Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 97 of 2010

Dated: 01st July, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member,

In the matter of

Tamil Nadu Electricity Board
No. 144, Anna Salai
Chennai-600002 … Appellant(s)

Versus

1. Central Electricity Regulatory
Commission
3rd & 4th floor, Chanderlok Building
36, Janpath
New Delhi-1100001

2. National Thermal Power Corporation
7, Institutional Area, NTPC Bhawan
SCOPE Complex
Lodhi Road
New Delhi-110003

3. Kerala State Electricity Board
Vaidyuthi Bhavanam
Pattom
Thiruvanathapuram ….Respondents

Counsel for Appellant(s): Mr. Ramji Srinivasan,Sr.Adv.
Mr. Zeyaul Haque
Mr. Vimal Dubey
Mr.R. Nedumaran

Counsel for Respondent(s):Mr. M.G.Ramachandran
Ms Swapna Seshadri
Mr. Anand K. Ganesan
Ms Ranjeetha Ramachandran
Ms Sneha Venkataramani
Mr. M.T. George
Ms Smitharani M.R.

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

Tamil Nadu Electricity Board is the Appellant herein. NTPC is the Second Respondent.

2. In the Petition filed by NTPC seeking revision of generation tariff, the Central Commission by the impugned order dated 9.6.2009 ordered the revised

generation tariff by considering the cost of switchyard transferred from Powergrid.

3. Aggrieved by the same, the Tamil Nadu Electricity Board has filed this Appeal. The short facts are as follows:

(a) The Appellant is a successor organization to the erstwhile Electricity Department of Government of Tamil Nadu. Tamil Nadu Electricity Board continues to function as a monolithic organization dealing with generation, transmission and distribution of power within the State of Tamil Nadu. It also purchases the power from various central generating stations located in various States. In the year 2001, the Central Commission notified the Terms and Conditions for Determination of Tariff for the period 2001-04 and on 29.3.2004 for 2004-09. Accordingly, the Central Generating Stations and Central

Transmission Utilities filed their tariff petitions before the Central Commission.

(b) NTPC has commissioned the Rajiv Gandhi Combined Cycle Power Gas based Power Project comprising of two Gas turbines units and the Steam Turbine Unit. Initially, the entire power from the Stations was allocated to KSEB. But on 22.1.2003, the Ministry of Power allocated 50% of the capacity to Tamil Nadu Electricity Board on a temporary basis.

(c) In 1993, the Ministry of Power decided that switchyards on the New Green Fields Generation Projects would need to be designed in a manner which will enable the Powergrid to have their ownership and control while the switchyards of the existing Stations as well as for the extension projects will continue to vest in NTPC.

(d) In line with the above switchyards for the project was executed by Powergrid along with transmission lines. In the year 2000, the Ministry of Power decided that for better project planning and matching of schedules for switchyards, enhanced reliability in operations etc, the ownership and control of switchyards associated with Faridabad Gas Power Project in Haryana, Kayamkulam combined cycle power project in Kerala will be transferred by Powergrid to NTPC on mutually agreed terms and conditions. Accordingly, the transfer took place on 1.9.2007.

(e) The Central Commission has determined the book value on the date of the transfer vide its order dated 17.6.2008. Thereupon, on 29.10.2008, the NTPC filed a Petition seeking revision of generation tariff by considering the cost of switchyards transferred from Powergrid. The Appellant was asked to furnish the loan details. Accordingly, these details sought by the Central Commission were furnished on 6.4.2009. Ultimately, on 9.6.2009, the Central Commissioned passed the impugned order revising the generation tariff by considering the cost of the switchyards transferred from Powergrid.

4. As against this order, the Appellant filed a Review Petition on 6.8.2009. However, by the order dated 23.12.2009, the Central Commission dismissed the Review Petition. Aggrieved by the main impugned order dated 9.6.2009, the present Appeal has been filed.

5. The Appellant has challenged the impugned order on the following grounds:

(a) The Central Commission has allowed the Additional Capitalization to NTPC on the basis of gross block value of the switchyards in stead of net block value at which the NTPC purchased the switchyard. This is in contravention of Regulation 17 and 18 of the Central Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2004.

(b) The NTPC has been allowed capitalization on the basis of 70 : 30 debt-equity ratio when the equity allowed to Powergrid was less than 30%.

(c) The Central Commission has considered the higher weighted average rate for allowing depreciation on the switchyard to NTPC, thereby leading to frontloading of depreciation by Rs.167 lakhs.

