APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

Appeal No. 82 of 2009

Dated 27th July, 2010

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

Appeal No. 82 of 2009

In the matter of:

NTPC Limited
NTPC Bhawan, Scope Complex
Core-7, Institutional Area,
Lodhi Road, New Delhi-110 003

Versus

1. **Central Electricity Regulatory Commission**
   3rd and 4th Floor, Chanderlok Building
   36 Janpath, New Delhi-110 001 ....Respondent-1

2. **Grid Corporation of Orissa**
   Vidyut Bhawan, Janpath,
   Bhubaneswar-751 007 ... Respondent-2

Counsel for the Appellant(s) **Mr. M.G. Ramachandran &**
Ms. Swapna Seshadri
Mr. Anand K. Ganesan

Counsel for the Respondent(s) **Mr. R.B. Sharma for R-2**

JUDGMENT

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

1. NTPC Limited is the Appellant herein. The Central Electricity Regulatory Commission (Central Commission) is the 1st Respondent. The Grid Corporation of Orissa (GRIDCO) is the 2nd Respondent.

2. The Appellant has filed the present Appeal as against the impugned order dated 03.02.2009 passed by the Central Commission in the Petition filed by the Appellant for approving the revised fixed charges for the period 2004-2009.

3. The following are relevant facts for disposal of this Appeal,.

4. The Appellant is engaged in the business of generation and sale of electricity. It operates several coal based generating stations and gas based generating stations all over the country. One

of the generating stations owned and maintained by the Appellant is Talchar Thermal Power Station in the State of Orissa. The entire electricity generated from the Talchar Thermal Power Station is being sold by the Appellant to the Grid Corporation of Orissa (R-2).

5. The Talchar Thermal Power Station was initially owned by the Orissa State Electricity Board. Due to the inability of the Electricity Board to continuously operate the said Thermal Station at its optimum capacity, on the orders of the State Legislature under the Act passed by the State Legislature, the Talchar Thermal Power Station was transferred to the NTPC on 03.06.1995. Thereupon a Tripartite Power Purchase Agreement was entered into between the NTPC Limited (Appellant), the Orissa State Electricity Board and the State Government for the purchase of electricity by the Electricity Board from the Talchar Thermal Power Station.

6. The Central Commission used to pass various orders fixing the tariff for the said Thermal Power Station for the tariff period from time to time. On 23.03.2007, the Central Commission in the Petition filed on behalf of the Talchar Thermal Power Station, by the Appellant, determined the tariff for the period 01.04.2004 to 31.03.2009. Thereupon the Appellant on 11.03.2008 filed a Petition for approval of revised fixed charges for considering the impact of additional capital expenditure in the years 2004-07. The Central Commission asked the Appellant to submit various documents and details. Accordingly the same were produced. Ultimately, the Central Commission, by the impugned order dated 03.02.2009 has decided, by allowing some claims and disallowing the other claims in respect of the additional capital expenditure incurred by the Appellant. The claims which were not allowed by the Central Commission are as follows:

(a) The un-discharged liability incurred in relation to capital assets commissioned;

(b) Disallowance of interest during construction;

(c) Capitalisation of certain renovation and modernization works.

(d) Reduced rate of interest on loan.

(e) Incorrect amount of balance depreciable value of capital assets.

Aggrieved by the disallowance of these claims, the Appellant has filed this Appeal.

7. On these issues the Learned Counsel appearing for the Appellant would make the following submissions:

(i) **Undischarged Liabilities:** The part of the liability approved in the creation of capital asset pending actual disbursement and payment to the payee, described as a "undischarged liability" cannot be excluded from the capital cost for the purpose of tariff till actual payment is made. According to the Appellant, this issue has already been decided by this Tribunal in favour of the

Appellant in 2008 ELR (APTEL) 916 *NTPC versus CERC and Ors.* and 2009 ELR (APTEL) 337 *NTPC versus CERC and Ors.*

(ii) **Disallowance of interest during construction:** An amount of Rs. 9.35 lakhs incurred by the NTPC towards interest during construction has been disallowed while not accepting the First-in First-out (FIFO) method being followed by the NTPC and leaving part of the capital contributed by the NTPC towards the asset unserviced. This issue according to the Appellant, has also been decided by this Tribunal in favour of the Appellant in the following decisions:

(a) 2008 ELR (APTEL) 916 *NTPC versus CERC and Ors.*

(b) 2009 ELR (APTEL) 337 *NTPC versus CERC and Ors.*

(iii) **Capitalisation of certain Renovation & Modernization (R&M):**

The Central Commission has wrongly disallowed an amount of Rs. 26.16 lakhs incurred by the NTPC on certain R&M works merely because the NTPC has booked the same under the Profit & Loss account. In respect of this issue, it is submitted by the Appellant that these expenses have been incurred towards construction of concrete road, air circuit breakers etc., which are part of the R&M works. These expenses are essential part of the successful execution of R&M works and are of capital nature as they give benefit of enduring nature. As such, the said expenses have to be included in the capital asset notwithstanding the Accounting Standards providing for the inclusion of the same in the Profit & Loss accounts. As a matter of fact, the Central Commission in respect of the earlier years allowed the capitalization of similar such expenditure while fixing the tariff.

(iv) **Reduced Rate of Interest on Loans:** NTPC sought the interest on loan which has to be allowed as per Tariff Regulations 2004. According to these Regulations, the interest on loan capital shall be computed loan-wise on the loan arrived at in the manner indicated in Regulation 20. However, there is a clear stipulation in the Agreement on the rate of interest on the loan portion at 14% which was a notional loan paid through internal accrual. Despite the above, the Central Commission wrongly proceeded on the basis that it would include only the actual loan taken for the purpose of determining the weighted average rate of interest. This is contrary to the Agreement reached between the parties.

