

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

**Appeal No. 168 of 2010**

**Dated: 31<sup>st</sup> May, 2011**

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

**In the matter of**

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

**... Appellant(s)**

**Versus**

**1. Central Electricity Regulatory**  
**Commission**  
**3<sup>rd</sup> & 4<sup>th</sup> floor, Chandralok Building**  
**36, Janpath**  
**New Delhi**

**2. West Bengal State Electricity**  
**Distribution Company Ltd.**  
**Vidyut Bhawan, Block DJ**  
**Sector-11, Salt Lake City**  
**Kolkata-700091**

**3. Bihar State Electricity Board**  
**Vidyut Bhawan, Bailey Road**  
**Patna-800002**

- 4. Jharkhand State Electricity Board  
Engineering Bhawan, HEC  
Dhurwa, Ranchi-834004**
- 5. Grid Corporation of Orissa Ltd.  
Vidyut Bhawan, Janpath  
Bhubaneswar-751007**
- 6. Damodar Valley Corporation  
DVC Towers, VIP Road  
Kolkata-700054**
- 7. Power Department  
Govt. of Sikkim  
Gangtok-737101**
- 8. Tamil Nadu Electricity Board  
800, Anna Salai  
Chennai-600002**
- 9. Union Territory of Ponducherry  
Electricity Department  
58, Subhash Chandra Bose Salai  
Pondicherry-605001**
- 10. Uttar Pradesh Power Corporation Ltd.  
Shakti Bhawan, 14, Ashoka Marg  
Lucknow-226001**
- 11. Power Development Department  
Government of Jammu and Kashmir  
Secretariat  
Srinagar-180001**

- 12. Power Department  
Union Territory of Chandigarh  
Additional Office Building  
Sector-9D, Chandigarh-160009**
  
- 13. Madhya Pradesh Power Trading Co. Ltd.  
Shakti Bhawan, Vidyut Nagar  
Jabalpur-482008**
  
- 14. Gujarat Urja Vikas Nigam Ltd.  
Bidyut Bhawan  
Race Course  
Vadodara-390007**
  
- 15. Electricity Department  
Administration of Daman & Diu  
Daman-396210**
  
- 16. Electricity Department  
Administration of Dadra and Nagar Haveli  
U.T. Silvassa- 396230**
  
- 17. North Delhi Power Ltd.  
Grid sub Station Building  
HUDSON Lines, Kingway Camp  
Delhi-110009**
  
- 18. BSES Rajdhani Power Ltd.  
BSES Bhawan, Nehru Place  
New Delhi-110019**
  
- 19. BSES Yamusna Power Ltd.  
Shakti Kiran Building  
Karkodooma, New Delhi**

**20. Maharashtra State Electricity  
Distribution Co. Ltd.  
Plot No. G-9 Prakashgad  
Bandra(East)  
Professor Anant Kanekar Marg  
Mumbai-400051**

**...Respondents**

**Counsel for Appellant(s): Mr. M.G.Ramachandran  
Ms Swapna Seshhadri  
Mr. Anand K. Ganesan**

**Counsel for Respondent(s):Mr. Nikhil Nayyar  
Mr. Swapnil Verma  
Mr. Daleep Kumar Dhyani  
Mr. Manoj Dubey  
Mr. Pradeep Misra**

## **JUDGMENT**

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

NTPC Limited is the Appellant herein.