6. In respect of the First issue, it is submitted by the Appellant that the methodology adopted by the Central Commission on the basis of the gross block value of the switchyard is not in accordance with the Regulation 17 and 18 of the Tariff Regulations, 2004. According to

the Learned Counsel for the Respondent, the consideration of gross block value of the transferred assets is consistent with the past practice for transfer of assets between public sector utilities and the same is fully in line with the provisions of the Tariff Regulations, 2004 and such there has been no deviation from Tariff Regulation.

7. On going through the impugned order and other records, we are unable to accept the submissions made by the Learned Counsel for the Appellant that the methodology is against the Regulation 17 and 18. This Tribunal has already interpreted the term "actual expenditure incurred" appearing in Regulations 17 and 18 of the Tariff Regulations, 2004 in the following judgments:

(i) NPTC v. CERC & Ors 2009 ELR (APTEL)337 (Judgment dated 16th March, 2009 in Appeals No.133, 135 etc of 2008)

> *"4.00. To sum up, our conclusions on the four issue raised in these Appeals are as under:*
>
> > *a. The words 'actual expenditure incurred' contained Regulation 17 of the Act would refer to the liabilities incurred and the same would not refer to the actual cash outflow. Since the wordings in Regulation 17 are very clear, the only rational interpretation would be that the appellant would be entitled to recover the actual capital expenditure incurred without reference to the actual cash outflow".*

(ii) NTPC v CERC & Ors 2008 ELR (APTEL) 916 (Judgment dated 10th December 2008 in Appeals No.151 & 152 of 2007):

> *"17. This Regulation is fully comprehensible with the above understanding of the word "actually incurred". Regulation 18 is dealing with capital expenditure incurred after the date of commercial operation and up to the cut off date. The nature of such capital expenditures can be: deferred liability and work deferred for execution and the like. Such capital expenditures which were contemplated for being under taken originally but was deferred and actually undertaken after the date of commercial operation will be treated as additional capitalization. In Regulation 18, the word repeatedly used is "deferred liability". Obviously deferred liability is the liability which has not yet been assumed. When a capital asset is purchased, the liability is assumed. Such liability is not deferred. Only the payment is*

> *deferred. Regulation 18 is not dealing with deferred payments but is dealing with deferred liabilities. Work deferred for execution means works not already undertaken. Certain works, within the original scope of work may not have been undertaken before the date of commercial operation. Such work may be undertaken after the date of commercial operation. If it is so done, the same will be available for recovery through tariff under Regulation 18. It must however be ensured that no capital expenditure which is claimed under Regulation 17 is claimed again as Additional Capitalization under Regulation 18".*

8. In both these judgments, the Tribunal has held that the words "actual expenditure incurred" contained in Regulation 17 would refer to liabilities incurred but not the cash outflow and Regulation 18 would refer to the deferred liabilities only but not the deferred payments.

9. By virtue of the transfer of switchyard, the said capital asset was to be de-capitalized from the books of Powergrid and capitalized in the books of the NTPC. In the present case, the gross block value of switchyard in the books of Powergrid was Rs.8709.94 lacs. This

amount was decapitalized from the books of Powergrid and the said amount was allowed as the Gross Block of assets to be considered as additional capitalization for computing tariff to be charged by NTPC.

10. The de-capitalization and capitalization on such transfer is always at the Gross Block Value. Neither the de-capitalization nor the capitalization on transfer is on net book value or consideration paid for the transfer. However, the cumulative depreciation already adjusted is taken into account for future tariff to be allowed.

11. Accordingly, the Central Commission deducted the cumulative depreciation of the switchyard recovered by the Powergrid for Rs.2714.58 lacs from the gross block. Therefore, NTPC is getting the depreciation which cumulatively reduced from the Gross Block Value of the assets on Straight Line Method. Thus, the Central Commission has allowed the additional capitalization of

the amount actually incurred by the NTPC in acquisition of the switchyards i.e. Gross Block Value of the assets. As such, the consideration of Gross Block Value of transferred assets is consistent with the Regulation and also of the past practice for transfer of assets between public sector utilities. Thus, there is no infirmity in the findings of the Central Commission on this issue.

12. The next issue is relating to Debt Equity Ratio. According to the Appellant, the methodology adopted by the Central Commission is not in line with the Accounting Standings notified by the Institute of Chartered Accounts of India (ICAI) and that the Central Commission ought not to have considered the cost of the switchyards without considering the debt equity ratio of the previous owner namely Power Grid.

