

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

5th Floor, "Metro Plaza", Bittan Market, Bhopal - 462016



Petition No. 15 of 2021

PRESENT:

S.P.S. Parihar, Chairman

Mukul Dhariwal, Member

Shashi Bhushan Pathak,

Member

IN THE MATTER OF:

Petition filed under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 6(6) of the MPERC (Code of Conduct) Revision-1 Regulations, 2016 seeking review of the order dated 16.12.2020 passed by the Commission in petition No. 47 of 2019 for 2x250 MW Coal based Thermal Power Station at Bina.

M/s Jaiprakash Power Ventures Ltd., Noida (U.P.),

Petitioner

//Versus//

1. **The Managing Director**
M.P. Power Management Company Ltd.,
Block No. 2, Shakti Bhawan, Rampur, Jabalpur – 482008
2. **The Managing Director**
M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd.
Shakti Bhawan, Rampur, Jabalpur – 482008.
3. **The Managing Director**
M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd.
NishthaParisar, Govindpura, Bhopal – 462023
4. **The Managing Director**
M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.
GPH Compound, Pologround, Indore - 452003

Respondents

ORDER

(Date of Order: 13th September' 2021)

Shri Venkatesh, Advocate, Shri Siddharth Joshi, Advocate and Shri Ajeya Kumar Tripathi, DGM appeared on behalf of the petitioner.

Shri Ayush Bajpai, Advocate and Shri Ajasra Gupta, Sr. DGM appeared on behalf of the Respondent No. 1 (MPPMCL).

1. M/s Jaiprakash Power Ventures Ltd. (hereinafter called “the review petitioner” or “JPVL”) has filed the subject review petition on 18th February’ 2021 for review of the Commission’s order dated 16th December’ 2020 issued in Petition No. 47 of 2019 in the matter of true-up of Generation Tariff for 2 x 250 MW (Phase-I) coal based Thermal Power Station at Bina, District Sagar (M.P.) for FY 2018-19 determined by the Commission vide Multi Year Tariff Order dated 08th August’ 2016. The aforesaid MYT order was based on MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 (hereinafter called “the Tariff Regulations, 2015”).
2. The subject petition is filed under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 6(6) of the MPERC (Code of Conduct) Revision-1 Regulations, 2016.
3. In the subject review petition, the petitioner has sought review on various issues contending that there has been error apparent on the face of records as per Order XL VII Rule 1 of the Code of Civil Procedure, 1908 (CPC) in as much as the Commission has rejected the claim by misinterpreting the provisions of the MPERC Tariff Regulations, 2015 and the contentions/submissions made by the petitioner.
4. The petitioner has raised following issues for review in the subject review petition:
 - (i) Disallowance of additional expenditure incurred towards coal handling plant.
 - (ii) Disallowance of Operation & Maintenance Expenses of Dedicated Transmission Line.
 - (iii) Grossing up the Return on Equity with the effective tax rate of the respective financial year.
5. Motion hearing in the subject matter was held on 06th July’ 2021. Vide order dated 9th July’ 2021, the petitioner was directed to serve the copy of its review petition on all Respondents in the matter within three days and report compliance to the Commission. The Respondents were also directed to file their response on maintainability of the

subject review petition by 26th July' 2021 after serving a copy of the same to other side. The petitioner was asked to file its rejoinder by 5th August' 2021, thereafter.

6. The matter was further heard on maintainability on 10th August' 2021 when the Commission observed the following:
 - i. By affidavit dated 6th August' 2021, the Respondent No. 1 filed reply to the subject petition;
 - ii. Counsels of the petitioner and the Respondent No. 1 concluded their arguments on maintainability of the subject petition.
7. Vide order dated 12th August' 2021, the case was reserved for order on maintainability of the subject review petition.
8. Respondent No. 1 (M.P. Power Management Company Ltd.) in its reply has submitted the following:
 - i. *"Answering respondent most respectfully submits that vide impugned order this Hon'ble Commission has allowed substantial claims of the Review Petitioner however on the other hand had disallowed the following claims of the Review Petitioner which are as follows :-*
 - (a) *The additional expenditure claims towards Coal handling plant amount to INR Rs. 22.87 Crores on the pretext that it is claimed beyond the cut ff date and not covered under any of the provisions under MPERC, Regulations-2015.*
 - (b) *Claim towards operations and maintenance (O&M) expenses for the dedicated transmission line build by the Review Petitioner for supplying the power to the respondent No.1 to 4 as a part of its J.P. Bina Thermal Power Project (TPP) on the pretext that the MPERC Regulations-2015 does not provide for grant of O & M expenses for dedicated transmission line separately.*
 - ii. *That, being aggrieved by the aforesaid finding of the Hon'ble Commission, the Review Petitioner filed the instant petition. The petitioner has sought review of Commissioners order on following issues: -*
 - *Disallowance of additional expenditure incorrect towards coal handling plant amounting to Rs. 22.87 Crs.*
 - *Disallowance of operation and maintenance expenses of dedicated transmission line.*
 - *Grossing up the return on Equity with the effective tax rate of the rate of the respective financial year.*