(v) **Incorrect Amount of Balance Depreciable Value of Capital Assets:**

The Central Commission has given a wrong calculation under the head "Depreciation". According to the Central Commission the amount of cumulative

depreciation recovered as on 31.03.2004 is Rs. 24,631 lakhs. This is wrong. The actual recovered amount is only Rs. 23,361 lakhs. Taking the amount of Rs. 23,361 lakh as cumulative depreciation, the balance depreciation value as on 31.03.2004 should be Rs. 40,839 lakhs and not Rs. 39,569 lakhs as calculated by the Central Commission. As such the Central Commission wrongly calculated the balance depreciation without considering that the Appellant had not recovered depreciation in regard to some generating units which were undergoing Renovation & Modernization.

8. On these issues, lengthy arguments were advanced by the Learned Counsel for the Appellant who ultimately prays that these claims on these issues are to be allowed.

9. The Learned Counsel for the Respondent in justification of the impugned order would submit that all these issues have been

correctly decided by the Central Commission and some of the issues which have been decided in favour of the Appellant earlier by this Tribunal have not been correctly decided as the relevant Regulations have not been taken into consideration at the time of deciding those issues and as such the finding on those issues requires reconsideration by the larger Bench.

10. We have carefully considered the submissions made by both parties and gave our anxious consideration. On said careful consideration, the following questions would arise for consideration.

(i) Whether part of liability accrued in the creation of capital asset pending actual disbursement and payment to the payee described as an 'Undischarged Liability' be excluded from the capital cost on the ground that the actual cash payment has not been made by the Appellant?

(ii) Whether the amount of Rs. 9.35 lakhs incurred by the NTPC during the period from 2004-5 to 2006-07

towards interest during construction can be disallowed while not accepting the First In First Out (FIFO) method being followed by NTPC and leaving the part of the capital contributed by NTPC towards assets unserviced?

(iii) Whether the amount of Rs. 26.16 lakhs incurred by the NTPC for certain Renovation & Modernization works be disallowed along with the capitalization of R&M works because the Accounting Standards require the Appellant to book the same to the Profit & Loss Account?

(iv) Whether the Central Commission can include only the actual loan for the purpose of determining the weightage average rate of interest without considering the rate of interest provide for the notional loan as per the terms of the PPA and make applicable such

weightage average rate of interest to the rate of interest allowable on notional loan?

(v) Whether the Central Commission has made a wrong calculation with reference to the cumulative depreciation to the effect that an amount of cumulative depreciation recovered as on 31.03.2004 is Rs. 24,631 lakhs and the balance depreciable value at the end of 31.03.2004 is Rs. 39,569 lakhs while the correct calculation shall be that the cumulative depreciation as on 31.03.2004 is Rs. 23,361 lakhs and the consequent depreciable value should be Rs. 40,839 lakhs?

11. We will now deal with every one of the questions referred to above in the light of the rival contentions urged by the respective Counsel for the parties.

12. With regard to the first issue relating to the undischarged liability, the Learned Counsel for the Appellant submits,

the Central Commission has wrongly held that as per Regulation 17 and Regulation 18, dealing with the actual expenditure incurred, cannot include that part of the expenditure for which payment is made subsequently, i.e. after the date of its capitalization and the same should form part of the additional capitalization. In support of its plea the Learned Counsel has cited 2 authorities namely (1) 2008 ELR (APTEL) 916 *NTPC versus CERC* and (2) 2009 ELR (APTEL) 337 *NTPC versus CERC and Ors.* The relevant portions of the decision rendered by the Tribunal in 2008 ELR (APTEL) 916 dated 10.12.2008 is quoted as below:

"*We are, therefore, of the opinion that the entire value of the capital asset since the same is put into operation is recoverable by way of capital cost under Regulation 17 itself, notwithstanding the fact that the part of the payment for the capital asset has been retained.*"

13. In respect of the decision rendered by this Tribunal reported in 2009 ELR (APTEL) 337 dated 16.03.2009, the following observations have been made:

> "*The words "actual expenditure incurred" contained in Regulation 17 of the Act would refer to the liabilities incurred and the same would not refer to the actual cash out-flow. 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 out-flow.*"

14. On the strength of these decisions, the Learned Counsel for the Appellant would submit that the finding given by the Central Commission in the impugned order that the liability accrued in the creation of capital asset pending actual payment to the payee described as "undischarged liability" shall be excluded from the capital cost is wrong and the same is liable to be set aside.

15. Refuting this contention, the Learned Counsel for the Respondent said that the interpretation on this issue which has

been given by the Tribunal in the judgment referred to above is wrong since if the capital cost is increased to the extent of liability incurred but not paid, it would result in the proportionate increase in the loan as well its interest which would become a profit in the hands of the Appellant but this profit on loan and interest on loan is prohibited under Regulation 21(1)(g) of the Tariff Regulation 2004 and as such the said issue has not been decided correctly by this Tribunal and hence, the same requires reconsideration by the larger bench.

16. Let us now quote Regulation 21(1) (g) of the Tariff Regulation 2004 to consider the above issue in the light of the contention urged on behalf of the Respondent:

> **"Regulation 21: Computation of capacity (Fixed Charges) – (1) The capacity charges shall be computed on the following basis and their recovery shall be related to target availability:**
>
> **(i) Interest on loan capital**
>
> **(a) ……..**

(b) ……..

(c) The generating company shall make every effort to refinance the loan as long as it results in net benefit to the beneficiary. The cost associated with such refinancing shall be borne by the beneficiaries;.

(d) The changes to the loan terms and conditions shall be reflected from the date of such re-financing and benefit passed on to the benefit of beneficiaries;

(e) ……..

(f) ……..

(g) The generating company shall not make any profit on account of refinancing of loan and interest on loan;

17. The above regulation would provide that the generating company will make all efforts to refinance the loan as long as it results in net profit to the beneficiary and that the generating company will not make any profit out of this refinancing of loan. While taking into consideration the said Regulation, if we look at

the other Regulations 17 and 18 with regard to Undischarged Liability, we can conclude that the above Regulation 21(1)(g) has no application in the case of Undischarged Liability. Both the decisions cited by the Learned Counsel for the Appellant had dealt with the Regulations 17 and 18 elaborately.

