APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 222 of 2015

Dated : 25th July, 2018

PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

Chhattisgarh State Power Generation Company Limited
Vidyut Sewa Bhawan, Dangania,
Raipur, Chhattisgarh – 492013 .... **Appellant**

Versus

Chhattisgarh State Electricity Regulatory Commission
Irrigation Colony, Shanti Nagar,
Raipur, Chhattisgarh- 492001 .... **Respondent**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Shubham Arya

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. This is an appeal under Section 111 of the Electricity Act, 2003 against the detailed Order dated 22.06.2015 read with order dated 23.05.2015 passed by the Chhattisgarh State Electricity Regulatory Commission (hereinafter referred to as '**State Commission**') deciding on the true up of the aggregate revenue requirement (**ARR**) of the generating plants of the Appellant (Chhattisgarh State Power Generating Company Limited) for FY 2013-14 and on the determination of aggregate revenue requirement for 1x500 MW Korba West Thermal Power Plant and Marwa Thermal Power Station of the Appellant for FY 2015-16**.**

1.1 The impugned Order dated 22.06.2015 giving the detailed reasons was received by Appellant on 23.06.2015. The short Order dated 23.05.2015 providing the tariff determined without giving reasons was received by the Appellant on 25.05.2015.

2. Brief Facts of the Case:-

2.1 The Appellant, Chhattisgarh State Power Generation Company Limited is a Company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of generation and sale of electricity in the State of Chhattisgarh. The Appellant supplies 100% of the power capacity of its

generating stations to the Chhattisgarh State Power Distribution Company Limited (**CSPDCL**), the distribution licensee in the State of Chhattisgarh.

2.2 The Appellant has existing thermal power plants, namely, Korba Thermal Power Station, Korba East (hereinafter referred to as '**KTPS'**), Hasdeo Thermal Power Station, (hereinafter referred to as '**HTPS'**) and Dr. Shyama Prasad Mukherjee Thermal Power Station (hereinafter referred to as '**DSPM TPS'**), Korba alongwith 1x500 MW Korba West TPP and one Hydro Power Plant, namely, Mini Mata Hasdeo Bango Hydro Power Station (hereinafter referred to as '**HBPS**') for which the true up of financials of the year 2013-14 have been decided by the above Orders. In addition, the State Commission determined the ARR for 1X500 MW Korba West thermal power plant and Marwa TPS for financial year 2015-16.

2.3 The Generating Stations, namely, KTPS and HTPS are old generating stations. The Units 1 to 6 of KTPS were commissioned as under:

		First commissioning date	Renovation completion date
(a) Unit – 1	-	22.10.1966	21.12.2004
(b)Unit – 2	-	16.7.1967	07.03.2003
(c) Unit – 3	-	28.3.1968	26.06.2004
(d)Unit – 4	-	31.10.1968	18.12.2003
(e) Unit – 5	-	24.3.1976	29.07.2005
(f) Unit – 6	-	5.4.1981	21.01.2004

Units 1 to 4 of HTPS were commissioned during the years 1983 to 1986 as per the following details:

(a)	Unit – 1	-	21.6.1983
(b)	Unit – 2	-	30.3.1984
(c)	Unit – 3	-	26.3.1985
(d)	Unit – 4	-	13.3.1986

Unit No. 1 of DSPM TPS was commissioned on 27.1.2008 and Unit No. 2 of DSPM TPS was commissioned on 30.11.2008.

2.4 Accordingly, the age of Generating Stations of KTPS from the date of the last commissioned unit, Unit 6 is about 34 years and from the commissioning of the first unit is about 49 years. Similarly, age of the Generating Station of HTPS with reference to the last commissioned unit (Unit No. 4) is about 29 years and with reference to the first commissioned unit is about 32 years. Thus, the entire KTPS and HTPS have long completed the useful life of a Thermal Power Station, namely, 25 years. These generating stations are, however, still being operated and maintained by the Appellant and they are making available electricity at a competitive rate as compared to the electricity available in the market for purchase by the Procurers.

