

**JOINT ELECTRICITY REGULATORY COMMISSION FOR
THE STATE OF GOA AND UNION TERRITORIES
GURGAON**

Coram*

Sh. S.K.Chaturvedi, Member

Petition No. 109/2013

In the matter of

Review Petition under Section 94 of the Electricity Act, 2003 of order dated 3.07.2013 passed by this Commission in petition no. 89/2013 for fixation of completed / actual capital cost and Tariff of the project of the petitioner- a Power Generating Company.

And in the matter of

1. Electricity Department, Rep. by its Superintending Engineer, Port Blair, Andaman & Nicobar Islands.
2. Chief Secretary, Andaman & Nicobar Administration Secretariat, Port Blair.

.....Petitioners

Vs.

M/s Suryachakra Power Corporation Ltd. Suryachakra House, Plot No. 304-L-III, Road No.78, Film Nagar, Jubilee Hills, Hyderabad- 500096

.....Respondents

Order

23.09.2013

1. M/s Suryachakra Power Corporation Ltd.(SPCL)- Petitioner herein respondent filed Petition No. 89/2012 for fixation of completed / actual capital cost and Tariff of the project of the petitioner- a Power Generating Company under sections 62(1) (a) and 63 of the Electricity Act, 2003 read with Regulations 3(2)(a), 3(4), 12 and 36 of the Joint Electricity Regulatory Commission for the State of Goa and Union Territories (Terms and Conditions for determination of Tariff) Regulations, 2009.
2. The Commission after notice to the parties and hearing all concerned passed order dated 3.07.2013 and at pages no. 89-91 of the order dated 3.07.2013 gave following directions:-

Quote

- 1) The completed cost of the project is fixed at Rs. 7829.65 Lakhs.
- 2) The Liquidated Damages are not recoverable from the petitioner.
- 3) Beyond 10.12.2002 and upto the end of COD namely 02.04.2003, the petitioner is eligible to receive the deemed generation charges in terms of 3.3 (c) (iii) of PPA.
- 4) The incentive of 0.65% is applicable on the “amount of equity” as defined in the PPA and “not on the return on equity” as pleaded by the respondent, for every 1% increase in annual PLF over normative PLF.

- 5) The interest on Debt is reimbursable in the monthly tariff billing, on the basis of actual interest amount paid by the Petitioner. Along with each monthly invoice, the Petitioner is required to provide necessary documentary evidence in support of its claim to the Administration, from the respective lenders, for the prevailing rate of interest, repayment of loan, interest amount due on the reduced balance of loan after repayment and the interest amount actually paid by the Petitioner. For the purpose of the debt portion of the project cost, the loan amounts from Citi Bank and Unsecured Loan as approved by the Commission are to be included.
- 6) Interest on working capital: It is seen from the Written Submissions of both the parties that the Administration had started supplying HSD and Lube oil at the request of the Petitioner from July 2008 and January 2009 onwards respectively. Since the respondent is providing HSD and Lube Oil, while calculating the Working Capital requirements, these elements (Thirty days primary fuel cost & sixty days Lube Oil cost) are not to be included. As per the documents and Written Submissions provided by the Petitioner, SPCL has taken a WC loan from SBI on floating interest rate basis. The interest on Working Capital is payable on actual basis on furnishing documentary proof of payment to the Bank.
- 7) HEAT RATE: Heat Rate beyond 2010 kcal/ kWh is presently not recommended. However, in future the aforementioned suggestion of the CEA regarding the major overhauling and subsequent determination of Heat Rate and its consideration by the Commission may be pursued.
- 8) LUBE OIL CONSUMPTION: No change in the specific lube oil consumption is recommended as of now as norms are decided over the life of the plant. While initially the lube oil consumption may be less than the normative value, over the years it may exceed the norm value but as norms are decided based on the average over the life of the plant, on the whole it would average out.
- 9) Density of HSD: The Commission directs the respondent to accept the authenticated MET data submitted by the petitioner for the purpose of calculation of density of HSD.
- 10) The Capital Cost as well as all operating parameters as approved by the Commission and the various tariff elements as enumerated in the PPA which flow from Capital Cost will become the basis for tariff determination with effect from the COD. The amount thus worked out month wise will be the Tariff due as per PPA. Actual payments made when compared with the "benchmark month wise due tariff" will determine the amount of Arrears/Recoveries.
- 11) The payment of arrears to the Petitioner will be made along with the interest on delayed payments as per terms of the PPA (as followed by the respondent on the recovery from the petitioner in the past). Similarly, recoveries from the Petitioner by the respondent will also be made along with interest as per terms of the PPA.
- 12) REFURBISHMENT OF THE PLANT: The plant having completed 10 years of operation, it is the right time for renovation of the plant after carrying out R&M study and Cost benefit analysis and proposal submitted to the Commission for taking prior "in principle" approval before

