

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 169 of 2010

Dated: 31st 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
3rd & 4th 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. Power Department
Govt. of Sikkim
Gangtok-737101
7. Madhya Pradesh Power Trading Co. Ltd.
Shakti Bhawan, Vidyut Nagar
Jabalpur-482008
8. Maharashtra State Electricity
Distribution Co. Ltd.
Plot No. G-9 Prakashgad
Bandra(East)
Professor Anant Kanekar Marg
Mumbai-400051
9. Gujarat Urja Vikas Nigam Ltd.
Bidyut Bhawan
Race Course
Vadodara-390007
10. Uttar Pradesh Power Corporation Ltd.
Shakti Bhawan, 14, Ashoka Marag
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. Punjab State Power Corporation
Ltd. (Powercom)
The Mall, Patiala-147001
14. HPSEB Ltd.
Vidyut Bhawan,
Shimla-171004
Himachal Pradesh
15. Jaipur Vidhyut Vitran Nigam Ltd.
Vidyut Bhawan
Janpath
Jaipur-302005
16. Ajmer Vidyut Vitran Nigam Ltd.
Old Power House
Hathi Bhata
Jaipur Road
Ajmer-305001
17. Jodhpur Vidyut Vitran Nigam Ltd.
New Power House Road
Industrial Area
Jodhpur-342003

18. Chhattisgarh State Electricity
Distribution Co. Ltd.
PO Sundernagar
Danganiya
Raipur-492913
19. Haryana Power Purchase Centre
Shakti Bhawan
Sector-6, Panchkula
Haryana-134109
20. BSES Rajdhani Power Ltd.
BSES Bhawan, Nehru Place
New Delhi-110019
21. BSES Yamuna Power Ltd.
Shakti Kiran Building
Karkodoma, New Delhi
22. North Delhi Power Ltd.
Grid sub Station Building
HUDSON Lines, Kingway Camp
Delhi-110009
23. Uttrakhand Power Corporation Ltd.
Urja Bhawan
Kanwali Road
Dehradun-248001
24. Electricity Department
Administration of Daman & Diu
Daman-396210
25. Electricity Department
Administration of Dadra and Nagar Haveli
U.T. Silvassa- 396230 ...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. It and the present Appeal has been filed as against the impugned order dated 5.7.2010 passed by the Central Electricity Regulatory Commission (Central Commission) determining the tariff for Unit I for the period 1.8.2008 to 29.12.2008 and Units I and II (Combined) for the period 31.12.2008 to 31.03.2009 of Kahalgaon Super Thermal Power Station Stage-II.

2. Aggrieved over the some of the aspects decided by the Central Commission disallowing the claim of the Appellant, this Appeal has been filed raising the following issues:

- (a) Un-discharged liability
- (b) Disallowance of interest during construction (IDC):
- (c) Equating depreciation to normative loan payment
- (d) Recovery of Depreciation upto 90%
- (e) Exclusion of cost of initial spares for determination of maintenance spares for computing interest on working capital.

3. According to the Appellant, the First Issue with regard to un-discharged liability has already been decided and covered in favour of the NTPC by the following judgments:

(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.

4. In these decisions, it has been held by this Tribunal that since the words ‘actual expenditure incurred’ contained in Regulation 17 of the Regulations of 2004 only rational interpretation would be that the Appellant would be required to recover the actual capital expenditure incurred without the reference to the actual cash flow. Even though the Central Commission has followed this ratio and allowed the un-discharged liability, it has made wrong calculations thereby it has disallowed the un-discharged liability in respect of the amount of Rs.15591.00 and 26821.00 lakhs. Therefore, the Central Commission is directed to correct the mistake and make a correct calculation and pass consequential orders accordingly.

5. The next issue is disallowance of interest during construction. According to the Appellant, the Central Commission has disallowed the interest during construction on account of repayment of loan during construction over and above equity due to the following of average method of loan repayment by the Appellant instead of giving a logical adjustment to the same. This also has been covered in the following judgments:

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

6. In these decisions it has been held that the 'First in First Out' method cannot be adopted but the NTPC is entitled to claim deemed interest on such a loan which is repaid during the construction from internal accruals over and above equity contribution. Even though this ratio

has been followed, the Central Commission in the impugned order has disallowed the same by making wrong calculations. Therefore, Central Commission is directed to correct the mistakes by making correct calculations and pass the appropriate order.

