

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal Nos. 100, 103 of 2009 & 146, 151 of 2010

Dated 24th May, 2011

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

Appeal Nos. 100 of 2009, 146 & 151 of 2010

In the matter of:

U.P. POWER CORPORATION LIMITED
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226001, U.P.
Through its Executive Engineer

... Appellant

VERSUS

1. Central Electricity Regulatory Commission,
3rd & 4th floor, Chandernagore Building, 36, Janpath,
New Delhi-110 001
Through its Secretary.
2. National Thermal Power Corporation Ltd.,
NTPC Bhawan, Core-7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi 110 003.
Through its Senior Manager (Commercial),
3. Jaipur Vidyut Vitaran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur-302 005
Through its Managing Director

4. Ajmer Vidyut Vitaran Nigam Ltd.,
400 KV GSS Building (Ground Floor)
Ajmer Road, Heerapura, Jaipur,
Through by its Superintending Engineer (RPPC)
5. Jodhpur Vidyut Vitaran Nigam Ltd.,
400 KV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur,
Through by its Superintending Engineer (RPPC)
6. Delhi Transco Ltd.,
Shakti Sadan, Kotla Road, Near I.T.O.,
New Delhi-110 002
Through Chief Engineer (SO)
7. Haryana Vidyut Prasaran Nigam Limited,
Shakti Bhawan, Sector-6,
Panchkula-134 109.
Represented by its Superintending Engineer (Tariff)
8. Punjab State Electricity Board,
22 KV Sub Station Ablowal Patiala 147 001
Through its Chief Engineer (SO&C)
9. Himachal Pradesh State Electricity Board,
Kumar House Complex Building-II,
Vidyut Bhawan, Shimla-171004
Through its Chief Engineer
10. Power Development Department,
Government of Jammu & Kashmir,
Secretariat Building, Jammu-180 001
Through its Secretary Power
11. Electricity Department (Chandigarh),
Union Territory of Chandigarh, Addl.,
Office Building, Sector-9D, Chandigarh
Through its Chief Engineer
12. Uttaranchal Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Dehradun-248 001, Uttaranchal
Through Chairman & Managing Director

...Respondent(s)

Appeal No. 103 of 2009

In the matter of:

M.P. POWER TRADING COMPANY LIMITED
Shakti Bhawan, Block No.2, Rampur,
JABALPUR-482 008.

VERSUS

1. Central Electricity Regulatory Commission,
3rd & 4th floor, Chanderlok Building, 36, Janpath,
New Delhi-110 001
Through its Secretary.
2. National Thermal Power Corporation Ltd.,
NTPC Bhawan, Core-7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi 110 003.
Through its Senior Manager (Commercial).
3. The General Manager (Tariff & PP),
Gujarat Urja Vikas Nigam Ltd.,
Sardar Patel Vidyut Bhawan, Race Course,
VADODARA-390 007.
4. The Chief engineer (Power Purchase),
Maharashtra State Electricity Distribution Co. Ltd.,
Prakashgad, 5th Floor, Plot No. G-9, Bandra (East),
MUMBAI-400 051
5. The Chief Engineer (Commercial),
Chhattisgarh State Electricity Board,
P.O. Sunder Nagar, Dangania,
RAIPUR-492 012.
6. The Chief Engineer (Electricity)
Electricity Department,
Government of Goa,
3rd Floor, Vidyut Bhawan,
PANAJI (GOA)- 403 001

7. The Executive Engineer,
Electricity Department,
Administration of Dadra & Nagar Haveli, (UT)
SILVASA- 396 230

8. The Electricity Engineer,
Electricity Department,
Power House Building, Katharia Nani,
Administration of Daman & Diu,
Daman -396 210

Counsel for Appellant(s) : Mr. Pradeep Misra, Mr. Suraj Singh
Mr. Manoj Kr. Sharma &
Mr. Shashank Pandit (in Appeal
Nos. 100/09 & 146, 151 of 2010)
Ms. Goswami, Mr. S. Ravi Shankar
(in Appeal No. 103 of 2009)

Counsel for the Respondent(s): Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan &
Ms. Swapna Seshdari
Ms. Sneha Venkataramani &
Ms. Ranjitha Ramachandran for NTPC

