP. The sales proceed shall also be distributed accordingly. Till 31.03.2016, M/s. Sikkim Ferro Alloys Ltd., Mumbai has lifted about 10% of the total scrap material sold and therefore the **corresponding profit of Rs. 297.09 Lakh** for MP share, PY (Nil) has been included in **"Profit on Sale of Scrap"** at Point No. 7 above."*

19. Considering Rs. 297.09 lakhs as "Profit on sale of scrap" as per the Annual Audited Accounts of the company for FY 2015-16, this amount was considered as non tariff income in true-up order for FY 2015-16.

20. As per Annual Audited Accounts, Rs. 2.97 Crore is the profit and not the income from sale of de-capitalized assets. Thus, the Commission has considered profit/gain from sale of scrap in terms of the provision under Regulations, 2012 and also the Annual Audited Accounts for FY 2015-16. Therefore, the contention of petitioner on this issue also has no merit for review of Commission's order.

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21. Further, in accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), a person aggrieved by an order may apply for a review under the following circumstances:

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

22. In view of the aforesaid observations on each issue in the subject petition, the issues raised by the petitioner in the subject review petition do not fall under any circumstances as articulated in Rule 1 Order 47 of CPC for review in the instant matter. Therefore, the subject Petition No. 23 of 2017 is not maintainable and disposed of.

(Alok Gupta)
Member

(A. B. Bajpai)
Member

(Dr. Dev Raj Birdi)
Chairman