

or "Petitioner"), has filed the instant Petition under Section 94 (1) (f) of the Electricity Act, 2003 for review of Commission's Order dated 28.12.2021 in Petition No. 1879/2021 approved for determination of Final Capital Cost, Approval of Aggregate Revenue Requirement (ARR) & Tariff for FY 2018-19 to FY 2021-22 for CSCTPP Units 5&6 Power Station of RVUN.

2. Notices were issued through Online Portals to Respondents to file reply on the instant petition. Accordingly, Discoms submitted their comments/suggestions on 05.05.2022. RVUN submitted its additional submissions and reply to Discoms objections on 05.05.2022 and 11.05.2022 respectively.
3. The matter was heard on 23.02.2022, 15.03.2022, 31.03.2022 and 28.04.2022. Shri. Ankit Sharma, Representative appeared for the Petitioner. Ms. Swapna Sheshadri, Advocate, appeared for the Respondents.
4. RVUN has filed the petition seeking review of the said order on the following issue:
 - I. Hard Cost of Rs. 5.71 Crore disallowed against Bulldozer – M/s BEML Ltd.;
 - II. Hard Cost of Rs. 0.63 Crore disallowed in Additional Capitalization of FY 2020-21 pertaining to Locomotive – M/s San Engg.;
 - III. Revision of direction - For use of Construction Power for New Projects;
 - IV. Revision of LD amount to 2.50% of Unit 5 contract value instead of 10% of full Contract Value
 - V. Redefining cut-off Date for the Project, instead of Unit Wise.
5. The ratio decided by the Hon'ble Supreme Court in its various decisions for exercise of the Power of Review, has been culled out by Hon'ble APTEL in the judgment dated 17.04.2013, which is as follows:

- a) It is well settled that the Review Proceedings are not by way of an Appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1, CPC;
- b) The Review jurisdiction cannot be exercised on the ground that the decision was erroneous on merits. That would be the province of the court of Appeal. A power of Review is not to be confused with Appellate power which may enable an Appellate Authority to correct all matter of errors committed by the subordinate court. This power has not been conferred in the review jurisdiction;
- c) An error apparent on the face of record must be such an error which might strike one mere looking at the record and would not require any long drawn process of reasoning on points where there may be two opinions;
- d) An error which has to be established only by lengthy and complicated arguments during the long drawn process of reasoning cannot said to be an error apparent on face of the record;
- e) The party is not entitled to seek a Review of a judgment delivered by the Court merely for the purpose of re-hearing a fresh decision of the case. The principle is that the judgment pronounced by the court is final. Departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so;
- f) If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it would be difficult to hold that there is an error apparent on the face of the record;
- g) The parameters are prescribed in Order 47 Rule 1 CPC. It permits the party to press for a re-hearing on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The former part of the rule deals with a situation attributable to the applicant

and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible;

- h) There is a distinction between a mere erroneous decision and a decision which could be characterized by error apparent. The Review is by no means an Appeal in disguise whereby an erroneous decision is re-heard and corrected. Review lies only on a patent error;
 - i) Whatever, the nature of the proceedings, it is beyond dispute that a Review proceedings cannot be equated with the original hearing of the case. The finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility;
 - j) Where the Order in question is appealable and the aggrieved party has adequate and efficacious remedy by recourse to Appeal the original courts should exercise the power to review its order with the greatest circumspection;
 - k) An error contemplated under the Rule must be such which is apparent on the face of the record. It cannot be an error which has to be fished out and searched;
 - l) Expression "any other sufficient reason" appearing in order 47 Rule 1 has to be interpreted in the light of the other specified grounds.
6. The Commission has considered the submissions of the Petitioner and Respondents under Section 94 (1) (f) of the Electricity Act, 2003 read with Order No. XL VII Rule 1 of Civil Procedure Code, on the following grounds:
- a) Discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when the decree or order was passed;
 - b) Some mistake or error apparent on the face of the record; and

- c) For any other sufficient reason.
7. The submissions of Petitioner, Respondents and Commission's View on each issue are summarized as below:

Issue No. (i) :Hard Cost of Rs. 5.71 Crore disallowed against Bulldozer – M/s BEML Ltd.

