

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

Appeal No. 92 of 2010

Dated: 04nd February, 2011

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

In the matter of:

**NTPC Limited
NTPC Bhawan, SCOPE Complex
7, Institutional Area, Lodhi Road
New Delhi-110 001.**

... Appellant(s)

VERSUS

- 1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building
36, Janpath
New Delhi - 110001**
- 2. APPCC (Commercial)
Transmission Corporation of Andhra Pradesh Ltd.
(APTRANSCO)
Vidyut Soudha, Khairatabad
Hyderabad- 500082**

- 3. AP Eastern Power Distribution Company Ltd.
(APEDCL)
Sai Shakthi Bhavan
30-14-09, Near Saraswathi Park
Visakhapatnam – 531020**
- 4. AP Southern Power Distribution Company Ltd.
(APSPDCL)
H. No. 193-93 (M) Upstairs
Renigunta Road,
Tirupathi – 517 501 (AP)**
- 5. AP Northern Power Distribution Company Ltd.
(APNPDCL)
Opp: NIT Petrol Pump, Chaitanyapuri,
Warangal – 506 004. (AP)**
- 6. AP Central Power Distribution Company Ltd.
(APCPDCL), Singareni Bhavan
Red Hills, Hyderabad – 500 004 (AP)**
- 7. Tamil Nadu Electricity Board (TNEB)
800, Anna Salai
Chennai – 600 002.**
- 8. Karnataka Power Transmission Corporation Ltd.
(KPTCL), Kaveri Bhawan, K.G. Road
Bangalore – 560 009.**
- 9. Bangalore Electricity supply Company Ltd.
(BESCOM), Krishna Rajendra Circle
Bangalore – 560 009.**

- 10. Mangalore Electricity Supply Company
(MESCOM), Paradigm Plaza,
A.B. Shetty Circle
Mangalore – 575 001.**
- 11. Chamundeshwari Electricity Supply Corpn. Ltd.
(CESC Mysore), 927, L.J. Avenue,
New Kantharajours Road
Saraswathi Puram
Mysore – 570 009.**
- 12. Gulbarga Electricity Supply Company Ltd. (GESCOM)
Main Road, Gulbarga, Karnataka
Gulbarga – 585 102.**
- 13. Hubli Electricity Supply Company Ltd.
P.B. Road, Nava Nagar Hubli,
Karnataka-580 025.**
- 14. Kerala State Electricity Board (KSEB)
Vaidyuthi Bhavanam, Pattom
Thiruvananthapuram – 695 004.15.**
- 15. Electricity Department (PUDUCHERRY)
58, NSC Bose Salai
Puducherry – 605 001.**
- 16. Chairman & Managing Director
GRIDC, Janpath
Bhubaneswar – 751 022. ... Respondents**

Counsel for Appellant(s): Mr. M.G. Ramachandran
Ms. Swapna Seshadri
Ms Ranjitha Ramachandran
Ms Mr. Anand K. Ganesan
Ms Sneha

Counsel for the Respondent(s): Mr. M.A. Chinnasamy
Mr. Krishna Kumar for R-7
Mr. Jaideep Gupta Sr.Advocate
Mr. Nikhil Nayyar &
Mr. Swapnil Verma for R-1

JUDGMENT

PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

NTPC Limited is the Appellant herein. As against the impugned order passed by the Central Commission, whereby the Central Commission has determined the admissibility of additional capital expenditure incurred by the Appellant during the period 2008-09, the Appellant has filed this Appeal. The short facts are as follows:

2. The Appellant NTPC being a Central Government Enterprise is engaged in the business of generation and sale of electricity to various purchasers in India.

3. NTPC at present owns and operates 22 Generating Stations situated in different parts of India. One of the Generating Stations of the Appellant is the Talcher Station-II, located in the State of Orissa.

4. Central Commission determined the Tariff for the Talcher Station-II for the operation period, namely, 1.4.2004 to 31.3.2009 by the order dated 31.1.2008. Since the Central Commission did not allow some of the claims of the NTPC, NTPC filed an Appeal in Appeal No.66 of 2008 before this Tribunal.