- iii. *Answering respondent most respectfully submits that the Commission has examined all the issues in the subject petition in accordance with the principles, methodology and norms specified in M.P.E.R.C. (Terms & Condition) for determination of Generation Tariff Regulation-2015. Annual audited accounts of Jaypee Bina Thermal Power Project for financial year 2018-19 and other details documents placed on record by the petitioner i.e. instant petitioner in Review Petition. The Commission has also examined the subject true up petition in light of the comments/suggestion offered by MPPMCL (Madhya Pradesh Power Management Company Limited) and other stake holders.*
- iv. *In view of the submissions made by the respondents herein above it is crystal clear that all the issues raised by the petitioner have already been decided by the Hon'ble Commission vide its order dated 16.12.2020 and there is no error apparent on the face of the record in the impugned order dated 16.12.2020, therefore, no case for Review under the Section 94 of the Electricity Act r/w the Order 47 Of CPC is made out. Hence, no case is made out, the Review Petition deserves to be dismissed, on the ground of the maintainability itself. It is submitted that the petitioner has right to file appeal if he aggrieved of an order but the Review Petition is to be strictly heard as per the principle of the order 47 of CPC and the petitioner has failed to demonstrate that there is any prima-facie error on the face of the record. It is submitted that it is settled law that even an erroneous decision is not subject matter of Review and the party should exercise power of Review.*
- v. *That, the answering respondent are not filing para-wise reply at this juncture but reserve the right to file the same whenever this Hon'ble Court directs. The petition being bereft of merit deserves to be dismissed with costs.*

Commission's Observations and Findings:

9. 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.
10. Keeping in view of the above provisions and on perusal of the submissions made by the petitioner and Respondent No. 1, the Commission has examined the issues raised in the review petition as discussed below:

Issue No. 1

Disallowance of additional expenditure incurred towards Coal Handling Plant:

Petitioner's Submission:

11. Regarding the disallowance of additional capitalization of coal handling plant, the review petitioner has broadly submitted the following:

This Commission disallowed the claim of the Review Petitioner towards the additional capitalization of Coal Handling Plants on the pretext that it is not covered under any provisions of the MPERC, Regulation 2015 and are raised beyond the cut-off date. The said finding of this Commission is erroneous for the following reasons: -

- i. It is submitted that the Review Petitioner had filed the Subject Petition invoking the provisions of Regulation 8.4 and 20.3(i) of the MPERC Regulation, 2015. Regulation 20 of the MPERC Regulation, 2015 deals with the provisions of Additional Capitalization and De-capitalization.*
- ii. It is evident from a bare perusal of regulation 20.3 (i) of the MPERC Regulation, 2015 that the capital expenditure in respect of generation station incurred or projected after the cut-off date is admissible. If the said expenditure is necessitated on account of non-materialization of Coal Supply.*
- iii. Additionally, the Original Scope of work pertaining to Review Petitioner comes within the purview of Regulation 20.1 and 20.2 of the MPERC Regulation, 2015, whereas, Regulation 20.3 (i) has a much wider and comprehensive scope as the same provides for the grant of necessary expenditure provided the following criteria are fulfilled:*
- iv. The said expenditure must be with respect to modification required or done in the fuel receiving system.*
- v. The said expenditure must arise due to non-materialization of coal supply corresponding to full coal linkage in respect of a thermal generating system.*
- vi. The above said non-materialization of coal supply corresponding to full coal linkage must be a result of certain circumstances which are not within the control of the generating station.*
- vii. It is important to mention that stakeholders raised objections vide their letter dated 14.07.2020 stating that the Additional Capital Expenditure has not been claimed by the Review Petitioner under the Applicable Regulations of MPERC Regulations, 2015. In response to the objections raised by the stakeholders,*

Review Petitioner in para 5 of its reply dated 06.08.2020 has categorically explained that the expenditure of Rs 22.87 in Coal Handling Plant was incurred on account of procurement and installation of Coal Blending System and other auxiliary equipment such as centrifuge Oil Filtration machine, Hydraulic Power Motor in order to improve the blending of coal sourced/procured from different sources. The broader contents of the Reply dated 06.08.2020 are as follows:

- a) Bina TPP has availed coal linkage from the Government approved coal mines and accordingly a limitation is casted to procure coal from such approved coal mines based on the PPA executed with the GoMP.*
- b) In line with the coal requirement of Generating Station as per schedule being given by the GoMP under PPA and requirement of the merchant power (untied capacity), Review Petitioner was constrained to procure coal from other sources (open market, e-auction etc). Thereafter, Review Petitioner has to blend the different type of coals (linkage coal of different grades, open market and e-auction based coal) in order to maintain the uniform GCV as per the design rate of coal for feeding the boiler.*
- c) Given the circumstances mentioned above, the Review Petitioner is required/bound to install Blended Coal Management System ("BCMS") in the power plant for storage handling and blending of varieties of coal. BCMS is required to maintain the GCV of coal as per design of boiler tube due to excess heat with the feeding of higher GCV coal and heat losses with the feeding of lower GCV of coal. Hence the additional expenditure claimed by the Review Petitioner squarely fall within Regulations 20.3 (i) of the MPERC Regulation 2015.*
- d) Additionally, in existing plants of Review Petitioner, the coal unloaded for the wagon tippler is being conveyed to 2 number crushers at Crusher House of Unit 1 & 2. Therefore, the crushed coal is then conveyed to an existing linear stockpile for storage and onward transportation to steam generator coal bunker. With BCMS system, new linear stockpile for storage of different varieties of coal with existing stacker/re-claimer having a capacity of 1000 TPH and reclaiming with new stacker/re-claimer having capacity of 500 TPH to feed the coal to new steel fabricated 3 nos. silos of 1500 Ton capacity of each.*
- e) After modification in existing transfer tower JNT3A to modify discharge arrangement of coal from conveyor BCN6A & 6B for feeding into proposed 3 Nos steel silos through new conveyor BC 6 & BC 7. From 3 x 1500 Ton new steel silos coal is extracted from each silos in regulated proportion through 3 numbers apron weigh feeders. It is then further conveyed by a*

new conveyor BC9 to feed on BCN7A&7B for onward transportation to coal bunker.