2. The present Appeal has been filed as against the impugned order dated 15.6.2010 passed by the Central Electricity Regulatory Commission (Central Commission) whereby the Central Commission has determined the

tariff consequent upon the additional capitalization incurred by the Appellant-NTPC Limited for Kahalgaon Super Thermal Power Station Stage-I during the period 2006-07, 2007-08 and 2008-09. The Appellant is aggrieved by the following aspects decided by the Central Commission:

- (a) Un-discharged liability
- (b) Equating depreciation to normative loan repayment
- (c) Cost of Maintenance Spares
- (d) Consequences of Refinancing of Loans
- (e) Impact of de-capitalization of assets on cumulative repayment of loan
- (f) Non consideration of normative transit loss for coal received through railway system

3. We have heard the Learned Counsel for the Appellant as well as the Respondent.

4. With regard to the **first issue** namely un-discharged liability, it is submitted that the Central Commission dis-allowed

the capitalization of un-discharged liability expenditure holding that the actual expenditure incurred can not be included as part of capital expenditure where the actual cash payment is made subsequently. This issue of un-discharged liability has been decided in favour of the Appellant by this Tribunal in various decisions rendered earlier. Those decisions are referred as below:-

(a) Judgment dated 16.3.2009 in Appeal No.133 and 135 etc of 2008, NTPC V. CERC & Ors. 2009 ELR (APTEL)337.

(b) Judgment dated 10.12.2008 in Appeals No.151 & 152 of 2007 –NTPC Vs CERC & Ors. 2008 ELR (APTEL) 916.

5. It is pointed out that in the impugned order, that though the Central Commission has taken to consideration the above judgments of this Tribunal and allowed the un-discharged liability, the Central Commission has made a wrong calculations thereby there was a wrong disallowance of the said claim.

6. We have perused the relevant observation of the impugned order and also the table which has been given in the impugned order.

7. As correctly pointed out by the Learned Counsel for the Appellant, it is clear from the third and last row in the table which reads “Less: Un-discharged Liabilities included above – 43.45 lakhs in 2008-09”. The Central Commission by mistake disallowed the un-discharged liabilities of Rs.43.45 lakhs.

8. We have heard the Learned Counsel for the Central Commission on this aspect. As mentioned above this is purely a mistake and this needs to be corrected by the Central Commission. Therefore, the issue is allowed in favour of the Appellant. Accordingly, the Central Commission is required to pass a consequential order on this issue.

9. The **Second Issue** is relating to equating depreciation to normative loan repayment. It is submitted by the Appellant that

the Central Commission continued to adjust depreciation against the normative loan repayment despite the fact that is settled by accounting treatment and judicial decisions that the purpose of depreciation is to allocate the cost of an asset over its useful life of the asset so as to exhibit a true and faire view of the financial statements of the enterprise. As pointed out by the Learned Counsel for the Appellant, this issue has already been covered in favour of the Appellant in the following judgments of this Tribunal:

- (a) Judgment dated 16.2.2009 in Appeal Nos.133 and 135 of 2008 NTPC v. CERC & Ors, 2009 ELR (APTEL)337
- (b) Judgment dated 13.6.2007 in Appeals No.139 and 140
- (c) These decisions have been rendered as the strength of the judgment of Hon'ble Supreme Court reported in 2007 3 SCC 33 Delhi Electricity Regulatory Commission vs BSES Yamuna Power Limited & others.

10. It is pointed out by the Learned Counsel for the Respondent that because judgment of this Tribunal has been challenged in the Hon'ble Supreme Court and in that



proceedings, NTPC has given undertaking that it will not press for some of the issues including this issue before the Central Commission and, therefore, the issue cannot be pressed in this Tribunal. But as pointed out by the Learned Counsel for the Appellant that mere pendency of the Appeal against the judgment of this Tribunal in the Hon'ble Supreme Court and mere undertaking given by the NPTC as to not to implement the order of the Tribunal pending decision in the Second Appeal does not dilute the ratio of the decision of this Tribunal which is binding on the Central Commission.

11. Therefore, the issue is also decided in terms of the decision rendered by this Tribunal as referred to above. Accordingly, this issue is decided in favour of the Appellant.