5. On 7.7.2009, NTPC filed the Petition No.138/2009 for revision of tariff (fixed charges) based on the additional

capital expenditure incurred by the Appellant during the period 2008-09. However, the Central Commission by the impugned order dated 19.2.2010 disallowed the various claims made by the Appellant even though the Tribunal held earlier that the Appellant is entitled to those claims. Aggrieved over the said order, the Appellant has filed the present Appeal.

6. The Appellant in this Appeal has raised the following issues:

- (i) Un-discharged Liability;
- (ii) Treating Depreciation as Normative Loan Repayment;
- (iii) Disallowance of cost of maintenance spares on additional capitalization;
- (iv) Disallowance of Interest during Construction;
- (v) Disallowance of Cost of Capitalized Spares by applying the principle of cut-off date;
- (vi) De-capitalization of capital spares.

7. The learned Counsel for the Appellant has made elaborate submissions on these issues. They are as follows:

(A)The first issue is Un-discharged Liability. According to the Appellant, the Central Commission has disallowed capitalization of Un-discharged Liability, i.e. exclusion of part of the Capital Expenditure validly incurred, pending actual disbursement from the Capital Cost for the purpose of Tariff in spite of the fact that the Tribunal in various Judgments allowed the claim for Un-discharged Liability. The Appellant has cited the following Judgments:

2009 ELR (APTEL) 337 – NTPC Vs. CERC & Ors.

2008 ELR (APTEL) 916 – NTPC Vs. CERC & Ors.

The perusal of these decisions would reveal that this issue had been dealt with in detail by this Tribunal which held in favour of the NTPC on this issue. The

learned Senior counsel for the Central Commission has submitted that the Central Commission has followed the said finding and implemented these judgments through the impugned order by truing up the Additional Capital Expenditure at the end of the Tariff Period. It is true that the Central Commission allowed the said claim in the body of the impugned order. But as pointed out on behalf of the Appellant, the Central Commission has actually disallowed the claim towards the Un-discharged Liability to the tune of Rs.1275.17 lakhs while making the calculation referred to in the Table. Thus, the impugned order has not implemented the finding of the Tribunal with regard to the claim for Un-discharged Liability. Therefore, on this issue, we deem it fit to remand the matter to the Central Commission with a direction to the Central Commission to

correct the Table and allow the claim of the NTPC with regard to this claim. It is accordingly ordered.

(B) The next issue is relating to equating Depreciation against the Normative Loan Repayment. According to the Appellant, the Central Commission has wrongly continued to adjust the Depreciation against the Normative Loan Repayment despite the dictum laid down within the judgment of this Tribunal as well as the judgments of Hon'ble Supreme Court. The relevant portion of the judgment of the Tribunal is as follows:

1st decision by the Tribunal is:

(i) 2009 ELR (APTEL 337 – NTPC Vs. Central Commission & Ors. The observation is as under:

“”b. The Central Commission cannot treat depreciation as the deemed repayment of loan, where the depreciation is higher than the

normative repayment of loan. The depreciation amount, unlike advance against depreciation has to be allowed regardless of the fact whether there is any liability to make the repayment of the loan or not. The depreciation is admissible notwithstanding any loan is taken or otherwise.”

(ii) Next is the judgment in Appeal No.139-140 of 2006 dated 13.6.2007 rendered by this Tribunal. The relevant portion is as follows:

“It is well established that the depreciation is an expense and therefore, it cannot be deployed for deemed repayment of loan. In this view of the matter, the CERC shall need to make a fresh computation of outstanding loan in the light of the aforesaid observations.”

(iii) The other judgment is by the Hon'ble Supreme Court in 2007 (3) SCC 33 – Delhi Electricity Regulatory Commission Vs. BSES Yamuna Power Limited. The relevant portion in the above judgment is reproduced as under:

“40. For the following reasons, there is no merit in this civil appeal. Firstly, accounting for costs differs according to the object and the purpose for which the exercise is undertaken. Depreciation is Allocation of Costs so as to charge a fair proportion of the depreciable amount in each accounting period during the expected useful life of the asset(s). Depreciation includes amortization of assets whose useful life is pre-determined. It includes depletion of resources through the process of use. Depreciation in Commercial Accounting differs from depreciation in Tax Accounting.

In this case, we are concerned with Electricity Accounting. An asset is recognized in the Balance Sheet when one expects economic benefits associated with it to flow in future over a period of years. Accordingly, the asset has a cost or value that can be measured. Matching of revenue and expenses is an important exercise under Accounting. Depreciation is a part of this exercise.