- f) *In view of the foregoing, it is evident that the expenses incurred on account of procurement and installation of the BCMS in the Coal Handling Plant amounting to INR 22.87 Crore was a bonafide claim under Regulation 20 (3)(i) of the MPERC Regulation, 2015.*

It is submitted that this Commission has erroneously relied upon the Regulation 20.3(g) of the MPERC, Regulation 2015 while deciding the claim of the Review Petitioner towards the Additional Expenditure against the Coal Handling Plants. The Hon'ble Commission in arriving at the said finding has not considered the subsequent affidavit dated 06.08.2020 filed by the Review Petitioner in the Subject Petition. Therefore, the same amounts to error apparent on the face of record.

In support of the submission made above, it is humbly submitted that Hon'ble Apex has held in a catena of Judgments that non-mentioning or wrong-mentioning of the provision of law would not be of any relevance if the court had the requisite jurisdiction to pass the order. Considering the law settled by the Hon'ble Apex Court and submission made by the Review Petitioner in its comprehensive reply, the claim of the Review Petitioner towards the Coal Handling Plants ought to be considered and allowed by this Hon'ble Commission

Provisions Under Regulations:

12. The Bina thermal Power Project (Phase-I) achieved CoD on 7th April' 2013. Therefore, the cut of date of the project 31st March' 2016 in accordance with aforesaid Tariff Regulations, 2015. The Commission in its order dated 16.12.2020 under review observed that the additional capitalization filed by the petitioner was beyond the cut-off date of project. Therefore, the claim of additional capitalization was examined in light of the Regulation 20.3 of MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015.
13. Regulation 20.3 of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 provides as under:

20.3 The capital expenditure, in respect of existing generating station incurred or projected to be incurred on the following counts after the cut-off date, may be admitted by the Commission, subject to prudence check:

- a) *Liabilities to meet award of arbitration or for compliance of the order or*

decree of a court of law;

- b) Change in law or compliance of any existing law;*
- c) Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government Agencies of statutory authorities responsible for national security/internal security*
- d) Deferred works relating to ash pond or ash handling system in the original scope of work;*
- e) Any liability for works executed prior to the cut-off date, after prudence check of the details of such un-discharged liability, total estimated cost of package, reasons for such withholding of payment and release of such payments etc.;*
- f) Any liability for works admitted by the Commission after the cut-off date to the extent of discharge of such liabilities by actual payments;*
- g) Any additional capital expenditure which has become necessary for efficient operation of generating station other than coal based stations, the claim shall be substantiated with the technical justification duly supported by the documentary evidence like test results carried out by an independent agency in case of deterioration of assets, report of an independent agency in case of damage caused by natural calamities, obsolescence of technology, up-gradation of capacity for the technical reason such as increase in fault level;*
- h) In case of hydro generating stations, any expenditure which has become necessary on account of damage caused by natural calamities (but not due to flooding of power house attributable to the negligence of the generating company) and due to geological reasons after adjusting the proceeds from any insurance scheme, and expenditure incurred due to any additional work which has become necessary for successful and efficient plant operation;*
- i) Any capital expenditure found justified after prudence check necessitated on account of modifications required or done in fuel receiving system arising due to non- materialisation of coal supply corresponding to full coal linkage in respect of thermal generating station as result of circumstances not within the control of the generating station:*

Provided that any expenditure on acquiring the minor items or the assets including tools and tackles, furniture, air-conditioners, voltage

stabilizers, refrigerators, coolers, computers, fans, washing machines, heat convectors, mattresses, carpets etc. brought after the cut-off date shall not be considered for additional capitalization for determination of tariff w.e.f. 1.4.2016:

Provided further that any capital expenditure other than that of the nature specified above in (a) to (d) in case of coal based station shall be met out of Compensation Allowance:

Provided also that if any expenditure has been claimed under Renovation and Modernisation (R&M), repairs and maintenance under (O&M) expenses and Compensation Allowance, same expenditure cannot be claimed under this Regulation.”