18. Let us now quote both Regulations 17 and 18:

Regulation 17

*"**Capital Cost**:*

Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure, actually incurred up to the date of commercial operation of the generation station. ……."

Regulation 18

"Additional Capitalization:

The following capital expenditure within the original scope of work actually incurred after the date of commercial operation and up to the cut off date as may be

admitted by the Commission, subject to the prudence check .....”

19. The perusal of the Regulations both 17 and 18 would make it evident that the context of Regulation 17 is entirely different from the context of Regulation 18. The claim made by the Appellant for the inclusion of actual expenditure incurred for the completed liability is under the caption “Capital Cost” as provided in Regulation 17. The Regulation 18 deals with the actual expenditure incurred after the date of commercial operation and up to the cut-off date. The Regulation 18 is only dealing with the deferred liability and not with the deferred payment. In other words, the question of additional capitalization under Regulation 18 would refer to the capital expenditure actually incurred after the date of commercial operation in respect of the deferred liability, i.e. in respect of the work deferred for execution. But Regulation 17 would refer to the actual expenditure incurred before the date of commercial operation of the generating station after completion of the project and that too in respect of the liability served. So the

meaning of the actual expenditure incurred as contained in Regulation 17 has to be understood in the context of the liability incurred.

20. On the other hand, the meaning of capital expenditure as additional capitalization as provided in Regulation 18 has to be understood in the context of the liability deferred, that too after the date of commercial operation. In these cases, the claim of the Appellant is only in respect of the expenditure on account of liability already incurred involving deferred payments and not in respect of the deferred liability. From this, it is clear that notwithstanding the fact that some payments have not been made under the terms of the contract in respect of an asset which has already been purchased and has been put to use and is generating power as on date of commercial operation, there is a committed liability to make such payments and the same should be taken into account for the purpose of capital cost.

21. This aspect can be viewed from yet another angle. The tariff for the relevant period is to be determined under the Central Commission Tariff Regulations 2004. Regulation 2.2 provides that the Regulation shall apply where the capital cost based tariff is determined by the Central Commission. The scheme of capital cost based tariff in the Tariff Regulation 2004 is the same as was followed when the generating stations were established. Even before the constitution of the Central Commission in 1999, the tariff was regulated by a notification issued by the Central Government under section 46(a) of the Electricity (Supply) Act, 1948. Under section 46(1) of the Electricity (Supply) Act, 1948, a notification has been issued on 30.03.1992. This notification had stated as under:

> *"The actual capital expenditure incurred on the completion of the project shall be the criteria for fixation of tariff"*

22. Similarly, in Regulation 2.5 of the Central Commission Tariff Regulations 2001 for the period from 01.04.2001 to

31.03.2004, the expression which has been used in the said Regulation is as under:

> *"The actual capital expenditure incurred on completion of the project shall form the basis for fixation of tariff."*

23. The expressions referred to above in both the Regulations are one and the same. The very same expression has been followed by the Central Commission while framing Regulations 17 and 18 of Tariff Regulation 2004. The Central Commission, as indicated above, has stated in the Regulation 17 that the actual capital expenditure incurred on completion of project shall form basis of determination of final tariff and in Regulation 18 it is stated that the actual expenditure incurred has to be taken into account after the date of commercial operation.

24. In these circumstances, it can be safely concluded that notwithstanding that some payments may have been deferred under the terms of the contract in respect of the assets which are

already put to use and when there is a committed liability to make such payments, such deferred payment shall be taken into account for the purpose of the capital cost.

25. Once an asset is put to use as on the date of commercial operation, its 100% cost starts giving its 100% output and that asset is subject to the depletion right from that point of time. In that case it cannot be construed that there is no depletion to the extent cash out-flow has not been used. Regulation 21(v) which relates to the interest on working capital, is one of the element of tariff, provides for maintenance spare @ 1% of the historical cost, escalated @ 6% p.a. from the date of commercial operation. Therefore, it cannot be construed that there would be no requirement of the maintenance spares in respect of an asset which has been put to use and is generating power only to the extent that cash out-flow has not been made.

26. All expenditure incurred in bringing the asset to actual use including liabilities that are accrued payable to various parties

under the contract have to be capitalized. That apart, the depreciation chargeable in its Book of Accounts, is also based on the capital based values. The retention of money and the Security Deposit, etc. withheld are towards compliance of technical specifications for facilitating fool-proof system to deliver uninterrupted generation at specified quoted parameters. The retention money and other liabilities are already done but not paid due to various reasons, such as completion of the performance guarantee, non-compliance of minor deviation, etc. These are prudent practice which ensure that quality work is delivered and is of benefit to the beneficiaries in the form of getting uninterrupted quality product. Under those circumstances, it has to be held that the accrued liability shall form part of the capital asset notwithstanding the actual cash payment is made at a later date. As such, in the judgment rendered by this Tribunal, as referred to above, this issue has been correctly decided and hence, it requires no reconsideration. This question is answered accordingly in favour of the Appellant.