2.5 It has been submitted that of the vintage of KTPS and HTPS, the operational parameters achieved cannot be compared to the new generating stations established with advance technology. The generating units of

KTPS are of the capacity of 50 MW and 120 MW. The KTPS generating units are in the process of being retired and closed in view of the serious environmental issues affecting the said generating units. The Environmental Authorities have been serving notices on the Appellant since March 2012 and on 03.07.2015 have already served the notice for closure of 4 KTPS units of 50 MW each with immediate effect. The 50 MW generating units of KTPS will, therefore, be taken out of generation and scrapped over the next few years. A notice dated 03.07.2015 has already been served by Chhattisgarh Environment Conservation Board. Accordingly, no significant investment is being planned for any new renovation or modernisation of KTPS.

2.6 In the facts and circumstances mentioned herein above, the Appellant has been seeking the approval of Annual Revenue Requirements and tariff determination for the vintage units of KTPS and HTPS taking into account the age of the plants, inadequacy of funds available to attend to any extensive repair and maintenance works of the generating units forming part of KTPS and other circumstances as more fully set out in the Tariff Petition/True Up Petition filed from time to time.

2.7 The Respondent, Chhattisgarh State Electricity Regulatory Commission, (hereinafter referred to as **'the State Commission'**)is the regulatory Commission under the Electricity Act, 2003 for the State of Chhattisgarh.

The State Commission regulates the tariff for generation and sale of electricity by the Appellant.

2.8 The State Commission has notified from time to time the Tariff Regulations under Section 61 of the Electricity Act, 2003 providing for the terms and conditions of determination of tariff for the sale of electricity by a generating company to the distribution licensees. These Tariff Regulations include the Chhattisgarh State Electricity Regulatory Commission (Terms and Determination of Tariff according to Multi-Year tariff principles and Methodology and Procedure for determination of Expected revenue from Tariff and Charges) Regulations, 2012 (hereinafter referred to as '**MYT Regulations, 2012**') which governs the control period 2013-14 to 2015-16.

2.9 The MYT Regulations, 2012, amongst others, contain a specific provision empowering the State Commission to exercise Power to Relax. In this regard, Regulation 77 of the MYT Regulations provide as under:

> ***"The Commission, for reasons to be recorded in writing, may relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person."***

2.10 In addition to the above, the State Commission has Inherent Powers under Regulation 78 and the Power to Remove Difficulties under Regulation 79. These powers are to be exercised by the State commission in a judicial manner, wherever the situation requires for exercise of such powers. These powers are vested in the State Commission on the well accepted principle

of providing exemption etc. in any plenary or subordinate legislation on the basis that it is impossible to deal with all the exigencies in the specific provisions and from time to time circumstances may arise for deviation from the specific provisions.

2.11 On 28.04.2012, the State Commission passed the Order on Annual Performance Review and Tariff Petitions for the financial year 2012-13. In the said Order, the State Commission accepting the submission of the Appellant on the lack of standard benchmarks, directed the Appellant to engage a neutral reputed third party to conduct a study in order to assist in fixation of targets for the stations and suggested amongst others, Central Power Research Institute (CPRI), an independent Central Government Body.

2.12 On 12.04.2013, CSPGCL submitted to the State Commission the report of the Central Power Research Institute (**CPRI**) on its Study for assessment of achievable performance parameters like heat rate and auxiliary consumption for the Korba Thermal Power Station of the Appellant.

2.13 On 12.07.2013, the State Commission passed Multi Year Tariff (hereinafter referred to as '**MYT**') Order wherein the State Commission approved the Annual Revenue Requirement(ARR) of the Appellant for the Control Period FY 2013-14 to FY 2015-16. In the said Order, the State Commission

relied on the CPRI Report for determination of the benchmark Plant Load Factor (**PLF**) for Korba Thermal power station.