13. On the other hand, it is submitted by the NTPC that the debt equity ratio has to be calculated for the

entire generating station and not for an individual asset and that the generating stations of NTPC prior to 1992 will have a debt equity ratio of 50 : 50 whereas generating stations conveived after 1992 are financed in the debt equity ratio of 70 : 30.

14. While considering this issue, we have to refer to the basis on which the Central Commission took decision to fix the debt equity ratio. According to the Central Commission, the debt equity ratio has to be fixed in accordance with the Regulation 20 (1) (c) of the Tariff Regulations, 2004. The said Regulation is quoted below:

> *"20. Debt-Equity Ratio (1) In case of the existing generating stations, debt-equity ratio considered by the Commission for the period ending 31.3.2004 shall be considered for determination of tariff with effect from 1.4.2004:*
>
> *Provided that in cases where the tariff for the period ending 31.3.2004 has not been determined by the*

Commission, debt-equity ratio shall be as may be decided by the Commission:

Provided further that in case of the existing generating stations where additional capitalization has been completed on or after 1.4.2004 and admitted by the Commission under Regulation 18, equity in the additional capitalization to be considered shall be:-

(a) 30% of the additional capital expenditure admitted by the Commission; or

(b) equity approved by the competent authority in the financial package, for Additional capitalization; or

(c) actual equity employed,

whichever is the least:

Provided further that in case of additional capital expenditure admitted under the second proviso, the Commission may consider equity of more than 30% if the generating company is able to satisfy the Commission that deployment of such equity of more than 30% was in the interest of general public".

15. In view of the above Regulation the debt equity ratio of the previous owner cannot be applied to the

present case since the Central Commission is determining the tariff for the NTPC generating stations and not for Powergrid, a transmission licensee. When the cost of the switchyard is being capitalized in the books of NTPC, the funding pattern and debt equity ratio of NTPC need to be considered.

16. It is submitted by the Appellant that in the takeover of the Tanda Station, the asset of Rs.607 crores was transferred towards final settlement of outstanding dues of Rs.1000 crores. This is not correct. In the case of Tanda Station, the Central Commission had taken the gross block of assets of Rs.607 Crores while approving tariff of Tanda Station of NTPC.

17. It is contended by the Appellant that the methodology adopted by the Central Commission is not in line with the Accounting Standards notified by the Institute of Chartered Accountants of India. This is not

relevant to the issue. The Central Commission has determined the tariff as per the Tariff Regulation and not as per the provisions of the Income Tax Act.

18. It is important to note that the Gross Block of the switchyard on the date of transfer was Rs.8709.94 lacks. The accumulated depreciation on the date of transfer was Rs.2714.58 lacs. The Net gross block of the switchyard works out to Rs.5995.36 lacks. NTPC took actual loan of Rs.3800 lakhs for acquision of the switchyard and the balance amount of Rs.2195.36 lacs was funded through equity.

19. Considering the gross block of Rs.8709.94 lacs, the permissible 30% equity works out to be Rs. 2612.98 lacs. Since the actual equity deployed is Rs.2195.36 lacs which is less than the limit mentioned above, the actual equity deployed has been considered for the purpose of tariff and the balance amount of Rs.6514.58 lacs towards

loan alongwith loan repayment of Rs.2714.58 lacs as on the date of transfer of asset has been considered and as such there is nothing in the Accounting Standard quoted by the Appellant to indicate that it is against the due process which has been followed by the Central Commission.

20. As a matter of fact, the Central Commission has followed the Tariff Regulation in determination of additional capitalization as well as the debt equity ratio and there is no cherry picking of benefits. Thus, there is no merit in the contention urged by the Appellant.