The Allocated Cost of a given year has to match with the expected revenue for that year. The concept of matching is a concept according to which expenses are recognized in the Statement of Profit and Loss on the basis of direct connection between the costs incurred and the earning of specific items of income. Depreciation helps this concept of matching. The Full Cost Method ('FCM' for short) is a method of matching income (revenue) and expenses. This method proceeds on the

basis that a proper matching of income and expenses can take place only if total costs are depreciated on a pro rata basis. The FCM, therefore, avoids distortion of reported earnings.

It is in this context that one has to keep in mind the difference between distributable profits and the cash profits. Depreciation reduces the distributable profit without reducing the cash profit. The difference between the two is a sum which the company has to retain to meet the cost of replacement in future. We may clarify that depreciation is ordinarily not a "source of fund" under Commercial Accounting. Since the charge is recoverable from the consumers, depreciation is a source of funding not for the current year but for the replacement cost.

Before concluding, we may state that the basic object of providing depreciation is to allocate the amount of

depreciation of an asset over its useful life and not actual life so as to exhibit a true and fair view of the financial statements of an enterprise. Useful life is a period over which a depreciable asset is expected to be used. Useful life of an asset in a capital intensive industry is generally shorter than its physical life.

Useful life is pre-determined by contractual limits or by amount of extraction or consumption dependent on the extent of use and physical deterioration on account of wear and tear which depends on operational factors such as the number of shifts, repair and maintenance policy of the Utility and reduced by obsolescence arising from technological changes, improvement in production methods etc.

In the present case, DERC has not considered the difference between the physical life of an asset and the useful life of the asset.”

In view of the ratio referred to above, decided by this Tribunal and the Hon'ble Supreme Court, the claim of the Appellant on this issue has to be held as legally valid.

It submitted by the learned senior counsel for the Central Commission that the judgment rendered by this Tribunal, referred to above, had been appealed before the Hon'ble Supreme Court and the same is pending. In our view, the pendency of the Appeal before the Supreme Court is not a ground to ignore the orders of this Tribunal. As a matter of fact, the Hon'ble Supreme Court also in 2007 (3) SCC 33 has decided the issue of depreciation as mentioned above. Hence, this point is also answered in favour of the Appellant.

(C) The 3rd issue is relating to the Disallowance of the cost of maintenance spares. According to the Appellant, this issue is also covered in favour of the Appellant in the judgments, referred to hereunder:

The relevant observations in the judgment dated 21.8.2009 in Appeals Nos.54 and 74 of 2009 – NTPC Vs. Central Commission & ors. – 2009 ELR (APTEL) 705 are as follows:

“6. The second point relates to the disallowance of cost of Maintenance Spares. According to the Learned Counsel for the Appellant, the Central Commission has not allowed the additional capital cost in regard to the maintenance spares corresponding to the additional capitalization while computing the historical capital cost.

It is strenuously contended by the Learned Counsel for the Appellant that the Central Commission has permitted the cost of spares as per the capital cost frozen on the date of commercial operation without considering the additional capitalization undertaken from the date of the commercial operation as allowable under the Tariff Regulations 2004.

It is further pointed out that this point also has been covered in the Judgment in Appeal No. 139 of 2006 dated 13.6.2007.

In this Judgment, it has been held that the cost of maintenance spares needs to be calculated on the total capital cost inclusive of additional capitalization. The relevant portion of the Judgment is as follows:

.....

Therefore, it has to be held that the Appellant is entitled to include the cost of maintenance spares also into capital cost.”

“11. In regard to the point (d) relating to disallowance of cost of maintenance spares, it is noticed that the Central Commission has permitted the cost of spares as per the capital cost frozen on the date of commercial operation without considering the additional capitalization undertaken from the date of the commercial operation as allowable under the Tariff Regulations, 2004.

There is no dispute in the fact that it has been held in the Judgment in Appeal No. 139 of 2006 dated 13.6.2007 that the cost of maintenance spares needs to be calculated on the total capital cost inclusive of the additional capitalization.”