2.14 On 02.12.2014, the Appellant filed a petition being Petition No. 3 of 2015 before the State Commission for truing-up of aggregate revenue requirement of three pre-existing thermal plants of the Appellant for FY 2013-14 and determination of aggregate revenue requirement for 1x500 MW Korba West Thermal Power Plant for FY 2015-16. In the petition, the Appellant had given justifications for applying norms and parameters, seeking relaxation of the specific provisions contained in the MYT Regulations with reasons and justifications.

2.15 In the proceedings before the State Commission, the Appellant filed information, details and documents. These include additional information in respect of True Up Petition No. 3 of 2015 furnished to the State Commission on 18.2.2015, 25.02.2015, 12.3.2015, 27.4.2015 and on 2.5.2015.

2.16 In the petition filed and in the various subsequent submissions as mentioned herein above, the Appellant had given detailed justification on various aspects of the claim made by the Appellant on the operational and other parameters to be applied for the tariff determination process. The Appellant in these submissions had dealt with the implication of the report of the

Central Power Research Institute. The Appellant has craved leave to refer to the relevant part of the submissions made by the Appellant before the State Commission at the time of the hearing.

2.17 By Order dated 23.05.2015, the State Commission issued the tariff schedule applicable along with the brief outline. Subsequently on 22.06.2015, the State Commission passed a detailed order with findings on various elements of tariff. Hence, the Petition No. 3 of 2013 was finally decided vide order dated 22.06.2015.

2.18 The Appellant vide letter dated 30.06.2015 sought clarifications from the State Commission on certain issues including computational clarifications. The Appellant has so far not received any response to the said letter

2.19 On 22.07.2015, the Appellant has filed a Review Petition before the State Commission challenging some specific issues decided in the Order dated 22.06.2015 read with Order dated 23.05.2015 as the Appellant has been of the view that there are errors apparent on record and there has been otherwise sufficient cause to rectify and modify the said orders on those aspects.

2.20 The present appeal is being filed on various other issues which have been decided against the Appellant in the said orders and claims which have not been allowed by the State Commission as enumerated in facts in issue

herein. The aspects being challenged under review and aspects challenged under the Appeal are separate and different. However the Appellants crave leave to add to the issues in the present appeal subsequent to the decision of the State Commission in the Review Petition.

3. QUESTIONS OF LAW

The Appellant has raised following questions of law for our consideration:-

3.1 Whether the State Commission is right in disallowing the effect of Backing Down Instructions on Station Heat Rate and Auxiliary Consumption in respect of Hasdeo Thermal Power Station, when the Central Electricity Authority the highest technical body has recommended the relaxation in the norms on account of backing down?

3.2 Whether the State Commission is right in considering the DSPM Thermal Power Station as a Pit-head Station when the Appellant falls under the definition of Non-Pit head Station as provided by the Notification issued by the Ministry of Environment and Forest ?

3.3 Whether the State Commission is right in not relaxing the Normative Plant Availability Factor (NAPAF) for the Korba Thermal Power Station of the Appellant and in determining the parameters solely on the basis of CPRI Report which is on the basis of normal consistent operation and does not take

into account even the statutory annual overhaul let alone the specific issues like long outages faced by the Korba Thermal Power Station?

3.4 Whether the State Commission is right in not considering the relaxed auxiliary energy consumption claimed by the Appellant?

3.5 Whether, the State Commission is right in not relaxing the operating norms of Station Heat Rate and Secondary Fuel Oil Consumption in the case of Korba Thermal Power Station (KTPS) considering the vintage design and coal quality of the generating units at KTPS and the fact that being very old units, the units are due for retirement in time to come?

3.6 Whether the State Commission is right in considering the interest accrued on the Fixed Deposits (FDRs) as Non-Tariff Income when the principal of Fixed Deposit are from retained earnings and not a part of gross fixed assets serviced by tariff under the MYT Regulations and no part of any of the associated expenditure is charged to the Annual Revenue Requirement?