RVUN's Submission

8. The Petitioner submitted that the Commission has disallowed the Hard Cost of Rs. 5.71 Crore against Bulldozer, even though all the documents were submitted along with the Work Order of the Bulldozer.
9. The Commission vide Order dated 28.12.2021 (Petition No. 1879/21) had considered only the cost of Work Order as Rs. 3.50 Crore and not the cost of taxes and other items that were submitted with the data gap reply.
10. The cost of Bulldozer transferred from Giral has been deducted in GLPL asset vide Order dated 28.05.2018. Once the assets have been deducted from GLPL, the same is to be allowed at CSCTPP. Therefore, RVUN requested the Commission to allow the remaining cost of Bulldozer of Rs. 5.71 Crore.

Respondent's Objections/Comments

11. The Respondent submitted that the Petitioner regarding the cost of Bulldozers had submitted Work Orders for six (6) numbers of quantities, out of which two (2) numbers are for CSCTPP Units 5&6 and the remaining four (4) are for SSCTPP. However, the various heads of expenses being claimed by the Petitioner under entry tax, spares works etc., were not available in one submission before the Commission.
12. The Respondent further submitted that the contention of the Petitioner that the cost of Bulldozer transferred from Giral has been deducted in GLPL asset

vide Order dated 28.05.2018 is correct and has been verified. The Commission may take an appropriate view on the contention of the Petitioner that once the assets have been deducted at GLPL, the same is to be allowed at CSCTPP.

RVUN's reply to the Respondent's Objections/Comments

13. The Petitioner submitted that all the required documents, i.e., Work Order, Spare Parts Work Order and Entry Tax Details have been submitted with the main petition and in various replies. Further, with regard to inter-company transfer of Bulldozer from GLPL to CSCTPP, all relevant documents had already been submitted with the data gap and in the instant petition and Respondent have also accepted the same. Therefore, RVUN requested the Commission to allow hard cost of Rs. 5.71 Crore of Bulldozer.

Commission's Analysis

14. The Petitioner in its review petition has submitted that cost of Bulldozers received from Giral Lignite Power Ltd. (GLPL), Barmer has not been considered by the Commission, though the cost of Bulldozer transferred from Giral has been deducted in GLPL Asset as per the Commission's Order dated 28.05.2018.

15. To verify the Petitioner's claim in this regard, the Commission has looked into the documents No. 736 and 737 dated 07.01.2017 relied upon by the Petitioner, which shows inter-company transfer of the assets. As per inter-company transfer documents, the Bulldozers were actually transferred to Chhabra Thermal Power Plant (CTPP) (4x250MW), which is entirely a different entity than Chhabra Super Critical Thermal Power Plant (CSCTPP)(2x660 MW). Even the store receipts of CTPP shows that the Bulldozers were received at the Chhabra Thermal Power Plant (CTPP) only. It is also noted

that the Petitioner has claimed the full cost of Bulldozers as per Work Order transferred from GLPL instead of depreciated cost. Thus, the Bulldozers were not transferred to CSCTPP as claimed by the Petitioner but to CTPP. The Petitioner must have taken into consideration the depreciated cost of the Bulldozers in O&M expenses of CTPP.

16. Further, it is also noted that Petitioner has issued corrigendum dated 05.05.2022 in this regard. It is observed that corrigendum was issued only after this point was raised by the Commission, which clearly shows that this is after thought of the Petitioner to claim the cost of the bulldozers in CSCTPP. In view of above, the cost of bulldozers and spares transferred from GLPL is not allowed.
17. On the issue of entry tax and the spares of bulldozers procured for CSCTPP, the Petitioner has now furnished the supporting documents for its claim. In view of above, the entry tax being the statutory obligation of the Petitioner and spares of bulldozers procured for CSCTPP to the tune of Rs. 0.948 Crore are allowed.
18. As the impact of Rs. 0.948 Crore additional capitalization will be miniscule in total approved ARR of CSCTPP, the Commission deems it appropriate not to revise the ARR computations at this stage. The Petitioner is directed to submit its claim in respect of entry tax and the spares of bulldozers procured for CSCTPP along with audited accounts in its true up Petition. The Commission will allow the impact of this additional capitalization in the petition to be filed by RVUN for truing up for respective financial year.

Issue No. (ii) - Hard Cost of Rs. 0.63 Crore disallowed in Additional Capitalization of FY 2020-21 pertaining to Locomotive – M/s San Engg.

RVUN's Submission

19. The Petitioner submitted that the cost of locomotive allowed by the Commission is Rs. 9.89 Crore against the claimed cost of Rs. 10.52 Crore. The Cost on account of variation in GST rate from 5.00 % to 12.00 % has not been considered. Therefore, RVUN requested the Commission to allow the remaining cost of locomotive of Rs. 0.63 Crore.