JUDGMENT

HON'BLE MR. RAKESH NATH, TEHNICAL MEMBER

Appeal Nos. 100 of 2009, 146 of 2010 and 151 of 2010 have been filed by Uttar Pradesh Power Corporation Ltd. against the order dated 3.2.2009 of Central Commission revising Operation and Maintenance norms for gas based power stations at

Anta, Dadri and Auriya respectively of NTPC. The Central Commission is the respondent no. 1. NTPC, the Central Sector generating company is the respondent no.2. The other respondents are also the beneficiaries from these power stations like the appellant.

2. Appeal no. 146 of 2010 has been filed by M.P. Power Trading Co. Ltd. against the same order dated 3.2.2009 in respect of Kawas Gas Based Station of NTPC. The Central Commission is the respondent no.1. The respondent no.2 is NTPC. The other respondents are the beneficiaries of Kawas Gas based Power station of NTPC like the appellant.

3. Since the impugned order being challenged in these appeals is one and the same, a common Judgment is being rendered.

4. The brief facts of the cases are as under:

4.1. Appeal no. 100 of 2009

i) On 26.3.2004, the Central Commission notified the 2004 Tariff Regulations for the period from 1.4.2004 to 31.3.2009. The respondent no. 2 on 28.10.2004 filed petition No. 160 of 2004 for determination of tariff for Anta Gas Power Station for the period 2004-09.

ii) On 9.5.2006, the Central Commission determined the tariff in respect of Anta Gas Power Station for the period from 1.4.2004 to 31.3.2009 in Petition no. 160 of 2004.

iii) The appellant filed appeal no. 139 of 2006 before this Tribunal against the Central Commission's order dated 9.5.2006. On 13.6.2007 the Tribunal decided the appeal.

iv) During the pendency of the above appeal, the respondent no. 2/NTPC filed IA no. 52/2006 in tariff petition no. 160 of 2004 relating to Anta Gas Power Station wherein a prayer was made to award O&M cost on the basis of five years' actual O&M expenses of the gas station.

v) The Central Commission vide its order dated 3.2.2009 allowed IA No. 52 of 2006 filed by the respondent no. 2. Aggrieved by this order the appellant has filed this appeal.

4.2. Appeal no. 103 of 2009

i) The Central Commission passed order dated 16.11.2006 in petition no. 79 of 2005 of the respondent no. 2 determining tariff in respect of Kawas Gas Power Station for the period from 1.4.2004 to 31.3.2009. In this order the O&M expenses of the

Power Station were determined as per the Tariff Regulations, 2004.

ii) On 4.1.2007, the respondent no. 2/NTPC filed review petition no. 4/2007 in petition no. 79 of 2005 requesting for allowing higher Operation and Maintenance cost. NTPC by IA no. 24 of 2008 in Petition No. 79/2005 filed information pertaining to O&M expenses for Kawas GPS.

iii) At the same time an appeal being no. 11 of 2007, was filed by the respondent no. 2 before this Tribunal challenging the tariff order dated 16.11.2006, including the issue of inadequacy of O&M expenses. However, in the Appeal no. 11 of 2007, NTPC submitted that the issue of inadequacy of O&M charges for gas power station is covered in a separate proceeding before the Central Commission and,

therefore, did not press the issue. The Tribunal gave its Judgment in appeal no. 11 of 2007 on 13.6.2007.

iv) On 29.6.2007 the Central Commission passed an order disposing off review petition no. 4/2007. However, the Central Commission decided that the issue of revision of O&M expenses will be taken up separately.

v) The Central Commission by its order dated 3.2.2009 (impugned order) allowed IA no. 24 of 2008 allowing revision in O&M norms as applicable to gas based stations without warranty spares. Aggrieved by this order, the appellant has filed the appeal.