14. Regarding the aforesaid issue of additional capitalization for coal handling plant claimed by the review petitioner, the Commission in para 53, 54 and 55 of its order dated 16.12.2020 which is under review in this matter, has mentioned the following:

“53. On examination of the petitioner’s response on to the Commission’s query on the issue related to the coal handling plant, the Commission has observed the following:

- i. The petitioner has capitalized the amount of Rs 22.87 Crore towards coal blending system and Rs 0.73 Crore towards other plant & machinery items beyond the cut-off date of the project. The petitioner submitted that the aforesaid assets have been created and capitalized during FY 2018-19.*
- ii. The petitioner submitted that the aforesaid additional capitalization **are claimed under Regulation 20.3 (e) of MPERC Regulations, 2015**. The Regulation 20.3 provides that the Additional Capital Expenditure after the cut-off date may be admitted on very specific and limited counts such as liability to meet out award of arbitration, decree of court of law, change in law, deferred work, relating to ash pond liability for works executed prior to cut-off date.*
- iii. Further, **Regulation 20.3 (e) stated that “Any liability for works executed prior to the cut-off date, after prudence check of the details of such undischarged liability, total estimated cost of package, reasons for such withholding of payment**. However, the assets/work toward coal blending system have been put-to-use and capitalized during FY 2018-19. The aforesaid Regulation permit only liability for works executed prior to the cut-off date. **Therefore, the aforesaid assets are not covered under Regulation 20.3(e)***

of the Regulations, 2015.

iv. *The petitioner mentioned that the assets of Rs 22.87 Crores have been capitalized in 'Coal Handling Plants' in order to maintain the uniform Station Heat Rate and reduce the overall coal consumption and improve the overall operational efficiency at the station. With regard to the additional capitalization which is necessary for efficient operation of generating station, Regulation 20.3 (g) of the Regulations, 2015, provides for generating stations other than coal-based power stations as under:*

"Any additional capital expenditure which has become necessary for efficient operation of generating station other than coal based stations, the claim shall be substantiated with the technical justification duly supported by the documentary evidence like test results carried out by an independent agency in case of deterioration of assets, report of an independent agency in case of damage caused by natural calamities, obsolescence of technology, up-gradation of capacity for the technical reason such as increase in fault level;"

54. *In view of the above, the claim of the petitioner towards additional capitalization of Rs 22.87 Crore for procurement and installation of coal handling plant in petitioner's coal-based power station is not covered under the provisions of Regulation 20.3 of MPERC Regulations, 2015.*

55. *Hence, the expenses claimed by the petitioner towards capitalization of coal handling plant of Rs 22.87 Crore and Rs 0.73 Crore towards capitalization of other item such as such as fire station, AC Ventilation, natural cooling towers and Boilers is beyond the cut-off date and not covered in any provisions under the MPERC Regulation 2015, hence not considered in this order"*

15. Unit No. 1 and 2 of the Jaypee Bina Thermal Power Station achieved CoD on 31st August' 2012 and 7th April' 2013, respectively. Therefore, the cut-off date of the project is 31st March' 2016 in accordance with aforesaid Tariff Regulations, 2015. This cut-off date is undisputed in the present review petition. In the order which is under review in the subject matter, the Commission observed that the additional capitalization for coal handling plant filed by the petitioner was beyond the cut-off date of the project. Therefore, the claim of additional capitalization was examined in light of Regulation 20.3 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015.

16. While processing the true-up petition No. 47 of 2019 for FY 2018-19, the Commission

had sought response of the review petitioner on several issues/queries related to additional capitalization of coal handling plant in light of above-mentioned Regulations. The issue and the response filed by the review petitioner have been mentioned in para 51 of Commission's order dated 16th December' 2020. While disallowing the additional capitalization of Rs. 22.87 Crore towards coal handling plant during FY 2018-19, detailed reasons have been mentioned in Para 53 to Para 55 of the Commission's order under review in the subject matter.

17. The basis for allowing additional capitalization of the thermal power stations beyond the cut-off date of any project has very limited scope and required examination within the specific counts prescribed under Regulation 20.3 of the MPERC Tariff Regulations, 2015. During the proceedings under petition No. 47/2019, the review petitioner was given opportunity to justify its claim of additional capitalization towards coal handling plant beyond the cut-off date.
18. Vide Commission's letter dated 21st January' 2020, the review petitioner was specifically asked to explain the reasons for claiming the additional capitalization towards coal handling plant beyond the cut-off date in light of the provisions of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015. It was also asked to mention the Regulation based on which the additional capitalization of coal handling plant was claimed by the review petitioner.
19. In response to above, by affidavit dated 20th February' 2020, the review petitioner had submitted that the additional capitalization towards coal handling plant is claimed under **Regulation 20.3 (e) of the Regulations, 2015**.
20. On the above submission and claim of the petitioner, the Commission had examined the additional capitalization towards coal handling plant in terms of Regulation 20.3 (e) of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 which provides as under:

“Any liability for works executed prior to the cut-off date, after prudence check of the details of such un-discharged liability, total estimated cost of package, reasons for such withholding of payment and release of such payments etc.”.

21. The assets/works towards coal blending system had been put-to-use and capitalized during FY 2018-19. However, the aforesaid Regulation permits only liability for works executed prior to the cut-off date. Therefore, the aforesaid assets were not covered under Regulation 20.3 (e) of the Regulations, 2015.

22. As a matter of fact and also stated by review petitioner in the subject review petition that, in para 5 of its reply dated 06.08.2020 to the comments/objections of one stakeholder, the review petitioner stated that the expenditure of Rs 22.87 in Coal Handling Plant was incurred on account of procurement and installation of Coal Blending System and other auxiliary equipment such as centrifuge Oil Filtration machine, Hydraulic Power Motor in order to improve the blending of coal sourced/procured from different sources.
23. The review petitioner vide affidavit dated 06.08.2020 while responding response to the objections raised by the stakeholder in petition no 47/2019, had changed its contention towards the additional expenditure incurred for coal handling plant which was neither stated in its petition No 47 of 2019 nor informed to the Commission vide its affidavit dated 20th February' 2020.
24. In view of above, the Commission has noted that the claim of the review petitioner towards coal handling plant under additional capitalization had been appropriately dealt with in detail by the Commission in its order under review. Therefore, the contention of the review petitioner seeking review on this issue has no merit.