Respondent's Objections/Comments

20. The Respondent submitted that the Petitioner has not pointed out any error apparent nor the contention of the Petitioner with respect to its claim of Rs. 0.63 Crore towards locomotive is maintainable on merits. The Petitioner is claiming the cost on account of variation in the GST, which is wrong and misconceived and is liable to be rejected.

RVUN's reply to the Respondent's Objections/Comments

21. The Petitioner submitted that the Respondent have failed to address the issue and aspects raised by the Petitioner. The variation in the hard cost of locomotive is due to statutory variation in the taxes, which is attributable to the purchaser. Therefore, RVUN requested the Commission to allow hard cost of Rs. 0.63 Crore towards Locomotive.

Commission's Analysis

22. The Commission observed that the Petitioner during the proceedings of Petition No. 1879/21 has only submitted the Work Order copy against Locomotives – M/s San Engineering amounting to Rs. 9.89 Crore on the basis of which the claim had been considered by the Commission. Also, the

Commission through its various data gaps on Petition No. 1879/21 had asked RVUN to submit Statutory Auditor Certificate against capital cost and additional capitalization with asset category/class wise complete bifurcation of cost claimed.

23. The Petitioner never submitted that the cost against locomotives (as per the work order) Rs. 9.89 has increased to Rs. 10.52 Crore due to variation in GST rate from 5.00% to 12.00 %, though enough opportunity was given during the proceedings of Petition No. 1879/21 to the Petitioner for justifying its claimed cost against each component along with the supporting documents and detailed bifurcation. However, the Petitioner now has submitted the bifurcation and supporting documents for GST rate variation alongwith this review petition.
24. Since, GST is a Statutory levy and Petitioner has paid the said amount, the Commission, therefore, allows the remaining cost of locomotive of Rs. 0.63 Crore on account of GST variation.
25. As the impact of Rs. 0.63 Crore capitalization will be miniscule in total approved ARR of CSCTPP, the Commission deems it appropriate not to revise the ARR computations at this stage. The Petitioner is directed to submit its claim in respect of revision in GST rates for procurement of locomotives along with audited accounts in its true up Petition. The Commission will allow the impact of this capitalization in the petition to be filed by RVUN for truing up for respective financial year.

Issue No. (iii) - Revision of direction - For use of Construction Power for New Projects

RVUN's Submission

26. The Petitioner submitted that the Commission vide Order dated 28.12.2021

against Petition No. 1879/21 had issued direction for the construction power utilization as below:

"The Commission directs RVUN not to violate the provisions of PPA and the provisions of the Electricity Act, 2003 and further directs to follow the proper procedure in sourcing construction power for its upcoming new Generating Stations like SSCTPP Unit 7&8 or any other upcoming power plant, else the Commission may impose penalty against RVUN for wrongful practices".

27. In this regard, the Petitioner submitted that the power supply made available by the RVUN for construction is stable and cheaper, otherwise the costly power purchase will be loaded by the contractor in its contract value, which will lead to increase in cost of Power Project.
28. Further, the Commission had given aforesaid direction for SSCTPP Units 7&8, which has already been commissioned. Therefore, RVUN requested the Commission to allow construction power for the SSCTPP Units 7&8 and also for new projects in future to reduce the Project Cost, which will be in public interest.

Respondent's Objections/Comments

29. The Respondent submitted that the contentions of the Petitioner are not only wrong on merits, but are challenging the view taken by the Commission without pointing out any error apparent. The Commission has correctly observed that the Petitioner should not have sourced construction power for CSCTPP Units 5&6 from CTPP Units 1-4, since, CTPP Units 1-4 has a Power Purchase Agreement with the Respondents. This being a considered view of the Commission, the contentions of the Petitioner seeking to re-agitate the same issue is misconceived and is liable to be rejected.

RVUN's reply to the Respondent's Objections/Comments

30. The Petitioner submitted that the Commission has issued direction with regard to construction power for SSCTPP Units 7&8, which has already been commissioned. Therefore, RVUN requested the Commission to allow construction power for SSCTPP Units 7&8 and the direction issued will be compiled in the future projects of RVUN.

Commission's Analysis

31. The detailed direction against use of construction power was issued in the Order dated 28.12.2021. Commission observed that the Petitioner was violating the terms of PPA and the Electricity Act, 2003 by sourcing construction power from CTPP Unit 1-4 for CSCTPP Units 5&6, when the PPA for entire capacity of CTPP Units 1-4 is with the Respondents.