proceeding with the actual works. For this purpose the Petitioner should make a Detailed Project Report giving complete scope, justification, cost-benefit analysis, estimated life extension, financial package, phasing of expenditure, schedule of completion, estimated completion cost and any other information considered to be relevant and file a petition before the Commission.

- 13) The following charges being claimed as extra by the Petitioner are not admissible: Water Charges, Octroi Charges: (Administration may, however provide support to the Petitioner for exemption of Octroi charges as the plant is outside the bounds of Municipal Committee.) Reimbursement of fees payable to Port management Board and Increase in O&M expenses other than the escalation provided in the PPA.
- 14) REBATE: In view of the fact that the Capital cost was not finalised, both parties have been working with various figures of the Capital Cost, as also other tariff related parameters, therefore, the Invoices raised were being paid by the Administration on the basis of payment considered by them as due unilaterally as decided by the Administration. The rebate is applicable retrospectively since COD, on all Tariff Invoice amounts released within the PPA stipulated time for availing the Rebate. Any under-payment / over-payment be regulated by a para no. 11 of the directions as above in this order. If "amount paid" within the PPA stipulated time for availing the Rebate is equal or more than "Due amount" as calculated as per this order, then "Rebate" availed by A&N Admn. be retained by them. If "amount paid" (x) within the PPA stipulated time for availing the Rebate is less than the "Due Amount" (y) as calculated as per this order, then "Rebate" availed on excess of (y-x) be refunded alongwith the interest as per PPA provisions.
- 15) Loss of Opportunity claim: As there is no provision in the PPA regarding loss of opportunity claim, this claim of the petitioner is rejected.
- 16) As there is no provision in the PPA regarding payment of HSD evaporation losses as also viewed by CEA vide letter dated January 22, 2013 that there is no provision in the PPA to allow compensation for evaporation losses no compensation on account of HSD Handling/Transportation losses is payable to the petitioner; also, the same decision holds good in respect of HSD supply by the respondent to the petitioner.

Unquote

3. The petitioners have filed the present petition to review order dated 3.07.2013 passed by the Commission in petition no. 89/2012. On receipt of the review petition the Commission sent pre-admission hearing notice to the parties for 19.09.2013.
4. The Commission has heard learned counsel for the parties at length and has gone through the main petition, order under review, petition for review and documents carefully and thoroughly. The Commission has also applied mind on the facts of the case and Law on the point.
5. From reading of the review petition it is evident that the petitioners have prayed for review of six directions out of the sixteen directions given by the Commission in the order dated 3.07.2013. The petitioners have prayed for review of the following six directions:-

- i. The completed cost of the project is fixed at Rs. 7829.65 Lakhs.
- ii. The liquidated damages are not recoverable from the petitioner.
- iii. Beyond 10.12.2002 and up to the end of COD namely 02.04.2003, the petitioner is eligible to receive the deemed generation charges in terms of 3.3 (c) (iii) of PPA.
- iv. Density of HSD – The Commission directs the respondent to accept the authenticated MET data submitted by the petitioner for the purpose of calculation of density of HSD.
- v. The payment of arrears to the petitioner will be made along with the interest on delayed payment as per terms of the PPA (as followed by the respondent on the recovery from the petitioner in the past). Similarly, recoveries from the petitioner by the respondent will also be made along with interest as per the terms of the PPA.
- vi. Rebate- Only to the extent of clarification prayed for with regard to the following para:
“If “amount paid” (x) within the PPA stipulated time for availing the Rebate is less than “Due Amount”(y) as calculated as per this order, then “Rebate” availed on excess of (y-x) be refunded alongwith the interest as per PPA provisions”.