3.7 Whether the State Commission has erred in holding that the consequential damages in the form of under-recovery of Annual Fixed Cost (AFC) due to uncontrollable outage of DSPM Thermal Power Station shall be recoverable from BHEL without considering the limitation on the liability of BHEL?

3.8 Whether the State Commission is justified in not exercising its power to relax and associated inherent powers when there was sufficient material available on record to exercise such powers?

4. **The learned counsel for the Appellant, Mr. M.G. Ramachanrdran, submitted his issuewise submissions as follows:-**

(A) Disallowance of impact of backing-down instructions on the Gross Station Heat Rate and Auxiliary Consumption for Hasdeo Thermal Power Station (HTPS)

4.1 The State Commission has not considered the relevant aspects and the implication of the repeated backing down instructions from the State Load Despatch Centre (hereinafter referred to as **'SLDC'**) and that the station had to be operated by the Appellant complying with the backing-down instructions and at the part load;

4.2 By reason as stated above and on account of the technical aspects involved and for reasons beyond the control or power of the Appellant, there was a direct adverse impact on the maintenance of the Gross Station Heat Rate and auxiliary consumption at the norms determined by the State Commission in the MYT Order. Such norms could be validly applied only for the base load plant operating at constant load and normative parameters;

4.3 There cannot be any dispute that the Station Heat Rate cannot be maintained in a constant manner when there are backing down instructions

affecting the operation. The Station Heat Rate to be maintained based on the designed GCV of the coal is related to full load operation. If there is reduction in the generation on account of backing down and there is variation in the quantum of generation from time to time, the Station Heat Rate and auxiliary consumption are bound to be adversely affected as a natural consequence without there being any fault or imprudence on the part of the generating company.

4.4 In the present case, there was massive backing down as per the instructions given by SLDC during the relevant period. When the Plant Load Factor(hereinafter referred to as **'PLF'**) is reduced on account of backing down instructions, the same leads to the higher turbine cycle heat rate which has a natural impact on the Station Heat Rate to be achieved;

4.5 The Central Electricity Authority (hereinafter referred to as **'CEA'**) as well as the Standard Bidding Documents for Case II Ultra Mega Power Project issued by the Ministry of Power acknowledged the impact of backing down instructions or part load operation requiring relaxation of the Station Heat Rate. The CEA has recommended increase in Station Heat Rate for despatches below 85% of the ex-bus declared capacity as referred in the Standard Bidding Documents of the Ministry of Power, Govt. of India for part load operation**.** This clearly establishes the natural consequence of operating the generating station by backing down. The State Commission

has not given due effect to the above recognition by CEA which is the technical authority under the Electricity Act, 2003 with functions as provided in Section 73 including that of aiding and advising the Appropriate Commission**;**

4.6 The State Commission has also recognised the impact of backing down on the PAF and has allowed the loss of generation due to such backing down to be considered in the true up as deemed generation. Thus, the State Commission itself has accepted that backing down is not within the control of the Appellant and resultantly, given relief on one aspect i.e PAF. There is therefore no rationale in not granting the relief in respect of the Station Heat Rate and Auxiliary Consumption;

4.7 Despite the above, the State Commission has not considered and allowed appropriate adjustment in the Station Heat Rate on account of the compliance with the backing down instructions issued by SLDC. The Appellant pleading was specific and limited. Impact of backing down on Station Heat rate was uncontrollable and degradation of 2.25% has been recommended by CEA and adopted by Ministry of Power, Government of India. It can be seen that the actual degradation has been much lower than 2.25% and as such is well within the allowable range, hence the same should have been allowed.

4.8 The only reasoning purported to be given by the State Commission for maintaining the normative Station Heat Rate is that another power plant of the Appellant, namely, DSPM was working within the normative value even with backing down instructions.