21. The third issue is relating to Front Loading of Depreciation.

22. According to the Appellant, the depreciation to NTPC allowed by the Central Commission based on the weighted average rate of depreciation at 4.45% of the

revision of tariff is not in accordance with the provisions of the Tariff Regulations, 2004. It is also further contended by the Appellant that by applying to the weighted average rate of depreciation, the Appellant is being asked to pay more depreciation. In reply, it is contended by the Respondent that the Central Commission has followed same process as was followed by the Government of India for transfer of assets between public sector utilities in the past. The relevant portion of the impugned order with reference to the issue of rate of depreciation is quoted below:

> *"12. The depreciation rates applicable for various assets have been laid down by the Commission, for determination of tariff for thermal generating stations. Also, the switchyard of thermal generating station is an AC sub-station and has a useful life corresponding to the useful life of the thermal generating station. Also, an increase in the depreciation would result in reduction of the amount of Advance depreciation. Hence, the apprehension of Respondent No.1 that there would be an increase in tariff on account of constriction in the useful life for recover of depreciation, consequent upon transfer of switchyard*

> *to the generating station of the petitioner, is unfounded".*

23. It has been clearly held in the impugned order that the apprehension of the Appellant that there would be an increase in tariff on account of constriction in the useful life for recovery of depreciation, consequent upon transfer of switchyard to the generating station of the NTPC is without basis. It has to be stated that the depreciation is allowed to the Generating Company and the transmission licensee considering the different life spans. The notification dated 29.3.94 issued by the Government of India provided for the life of the liquid fuel/gas generating stations as 15 years and the transmission assets as 35 years for the purposes of depreciation.

24. Thus, in view of the notification upon the transfer of switchyards from Powergrid to NTPC the load of depreciation to be applied is the rate applicable to generating stations and not the load applicable to the

transmission system. Weighted average load of depreciation for assets owned by the generating Companies would necessarily be different as compared to the assets owned by the transmission licensees. As a matter of fact, the Appellant has been benefitted by corresponding to the reduction in the depreciation payable to the Powergrid which has been correspondingly increased in the case of NTPC. Further, the Central Commission does not determine the depreciation of an individual asset. In the case of determination of tariff as well as additional capitalization, the Central Commission considers all the assets applying a different rate of depreciation depending upon the asset. Only thereupon, the weighted average rate is considered. Therefore, there is no merit in this contention also raised by the Appellant.

25. Summary of our findings

The first issue is relating to the finding whereby Central Commission allowed in favour of the NTPC on the basis of the gross block value of the switchyard, instead of net book value at which NTPC purchased the switchyard. According to the Appellant this is said to be the violation of the Regulations 17 and 18 of the Determination of Tariff Regulations, 2004. This contention urged by the Learned Counsel for the Appellant is not well founded. In fact this Tribunal interpreted the Regulations 17 and held the words "actual expenditure incurred" contained in Regulation 17 of the Regulation refer to the liabilities incurred but not the cash outflow. Similarly the Tribunal has interpreted Regulation 18 by holding that it would recover deferred liabilities only but not deferred payments. By virtue of the transfer of switchyard, the said capital asset was to be de-capitalized from the

books of Powergrid and capitalized in the books of the NTPC. The de-capitalization and capitalization etc. on such transfer is always at the Gross Block Value. Neither the de-capitalization nor the capitalization on transfer is on net block value. Therefore, the Central Commission has correctly allowed the amount actually incurred by the NTPC which is gross block value of the assets. This finding, in our view, is perfectly correct.

The 2nd issue is relating to the Debt Equity Ratio. According to the Central Commission the Equity Ratio has to be fixed in accordance with the Regulation 20(1)(c) of the Tariff Regulations, 2004. In view of the said Regulation, the Debt Equity Ratio of the previous owner cannot be applied to the present case. The Central Commission is determining the tariff for the NTPC generating stations and not for Powergrid, a transmission licensee. Therefore the

contention of the Appellant that the methodology adopted by the Central Commission is not in line with the Accounting Standards notified by the Institute of Chartered Accountants of India cannot be accepted as the same is not relevant to the issue in question. Therefore, the findings given by the Central Commission on this issue is perfectly correct.

The 3rd issue is relating to Front Loading of Depreciation. In the impugned order it has been clearly held that the apprehension of the Appellant that there would be an increase in tariff on account of constriction in the useful life for recovery of depreciation, consequent upon transfer of switchyard to the generating station of the NTPC is without basis. The depreciation is allowed to the generating company and the transmission licensee considering the different life spans. In view of the notification dated 29.3.1994 issued by the Govt. of India the load of

depreciation to be applied is the rate applicable to the generating stations and not the load applicable to the transmission system. The finding on this issue as well is perfectly justified.

26. Thus, the Appeal is liable to be dismissed as devoid of merits. Accordingly the same is dismissed. No order as to cost.

(Rakesh Nath) (Justice M. Karpaga Vinayagam)
Technical Member Chairperson

Dated: 01st July, 2011

REPORTABLE/NON-REPORTABALE