6. The petitioners have filed this petition under section 94 of the Electricity Act to review order dated 3.07.2012. Before proceeding further it is worth reproducing the provisions of section 94 of the EA, 2003 which reads as under:-

“The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) discovery and production of any document or other material object producible as evidence;

(c) receiving evidence on affidavits;

(d) requisitioning of any public record;

(e) issuing commission for the examination of witnesses;

(f) reviewing its decisions, directions and orders;

(g) any other matter which may be prescribed.

(2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.

(3) The Appropriate Commission may authorise any person, as it deems fit, to represent the interest of the consumers in the proceedings before it”.

7. From bare reading of the section 94 (f) of EA, 2003 it is clear that this Commission has power to review its own orders or decisions as a Civil Court under the Civil Procedure Code.

8. The Civil Court while reviewing its order/ judgment has to follow the provisions of Order 47 Rule 1 of the CPC which is reproduced as under:-

“1. Application for review of judgment: (1) Any person considering himself aggrieved-
(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
(b) By a decree or order from which no appeal is allowed, or
(c) By a decision on a reference from a court of Small causes,
(d) And who from the discovery of new and important matter of evidence which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order”

9. The same powers are vested in this Commission and same provisions of Order 47 Rule 1 of the CPC shall apply. From reading of provisions of Order 47 Rule 1 of the CPC it is clear that review is maintainable on following grounds only:-

“(a) Discovery of a new and important matter of evidence which even after exercise of due diligence was not within the knowledge of the Petitioner;
(b) Discovery of new and important matter of evidence which even after exercise of due diligence could not be produced by the Petitioner during the original proceedings which culminated in the final order passed;
(c) Order made on account of some mistake or error apparent on the face of the record or any other sufficient reason”.

Admittedly, the ground (a) and (b) would not apply to the present case. The learned Counsel for the Review Petitioner has argued the Review Petition on the basis of the ground(c).

10. After hearing both the sides at length and perusal of record it is clear that ED- A&N and A&N Administration petitioners have filed the review petition before the Commission to review the order dated 3.07.2013 passed by the Commission in petition no. 89/2012 on the grounds that some material facts, relevant documents available on record and the relevant provisions of law have not been considered, while passing the order. Hence the Commission has committed serious error apparent on record, which warrants review of the said order.

In the light of the above pleadings of the petitioners, it has to be considered as to whether the ground raised by the Review Petitioners in this Review Petition is sufficient to invite the restrictive jurisdiction of this Commission to review its order dated 3.07.2013.

Before considering the said issue, it would be appropriate to refer to judgment of Hon’ble APTEL dated 17.04.2013 passed in Review Petition No. 12/2012 in Appeal No. 17/2012 titled Ajmer Vidyut Vitran Nigam Limited Vs. Rajasthan State Electricity Regulatory Commission and another,

wherein the Hon'ble APTEL after relying upon case law reported as (a) Meera Bhanja (Smt) Vs. Nirmala Kumari Choudhary (Smit) reported in (1995) 1 SC 170 : AIR 1995 SC 455; (b) M/s. Northern India Caterers (India) Ltd., Vs Lt. Governor of Delhi reported in (1980) 2 SCC 167; (c) Haridas Das Vs Usha Rani Banik (Smt) and Ors reported in (2006) 4 SCC 78; (d) Thungabhadra Industries Ltd.,Vs Govt of A.P (1964) 5 SCR 174 : AIR 1964 SC 1372; (e) Ariban Tuleshwar Sharma V Aribam Pishak Sharma (1979) 4 SCC 389 : AIR 1979 SC 1047; (f) Satyanarayan Laxminarayan Hegde Vs Mallikarjun Bhavanappa Tirmuale (1960) 1 SCR 890 : AIR 1960 SC 137;(g) Sajjan Singh Vs State of Rajasthan (1965) 1 SCR 933: AIR 1965 SC 845; (h) O.N Mohindroo Vs Distt Judge, Delhi (1971) 2 SCR 11 : 1971 3 SCC 5 (i) Sow Chandra Kante Vs Sheikh Habib (1975) 1 SCC 674: (1975) 3 SCR 933; (j) Parsion Devi Vs. Sumitri Devi (1997) 8 SCC 715; (k) S Bhagirathi Ammal Vs Palani Roman Catholic Miss 2008 SC 719; (l) State of West Bengal Vs. Kamal Sengupta (2008)8 SCC612, held that the power of review can be culled out as under:-