Issue No. 2: O&M expense for the Dedicated Transmission Line

Submission of Review petitioner:

25. Regarding the disallowance of operation and maintenance expenses of dedicated transmission line and bay, the review petitioner has broadly submitted the following:
- 7.1 *The Commission disallowed the claim of the Review Petitioner towards O&M Expenses for the Dedicated Transmission Line built by the Review Petitioner for supplying power to Respondent No. 1 to 4 as part of its Bina TPP on the pretext that the MPERC Regulations, 2015 does not stipulate grant of O&M expenses for Dedicated Transmission Line separately. The said finding of this Commission is erroneous for the following reasons:*
- (a) *It is pertinent to mention that reliance of this Hon'ble Commission upon the order dated 03.06.2016 passed in Petition No. 70 of 2015 cannot be taken into consideration for the reason that the order being relied upon is under challenge by the Review Petitioner vide Appeal No. 131 of 2018 which is pending adjudication before the Hon'ble Appellate Tribunal for Electricity.*
- (b) *Additionally, it is most humbly submitted that each tariff year gives rise to a separate cause of action to the Review Petitioner and each claim is required to*

be determined in light of the extent of the relevant regulatory and statutory framework.

- (c) It is pertinent to mention that the issue in question is subjudice before the Hon'ble Tribunal in so far as the facts relating to Bina plant is concerned and as such has not attained finality, therefore, Review Petitioner is bonafide in claiming the O&M expenses as Capacity charges.*
- (d) The finding of this Hon'ble Commission holding that the Transmission line is a dedicated line, and its cost has been appropriately included in the capital cost is erroneous for the following reason:
 - i. Review Petitioner's Power Plant operates under the tariff determined through Section 62 of the Act. It is a settled position that in a cost-plus Tariff, the State Commission must allow all the reasonable expenditures to the Generator after prudence check. It is pertinent to mention that all Generating Stations covered under Section 62 are governed by principles enumerated under Section 61 of the Act. Further, Section 61 (c), (d) and (e) clearly mandate that there should be reasonable recovery of the cost of electricity. Therefore, the Review Petitioner as enshrined under Section 62 and 61 of the Act is entitled to reimbursement of all legitimate costs incurred by it in generation and supply of power to the Respondent No.1.**
- (e) This Commission while disallowing the claim of the Review Petitioner held that MPERC Regulations, does not provide for any O&M expenses of Dedicated Transmission Line separately and therefore the Claim of the Review Petitioner cannot be allowed. The finding of this Hon'ble Commission in this regard is erroneous for the following reasons:
 - i. It is stated that the finding of this Commission qua O&M expenses is incorrect, for the reason that Hon'ble Central Electricity Regulatory Commission ("CERC") and its Regulations does not provide specifically for O&M Expense of Dedicated Transmission Line. However, Hon'ble CERC owing to various projects having such requirement provides the same. Central Commission as a matter of practice allows O&M expenses on dedicated Transmission Lines as if the same is not allowed then it will lead to under-recovery for the generator. The same is evident from the Hon'ble CERC Order dated 11.03.2010 in Petition No. 308 of 2009 wherein the following has been held:
 - "51. The petitioner has submitted that O&M charges for dedicated transmission lines and sub-stations /bays for captive power generating station has not been provided in the O&M expenses for thermal power***

generating stations under the 2009 regulations specified by the Commission. Hence, the petitioner has claimed the following O&M expenses for the dedicated transmission line:

...

52. The petitioner has submitted that out of the 7 no. of bays for associated transmission system, 3 no. of bays fall within the side of the petitioner and the rest 4 no. of bays fall within the Raipur sub-station of Power Grid Corporation of India (PGCIL) for connection to the double bus scheme. The petitioner has also submitted that the assets included in the 4 bays at Raipur sub-station belonged to the petitioner and it has awarded the O&M contract to PGCIL for O&M of these 4 bays. The submission of the petitioner is found to be in order and the O&M expenses claimed is allowed. Accordingly, the total O&M expenses allowed for the generating station and transmission system is as under:”

Further, disallowing the cost of O&M expenses for Dedicated Transmission Line to the Review Petitioner will be contrary to the principles of Tariff determination to be undertaken under Section 62 of the Act.

- 7.2 *It is a settled position in law that Regulation is not a pre-condition for any State Commission to exercise its powers under Section 86 of the Act. Therefore, even in the absence of any Regulation to this effect, this Hon'ble Commission under Section 62 read with 86 (1) (b) of the Act is vested with the power to regulate the tariff of generating companies and that the concept of regulatory jurisdiction provides for comprehending all facts not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation. Further, it has been consistently held that the word 'regulate' has a broad impact having wide meaning and cannot be constructed in a narrow manner. The above stated principle of law has been upheld by the Hon'ble Supreme Court vide its Judgment in the following cases: -*

- (a) *The Hon'ble Supreme Court in U.P. Co-operative Cane Unions Federation Vs. West U.P. Sugar Mills Association (2004) 5 SCC 430 has held that :-*

“20..... “Regulate” means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute”.