4.9 The State Commission has thus proceeded on a simplicitor basis on such comparison with DSPM, without considering the differences in the two stations in regard to the operation, namely, the design structure, efficiency of the power plant etc. Above all, DSPM was commissioned in 2008 as compared to HTPS, which is 29 years old and had completed the useful life of 25 years. By the time DSPM was established, there were considerable technology advances and improvements including computer aided design, blade profile, control instrumentation next generation control system leading to the integrated monitoring and control. The State Commission has compared with un-equal generating station to limit the Station Heat Rate in the case of HTPS. Further merely because the DSPM was able to perform despite obstructions is not a reason to expect HTPS to also perform despite obstructions;

4.10 In addition to the Station Heat Rate, backing down instructions and generation at a lower PLF affects the auxiliary consumption at the power generating unit. The normative auxiliary consumption can no longer be maintained. The State Commission ought to have considered a higher

percentage of auxiliary consumption than what has been provided in the MYT Regulation based on the normal performance. However, the State Commission has not considered the detailed justification given by the Appellant.

4.11 The State Commission in maintaining the normative auxiliary consumption despite reduction in the PLF has ignored the basic aspect that the power consumption in the auxiliary system does not get reduced in the same proportion as the backing down of a generating unit. In other words, if the unit is backed down to 70% of the PLF, the auxiliary consumption (in absolute terms) does not get reduced proportionately. The consumption at ash handling system, cooling tower system, air system and similar miscellaneous loads remain constant during backing down duration and thus with lower generation, the auxiliary consumption in percentage terms increases;

4.12 The non-reduction of the auxiliary consumption proportionately during the backing down is not on account of any act of omission or commission on the part of the generating station, there is no imprudence in the above on the part of the generating station and has a natural consequence and is beyond the control of the generating station;

4.13 The State Commission itself had observed in the MYT Order dated 12.07.2013, the increase in the auxiliary consumption of a unit when the

other unit is under shut down. The State Commission noted that there are common facilities which are to be shared by the lone unit:

> ***"10.2.12…Unlike other parameters, which don't get affected by the outage of the other unit, auxiliary consumption has a steep tendency to go up as there are always some common facilities which are to be shared by the lone unit in service……"***
>
> The logical conclusion is that when the PLF of one unit is less, the said common facilities would have to be shared by the lower generation and therefore the auxiliary consumption in percentage terms would be higher.

4.14 As on this date, the very fact that backing down technically has a direct adverse impact on operational parameters such as Station Heat Rate and Auxiliary Consumption has been duly accepted both by Central Commission and the State Commission. The Central Commission vide the fourth amendment to Indian Electricity Grid Code (hereinafter referred to as **'IEGC'**) dated 06th April 2016 has notified the same.

4.15 Though the above aspects have been recognised and appropriate Regulations have been notified in recognition of the same, the fact that such an implication exists and should be given effect to even for the past period cannot be denied. This is particularly when the Appellant had raised the same and the existence of the need to recognise the same even in the past was a reality. It cannot be the case that such an implication be given effect

to only in the future. Such a restrictive approach will be arbitrary and capricious as it would amount to a Regulator ignoring a basic concept even after recognition of the same.

4.16 Similarly dealing with the Auxiliary Consumption, the Impugned order is rather cryptic. The order simply states "*Since the Commission has not revised the PLF and has adhered to the norms specified in the MYT order for sharing of gain and losses, the auxiliary consumption norms has not been reviewed in this order*". No logic at all on specific grounds put forth has been forwarded. The State Commission ought to have deliberated on the contentions raised by the Appellant and should not have rejected the prayer summarily and without assigning proper reasons.