(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 Rule1, 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 rehearing 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 proceeding 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 Rule1 has to be interpreted in the light of the other specified grounds.

- 11.** In the light of the above mandates laid down by the Hon’ble Supreme Court and APTEL the Commission now will discuss each of the grounds raised by the petitioners in the petition for review the directions/ order issued by the Commission.

I) Capital Cost :

The first issue raised by the learned counsel for the petitioners is that the Commission has grossly erred in allowing benefit of foreign exchange rate variation on 7.96 mUSD which is not supported by the relevant provisions of the Power Purchase Agreement (PPA) between the petitioners and the respondent. Allowing any benefit over and above the amount of 5.13 mUSD is unwarranted and unlawful. The Commission has erroneously allowed 2.83 mUSD towards custom duty, freight charges etc. on the plea of the respondent that 2.83 mUSD was converted into INR and utilized for payment of custom duty, freight charges etc. The respondent had actually paid only Rs. 4.53 crores towards the custom duty against the normal duty payable amounting to Rs. 10.50 Crs. The Techno Economic Committee (TEC) provides for Rs. 7.29 Crs. towards custom duty. Thus, there is a saving of Rs. 2.76 Crs. which is to be passed on the final completion cost.

The Commission while passing the order under review considered that some of the foreign equipment, indigenously available and M/S SPCL, the respondent decided to procure those equipment, indigenously and executed EPCC contract accordingly. Hence the company has utilized a part of the foreign component in Indian Rupees for procurement of the said equipment, indigenously.

The Commission is of the opinion that CEA allowed Foreign Exchange Rate Variation (FERV) considering 10.53 mUSD foreign component included in the approved cost of 63.14 crores. M/s SPCL in their submissions stated that they have utilized 7.96 mUSD equivalent to foreign currency loans. ED- A&N in their submissions stated that FERV has to be allowed only on 5.13 mUSD utilized for the purpose of import of the equipment. The Commission in its order dated 3.07.2013 observed that it is a normal industry practice to take foreign currency

loan not just for the purpose of import of capital goods and /or offshore services, but also on considerations of loan availability, cheaper interest rates, better terms and conditions as compared to the domestic loans as a source of funding the project. Therefore, M/s SPCL has utilized the balance portion of 2.83 mUSD towards other project related expenditure by converting the foreign currency loan into Indian Currency.

The exchange rate variation in the completed cost as per the order dated 3.07.2013 passed by the Commission was calculated on the actual loan drawal and not on the sanctioned loan or the estimated loan. While CEA in its report considered 10.53 mUSD foreign component included in the approved cost of Rs.63.14 crores, it is seen that at the project implementation stage, (i) the import –indigenous mix of the equipment had changed; and (ii) the actual foreign currency loan availed also had come down.

Accordingly, the foreign exchange rate variation (FERV) was allowed only on the actual foreign currency loan amount availed towards the funding of the project, not restricting only to the import of equipment.

The detailed rationale for allowing FERV in the completed cost was given on pages 73 – 76 of the order dated 3.07.2013 passed by the Commission. Hence, the contention raised by learned counsel for the petitioners is devoid of any merit. The Commission after going through the record and hearing learned counsel for the parties gave directions on this issue. Learned counsel for the petitioners has failed to show that how the Commission has committed error on face of record. Hence, there is no ground to review this issue.