4.3. Appeal no. 146 of 2010

i) The Central Commission vide its order dated 9.5.2006 determined the tariff in respect of Dadri Gas Power station for the period from 1.4.2004 to 31.3.2009

according to its Regulations of 2004 in petition no. 155/04.

ii) The respondent no. 2/NTPC filed a review petition before the Central Commission against this order. Simultaneously, it also filed an appeal before this Tribunal, being appeal no. 154 of 2006.

iii) During the pendency of the above appeal, the respondent no. 2/NTPC filed an IA No. 53 in tariff petition No. 155/04 relating to Dadri gas based station wherein a prayer was made to award O&M cost on the basis of five years' actual O&M expenses of the gas station.

iv) The Central Commission vide its order dated 3.2.2009 allowed IA no. 53 of 2006, permitting higher O&M expenses to the respondent no. 2/NTPC.

Aggrieved by this order the appellant has filed this appeal.

4.4. Appeal No. 151 of 2010

i) The Central Commission vide its order dated 9.5.2006 determined the tariff in respect of Auriya Gas Power station for the period 1.4.2004 to 31.3.2009 in petition no. 164/04.

ii) NTPC filed a review petition against the above order before the Central Commission. Simultaneously, it also filed an appeal against the order before this Tribunal being appeal no. 153 of 2006. NTPC did not raise the issue about O&M expenses in this appeal. The said appeal was disposed of by the Tribunal vide its Judgment dated 13.6.2007.

iii) During the pendency of the appeal, the respondent no. 2 filed IA No. 51 of 2006 in tariff

petition No. 164 of 2004 relating to Auriya GPS, wherein a prayer was made to award O&M cost on the basis of five years' actual O&M expenses of the gas station.

iv) The Central Commission vide its order dt. 3.2.2009 (impugned order) allowed IA no. 51 of 2006, in petition no. 164 of 2004. This order is being challenged by the appellant in the present appeal.

5. The appellants have raised the following issues:

5.1. In its order dated 29.3.2004 regarding the 2004 Regulations, the Central Commission had laid down two sets of Operation and Maintenance norms, one for Gas Power Stations with warranty spares and the other for Gas Power Stations without warranty spares. However, in respect of Faridabad and Kayamkulam Gas Power Stations, liberty was granted to the

respondent no. 2/NTPC to approach the Commission in case of abnormal O&M expenses on account of spares.

5.2. The respondent no. 2/NTPC did not raise the issue regarding O&M expenses in its appeal before the Tribunal against the tariff orders. Thus the claim for spares under O&M is barred by constructive resjudicata as the same point was not raised in the appeal against the tariff orders by respondent no. 2.

5.3. The order passed by CERC has merged in Appellate order and thereafter the same could not have been changed either suo motu or on application moved by the respondent no. 2/NTPC.

5.4. After passing the tariff order thereby disposing of the main petition, the State Commission has become

functus officio and could not have entertained the application filed by NTPC.

5.5. The Central Commission could not have applied the norms regarding power station without warranty spares when warranty spares were available in the present case. Also a single component of tariff could not have been revised without recording the finding that 14% Return on Equity is not available to NTPC.

5.6. The Central Commission could have asked the respondent no. 2/NTPC to submit its revenue requirement even if the regulations were not made under Section 62(5) of the Act.

6. Respondent no. 2/NTPC has submitted as under:

6.1. Anta, Auriya, Dadri and Kawas Gas Power Stations were established with warranty period of ten years during which there was free supply of warranty

spares from the original equipment manufacturer and after a period of 10 years there was no free supply. The period of 10 years from date of commercial operation during which free warranty spares were available has expired and power stations no longer get free spares from the original equipment manufacturer. In the impugned order the Central Commission after considering all the relevant aspects and the material placed by NTPC in justification of the higher O&M expenses has correctly decided that such gas power stations where 10 year warranty period is over are to be treated at par with Gas Power Stations where there is no warranty period. On the other hand, no material was placed by the appellants/beneficiaries to show how the higher O&M expenses claimed by NTPC were not justifiable on merits.

6.2. The only factual aspect to be considered is whether the embedded cost in the plant purchased by inclusion of warranty spares for 10 years is giving benefit to NTPC in the form of Return on Equity (ROE) and depreciation to an extent that it would amount to giving double benefit to NTPC if higher O&M expenses are allowed after 10 years. NTPC placed the relevant materials before the Central Commission to show that NTPC did not get such double benefit.