27. The next issue is disallowance of interest during construction. According to the Appellant, an amount of Rs. 9.35 lakhs incurred by the Appellant towards interest during construction cannot be disallowed while not accepting the First In First Out (FIFO) method being followed by the Appellant without giving logical effect to adjustment for the payment of loan taken by the Appellant. While this issue is elaborated, the Learned Counsel for the Appellant contended that the Appellant enters into loan agreements with the lenders at different times with varying interest rate and terms and conditions. Some of the loan agreements are based on fixed interest rate while some of the agreements carry floating rate of interest. Depending upon the terms of the each loan agreement, the amount drawn on different dates carry different rate of interest. The loans have to be drawn over a period of years at the time of such drawl, it is not known whether the next drawl will be at the same interest rate. The Appellant further borrows amount based on its corporate balance sheet for more than one station, all the borrowings are on the strength of the corporate balance sheet and they are not project

specific loans and that the Central Commission has failed to appreciate that the method adopted by the Appellant for the common loan does not result in adverse effect to the beneficiaries. According to the Learned Counsel, this aspect has been already considered and decided in favour of the Appellant in 2 decisions, i.e. 2008 ELR (APTEL) 916 dated 10.12.2008 *NTPC versus CERC* and 2009 ELR (APTEL) 337 dated 16.03.2009 *NTPC versus CERC and Ors.*

28. Let us now quote the relevant portion of the decisions render by this Tribunal in these two judgments:

Judgment dated 10.12.2008 in 2008 ELR (APTEL) 916 *NTPC versus CERC*

"21. The other issue in the matter relates to the repayment of loan and interest during construction…… When a plant is under construction, the Appellant is entitled to Interest During Construction (IDC) on the funds which had to be borrowed. The Appellant claim that it be allowed to firstly adjust the entire instalments falling due to the lender in the debt repayment of the

generating projects under commercial operation. According to the Appellant, this would allow the costliest loan to be retired first fully thereby reducing the interest on outstanding debts. This method has been described as First In First Out method (FIFO). ………However, during arguments, the Appellant has given up the claim for adopting FIFO method for repayment of corporate loan. However, it is contended on behalf of the Appellant that if the loans repaid are attributed to certain projects under construction for which tariff is yet to be fixed and revenue is yet to be earned, such repayments should be deemed to have been made out of internal or borrowed funds……… This submission is quite logical inasmuch as before the date of commercial operation, the project under construction does not generate any funds from which loan can be repaid. In such a situation, if the project under construction repays a part of the loan, the fund for the same has to come either from the NTPC or from the funds borrowed from other sources.

"22. Accordingly NTPC should be entitled to claim notional interest for such loans during construction"

"23…………………

It is contended by the Respondent that the funds deployed for repayment of loan during construction should earn interest only if such interest is actually borrowed and not if the amount comes from NTPC's own sources. This, however, is not a correct view……."

"24. We, therefore, find that the Central Commission's decision not to follow the FIFO method, does not call for any interference but that repayment assumed for generating station during the period prior to the date of commercial operation be deemed as a loan from NTPC and interest during construction be allowed on such loan."

29. The relevant observation made in the other judgment 2009 ELR(APTEL) 337 dated 16.3.2009 is as follows:

" *"The First in First Out" method cannot be adopted. However, the deployment of internal resources of NTPC which is in addition to the equity contribution should be considered as a deemed loan from the NTPC to the project. NTPC is entitled to the deemed interest on such loan during construction."*

30. However, while refuting this plea made by the Appellant, the Respondent (GRIDCO) in the Additional Written Statement has raised an issue by stating that in case of existing generating stations, the issue of disallowance of interest during construction will not arise at all. As a matter of fact, the Respondent urged that no interest during construction is admissible to the Appellant in the present case and even what has been allowed in the impugned order ought not to have been allowed. The Respondent in his cross reply in Appeal No. 81 has objected to the vary basis for accepting the interest during construction by the Central Commission. In regard to the above issue, the GRIDCO has quoted the order dated 22.07.2008 passed by the Central Commission in Petition No. 32/07 in the case of Farakka Super Thermal Power Station, which is another generating station of NTPC, whereby the Central Commission rejected the claim of NTPC for capitalisation of interest during construction on year to year basis. However, the learned counsel for the Appellant has contended that the relevance placed by the GRIDCO on the above

order dated 22.07.2008 in Petition No. 32/07 is not valid as the said order has been modified by the order subsequently passed by the Central Commission on 23.12.2009. The relevant observation in the said order is as under:

> ”*6. The petitioner has pointed out that in the past the Commission had been allowing capitalisation of IDC under similar circumstances and on account of denial of its claim, the interest paid during the period of construction would remain un-serviced, resulting in perpetual loss. The petitioner has also submitted that it had actually incurred expenses towards IDC and the same ought to be considered as part of the capital cost for the purpose of tariff. The petitioner further emphasizsed that IDC in respect of loan applied to the works executed under R & M forms part of the capital cost and added that the account rules also permitted capitalisation of IDC.*
>
> *7. Learned Counsel for the Respondent No. 2, Bihar State Electricity Board, submitted that the petitioner was not*

entitled to the claim for capitalization of IDC as the Commission in its order dated 22.7.2008 had given sufficient reasons for rejection of the claim. Learned Counsel also pointed out that the petitioner has failed to point to any provision of the tariff regulation supporting capitalisation of IDC and therefore, no relief could be granted……………………. Learned counsel reiterated that the claim of the petitioner deserved no consideration and prayed that the application be rejected.

8……………….

9……………….

10. It is observed that capitalization of expenditure reflected in the books of accounts of the petitioner in respect of the works in progress contains the elements of IDC. We are convinced that by not allowing IDC on works in respect of which additional capitalization has been incurred, the component of interest incurred by the petitioner would remain un-serviced. The information sought for by the Commission as to the amount of IDC along with CWIP

changes on year to year basis was to ensure that the total interest capitalised and charged to revenue does not exceed the amount payable by the petitioner. In the light of the above discussions, we allow the capitalisation of Rs. 23.09 lakhs as IDC, during the year 2005-06.

31. So, in view of the above order which has modified the earlier order dated 22.7.2008, the contention of GRIDCO that there is no provision for inclusion of IDC on the additional capital expenditure in the Tariff Regulations 2004 is without any merit. The GRIDCO has alleged that NTPC is deriving double benefit namely servicing of capital asset as well as interest during construction for the same expenditure. This is not factually correct. The NTPC has claimed interest during construction till the time the capital assets are into use and capitalisation occurs. The NTPC is entitled to service the capital only after capitalisation. It is clear that as per the Tariff Regulations both are admissible at different periods. The NTPC has not claimed for both the periods as alleged by the GRIDCO. Therefore, the NTPC is entitled to the IDC as

allowed by this Tribunal in the 2 judgments referred to above to the extent of repayment of loan from internal resources of NTPC or deemed loan without interfering with Commission's decision not to follow FIFO Method. Accordingly, the same is allowed.