This is reiterated in another decision reported in 2009 ELR (APTEL) 710(NTPC VS CERC & Ors). In view of the dictum laid down by this Tribunal in the above judgments, this point is also answered in favour of the Appellant. Consequently, the Appellant is entitled to claim for the cost of maintenance spares by adding it into the capital cost.

(D) The 4th issue is disallowance of interest during construction. According to the Appellant, this issue also had been decided by the Tribunal in favour of the Appellant in the following decisions:

(i) 2009 ELR (APTEL) 337 – NTPC Vs. CERC Appeal Nos.133-135 and (ii) 2008 ELR (APTEL) 916 – NTPC Vs. CERC & ors. The relevant observation in Appeals No.151 and 152 are as under:

- (i) *“c. 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 claim deemed interest on such loans during construction.”*
- (ii) *“24. We, therefore, find that the 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 loan from NTPC and interest during construction be allowed on such loans.”*

In view of the above finding arrived at by this Tribunal, the Central Commission is directed to consider the issue and order accordingly.

(E)The 5th issue is regarding the Disallowance of Cost of Capitalized Spares by applying the principle of cut-off date. Regarding this issue, it is contended by the learned Counsel for the Appellant that the Central Commission has disallowed the cost of capitalized spares applying the principle of cut-off date even though this is not present in the Tariff Regulation, 2004. Similar issue had been dealt with in the recent judgment of this Tribunal in Appeal No.66 of 2008 dated 18.8.2010 reported in 2010 ELR (APTEL) 1096 which is also related to additional capitalization of the initial spares for Talcher II. In this case the Tribunal noted that the items were mainly initial spares required for the power plant and in view of explanation offered by the Appellant, the Tribunal

was convinced that it was a fit case for consideration of the Commission to exercise its power to relax under the Regulations. Accordingly, this Tribunal remanded the matter back to the Central Commission to consider to extend the cut off date appropriately in exercise of its power to relax. The relevant portion of the judgment of this Tribunal in this decision is as under:

“45. We have examined the details of the items where the orders were placed after the cut off date submitted by the appellant. These are essentially the initial spares required for the power plant. In view of the explanation offered by the appellant we are convinced that it is a fit case for consideration of the Commission to exercise its power to relax under the Tariff Regulations, 2004.

Accordingly we remand this matter to the Commission to consider the request of the appellant to extend the cut off date appropriately in exercise of its power to relax.”

Learned Sr. Counsel for the Central Commission submitted that pursuant to the aforesaid observations, in the said decision the Central Commission has fixed hearing of the original petition with regard to cut off date. As the Central Commission is already examining the matter regarding additional capitalization of initial spares for the same power station in pursuance of the matter rendered by the Tribunal in Appeal No. 66 of 2008, it would be prudent that the capitalization of spares raised in this Appeal may also be considered by the Central Commission along with the matter remanded earlier. Accordingly the matter is remanded back to the Central Commission to consider the cost of

spares along with capitalization of initial spares for Talcher II earlier remanded to the Central Commission in the judgment referred to above.

(F) The 6th issue is regarding De-capitalization of capital spares. The Central Commission in the impugned order did not accept the prayer of the Appellant to ignore negative entries amounting to Rs.95.32 lakhs arising out of de-capitalization for the purpose of Tariff determination, when the new capitalization on the replacement thereof under this Head is not allowed for the Tariff period 2009-14.

According to the Appellant, the amount of Rs.95.32 lakhs during the year 2008-09, de-capitalized by the Appellant will remain un-serviced if the same is not allowed as an exclusion. It is further contended that the spares

have been de-capitalized for accounting purposes only and not for Tariff purposes.

The Central Commission's finding in the impugned order on the above issue is as under:

“ The prayer of the Petitioner for exclusion of de-capitalized spares is justified if these de-capitalized spares are the ones which were disallowed for the purpose of tariff during the previous tariff period or the replacement of de-capitalized spares/components(unservicable) are met from the spares disallowed for the purpose of tariff and which are booked to O&M on consumption. The petitioner vide its affidavit dated 18.12.2009 has submitted as under:

“ The above de-capitalized assets are capital spares which have been either allowed in tariff

earlier by Hon'ble Commission or are under consideration of Hon'ble Commission in Add.Cap. Petition No. 146/08 (for the period 2004-08)".