II)Deemed Generation Charges beyond 10.12.2002 upto Date of Commissioning (COD):

The second issue raised by learned counsel for the petitioners is deemed generation charges beyond 10.12.2002 upto Date of Commissioning. Learned counsel for the petitioner argued that there was delay on the part of M/s SPCL to offer the DG sets for acceptance tests due to the withdrawal and late arrival of their OEM engineer at site. Besides COD could not have been declared before obtaining clearance from pollution control board and furnishing of valid Bank Guarantee which were complied only on 24.03.2003 and 26.03.2003 respectively. The transmission facilities were ready before the respondent offered the DG sets for acceptance tests. The Commission was requested to review its decision of payment of deemed generation charges in view of the above submissions.

The Commission in its Order dated 03.7.2013 found that the M/s SPCL has submitted a claim for deemed generation charges as per PPA provisions as they were not liable for the delay in commissioning of the project and also in view of waiver of liquidated damages.

The Commission also observed that the submissions made by ED- A&N, they have annexed Minutes of the Meeting (MOM) held in the chamber of Chief Secretary, A&N Admn. at Port Blair on 5.06.2002 wherein it was agreed by both petitioners and respondent that

the transmission line was likely to be completed by Oct., 2002 and till then generation from 3rd & 4th Units cannot be utilized. It was also recorded in the (MOM) that M/s SPCL agreed to defer COD of 3rd & 4th units to 15th Oct., 2002 or till the completion of construction of transmission line which ever was earlier.

The Commission observed that due consideration was to be given to the agreements reached during the meeting especially taken at the highest level of Chief Secretary, even though the same were not followed by an amendment to the PPA. The Commission has found that there was an agreement with respect to the deferment of COD of the generating units. Having accepted the decision in the meeting by both the parties, the Commission observed that M/s SPCL cannot claim deemed generation charges at this stage till both the parties were ready for commissioning i.e. 10th December, 2002. However, the Commission also observed that though the line and the generating sets were physically completed, unless CEA inspection was done, there could not be any "interconnection". Commissioning of the plant of M/s SPCL was declared only on 02.04.2003.

It is proved that the transmission line was ready on 10.12.2002 whereas M/s SPCL informed ED- A&N that their all four units were ready for performance test on 09.12.2002. Thus, it is observed by the Commission that ED- A&N has defaulted in their obligation to provide transmission line 120 days before the COD.

Therefore the Commission came to the conclusion that M/s SPCL was eligible to receive the deemed generation charges in terms of 3.3 (c)(iii) of PPA beyond 10.12.2002 and upto COD namely 02.04.2003. Hence, the arguments advanced by learned counsel for the petitioners is without any merit. The Commission after going through the record and hearing learned counsel for the parties gave directions on this issue as per the record and Law. Learned counsel for the petitioners has failed to show that how the Commission has committed error on face of record and which material facts are not considered by the Commission while passing the order under review. Hence, there is no ground to review this issue and the prayer of the petitioners is declined.

III) HSD Density:

The third issue raised by learned counsel for the petitioner is on HSD Density and argued that the respondent from the inception of the plant and till March 2007 had been claiming the HSD consumption based on the density @ 15 °C indicated in the Indian Oil Corporation Limited (IOCL) invoices in accordance with the unit of measurement of HSD as indicated in the project report submitted by the respondent and in conformity with the provisions of PPA. IOCL started indicating in their invoice the exact ambient temperature at the time of delivery of each consignment only from April 2007 onwards and corresponding density of HSD on each and every consignment dispatched from their terminal. The petitioners had allowed measurement/ calculation of HSD consumption by conversion of weight into volume, with effect from April, 2007 in compliance of the directives of the MHA after careful consideration because the data regarding exact ambient temperature and

corresponding density of delivery of each and every consignment measured from calibrated equipment of IOCL was available only from April, 2007 onwards. Hence, Addendum-II of PPA was given effect from April, 2007 onwards. It was a decision taken consciously and keeping in view the availability of relevant data w.e.f. April, 2007 and its non-availability in respect of the period from April, 2003 to March 2007. The petitioners thus while executing the Addendum – II to PPA were of the firm view that for settling the claim of HSD consumption exact temperature at the time of delivery of each consignment is necessarily required, otherwise errors are bound to be in conversion of weight of HSD into volume, which may involve substantial financial implications. Accordingly the Addendum-II was executed only w.e.f. April 2007 as the IOCL data was available only from that date onwards.