32. The next issue is regarding the capitalization of certain Renovation & Modernization works. In the impugned order, the Central Commission has disallowed an amount of Rs. 26.16 lakhs incurred by the Appellant for various R&M works along with the capitalization of Revenue and Modernization works on the reasons that the Appellant has booked the same under Profit & Loss Accounts. According to the Learned Counsel for the Appellant, these expenses have been incurred towards construction of concrete road, air circuit breakers, which are part of the R&M work; these are booked to the Profit & Loss Accounts/Revenue and not capitalised due to the requirement of Accounting Standards, but the Central Commission has failed to appreciate that the expenses of R&M are of a capital nature; and the same are to be included in the capital asset for tariff determination,

notwithstanding accounting standards, providing for the inclusion of the same in Profit & Loss Accounts.

33. On the other hand, Learned Counsel for the Respondent stated that the Tariff Policy framed by the Union Government distinguishes between the R&M expenses of capital nature and the Operation & Maintenance expenses of revenue nature; while the former is about achieving higher efficiency levels, the latter only related to maintaining earlier performance. Talchar Thermal Power Station was operating in the ceiling norms and the Appellant did not agree for approved norm of operations as per provisions of Regulation 3 of the Tariff Regulation 2004; and therefore, the question of sustenance of high level of performance does not arise in the present case. In brief, according to the Respondent, the claim of the Appellant with regard to R&M work is for getting double benefit.

34. Let us now look into the details of the claims made by the Appellant before the Central Commission.

" **<u>Capitalization of certain R&M works:</u>**

" 14. *It is submitted that due to the requirement of* ***accounting stgandard & guidelines****, some portion of such R&M expenditure need to be booked to Profit & Loss Account as a charge to Revenue and not being capitalized. Accordingly during the years 2005-06 and 2006-07, expenditure of Rs.19,86,416/- and Rs. 6,50,402/- respectively against approved R&M Scheme of the station has been charged to Revenue. The details of such expenditure is enclosed at Annexure-7 (S.No. 53) & Annexure-8 (Sl. No. 11 & 12) under nature of capitalization as 18(2)(i). The petitioner has included the same in the additional capital expenditure claim of respective years and the Commission may be pleased to allow the same.*"

35. While dealing with this claim, the Central Commission excluded the capitalization of sundry items not of capital nature

observing that the same cannot be considered for capitalization as per the consistent policy of the Central Commission. The relevant portion of the impugned order is reproduced below:

> "24. *The petitioner has claimed additional capital expenditure of Rs. 26.16 lakhs for the years 2005-06 and 2006-07 which pertains to various R&M works like construction of concrete roads and expenditure on air circuit breakers. The petitioner has submitted that due to requirement of accounting standards, some portion of the R&M expenditure was booked to Profit & Loss Account and charged to revenue and was not capitalized. After verification, it is observed that the expenditure relates to the R&M scheme approved by the CEA. In our view, capitalization of expenditure forming part of the R&M work, but not of capital nature cannot be considered for capitalization. This is the consistent view of the Commission. In view of this, the claim of capitalization of an amount of Rs. 26.16 alkhs is not admitted.*"

36. It is true that there is no definition relating to the distinction between the capital and revenue expenditure. However, the Tariff Policy framed by the Union Government, under section 3(1) of the Electricity Act, notified through the Resolution dated 06.01.2006 of the Central Government, gives a fair idea of capital and revenue expenditure. The relevant portion of the Tariff Policy [5.3(g)] related to R&M is given below:

"**g) Renovation and Modernization:**

"Renovation and Modernization (it shall not include periodic overhauls) for higher efficiency levels needs to be encouraged. A multi-year tariff (MYT) framework may be prescribed which should also cover capital investments necessary for renovation and modernization and an incentive framework to share the benefits of efficiency improvements between the utilities and the beneficiaries with reference to revised and specific performance norms to be fixed by the Appropriate Commission. Appropriate capital costs required for pre-determined efficiency gains and/or for sustenance of high level performance would need to be assessed by he Appropriate Commission."

37. The perusal of the section 5.3(g) of the Tariff Policy referred to above, would reveal that the Tariff Policy distinguishes between the R&M expenses of the capital nature and the Operation & Maintenance expenses of revenue nature. If the expenditure incurred brings about a higher efficiency level in the performance and/or for sustenance of high level performance of the power station, then the expenditure is of capital nature. NTPC has not been able to establish that the expenditure claimed by them is of capital nature required for improving the efficiency or for sustenance of high level of performance. It is also not disputed that this expenditure on concrete road and air circuit breaker has been booked to the revenue account of the power station and not capitalised. The argument for maintaining high level of performance will also not hold good as the power station had relaxed operating norms. It is pointed out by the Learned Counsel for the Respondent – GRIDCO that in spite of the request made by the GRIDCO, Talchar Thermal Power Station was operating at the ceiling norms and the Appellant did not agree for improved norms

of operations as per provisions of Regulation 3 of Tariff Regulations, 2004. According to the GRIDCO, the Talchar Thermal Power Station is already getting relaxed Operation & Maintenance norms in comparison to the other generating stations. It is pointed out by the Learned Counsel for the Respondent that the Talchar Thermal Power Station was permitted an Operation & Maintenance expenditure of Rs. 8,700 lakhs under the impugned order. This works out to Rs. 8,700/460 = Rs. 18.91 lakhs/MW. As against this amount, the O&M expenses of 210 MW set is Rs. 10.4 lakh/MW. Thus the O&M expenses to this power station 18.91lakhs/10.4 lakhs = 1.82 times higher than the 210 MW/set.