32. The Commission is of view that there is no ground for review on this issue, since, RVUN has neither pointed out any error apparent nor provided any new information, which satisfies the conditions for review of the impugned Order. Hence, the review sought by RVUN is not admissible in this regard.

Issue No. (iv) - Revision of LD amount to 2.50 % of Unit 5 contract value, i.e., 60.00 % of total contract, instead of 10.00 % on full contract;

RVUN's Submission

33. The Petitioner submitted that vide Commission's data gaps reply dated 26.11.2021, RVUN submitted minutes of meeting of 304th BOD of RVUN, where LD is recommended as 2.50 % of contract value of Unit 5, (60.00 % of the total contract value). The BOD resolution is as below:

"Resolved that as per the recommendations of the Whole time Directors of RVUN, approval of the Board of Directors is hereby accorded:

For Final Time Extension up to 09.08.2018 with levy of Liquidated Damages (LD) for delay of 35 days in respect of Unit 5 (up to Provisional acceptance take over) attributable to the EPC Contractor, @ 0.50 % per week totaling to 2.50 % of the contract price of Unit 5 (which is 60.00 % of the total contract value) along with applicable GST of 18.00 % thereon and the same shall be recovered from the EPC Contractor - M/s L&T Ltd.;"

34. Accordingly, the LD amount is Rs. 88.55 Crore plus USD 19,69,116/- plus JPY 10,69,04,278/- with GST recoverable from the EPC contractor as on 24.11.2021. The Petitioner further submitted that no-where in the Petition or in the data gap replies they furnished any rate of LD of 10%. The Commission has inadvertently considered 10% as LD rate. Therefore, RVUN requested the Commission to consider the LD amount as approved by the BOD of RVUN in its 304th BOD meeting submitted vide data gap reply dated 26.11.2021.

Respondent's Objections/Comments

35. The Respondent submitted that the Petitioner had not submitted the amount of LD in the Original Petition. The Commission had taken a considered view strictly in terms of the contract entered into by the Petitioner and there is no error apparent on the face of the record. All contentions and averments to the contrary are stated to be wrong and are denied.

RVUN's reply to the Respondent's Objections/Comments

36. The Petitioner submitted that while filing petition of final capital cost of CSCTPP Unit 5&6, the case of finalization of LD amount was under consideration of BOD's of RVUN. Further, RVUN submitted 304th BOD minutes of meeting in its reply dated 26.11.2021 against the Commission's query and the Commission has also acknowledged the same vide Order dated 28.12.2021. The Respondent in the instant petition has misconceived the submission of the Petitioner when dealing with this aspect of the review

petition. Therefore, RVUN requested the Commission to consider the LD amount as approved by the BOD of RVUN in its 304th BOD meeting submitted to the Commission on 26.11.2021, instead of any notional rate (10%).

Commission's Analysis

37. Commission vide its Order dated 28.12.2021 has dealt in detail the issue of Liquidated Damages (LD). Since, the Petitioner had not finalised and recovered the LD amount, the Commission considered the maximum LD amount that can be levied as per the contract against EPC contractor, i.e., 10.00 % of the total contract price.

38. However, the Commission may re-examine this aspect and carry out the prudence check once the LD amount is finalised and recovered from the contractor and the contract is closed with EPC contractor. The Petitioner is at liberty to raise this issue in the subsequent year true up petition after the contract is closed with EPC contractor.

Issue No. (v) - Redefining Cut-off date for the Project, instead of Unit Wise

RVUN's Submission

39. The Petitioner submitted that the Commission vide Order dated 28.12.2021 against Petition No. 1879/21 had dealt with respect to the Cut-off date for CSCTPP Units 5&6 as below:

"4.122. Regulation 2(17) of the RERC Tariff Regulations, 2014 specifies as under: (2)... (17) "cut-off date" means 31st March of the year closing after 365 days from the date of commercial operation of the project, and in case the project is declared under commercial operation in the last quarter of a year, the cut-off date shall be 31st March of the year closing after 730 days from the date of commercial operation:

4.123. Further, Regulation 2(15) of the RERC Tariff Regulations, 2019 is read as

below: (2) (15) "cut-off date" means the last day of calendar month after three years from the date of commercial operation of the project: Provided that the cut-off date may be extended by the Commission, if it is proved on the basis of documentary evidence that the capitalization could not be made within the cut-off date for reasons beyond the control of the project developer:"

4.124. The COD of CSCTPP Units 5&6 were achieved on 09.08.2018 and 02.04.2019 respectively. As the COD of Units 5&6 falls under different Tariff Regulations regime, the Commission considers the cut-off date for Unit 5 as 31.03.2021 and Unit 6 as 30.04.2022. The Commission directs that for any additional capital expenditure from FY 2021-22 onwards in its forthcoming year tariff petition, RVUN is required to submit its claim separately for Units 5&6 certified by statutory auditor."