The respondent once again approached IOCL for obtaining the data for the period from April, 2003 to March, 2007, but IOCL confirmed that the data for the said period was not available with them. In the absence of the IOCL data, the respondent submitted the claim on the basis of Meteorological data (MET). The petitioner submitted that this Meteorological (MET) data was found as absolutely irrelevant and accordingly the claim was rejected. The provisions of PPA as they exist today provide for measurement of HSD on the basis of volume only w.e.f. April, 2007 and not retrospectively. Unless & until the said provision is amended legally the claim cannot be entertained. The petitioners have examined this issue extensively and are of the firm view that there is no reason to amend the PPA on this account.

The petitioners submitted that the Commission while deciding the issue has erred by overlooking the fact that PPA allows conversion of unit of measurement from weight to volume w.e.f. April, 2007 onwards only. Allowing any benefit retrospectively in violation of the provisions of PPA is unlawful and cannot be allowed. The Petitioners submitted that the Commission may kindly review their direction to allow HSD density considering Meteorological data (MET).

The Commission in their Order dated 03/07/13 under review observed that during one of the earlier hearings on 26/06/13 M/s. SPCL informed the Commission that the relevant records are not available with IOCL (from which HSD was supplied to the Respondent) for the period from April, 2003 to March, 2007. However, M/s. SPCL informed that the reliable, verifiable and authenticated hourly temperature data of Port Blair station/area for the same period obtained from MET Department, Kolkata had been furnished to the Petitioner.

The Commission further observed that in the Minutes of Meeting chaired by Pr. Secretary, Power, A & N Admn, on 17.04.2012, it was recorded that proposal had already been submitted to Administration dated 16.03.2012 for getting “in principle” approval for payment of arrears of HSD Consumption on the basis of MET data.

The Commission observed in their Order dated 03.07.2013 that the India Meteorological Department is the Govt. department, specializing in the sphere of MET data, whose data is utilized by different Govt. departments/agencies, Airlines, Airports Authority of India, DGCA etc as authentic data. Thus, the Commission came to the conclusion that there is no reason for A & N Admn not recognizing MET data in the absence of the records at IOCL end. Hence, the Commission directed A & N Admn to accept the authenticated MET data for the purpose of calculation of density of HSD.

12. Learned counsel for petitioners stressed the above issues during the hearing of the review petition before the Commission. In view of the rationale given for the decision taken by the Commission as detailed in the order dated 3.07.2013 and the reasons given above, the Commission comes to the conclusion that there is no necessity to review the decision already taken by the Commission in respect of the above issues raised during the hearing.

13. The Commission also took note of the other issues raised by the petitioner in the review petition filed before the Commission and examined the same on merits of each issue. The Commission observed that there are no new facts or figures pertaining to these issues which have been raised by the petitioner in the review petition filed before the Commission. The petitioner has raised the following other issues in their review petition:

a) The petitioner has submitted the liquidated damages at a maximum of 5% on every uncompleted unit at 0.5% per week are to be recovered from M/s SPCL as they have defaulted for more than 10 weeks in achieving COD of all four units.

The order issued by the Commission dated 3.07.2013 has exhaustively dealt with the above issue on pages 79-81 and hence the Commission concluded that liquidated damages are not recoverable from M/s SPCL.

b) The petitioner has submitted that M/s SPCL had been changing their claim regarding the completed cost of the project from time to time intentionally to delay the finalization of the same. The petitioner also claimed that the delay is solely attributable to the respondent due to delayed, piecemeal, incomplete and defective submission of completed cost documents. The Respondent also had not submitted documentary evidence for interest on debt servicing and interest on working capital. Hence, the petitioner prayed that they should not be burdened with the delayed interest on arrears if any payable to M/s SPCL.