- (b) *The Hon'ble Supreme Court in its Judgment dated 3rd March 2009 titled 'Uttar Pradesh Power Corporation Limited Vs National Thermal Power Corporation Limited & Ors' (2009) 6 SCC 235 has held that: -*

"48. The power to regulate may include the power to grant or refuse to grant the licence or to require taking out a licence and may also include the power to tax or exempt from taxation. It implies a power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or may be conducted"

- (c) *In view of the above-mentioned judgments of the Hon'ble Supreme Court, it is unequivocal that this Hon'ble Commission under its Statutory and Regulatory jurisdiction has the power to revisit the Tariff. Therefore, once it was established that the Review Petitioner has incurred cost for O&M of the Dedicated Transmission Line and such cost are not covered under the Normative O&M expense as provided under the Regulations, this Hon'ble Commission ought to have allowed such cost incurred on account of O&M expense for Dedicated Transmission Line under "Power to relax".*

7.3 *In the present case, the Dedicated Transmission Line was declared as part of the generation system, therefore, it was the responsibility of the Review Petitioner to operate and maintain the Transmission line, consequent to which the Review Petitioner has incurred substantial cost qua such work.*

7.4 *Further, the O&M expenses incurred by the Review Petitioner on the Dedicated Transmission Line is a cost incurred with regards to generation and supply of power and such cost are a pass through in a cost-plus tariff regime. It is most respectfully submitted that this Hon'ble Commission has failed to appreciate that regardless of the fact whether the MPERC Regulations provides for such cost or not, this Hon'ble Commission under its regulatory power can allow any expenditure prudently incurred by the Review Petitioner after prudence check.*

7.5 *In facts of the present case, it is undisputed that the Review Petitioner has incurred O&M expenses for the Dedicated Transmission Line which cannot be recovered through the Normative O&M for the Plant. In view thereof and in terms of the principles of Section 61 of the Act, the Review Petitioner ought to have been allowed the O&M expenses for Dedicated Transmission Line, as there were justified and reasons for this Hon'ble Commission to exercise such discretion to relax norms and allow the claim of the Review Petitioner after prudence check.*

7.6 *It is relevant to highlight that this Hon'ble Commission has been vested with inherent powers and judicial discretion to relax norms in case any regulations cause hardship to a party or works injustice to it or application thereof leads to unjust result and the same is provided in MPERC (Conduct of Business) Regulation, 2016. The relevant extracts of the said Regulation are produced hereunder: -*

"45. Saving of inherent power of the Commission.-

(1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.

(2) Nothing in these Regulations shall bar the Commission from adopting a procedure for dealing with the matters in conformity with the provisions of the Act, which is at variance with any of the provisions of these Regulations, if the Commission, for reasons to be recorded in writing, deems it necessary or expedient.

(3) Nothing in these Regulations shall, expressly or impliedly, bar the Commission to deal with any matter or exercise any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit."

Considering the facts and circumstances mentioned above, it is evident that this Commission had the requisite jurisdiction to grant the O&M expenses to the review petitioner.

26. Regarding the O&M expenses of dedicated transmission line and bay, the observations and findings of the Commission in para 106 to 109 of the order dated 16.12.2020 are as given below:

"106. With regard to O&M expenses of transmission line, the Commission has already dealt with the same in earlier true up orders wherein the commission has disallowed the O&M expenses of transmission line with the following observation:

"94. It is evident from the above submission of the petitioner that the Transmission line in the subject petition is a dedicated line and its cost has been appropriately included in the capital cost of the 2x250 MW (Phase-I) of petitioner's power plant while determining its final tariff vide Commission's order dated 26.11.2014.

Further, the petitioner had never claimed the operation and maintenance (O&M) expenses for the said dedicated transmission line in its any of the petitions filed for determination of provisional tariff of each generating unit and also the final tariff of the petitioner's power plant. For the first time in the subject true-up petition, the O&M expenses of dedicated transmission line is claimed by the petitioner.

95. The status of the aforesaid dedicated transmission line has already been dealt with in para 27 to 30 of the Commission's first order dated 12th December' 2012 in Petition No. 40 of 2012. Further, the remaining issue has been dealt with in relevant paras of Commission's order dated 26.11.2014.

96. The extract of the above-mentioned paragraphs of Commission's order is that the dedicated transmission lines is neither a transmission line in terms of sub-section (72) of Section 2 of the Electricity Act' 2003 nor it is a distribution system connecting the point of a connection to the installation of consumer in terms of sub-section (19) of Section 2 of the Act. The O&M expenses of a transmission line are part of the Annual Fixed Cost of the line of a transmission licensee whereas; the petitioner is not a transmission licensee. The cost of dedicated line has been considered in the capital cost of the petitioner's power plant and the tariff of the said power plant has been determined in terms of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations' 2012 which does not provide for any O&M expenses of dedicated transmission line separately."

107. Further, the petitioner files a review petition on 47/2016 for review of the Commission's order dated 6th June 2016 (in petition No. 70/2016 for true-up of FY 2014-15) to the extent allowing grossing up of ROE by MAT and "O&M expenses for dedicated transmission line". Vide order dated 25th September, 2017 the Commission has not considered the O&M expenses for dedicated transmission line.

108. The Petitioner has filed several Appeals before the Hon'ble Appellate Tribunal for electricity on the issue of O&M expenses of dedicated transmission line and all the Appeals are sub-judies before the Hon'ble Tribunal.