38. In the light of the above factual position, we are of the view that the finding rendered by the Central Commission rejecting the claim for capitalisation of R&M expenditure forming part of the R&M work but booked to revenue account is perfectly justified. Therefore, we confirm the said finding and reject the claim of the Appellant over this issue.

39. The next issue relates to the reduced rate of interest on loan. On this issue, the contention of the Appellant is that the Appellant claimed interest on loan as per Tariff Regulations as well as MoU dated 11.10.1994 and the PPA dated 08.03.1995, @ 14%, but despite the same, the said claim has been disallowed.

40. Justifying the rejection of the said claim, the Learned Counsel for the Respondent contends that, the Central Commission already decided as against the similar claim in Petition No. 62 of 2000 dated 19.06.2002 and in the absence of challenge of the said order, the said point cannot be reopened now.

41. The claim of the Appellant over the interest on loan is based upon the Regulations and the two documents namely MoU and the PPA.The Appellant had sought interest on loan as per Tariff Regulations 2004. These Regulations provide that interest on loan capital shall be computed loan-wise, on the loan arrived at, in the manner indicated in Regulation 20. The loan in the case of Talchar Thermal Power Station, as at the beginning of the Tariff year

2004-2009 included the notional loan arising out of the amount contributed by the NTPC through internal accruals which is essentially to be treated as equity. In view of the normative Debt Equity Ratio of 50:50, the amount so contributed in excess of 50% of the capital cost was treated as notional loan.

42. According to the Appellant, as per MoU dated 11.10.1994 and the PPA dated 08.03.1995 signed between the Appellant and the Orissa State Electricity Board, the predecessor of the Appellant and the Government of Orissa providing for interest on loan to be calculated at 14%. The relevant clause of the MoU is as follows:

> "***Clause 2.8 of MoU***
>
> *"iv) The total value of assets of Rs. 356 crores taken for the purpose of tariff fixation shall be divided into debt and equity on normative basis in the ratio of 1:1. Similar dispensation will be applicable in case of future investments made on renovation and modernization and other capital works as and when these are incurred.*

(v) There will be 16% rate of return on equity as arrived on the basis of above debt equity ratio.

(vi) Interest on the portion of loan for this purpose shall be charged @ 14%"

43. The above clause 2.8 would clearly provide that interest on loan shall be charged @ 14%. The clause 6.1 of the PPA is as follows:

Clause 6.1 of PPA

"6.1 *The following stipulations are to be taken into account while working out the tariff of TTPS:-*

…………

(h) ***Interest on the portion of loan for this purpose will be charged @ 14%"***

44. According to the Learned Counsel for the Respondent the finding to this effect given by the Central Commission in the order dated 19.06.2002 in Petition No. 62 of 2000 is that the PPA dated 08.03.1995 has already expired on 02.06.2000 and that therefore,

the parties cannot be bound by the PPA. It is also pointed out that the said order dated 19.06.2002 has not been challenged.

45. The Tripartite Power Purchase Agreement dated 08.03.1995 entered into between NTPC, Orissa State Electricity Board and Government of Orissa for purchase of electricity by Orissa State Electricity Board from Talcher Thermal Power Station was valid for a period of 5 years from the date of take over i.e. 03.06. 1995. Thus the agreement expired on 02.06.2000. Further the Power Purchase Agreement ceases to be operative from the date on which the Tariff Regulations, 2001 of the Central Commission became effective. In this regard this Tribunal in order dated 26.03.2009 in Appeal No. 103 of 2008 with respect to Tanda Thermal Power Station of NTPC has held as under:

> *" 30. Appellant contends that the rate of interest of 14.5% ought not to have been disallowed for the periods mentioned in (b) and (c) above. It is to be noted, however, that the circular of Government of India dated 30.03.1992 mentioned in clause 5.1(v) of the PPA ceases to be operative from the date on which the Tariff Regulations, 2001 become*

effective as the interest rate in accordance with Regulation 2.7(a) allowing weighted average rate of interests on actual loans will become effective. Admittedly, the acquisition of Tanda TPS was not financed by any borrowed capital but as an adjustment of the outstanding dues payable by UPPCL to NTPC. The cost of raising the loan capital in 70:30 debt-equity ratio would be governed by the prevailing interest rate in the market during the period.

31. *The Respondent No. 2, UPPCL supporting the decision of the Central Commission on this issue has submitted that the methodology followed in this case was also applied by the Central Commission for determining tariff in respect of Sigrauli Super Thermal Station (STPS) and Vindyachal STPS for the period 2001-04. It has further submitted that the Appellant, NTPC should not be allowed to raise this issue in the present case as it has not challenged the rate of interest in the aforesaid tariff petition.*

32. *In view of the above, we find that the methodology adopted by the Central Commission in calculation of interest on notional loan is reasonable and justified and the appeal on this issue is liable to be rejected".*

46. Learned counsel for the Appellant has argued that the above decision is not applicable to Talcher Thermal Power Station. While in the case of Tanda, there was no express provision in Power Purchase Agreement between NTPC and the beneficiary, in the present case Memorandum of Understanding and Power Purchase Agreement existed.

47. This argument of Learned Counsel of the Appellant is not tenable as after the notification of the Tariff Regulations of the Commission, the same will prevail over the PPA. Moreover, in this case the Agreement has already expired in June, 2000.

48. The Tariff Regulations, 2004 of CERC provide for interest on loan to be computed loan wise on the normative loan. Accordingly, the Commission has determined the weighted average rate of interest based on actual loans taken by NTPC and applied the same on the tariff of Talcher in the impugned order. Thus the Commission has determined the interest on loan as per the prevailing Regulations.