7. The next issue is Equating Depreciation Against normative loan repayment. According to the Appellant, the Central Commission has continued to adjust depreciation against normative loan repayment despite the judgment by this Tribunal in favour of the Appellant in Appeal No. 133,135 etc. of 2008 dated 16.3.2009 and in Appeal No. 139/140 of 2006 dated 13.6.2007. These decisions were in line with the judgment of Hon'ble Supreme Court in 2007(3) SCC 33. Therefore, the Central Commission will consider the ratio decided by this Tribunal and pass the consequential order.

8. The next issue is recovery of depreciation up to 90%. This issue has been covered in favour of the Appellant by the judgment dated 13.6.2007 in Appeal No.139/140 of 2006. In this decision, it has been specifically held as under:

“However, the same cannot be denied forever, and therefore, it will be only fair to allow the unpaid portion of the depreciation after plant has lived its designated useful life”.

9. Despite the directions of the Tribunal in the above issues, the Central Commission has continued to adjust depreciation against the normative loan repayment and has not dealt with the issue of depreciation upto 90%. It is contended by the Learned Counsel for the Respondent that this judgment of the Tribunal dated 13.6.2007 has been challenged in the Appeal before the Hon’ble Supreme Court and the same is pending. As the mere pendency of the Appeal against the judgment of this Tribunal in the Hon’ble Supreme Court can not be taken as a ground for

not following the ratio decided by this Tribunal which has not yet been set aside by the Hon'ble Supreme Court that apart, the impugned order does not deal with the claim of the Appellant with regard to this issue dealing with depreciation. This approach is wrong. The ratio which has been decided in the earlier decision by the Tribunal is binding precedent to the Central Commission to follow the same till the said decision is set aside. Accordingly, the said issues c & d are answered in favour of the Appellant.

10. The next issue is exclusion of cost of initial spares for determination of maintenance spares for computing interest on working capital. This issue is a new issue which needs to be decided.

11. According to the Appellant, the Central Commission has wrongly excluded the cost of initial spares from the historical capital cost on which working capital is

calculated when such cost of initial spares duly form part of the capital cost within the scope of the Regulations.

12. According to the Respondent, the cost of initial spares have to be deducted from the capital cost for considering the grant of maintenance spares.

13. Let us quote the relevant portion of the findings in the impugned order:

“51. Working capital has been calculated considering the following elements;

(a) *Fuel Cost.....*

(b) *Secondary Fuel Oil....*

(c) *O&M Expenses...*

(d) *Spares: As per Regulation 21 (v) (a) (iv) maintenance spares @ 1% of the historical cost escalated @ 6% per annum, from the date of commercial operation is permissible. Accordingly, the spare requirement has been worked out on admissible capital cost as on the date of commercial operation after deduction of the cost of initial spares on the particular date.*

- (e) Receivables....*
- (f) Rate of interest on working capital*

14. Even though the Regulation 51 (e) refers to the Regulation 21 (v) (a) (iv) the same has not been taken into consideration by the Central Commission to give the finding on this issue. Let us now cite the Regulation 21 (v) (a) (iv) of the Tariff Regulation which reads as under:

“(v) Interest on Working Capital

(a) Working Capital shall cover

Coal based/ Lignite fired generating stations

(i).....

(ii).....

(iii).....

(iv) Maintenance spares @ 1% of the historical cost escalated @ 6% per annum from the date of commercial operation; and

(v).....”

15. Admittedly, the Central Commission has not followed this Regulation quoted above which states the value of the maintenance spares should be taken at 1% of

the historical cost escalated at 6% per annum from the date of commercial operation. This would make it clear that the Central Commission excluded the cost of initial spares from the historical capital cost on which the working capital is calculated even though such cost of initial spares duly formed part of capital cost as per the Regulation 21 (v) (a) (iv) of the Tariff Regulation.

16. Therefore, the findings on this issue in the impugned order is set aside. The Central Commission is directed to pass a consequential order in the light of the Regulations referred to above. Accordingly, this issue is decided.

17. In view of the reasonings given in the above paragraphs, the order impugned is set aside and the Central Commission is directed to implement the findings given by us in this Judgment.

18. The Appeal is allowed and the impugned order is set aside. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 31st May, 2011

REPORTABLE/NON-REPORTABLE