6.3. The Central Commission's Tariff Regulations provide for the power to relax. The power to relax gives the Central Commission discretion which is of the nature of judicial discretion to be exercised based on the facts and circumstances of the case.

6.4. In proceeding in Petition no. 160 of 2004 for Anta and 164 of 2004 for Auriya, the Central Commission

directed NTPC to furnish details for considering O&M expenses in deviation of the norms given in the Regulations, 2004. Thereafter in the order dated 9.5.2006, the Central Commission decided to consider the issue of O&M expenses for Gas Power Stations in a separate proceeding. Thus the issue of O&M expenses was pending for consideration before the Central Commission, which was decided by the impugned order.

6.5. The issue of O&M expenses was pending before the Central Commission, therefore, the respondent no. 2 had no occasion to challenge the aspect of O&M expenses in the appeals filed before the Tribunal against the tariff orders of the State Commission for the gas power stations for the period 2004-09. NTPC had only challenged the issue of O&M expenses in Appeal no. 11 of 2007 before the Tribunal in respect of

Kawas GPS. However, when the Central Commission later decided to consider the issue, NTPC did not press the matter with liberty to raise the issue, if required.

6.6. The contention of the appellant that no relaxation ought to be given to NTPC in O&M expenses since NTPC is getting 14% ROE is not supported by the provisions of the Act.

6.7. Section 62(5) has no application in the present case. NTPC gets a normative tariff and, therefore, adjustment on account of Section 62(5) of the 2003 Act can not arise in the present case.

7. After considering the contentions of the parties, we frame the following questions for consideration:

- i) Is the claim for higher O&M expenses is barred by constructive resjudicata as the same point

was not raised in the appeal filed by respondent no. 2 before the Tribunal challenging the tariff order for the gas power stations for the period 2004-09?

- ii) Has the tariff order passed by the Central Commission merged in the Appellate order which could not be changed by the Central Commission on an application moved by the respondent?
- iii) Whether after passing the tariff order disposing of the main petition of the Respondent no. 2, the Central Commission has become functus officio and could not have entertained the application filed by the respondent no. 2 regarding enhancement of O&M expenses?

- iv) Whether the Central Commission could have allowed the O&M expenses without warranty spares to Anta, Auriya, Dadri and Kawas Gas Power Stations when these stations had a provision for warranty spares for first 10 years of operation?
- v) Whether a single component of tariff be revised by the Central Commission without considering that 14% ROE is not available to respondent no.2 and without asking the respondent no. 2 to submit its annual revenue requirements?

8. The first three questions are interwoven and therefore, we deal with them together. Before answering these questions, we would first like to examine the background of the case and findings of the Central Commission.

8.1. In petition filed by the respondent no.2/NTPC for determination of tariff for gas based station for the period from 1.4.2004 to 31.3.2009, it submitted the details on the inadequacy of O&M expenses and sought relaxation under Regulation 13, viz., power to relax.

8.2. In the order dated 9.5.2006 regarding tariff determination for Anta GPS, the Central Commission has recorded the following on the aspect of O&M expenses:

“50. The petitioner has stated that the normative O&M expenses specified in the 2004 regulations are highly inadequate in case of gas-based generating stations. The petitioner has, therefore, submitted that O&M expenses should be based on actual figures for it to be more realistic.

51. The petitioner has submitted that the 10 year warranty period has expired in November

1998 and O&M charges claimed by them are higher than the normative O&M expenses due to the following reasons:

(i) Higher repair and maintenance (R&M) expenses due to aging, higher replacement cost of spares, equipment failure etc. and

(ii) Inclusion of cost of spares consumed at actuals after the warranty period and inclusion of additional capitalization disallowed.

52. The Commission vide order dated 16.2.2006 had directed the petitioner to place on record the following information before a view on the revision of O&M expenses for the five gas based stations was taken:

(a) Details of actual O&M expenses from the date of commercial operation of 1st GT of each of the generating stations to 2004-05;

(b) O&M expenses recovered in tariff from the date of commercial operation of 1st GT to 2004-05;

(c) Whether or not the capital spares issued at zero cost already included in the capital cost for the purpose of tariff; and

(d) Basis of estimation of embedded cost of spares in respect of each of the above named gas based generating stations.