The Commission has summarized in the order dated 3.07.2013, various action taken by both the parties namely M/s SPCL and ED- A&N Admn., regarding the finalization of completed cost of the project during almost the last decade. The issue of payment of interest on debt servicing and working capital along with the necessary documents to be submitted by M/s SPCL for evidence of debt servicing, bank statements, repayment of loan etc. are also elaborately dealt in the Order of the

Commission dt.03.07.2013. The Commission finally disposed of the issue in the said order as under:-

“Quote

The payment of arrears to the Petitioner will be made along with the interest on delayed payments as per terms of the PPA (as followed by the respondent on the recovery from the petitioner in the past). Similarly, recoveries from the Petitioner by the respondent will also be made along with interest as per terms of the PPA”

Unquote

c) Rebate:

The Commission directed that “if amount paid” within the PPA stipulated time for availing the rebate is equal or more than “Due amount” as per this order, then rebate availed by A&N administration be retained by them. If “amount paid” (X) within the PPA stipulated time for availing the rebate is less than “Due amount” (Y) as calculated as per this order, then “Rebate” availed on excess of (Y-X) be refunded along with the interest as per the PPA provisions”.

The petitioner submitted that the direction of the Commission to refund the rebate availed on excess of (Y-X) along with interest may kindly be clarified as even in a situation where the amount paid is less than the amount due as per this order, the question of refund of rebate on excess of (Y-X) does not arise since the petitioner has been availing rebate only on the amount paid to the respondent.

The Commission noted that as per Article 8.4 of the PPA **“if payment in full of a tariff Invoice and all other amounts due in respect thereof** is made on or prior to the date which is the fifth Business day after the Date of presentation of the Tariff Invoice to THE ADMINISTRATION pursuant to Article 8.2 (which presentation may be by facsimile transmission) by wire transfer payment or otherwise such that, in any such case, there shall be immediately available funds in any amount equal to the full which is such fifth Business Day, THE ADMINISTRATION shall be allowed a rebate equal to 2.5% of the amount of Invoice Amount of such tariff Invoice paid on such date; for payments within a period of one month of presentation of bills by the generating company a rebate of 1% shall be allowed.....”

The Commission has concluded in the order dated 3.07.2013 that in view of the fact that the Capital cost was not finalised, both parties have been working with various figures of the Capital Cost, as also other tariff related parameters, therefore, the Invoices raised were being paid by the Administration on the basis of payment considered by them as due unilaterally as decided by the Administration. The rebate is applicable retrospectively since COD, on all Tariff Invoice amounts released within

the PPA stipulated time for availing the Rebate. Any under-payment / over-payment be regulated by a para no. 11 of the directions as above in the said order (interest on delayed payments).

If "amount paid" within the PPA stipulated time for availing the Rebate is equal or more than "Due amount" as calculated as per the order, then "Rebate" availed by A&N Admn. be retained by them. If "amount paid" (x) within the PPA stipulated time for availing the Rebate is less than the "Due Amount"(y) as calculated as per this order, then "Rebate" availed on excess of (y-x) be refunded alongwith the interest as per PPA provisions.

14. The Commission concluded that with the finalization of the cost of the project under the said order and other tariff parameters, the "due amount" is to be reckoned with respect to the tariff calculated as per the decisions of the Commission. Therefore, arguments advanced by learned counsel for the petitioners is without any merit. The Commission after going through the record and hearing learned counsel for the parties gave directions on this issue as per the record and Law. Learned counsel for the petitioners has failed to show that how the Commission has committed error on face of record and which material facts are not considered by the Commission while passing the order under review. Hence, there is no ground to review this issue and the prayer of the petitioners is declined.

15. Learned counsel for the petitioners did not argue on any other directions issued by the Commission in the order dated 3.07.2013 under review and challenged in the review petition.