12. The **third issue** is the cost of maintenance spares. According to the Appellant, the Central Commission disallowed the cost of maintenance spares without considering the impact of additional capitalization on the maintenance spares to be

considered for determination of working capital. This issue has also been decided in favour of the Appellant in the following judgments:

- (a) Judgment dated 13.6.2007 in Appeals No.139 and 140
- (b) Judgment dated 21.8.2009 in Appeals No.54 and 74 of 2009 NTPC v CERC & Ors 2009 ELR (APTEL)705.

13. Despite the ratio decided by this Tribunal, the Central Commission has not followed the principle decided on 13.6.2007 and the similar arguments were advanced by the Respondent for the Counsel regarding the pendency of the Appeal before the Supreme Court.

14. As indicated above, the mere pendency of the Appeal against the judgment of this Tribunal will not dilute the ratio of this Tribunal so long it is not set aside. Therefore, the issue is also allowed in terms of the said decision.

15. The **next issue** is consequences of refinancing of loans. According to the Appellant, the Central Commission has wrongly applied the provisions of tariff Regulation 2004 to the refinancing of Government of India Loans by NTPC even though the loans were refinanced in the earlier period of 2001-04. This issue also stands covered in favour of the Appellant in the judgment dated 13.6.2007 in Appeals No.139, 140, etc; of 2007.

16. In this decision it has been specifically held that the Tariff Regulation 2004 have to be applied to the refinancing done by the Appellant after these Regulation came into force and it can not be applied to the prior period i.e when refinancing had already been done by the Appellant and costs associated with refinancing have been borne by the Appellant. So this decision is binding on the Commission. Accordingly, this issue is also decided in favour of the Appellant.

17. The **next issue** is impact of de-capitalization of assets on the cumulative repayment of loan. On this issue, it is submitted

that the Central Commission has not considered the impact of de-capitalization of assets on cumulative repayment of loan. As pointed out by the Learned Counsel for the Appellant this issue also stands covered in favour of the NTPC by the judgment dated 13.6.2007 in Appeal No.130 and 140 of 2007. In this decision, it has been held that when the asset is not in use, the capital base for the purpose of tariff is also proportionately reduced. However, despite the decapitalization, interest on loan is required to be paid. Whereas, 10% salvage value of the depreciated asset should be non-tariff revenue, the interest on loan has to be borne by the beneficiary. If the salvage value is more than 10%, the amount realized above 10% should be counted as additional revenue. If salvage value is less than 10%, it will be counted as loss in the revenue. Therefore, cumulative repayment of the loan proportionate to the assets decapitalized required to be reduced. But the Central Commission has not followed this ratio passed by this Tribunal. Therefore, this point is also answered in favour of the Appellant.

18. The next issue is non consideration of normative transit loss for coal received through railway system. The impugned order does not specifically deal with the claim of the Appellant. According to the Appellant the Central Commission has not considered the coal transit loss of 0.8% for requirement of coal between 62.8% and upto 80% Plant Load. This issue has been decided by this Tribunal in favour of the Appellant in the judgment dated 13.6.2007 in Appeal No.139 and 140 of 2007.

19. In this case, the Tribunal has specifically directed to allow the transit loss of 0.8% on the requirement of coal between 62.8% and upto 80% of the Plant Load Factor.

20. But the Central Commission in the impugned order has failed to consider this claim at all. Though, the Central Commission has filed second appeal against the judgment dated 13.6.2007, the Hon'ble Supreme Court has specifically directed the Central Commission to proceed to determine the other issues i.e. issues not challenged by the Central Commission.

Hence the Commission ought to have allowed the claim of NTPC with regard to normative transit loss of coal which has not even been challenged before the Supreme Court. Therefore, this issue also decided in favour of the Appellant.

21. Accordingly all these issues are answered in favour of the Appellant. The Central Commission is directed to implement the findings and directions on these issues in terms of this judgment as well as the other judgments rendered by this Tribunal. With these observations, this Appeal is allowed. However, there is no order as to costs.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated:31<sup>st</sup> May, 2011

REPORTABLE/NON-REPORTABLE