109 In view of the aforesaid, the claim of Petitioner for O&M expenses of dedicated transmission line is not considered in this order."

27. The Commission has noted that the claim of the review petitioner towards separate operation and maintenance expenses for dedicated transmission line and bay has been appropriately dealt with in details by the Commission in its order under review. Further, this issue is *sub-judice* in several Appeals filed by the review petitioner before Hon'ble Appellate Tribunals for Electricity. Therefore, the contention of the review petitioner seeking review on this issue has no merit.

Issue No 3:

Grossing up the Return on Equity with the effective tax rate of the respective financial year

Submission of the Review petitioner:

28. Regarding the return on equity, the review petitioner has broadly submitted the following:
- i. it is submitted that while claiming Return on Equity, the review petitioner inadvertently failed to claim tax return against the Minimum Alternate Tax ("MAT") paid by the review petitioner company. It is submitted that in terms of Regulation 30 of MPERC Regulations, 2015, Return on Equity as grossed by the Commission is grossed up with the effective tax rate of the respective financial year.*
 - ii. Tariff determination of an entity is to be done in water tight compartments and losses of another company ought not to be considered for the purpose of Tariff determination. In the present case while the review petition had requisite income and is liable to pay MAT, however, **due to losses suffered by other TPPs operating under the review petitioner Company no MAT was paid.** The Commission while passing the Impugned Order has also not considered Grossing Up of RoE for the very same reason. However, as per the law settled by the Hon'ble ATE the Commission ought to gross up the RoE payable to the review petitioner with the applicable Tax rate without considering the losses suffered by other TPPs operating under the review petitioner Company. In this regard the review petitioner has referred several relevant Judgments of the Hon'ble Tribunal -----.*

With the above submission, the review petitioner submitted that some of the key principles with regards to treatment of tax which have been laid down by the Hon'ble Tribunal in a series of judgments detailed above and are summarized as below: -

- (a) Each regulatory business is to be treated as if in a water tight compartment and the consumers of the regulated business must not be exposed to the risks of other regulated business and any other non-regulated business.*
- (b) Income Tax assessment has to be made on stand-alone basis for each of the regulated business of the entity so that consumers are fully insulated and protected from the Income Tax payable from other regulated or unregulated businesses of the entity. This is beneficial in cases when certain tax benefits are accruing to the entity from regulated or un-regulated businesses. However, the rationale behind prescribing such limitation is that if in a given scenario the overall tax liability of an entity increases due to other regulated or un-regulated businesses then the burden of the same ought not to be passed on to consumers of the regulated business for which tariff is being determined.*
- (c) Neither of the segments of the regulated businesses should be either exposed to the risks or derives a benefit at the cost of the other segments of the regulated business.*
- (e) Regulated businesses within the jurisdiction of the SERC should neither subsidize nor get subsidy from other businesses of such entity whether unregulated or regulated by the same or different regulator.*
- (f) Taxable income of a regulated business within the jurisdiction of SERC should be computed on stand-alone basis, irrespective of what is the impact of such business or other regulated or unregulated businesses on the overall tax liability of the corporate entity.*

It is submitted that, the legal principle set out in the above said Judgments is income of an entity must be computed on a standalone basis. Loss suffered by another unit within the ownership of same parent company cannot be a ground to deny legitimate tax claims of the entity. This issue has been specifically considered by the Hon'ble Tribunal and has been rejected previously in various judgments. In the instant case JP Bina Project of the Petitioner is being denied grossing up of RoE due to losses incurred by JP Nigrie Project which has had an adverse impact upon the cumulative balance sheet of the parent company i.e. Jaiprakash Power Ventures Limited which is impermissible in law. It is stated that the Tariff of JP Bina as per the law laid down by the Hon'ble Tribunal ought to be determined on a stand-alone basis and the Impugned Order passed the Hon'ble Commission is liable to be reviewed.

Provisions in Regulations:

29. Regarding the Return on Equity, Regulation 30 of MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015, provides as under:

30 Return on Equity:

30.1 *Return on equity shall be computed in rupee terms, on the equity base determined in accordance with Regulation 25.*

30.2 *Return on equity shall be computed at the base rate of 15.50% for thermal generating stations and hydro generating stations:*

Provided that:

(a) *in case of projects commissioned on or after 1st April, 2016, an additional return of 0.5 % shall be allowed, if such projects are completed within the timeline specified in Appendix-I:*

(b) *the additional return of 0.5% shall not be admissible if the project is not completed within the timeline specified above for reasons whatsoever:*

(c) *the rate of return of a new project shall be reduced by 1% for such period as may be decided by the Commission, if the generating station is found to be declared under commercial operation without commissioning of any of the Restricted Governor Mode Operation (RGMO)/ Free Governor Mode Operation (FGMO):*

(d) *as and when any of the above requirements are found lacking in a generating station based on the report submitted by the respective SLDC/RLDC, ROE shall be reduced by 1% for the period for which the deficiency continues:*

31. Tax on Return on Equity:

31.1 *The base rate of return on equity as allowed by the Commission under Regulation 30 shall be grossed up with the effective tax rate of the respective financial year. For this purpose, **the effective tax rate shall be considered on the basis of actual tax paid in the respective financial year in line with the provisions of the relevant Finance Acts by the concerned generating company.** The actual income tax on other income stream including deferred tax i.e., income of non generation business shall not be considered for the calculation of “effective tax rate”.*

31.2 *Rate of return on equity shall be rounded off to three decimal places and shall be computed as per the formula given below: Rate of pre-tax return on equity = Base rate / (1-t)*

Where “t” is the effective tax rate in accordance with Clause 31.1 of this

Regulation and shall be calculated at the beginning of every financial year based on the estimated profit and tax to be paid estimated in line with the provisions of the relevant Finance Act applicable for that financial year to the company on pro-rata basis by excluding the income of non-generation business and the corresponding tax thereon. In case of generating company paying Minimum Alternate Tax (MAT), "t" shall be considered as MAT rate including surcharge and cess.