49. In the light of above we up hold Commission's finding of determination of loan as per the Regulations.

50. The next issue is with reference to incorrect amount of balance depreciable value of capital asset. According to the Appellant, the Central Commission has made a wrong calculation under the head "Depreciation". As per the calculation of the Central Commission, the amount of cumulative depreciation recovered as on 31.03.2004 is Rs. 24,631 lakhs. According to the Appellant, this is wrong because the actual recovered amount is Rs. 23,361 lakhs. If the amount of Rs. 23,361 lakhs is taken as a cumulative depreciation, the balance depreciation value as on 31.03.2004 should be Rs. 40,839 lakhs but the Central Commission wrongly calculated the same as Rs. 39,569 lakhs. The grievance of the Appellant is that the Central Commission erred in calculating the balance depreciable value of Rs. 40,839 lakhs without considering that NTPC had not recovered the depreciation in regard to some of the units at Talchar which were undergoing Renovation and Modernization during the period 2001-04. .

51. On the other hand, it is contended by the Learned Counsel for the Respondent that the cumulative depreciation of Rs. 24,631 lakhs recovered as on 31.03.2004 was approved by the Central Commission while approving the tariff in respect of Talchar Thermal Power Station for the period 01.04.2004 to 31.03.2009 in its order dated 23.03.2007 and since the said order has not been challenged, the present claim of the Appellant raising the very same issue is without any legal basis.

52. The Central Commission in the impugned order has given the calculation under the head "Depreciation", which is given below:

(Rs. In lakhs)

	Upto 31.03. 2004	2004-05	2005-06	2006-07	2007-08	2008-09
Opening capital cost		69601.00	74757.54	76020.41	76759.49	76759.49
Closing capital cost		74757.64	76020.41	77498.57	76759.49	76759.49
Average capital cost		72179.32	75389.03	76759.49	76759.49	76759.49
Depreciable Value @ 90%	62,641	64961	67850	69084	69749	69749
Balance Depreciable Value	39569	41890	42503	40450	37801	34314
Depreciation		**3248**	**3393**	**3454**	**3487**	**3487**

53. According to the Appellant, it has not recovered the depreciation in respect of relatable fixed charges during the period 2001-2004 as the plants were undergoing R&M. Relatable fixed charges are the fixed charges not recoverable by the Appellant with respect of the units under R&M. Since the Appellant did not recover the entire fixed charges during this period, it also did not recover the depreciation corresponding to the same relatable fixed charges. As mentioned above, the amount of cumulative depreciation recovered as on 31.03.2004 is only Rs. 23,361 lakhs and not Rs. 24,631 lakhs. The Central Commission has taken into account Rs. 24,631 lakhs and wrongly calculated the balance depreciable value as Rs. 39,569 lakhs. If the amount of Rs. 23,361 lakhs is taken as the cumulative depreciation recovered, the balance depreciable value as on 31.3.2004 should be Rs. 40,839 lakhs and not Rs. 39,569 lakhs as calculated by the Central Commission. According to the Appellant, the Central Commission has wrongly calculated the depreciable value of 90% of capital assets and mentioned as Rs. 62,641 lakhs and the balance

depreciable value as Rs. 39,569 lakhs by not excluding the depreciation in regard to the plants which were undergoing R&M.

54. It is contended by the Learned Counsel for the Respondent that the Central Commission has already determined the cumulative depreciation recovered on 31.03.2004 as Rs. 24631 lakhs in the order dated 23.03.2007 and the same has never been challenged.

55. It was argued by the Learned Counsel for the Appellant that there was no reason for the Appellant to challenge the above figure as it is admitted case of Appellant that because certain units of Talchar Thermal Power Station were not in operation, the Appellant could not recover the depreciation component to the full extent and consequently the amount of cumulative depreciation recovered by the Appellant as on 31.03.2004 was only Rs. 23,361 lakhs and not Rs. 24,631 lakhs. If Rs. 23,361 lakhs is taken as cumulative depreciation as recovered, the balance depreciable value at the end of 31.03.2004 or at the beginning of the tariff

period 2004-05 should be Rs. 40,839 lakhs and not Rs. 39,569 lakhs calculated by the Central Commission.

56. In the Commission's order dated 23.03.2007 approving the tariff of Talcher Thermal Power Station for the period from 01.04.2004 to 31.03.2009, the Commission has held the cumulative depreciation and Advance Against Depreciation recovered in tariff up to 31.03.2004 as Rs. 24,631 lakhs including depreciation on additional capitalization on works as admitted by the Commission in its order dated 25.09.2006 in Petition No. 35 of 2004.

57. In the Petition filed by the Appellant before the Commission in Petition No. 31 of 2008 for additional capital expenditure, the Appellant has not made any pleading for correction of Balance Depreciable Value as on 31.3.2004 on account of outage of Units for Renovation and Modernization during the period 2001-04. Accordingly, in the impugned order dated 03.02.2009 the Commission has adopted the same value of Rs. 39569 lakhs as

Balance Depreciable Value based on the cumulative depreciation allowed up to 31.03.2004 as per the previous tariff orders. The issue regarding non-recovery of relatable fixed charges not recovered by the Appellant NTPC with respect of units undergoing Renovation and Modernisation has not been discussed in the impugned order. No evidence has been produced by the Appellant in regard to any submissions made by the Appellant before the Commission in this regard. Thus this issue has not been raised before the Commission even though the R&M of the units had been carried out during the period 2001-04, much before the petition was filed.

58. In view of above facts, we are not interfering with the figures of Balance Depreciable Value adopted by the Commission in the impugned order as the same was not an issue raised by the Appellant/Petitioner before the Commission in their petition for approval of revised fixed charges for 2004-09.