It is observed that certain spares claimed by the petitioner during 2007-08 in Petition No. 146/2008 have been disallowed by the Commission as the date of order for these spares was beyond the cut-off date. It is highly unlikely that these spares purchased during 2007-08 would become unserviceable during 2008-09. Hence it is concluded that all the spares amounting to Rs. 95.32 lakh de-capitalized during 2008-09 are a part of capital cost for the purpose of tariff and cannot be allowed to remain in the capital base on their becoming unserviceable. Hence exclusion of negative entry of Rs. 95.32 lakh is not allowed."

In the light of the clear reasonings given in the above observation contained in the impugned order we do not find any fault in the findings of the Central Commission in regard to de-capitalization of capital spares. If capitalization of some capital spares was not allowed in an earlier Petition by the Central Commission, it could not be argued that de-capitalization of some other spares should not be considered for the purpose of tariff to compensate for the capitalization of some spares disallowed earlier. Thus this issue is decided against the Appellant.

SUMMARY OF OUR FINDINGS:

8. (i) The Central Commission has disallowed the capitalization of Un-discharged Liability. This Tribunal in a number of cases held that the Appellant is entitled to claim for Un-discharged Liability. A perusal of those decisions would indicate that this Tribunal has given elaborate reasonings to hold that the Appellant is entitled to the said claim. Even in the present case, the Central Commission has followed the said judgment as referred to in the various paragraphs in the body of the judgment. But in the table giving particulars of calculations, the said claim was disallowed. Thus, there is a wrong calculation. Therefore, the Central Commission is directed to correct the table and allow the claim of the Appellant towards this claim of Un-discharged Liability.

(ii) The Central Commission in the present case has wrongly continued to adjust the depreciation against the normative loan repayment. As held by this Tribunal in various decided cases, the Central Commission cannot treat depreciation as the deemed repayment of loan where the depreciation is higher than the normative repayment of loan. Depreciation is an expense. The said amount, unlike the advance against depreciation, has to be allowed regardless of the fact whether there is any liability to make the repayment of loan or not. The depreciation is admissible notwithstanding any loan is taken or otherwise. Therefore, the claim by the Appellant on this issue is legally valid.

(iii) As regards the issue of disallowance of cost of maintenance spares, the issue has been decided in

favour of the Appellant in various cases by this Tribunal. The cost of maintenance spares needs to be calculated on the total capital cost inclusive of additional capitalization. Therefore, the Appellant is entitled to include the cost of maintenance spares into the capital cost.

(iv) In regard to disallowance of interest during construction, it has already been held in the earlier decisions that the 'First-In First-Out' method cannot be adopted and every deployment of internal resources of the Appellant which is in addition to the equity contribution should be considered as a deemed loan from the Appellant to the project. Also, repayment assumed for the Generating Station during the period prior to the date of commercial operation

be deemed as loan from the Appellant and interest during construction be allowed on such loan.

(v) In this case, the Central Commission has disallowed the cost of capitalization of spares applying the principle of cut-off date. The Central Commission is already considering similar matter of capitalization of initial spares after the cut off date in respect of Talcher II which was remanded by this Tribunal by its judgment dated 18.8.2010. Accordingly, this issue is also remanded back to the Central Commission to consider the cost of capitalization of spares which could not be capitalized up to the cut-off date by exercising the power to relax. Since in the present case also the matter relates to capitalization of spares this matter is also remanded back to the Central Commission to be considered along with the matter remanded earlier.

(vi) Regarding de-capitalization of spares we are not convinced with the argument of the Appellant to ignore negative entries amounting to Rs. 95.32 lakhs arising out of de-capitalization of spares for the purpose of tariff determination just because the Central Commission did not allow capitalization of spares it cannot be argued that the de-capitalization of some other spares should not be considered in tariff to compensate the same. Thus this issue is decided against the Appellant.

9. In light of our findings mentioned above, we conclude that the Appellant is entitled to the claims referred to above except the last issue regarding de-capitalization of capital spares. Accordingly, the Central Commission is directed to pass consequential order in terms of this judgment.

While implementing, the findings and directions of this Tribunal it is better to hear the other parties also, to assist in the process of correct calculation.

10. This Appeal is partly allowed. The impugned order passed by the Central Commission is set aside to the extent indicated above. No orders as to cost.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 4th February, 2011

REPORTABLE/NON-REPORTABLE