For example:- In case of the generating company paying

(i) Minimum Alternate Tax (MAT) @ 20.96% including surcharge and cess:

Rate of return on equity = $15.50/(1-0.2096) = 19.610\%$

(ii) In case of generating company paying normal corporate tax including surcharge and cess:

(a) Estimated Gross Income from generation business for FY2016-17 is Rs. 1000 crore.

(b) Estimated Advance Tax for the year on above is Rs. 240 crore.

(c) Effective Tax Rate for the year 2016-17 = Rs. 240 Crore/ Rs.1000 Crore =24%

(d) Rate of return on equity = $15.50/(1-0.24) = 20.395\%$

31.3 The actual tax paid together with any additional tax demand including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities pertaining to the tariff period 2016-17 to 2018-19 on actual gross income of any financial year shall be trued-up every year. However, penalty, if any, arising on account of delay in deposit or short deposit of tax amount shall not be claimed by the generating company. Any under-recovery or over-recovery of grossed up rate on return on equity after truing up, shall be allowed to be recovered or refunded to beneficiaries on year-to-year basis.

30. The aforesaid Regulation 31.1 provides that the base rate of return on equity shall be grossed up with the effective tax rate of the respective financial year. For this purpose, the effective tax rate shall be considered on the basis of actual tax paid in the respective financial year in line with the provisions of the relevant Finance Acts by the concerned **generating company**.

31. The petitioner contended that while claiming Return on Equity (RoE) in the subject petition for FY 2018-19, review petitioner **inadvertently failed to claim tax return** against the Minimum Alternate Tax (MAT) paid by the review petitioner Company.

32. The petitioner in its submission contended that JP Bina Project of the petitioner is being denied grossing up of RoE due to losses incurred by JP Nigrie Project which

has an adverse impact upon the cumulative balance sheet of the parent company i.e. Jaiprakash Power Ventures Limited. The review petitioner submitted that due to losses suffered by other TPPs operating under the review petitioner Company no MAT was paid.

33. In the true-up petition No. 47 of 2019, the petitioner had claimed the Return on Equity on base rate of return @ 15.50% without grossing up with Tax rate. The petitioner in form TPS 1(II) of the aforesaid true-up petition had claimed the Return on Equity for FY 2018-19 as given below:

Table 1: Return on Equity claimed by the review petitioner in P-47/2019

Sr. No	Particular	Unit	FY 2018-19
1	Opening Equity	Rs. Crore	1060.64
2	Less: de-capitalization during the year/period	Rs. Crore	0.01
3	Equity Additions (Normative)	Rs. Crore	7.20
4	Closing Equity	Rs. Crore	1,067.83
5	Average Equity	Rs. Crore	1,064.24
6	Base Rate of Return On Equity	%	15.50%
7	Tax rate considered MAT	%	0.00%
8	Rate of Return on Equity	%	15.50%
	Return on Equity	Rs. Crore	164.96

34. From the above table, It is observed that the review petitioner had claimed Return on Equity by applying base rate of return without grossing up with MAT. Since, the petitioner itself did not claim any tax paid while filing the true up petition for FY 2018-19, the Commission only allowed return on equity by applying base rate of return.
35. Further, on perusal of the Annual Audited Accounts for FY 2018-19 for Bina thermal power station and the Corporate balance sheet of the petitioner's company, it was observed that the petitioner did not paid/recorded any tax paid / to be paid during FY 2018-19. It was further observed in the balance sheet of the petitioner's company that it had neither paid any Tax nor booked/recorded any profits in the balance sheet.
36. In the order dated 16.12.2020, the Commission followed a consistent approach and determined the Return on Equity by applying the base rate on return as claimed by the petitioner in petition no. 47 of 2019. Further, during the proceeding of the true-up petition No. 47 of 2019, the review petitioner had neither informed about any Tax paid/to be paid nor filed any supporting documents in this regard. Therefore, the

Commission allowed return on equity by applying base rate of return as per the applicable Tariff Regulations, 2015.

37. In view of the above-mentioned observations and facts & figures, the claim of the review petitioner on this issue also has no merit.
38. Having discussed and deliberated at length on the issues claimed for review in the subject petition, the Commission has examined the subject review petition in accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), which provides that 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
39. In light of the issues examined in preceding paragraphs of this order, it is observed that the issues raised by the review petitioner in the present petition do not fall under any of the abovementioned circumstances articulated in Rule 1 Order 47 of CPC for review in the instant case. Therefore, the subject review petition is not maintainable and hence is disposed of and dismissed accordingly.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

(S.P.S Parihar)
Chairman

Date: 13th September' 2021

Place: Bhopal