The summary of our findings on each of the issues is described below:

(i) The Regulation 21(i)(g) of the Tariff Regulations 2004, pointed out by the Learned Counsel for the Respondent, has no application in the case of 'Undischarged Liability'. Regulations 17 and 18 would be applicable to the issue raised. In Regulation 17, it has been stated that the actual capital expenditure incurred on completion of project shall form basis for determination of tariff and in Regulation 18 it is stated that actual expenditure incurred after the date of commercial operation up to the cut off date has to be taken into account. Hence, notwithstanding that some payments may have been deferred under the terms of the contract in respect of assets which are already put to use and when there is a committed liability to make such payments, such a deferred payment shall be taken into account for the purpose of the capital cost. In other words, the

accrued liability shall form part of the capital asset notwithstanding the actual cash payment is made at a later date. Therefore, this point has been correctly decided by the Tribunal in the earlier decisions in 2000 ELR (APTEL) 916 and 2009 ELR (APTEL) 337. Therefore, it requires no reconsideration.

(ii) The contention of the Respondent/GRIDCO that there is no provision for inclusion of interest during construction on the additional capital expenditure in the Tariff Regulations 2004 and as such the Appellant is deriving double benefit namely servicing of capital asset as well as Interest During Construction for the same expenditure, is not correct and the same is without any basis. The Appellant has claimed Interest During Construction till the time capital assets are put to use and capitalization occurs. The Appellant is entitled to service the capital only after capitalization. The Appellant has not claimed for both the periods as

alleged by the Respondent/GRIDCO. Therefore, the NTPC is entitled to Interest During Construction on repayment of loan for internal resources or deemed loan. However, we are not interfering with Commission's decision not to follow FIFO method. This point has been decided by the Tribunal in the earlier judgments reported in 2008 ELR (APTEL) 916 and 2009 ELR (APTEL) 337. In view of the same, this point also requires no reconsideration.

(iii) The Tariff Policy framed by the Union Government distinguishes between the Renovation and Modernization expenses of capital nature and the Operation and Maintenance expenses of revenue nature. If the expenditure incurred brings about a higher efficiency level in the performance and/or for sustenance of higher level of performance of the power station, then the expenditure is of capital nature. According to the Respondent/GRIDCO, the Respondent made

several requests to the Appellant to adopt the improved norms of operations as per provisions of Regulation 3 of the Tariff Regulations 2004 but the Appellant did not agree for the same and it was operating at the ceiling norms. The Talchar Thermal Power Station is already getting relaxed O&M expenditure in comparison to the other generating stations. Actually the Appellant was permitted O&M expenses of Rs. 18.91 lakhs/MW as against 10.4 lakh/MW for 210 MW set. The Appellant has also booked the expenses under the revenue expenses and has not been able to establish that the expenditure claimed is of capital nature required for improving the efficiency or for sustenance of high level of performance. Therefore, we are of the view that the Central Commission has rightly rejected the claim of the Appellant of Rs. 26.16 lakhs for capitalization of R&M expenses which are not of capital nature.

(iv) The Appellant claimed interest on loan as per Tariff Regulations as well as MoU dated 11.10.1994 and the PPA dated 08.03.1995 @ 14%. This claim has not been accepted by the Central Commission and the Commission has determined the interest rate as per the Regulations. The Regulations provide that the interest on loan capital shall be computed loan-wise, on the loan arrived at in the manner indicated in Regulation 20. The loan in the case of the Appellant as at the beginning of the tariff year 2004-09 included the notional loan arising out of the amount contributed by the Appellant through its internal accruals. In view of the Debt Equity Ratio of 50:50, the amount so contributed in excess of 50% of the capital cost was treated as notional loan. Both MoU dated 11.10.1994 and the PPA dated 08.03.1995 signed by both the parties show that both parties agreed to pay the interest on loan to be calculated at 14%.Accordingly the Appellant has claimed interest at

rate of 14%. However, the Agreement between the parties was valid for a period of 5 years. After the notification of the Tariff Regulations the same will prevail over the PPA. Moreover, the Agreement has also expired in June, 2000. The Commission has determined the interest rate based on weightage average rate of actual loans taken by NTPC as per the prevailing Regulations. Thus we up hold the view of the Commission in respect of interest on loan.

v) The Appellant has claimed that the Commission has wrongly calculated the Balance Depreciable Value on 31.03.2004 as Rs. 39569 lakh. According to the Commission the cumulative depreciation recovered as on 31.3.2004 is Rs. 24631 lakhs. According to the Appellant the actual cumulative depreciation is Rs. 23,361 lakhs and if this figure is taken as the cumulative depreciation, the Balance Depreciable Value as on 31.3.2004 should be Rs. 40839 lakhs. However, the Commission in its tariff

order dated 23.3.2007 has taken the cumulative depreciation as on 31..3.2004 as Rs. 24631 lakhs as admitted by the Commission in its order dated 25.9.2006 in Petition No. 35 of 2004. In the Petition No. 31 of 2008 filed by the Appellant/Petitioner before the Commission for determination of additional capital expenditure for the period 2004-09 the Appellant/Petitioner has not made any plea with regard to Balance Depreciable Value as on 31.3.2004 to be corrected on account of depreciation not claimed on some units of Talcher during period of their outage for renovation and modernization during 2001-04. Accordingly the Commission has not given any finding on this account and has adopted the same value of Balance Depreciable Value as taken in the tariff order dated 23.3.2007 for the period 2004-09. Hence, we can not give a finding on this issue which has not been raised before the

Commission in the petition relating to impugned order and has been decided in the earlier orders.

59. In view of the above findings, our conclusions are that the Appellant is entitled to the reliefs in respect of the claims on issues namely (a) un-discharged liability incurred in relation to capital assets commissioned; & (b) disallowance of interest during construction and they are not entitled to the reliefs in respect of the claims on issues namely (c) capitalisation of certain renovation and modernization works (d) reduced rate of interest on loan and (e) incorrect amount of balance depreciable value of capital cost. Accordingly, the Central Commission is directed to implement our findings on the issues decided in favour of the Appellant as indicated above as expeditiously as possible.

60. The Appeal is partly allowed. No costs.

(RAKESH NATH) **TECHNICAL MEMBER**	**(JUSTICE M. KARPAGA VINAYAGAM)** **CHAIRPERSON**

REPORTABLE/NON-REPORTABLE

DATED: 27TH JULY, 2010