53. The issue of revision of O&M expenses as claimed by the petitioner shall be considered on merits after filing of the above information by the petitioner, after a comprehensive examination of the issue for all the five gas based generating stations of the petitioner. In the meanwhile, tariff is being awarded with O&M based the 2004 regulations”.

Thus the Central Commission directed the NTPC to file the information required to review the O&M expenses

which would be considered on merits. However, in the meantime the tariff was determined with O&M based on the 2004 Regulations.

8.3. NTPC filed appeals against the tariff order for the gas based stations for the period 2004-09 on some issues except O&M expenses, due to the reasons that the review of the O&M expenses was still under consideration of the Central Commission and the same had not been concluded. In the appeal against tariff order for Kawas GPS issue regarding inadequate O&M expenses was included but NTPC did not press for it as the Central Commission was considering the same, reserving its right to agitate the issue in future. Thus, there was no occasion for the respondent no. 2/NTPC to challenge O&M expenses. The Judgments of the Tribunal on the appeals filed by the respondent no.

2/NTPC against the tariff orders did not deal with the issue of O&M expenses.

8.4. Subsequently, the NTPC filed IAs with the Central Commission giving information regarding claim for higher O&M expenses which was accepted in the impugned order.

8.5. Shri Pradeep Misra has cited 2009(4) SCC 635 Shri Raghavendra Rao & Ors. vs. State of Karnataka & Ors., to press the point regarding constructive resjudicata and 2010 (1) SCC 756 in Edukanti Kistamma through Lrs. & Ors. vs. S. Venkatarreddy through Lrs. & Ors. to press the point that the final order can not be reconsidered in any subsequent proceedings. He also cited 2010(8) SCC 129 in Indian Bank vs. Blue Jaggers Estates Ltd. & Ors. that the order challenged and upheld in Special Leave Petition

can not be challenged indirectly in Special Leave Petition filed by other party.

8.6. Let us now examine the findings of the Central Commission in the impugned order regarding maintainability of IA filed by the NTPC regarding O&M expenses.

“14. We, in the first instance, consider the preliminary objection relating to maintainability of the IA. There is no denying the fact that IA is normally not maintainable after the final disposal of the main petition, except for rectification of clerical errors. This is intended to obviate the possibility of reopening the judgment or order on merits for which the remedy of appeal is available. The position is different in the present case. In the case on hand, the Commission had taken note of the submissions of the petitioner that O&M expenses calculated on normative basis were inadequate to meet the actual expenses in

respect of the gas based generating stations and directed the petitioner to file the required information for taking a view in the matter and till that time, O&M expenses were determined on basis of the norms. In other words, even though the main petition has been disposed of the prayer of the petitioner with regard to O&M expenses has not been finally disposed by the Commission and has been kept open for consideration. The information has been filed in compliance with directions of the Commission in the said order. Moreover, the information has been called for by the Commission to take a view in the matter. Therefore, filing of the IAs for submission of the required information in compliance with the directions of the Commission cannot be treated as synonymous with any other application made for the modification of the order. The legal point regarding the maintainability of the IA after disposal of the main petition decided by the Commission in its order dated 20.2.2008 in IA No. 49/2008 in

Petition No. 154/2007 is not applicable in this case. Similarly, Rule 3 Order XX of CPC does not stand as a bar to the maintainability of the IA in the instant case. The question of O&M expenses recoverable by the petitioner was not finally settled in the order dated 9.5.2006 and was left open to be considered by the Commission after submission of the details called for”.