40. The Petitioner submitted that aforesaid Tariff Regulations of 2014 and 2019 both define the cut-off date in terms of "Commercial operation of the Project". It is no-where in the both the Regulations stated that cut-off can be decided on the basis of Commercial operation of a Unit. Therefore, the Petitioner requested instead of Unit wise Cut-off date, Cut-off date should be based on Project commercial operation date.
41. RVUN also submitted that the Commission vide various Orders of the Capital Cost under Tariff Regulations, 2014 has considered the Cut-off date as per project COD. Further, Tariff Regulations, 2019 also defines the Cut-off date in terms of Project COD, Thus, with regard to the Cut-off date, there is no change in the Tariff Regulations. Therefore, RVUN requested the Commission that the Cut-off date of Unit 5 should be considered based on project COD, i.e., 02.04.2019 and accordingly, the Cut-off date of Unit 5 will be 30.04.2022.

Respondent's Objections/Comments

42. The Respondent submitted that the Commission has correctly observed that the COD of CSCTPP Units 5&6 were achieved on 09.08.2018 and 02.04.2019 respectively. Since, the COD of Units 5&6 falls under different Tariff Regulations regime, the Commission considered the Cut-off date for Unit 5 as 31.03.2021 and Unit 6 as 30.04.2022. The contention of the Petitioner that the Cut-off date of CSCTPP Units 5&6 should be based on Project commercial operation date instead of Unit wise Cut-off date is wrong and misconceived. The Respondent further submitted that the challenge to the findings of the Commission certainly cannot be a ground for review without pointing out an error apparent. Hence, the same is liable to be dismissed.

RVUN's reply to the Respondent's Objections/Comments

43. The Petitioner submitted that RERC Tariff Regulations of 2014 and 2019 both define the Cut-off date in terms of "Commercial Operation of the Project". It is nowhere in the both the Regulations stated that Cut-off would be decided on the basis of "Commercial Operation of Unit". Therefore, the Petitioner requested the Commission that instead of unit wise cut-off date of Units 5&6, cut-off date of CSCTPP Units 5&6 should be based on project commercial operation date.

44. Further, RVUN submitted that the Commission vide 'RERC Tariff Regulations, 2014 introduced the proviso of cut-off date. The Commission imposed the relevant clause on all the earlier commissioned power plants from its effective date, i.e., KTPS Unit 7, STPS Unit 6 and CTPP Units 1&2 after the notification of RERC Tariff Regulations, 2014. RVUN reiterated its submission during the proceedings of the respective Power Station and prayed to allow Tariff regime of the respective year when unit was declared on commercial operation. However, the Commission did not consider the same. Therefore,

in the instant case the decision of the Commission will be in contrary to the previous decision. Accordingly, RVUN requested the Commission to consider redefining Cut-off date for the Project instead of Unit Wise.

Commission's Analysis

45. The Petitioner has requested to consider Cut-off date based on COD of the Project instead of each unit separately.

46. The Commission has looked into the RERC Tariff Regulations, 2019. The Cut-off date is defined as under:

(15)"Cut-off date" means the last day of the calendar month after three years from the date of commercial operation of the project:

Provided that the cut-off date may be extended by the Commission, if it is proved on the basis of documentary evidence that the capitalisation could not be made within the cut-off date for reasons beyond the control of the project developer;

47. On perusal of the above definition, it is clear that Cut-off date is defined from date of Commercial Operation of the Project and there is no provision of Unit-wise Cut-off date separately. Therefore, the Cut-off date should be considered from COD of the Project as defined in the RERC Tariff Regulations, 2019. Consequently, it is also clarified that the Commission will re-examine the other normative parameters as per the relevant Tariff Regulations.

48. The review petition filed by RVUN stands disposed of in the above terms.

S. C. Dinkar
(Member)

Dr. B. N. Sharma
(Chairman)