16. Now the Commission shall examine the case of the petitioners in the light of the above observations of the Hon'ble APTEL in the judgment dated 17.04.2013 in review petition 12/2012 in appeal no. 17/2012. This Commission while passing the order under review has applied its mind on the facts of the case, law on the point and has gone through all the record carefully and thoroughly. The order under review is well reasoned, speaking, as per record and law on the point. The Commission did not ignore any document on record while passing the order under review. The matter in dispute is lingering on for the last more than ten years before one forum or the other. The petitioners are bent upon not to allow the issue to be settled. The Commission in its order under review has observed that quality and uninterrupted supply of Electricity is paramount consideration for the Commission. The petitioners by way of the review petition has challenged the order on the grounds available in appeal. The Commission cannot sit on its own order in the review petition in appeal. The learned counsel for the petitioners has failed to point out discovery of new and important matter of evidence which even after exercise of due diligence was not within the knowledge of the petitioners. The learned counsel for the petitioners also failed to point out discovery of new and important matter of evidence which even after exercise of due diligence could not be produced by the petitioners in original proceedings. Learned counsel for petitioners also failed to show some mistake or error apparent on face of record or any other sufficient reasons for review.

17. From the main petition, order dated 3.07.2013 under review and petition for review as well as arguments advanced by learned counsel for the parties it can be easily said that the order dated 3.07.2013 under review is well reasoned, speaking as per record and law on the point. The Commission while passing the order under review has considered the pleadings of the parties and documents available on the record and passed the order under review as per record and Law on the point. Learned counsel for the petitioners has failed to point out that which of the material facts, documents available on record and provisions of law have not been considered by the Commission in the order under review. The Hon'ble APTEL while delivering the judgment dated 17.04.2013 in Review Petition 12/2012 in Appeal No. 17/2012 has summarized that 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 of CPC. 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 the Appeal and power of review is not to be confused with appellate power which enable an Appellate Authority to correct all matters of errors committed by a subordinate Court. This power has not been conferred in review jurisdiction. An error apparent on 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 point where there may be two opinions. The parties are not entitled to seek a review of a judgment delivered by the Court merely for the purpose of re-hearing and a fresh decision of the Case. The review is by no means an appeal in disguise where by an erroneous decision is re-heard and corrected. Where order in question is appealable and aggrieved party has adequate and efficacious remedy by recourse to appeal the original Court should exercise power to review with greatest circumspection.

18. In the light of above discussion and observation the Commission is of the considered opinion that the petitioner has failed to point out that some material facts, relevant documents available on record and the relevant provisions of law have been ignored while passing the order dated 3.07.2013 under review, whereas the order under review is well reasoned, speaking, as per record and law on the points. The Commission has very limited power to review its own orders and the Commission can review its own orders only on discovery of new and important evidence which even after exercise of due diligence was not in knowledge of the petitioner, discovery of new and important matter of evidence which even after exercise of due diligence could not be produced by the petitioner in original proceedings and order made on account of some mistake or error apparent on the face of record or any sufficient reasons. But learned counsel for the petitioner has failed to make out a case that new and important evidence is discovered which could not be discovered despite due diligence and was not in knowledge of the petitioner despite due diligence. The learned counsel for the petitioners also failed to point out discovery of new and important matter of evidence which even after exercise of due diligence could not be produced by the petitioners in original proceedings. Learned counsel also failed to make out a case that the order under review is made on account of some mistake or error apparent on the face of record. The order under review is well reasoned, speaking as per record and law on the

point. Hence, the case of the petitioners does not fall within limited jurisdiction of the Commission provided under Order 47 Rule 1 of CPC. There is no merit in the present petition. The petition is false and frivolous and has been filed to just harm and harsh the respondent and deprive them to enjoy the fruit of the order under review. Hence, there is no merit in the review petition the same fails and is hereby dismissed.

Sd/-

(S.K.Chaturvedi)

Member

Chairperson (Vacant)

* Post of the Chairperson is vacant. As per proviso of Regulation 9 (II) of JERC (Conduct of Business) Regulations, 2009 for review of its own orders "Coram is all Members". Whereas according to provisions of Section 93 of the Electricity Act, 2003 no act or proceedings of the appropriate Commission shall be questioned or invalidated merely on the ground of existence of any vacancy or defect in the Constitution of the appropriate Commission. So the Member only constitute a valid quorum.

Certified Copy

Sd/-

(R.K. Malik)

Secretary