8.7. A generic agreement with what the Commission has observed in the later part of paragraph no.14 of the impugned order will be more in the nature of unsettling the legal position which stood settled for a long time. The appeal presents a dis-quietening feature which one trained in judicial discipline would find difficult to reconcile with, the question of merit of the case being a different proposition. The petition no. 160 of 2004 relating to Anta gas based power station was disposed of on 09.05.2006 leading to preferring

appeal no. 139 of 2006 and while appeal was pending the Commission entertained interlocutory application being I.A. No. 52 of 2006 concerning disposal of O&M issue and passed an order on 03.02.2009. Similarly, in respect of Kawas gas based power station, the Commission entertained interlocutory application being I.A. No. 24 of 2008 after disposal of the main petition no. 79 of 2005. Similar things happened with respect to petition no. 155 of 2004 relating to Dadri Gas Power Station and petition no. 164 of 2004 relating to Auriya gas based power station. It is common knowledge that depreciation, return on equity, interest on loan, O & M charges, interest on working capital and advance against depreciation are essential elements of Annual Revenue Requirements of a generation and transmission Company. The matters relating to O&M charges are essentially and absolutely

questions of fact. Order 14 Rule 2 of the CPC clearly mandates that except when a case hinges absolutely on the question of law, all issues particularly of facts have to be decided together. If we have studied the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 properly we will herein find a nice blending in spirit of the essential procedures for adjudication of a dispute as laid down in the Civil Procedure Code. The unusual feature is that the Commission disposes of tariff petitions while keeping one issue alive and they entertained interlocutory applications while appeals are pending against those orders. Entertaining of interlocutory applications after disposal of a matter from which appeal is preferred is definitely a procedure quite unusual and this leads us to hear a somewhat embarrassing submission of Mr. Pradeep Misra that

the Commission is not following a uniform procedure, for in one matter they say that they are powerless to do anything being *functus officio*, while in others they entertain application attempting to make a distinction between the two situations. What we want to emphasize is that the procedure must be uniform and uniformly applied leading no scope for anybody to assail that one is discriminated against the other. The position would have been definitely otherwise if the question of *res judicata* as has been raised by Mr. Pradeep Misra upon proper examination had been found to be applicable and secondly submission was made before this Tribunal that they were not pressing the issue on O & M expenses as the Commission was in seisin of the same. Be that as it may, what is called a final order is an order finally adjudicating upon all the issues of facts and law and there cannot be a final order separately to be passed on each of the issues

that may confront the Commission. Since the decisions referred to by learned counsel for the appellant do not fit in the peculiar facts of the case, we feel it unable to dismiss the appeal summarily but we hope and trust that the Commission will not depart from the normal judicial procedure in deciding cases.

8.8. Shri M.G. Ramachandran, learned counsel for respondent no. 2 has argued that the present case is different as the issue of O&M expenses was reserved by the Central Commission and, therefore, there was no occasion for the respondent-2 to challenge the same. He also cited (2009) 6 SCC 235 UPPCL vs. NTPC Ltd., (2000) 6 SCC 69 Divya Manufacturing Co. Ltd. vs. Union Bank of India & Ors., (2009) 8 SCC 766 Bhupinder Kumar vs. Angrej Singh, to counter the arguments of the Appellant on the issues of Constructive Res Judicata, functus officio and merger

of Central Commission's order with the Tribunal's Judgment.

8.9. After considering the contentions of the learned counsel for both the parties we come to the conclusion that the present case was different where the Central Commission had reserved its decision on the petition of the respondent no. 2/NTPC to revise O&M expenses. The Central Commission had also sought additional information from the respondent no. 2/NTPC which was furnished through the IA. In view of this we decide the first three issues against the appellant.

9. The next issue is application of O&M norms without warranty spares.

9.1. First of all we will examine the Central Commission's findings in the impugned order in this

regard. The Central Commission has given a reasoned order while reviewing the O&M expenses. In para 22, the Central Commission has deliberated on the spares cost estimated to be embedded in the capital cost of the respective station and in para 23 compared the actual O&M expenses of the four Gas based stations vis-à-vis the O&M expenses recovered upto 2004-05 to find the shortfall in O&M recovery. In paras 25 and 26 it has then estimated the difference in Repair & Maintenance expenses, a component of O&M expenses, before and after warranty period as in the year 2004-05. The Central Commission has worked out weighted average difference in R&M expenses of the four stations before and after the expiry of warranty period as Rs. 2.23 lakh/MW. It has also checked that difference between Base R&M and actual R&M for FY 2004-05 for Faridabad and Kayamkulam

which do not have any warranty spares in para 27 of the order and find the actual R&M almost equal to the normalized R&M expenses for 2004-05. Thereafter, the Central Commission has recorded as under in the impugned order:

“29. On analysis of the above it appears to us that there is merit in the petitioner’s contention and there is a case for having a second look at O&M norms to be allowed to the petitioner since it has been worked out that there is an increase of Rs.2.23 lakh/MW under the sub-head of R&M expenses after the expiry of warranty period. We have analyzed the data furnished by the petitioner in tariff petitions for the period 2001-04 and have found that cost of spares indicated by the petitioner and relied upon by the Commission in its orders were the notional values arrived at in the respective year of consumption after accounting for escalation and custom duty at 60% freight and handling charges etc. The customs duty,

freight and handling charges are generally paid in addition to the contract prices. As such, notional cost of these spares as worked out by the petitioner based on foreign exchange rate as on dates of commercial operation of the respective unit or generating station appears to be reasonable. Thus, there is no denying that existing O&M norms applied to the generating stations with initial warranty spares in the tariff order are much lower than the actuals for the period 1995-96 to 1999-2000 when warranty period was applicable and as such those expenses do not reflect the actual consumption pattern of spares and R&M expenditure.

30. We would not like to dragged into the debate on the question of cost of spares embedded in the project cost yet again. Any estimation of embedded cost would always be debatable. Even if for sake of argument it is accepted that there is embedded cost on account of warranty spares in the capital cost

of the generating station, in our view, such a provision was kept by the petitioner in its bidding condition in over all interest of the beneficiaries and in good faith and the beneficiaries were benefited during the warranty period with less O&M cost.

31. The warranty period for supply of free spare has already expired as noted above. We feel that with the expiry of warranty period, the generating station should be governed by the norms applicable to the generating stations without warranty spares. Accordingly, we direct that the O&M norms as applicable to the gas-based generating stations without warranty spares as given hereunder shall apply.”

9.2. Thus the Central Commission has given a reasoned and correct order for deciding O&M norms as applicable to the gas based stations without warranty

spares for the four gas stations where the ten years warranty period has already expired.

Accordingly, we reject the contentions of the Appellant in this regard.

10. The next issue is regarding revision of single component of tariff without considering ROE of the respondent no.2/NTPC.

10.1. The Central Commission in its Regulations has determined norms for the various components of the tariff. Thus, the regulations provide for a normative tariff.

10.2. The relevant provisions of the Section 61 of the 2003 Act are reproduced below:

61. "Tariff Regulations- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for

the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a)

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance.”

Thus, each element of the tariff has to be determined on the norms following commercial principles, encouraging competition and safeguarding

the consumer interest and at the same time ensure recovery of the cost of electricity in a reasonable manner. Accordingly, the Central Commission by a reasoned order has decided to allow O&M expenses to the four gas stations of NTPC as applicable to Gas power stations without warranty spares. It is expected that if NTPC performs better than the operational norms it will be rewarded for efficiency and if it performs at lower than normative parameters it will have to bear the consequential loss. Thus, there is no force in the argument of the Appellant that before allowing the enhanced O&M expenses, the Central Commission shall check whether the actual ROE is less than the normative ROE and then only allow the enhanced O&M expenses. This is not as per the scheme of the Regulations. Accordingly, this issue is also decided against the Appellant.

11. The last issue is regarding filing of Annual Revenue Requirement (ARR) by the Respondent-2 before the Central Commission under Section 62(5) of the 2003 Act.

11.1. Section 62(5) is reproduced below:

“62. Determination of tariff-

.....

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.”

11.2. The Central Commission has recorded in the impugned order that it is yet to frame the regulations under that sub-section and without the regulations being in place, NTPC could not be directed to file its ARR.

11.3. The existing regulations of the Central Commission provide for a normative tariff and there is no provision to file ARR as suggested by the appellants. Thus the filing of ARR is not according to the scheme of things as existing in the tariff Regulations. Accordingly, this issue is also decided against the appellant.

12. In view of above findings, we find no substance in the appeal. The Appeal is dismissed. No order as to costs.

13. Pronounced in the open court on this **24th day of May, 2011.**

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE

vs