4.17 In the State Commission's written submission filed before the Tribunal, reference has been made to the Regulation 11.2 of 2012 Regulations and purports to give some reasons, which it is respectfully submitted is an afterthought. However even while referring to Regulation 11.2, the State Commission has ignored the Regulation 11.1. For a clear understanding both should be read in harmony. A bare reading shows that Regulation 11.1 is more encompassing than Regulation 11.2 as it contains the rationale which should be applied in deciding that whether any factor is controllable or uncontrollable. It categorically specifies that domain of Regulation 11.1

is not limited only to the factors listed therein but any and every factor which satisfies the following twin conditions, is an uncontrollable factor:

- It should be beyond the control of applicant.
- It could not be mitigated by the applicant.

4.18 The fact that the Backing down instructions from SLDC are uncontrollable for the Generator is indisputable and is of universal nature. The generator can neither control them nor mitigate its effect. As mentioned above, this fact that technically backing down has its inescapable impact on Station Heat Rate and Auxiliary Consumption has also been acknowledged by none other than CEA.

4.19 Merely because Station Heat Rate and Auxiliary Consumption are mentioned in Regulation 11.2 as controllable factor, it does not mean that the impact of any outside factor, out of control of the Appellant, on such parameters should not be considered as uncontrollable. The State Commission has not considered the differentiation between non achievement of the parameters of Station Heat Rate and Auxiliary Consumption under normal circumstances and when such non achievement is the effect of external causes, such as due to backing down (as in the present case).

4.20 More importantly the State Commission itself has acknowledged and accepted the above logic and requirement to give necessary adjustments in

its subsequent MYT order dated 30.04.2016. While deciding the norms for the period FY 2016-17 to FY 2020-21, the State Commission has provided that there will be some outage to meet statutory requirements. Regarding the Appellant's prayer that due to such outage the Station Heat Rate and Auxiliary Consumption would also degrade, the State Commission has categorically stated as under:

> ***"……As far as CSPGCL's prayer for allowing impact of outage on norms of operation is concerned, the relaxation in norms shall be decided at the time of true-up in accordance with the provisions in IEGC under the heading "Technical minimum schedule for operation of CGS and ISGS".***

4.21 From the above it is quite evident that the "Uncontrollable factors" remained verbatim same in the two Regulations.

4.22 Thus, with identical provision, in the referred order (dated 30.04.2016), the State Commission has categorically acknowledged the principle that at the time of true up, the impact of uncontrollable outages (such as Backing Down Instruction from SLDC or in compliance of some other non-routine statutory requirement) on performance parameters needs to be accounted for, however in the written submission filed in the instant appeal, dated 09.08.2016 of the Respondent, which is a subsequent date, a capricious interpretation has been formulated.

4.23 The Impugned order of the State Commission and the purported reasons now sought to be given shows a legal perversity in the approach of the State Commission in dealing with the aspect of Station Heat Rate and Auxiliary Consumption. While in the impugned order, the State Commission after due scrutiny has acknowledged that Backing Down Instructions and impact on Plant Availability Factor were uncontrollable, it has however not undertaken any deliberation on the nature or cause of deviation in other operating/performance parameters. No reference to the number of other relevant aspects has been considered and no exercise of proper interpretation has been undertaken at all.

4.24 In the written submission, the State Commission has purported to include arguments which were not at all considered by the State Commission in the Impugned Order, which itself establishes that the Impugned Order is not sustainable. The State Commission in the Impugned Order has nowhere stated that degradation in Station Heat Rate and Auxiliary Consumption is not being allowed because PLF was higher than the Target. Contrarily, the Impugned Order allows inclusion of impact of Backing down in PLF to arrive at Plant Availability Factor numbers. The Impugned Order is quite specific that actual generation and availability are two different aspects. In fact, the State Commission has acknowledged a computational error regarding Plant Availability Factor and actual generation and has rectified

the same in the order dated 26.03.2016 in Review Petition No. 49 of 2015(M). Therefore, to that extent the Para14 of the written submission of the State Commission is factually incorrect and misleading. It is because of the frequent Backing Down only that though the plant availability was above the target, yet actual generation got capped. It is only the actual generation, not the PAF, which has correlation with other parameters namely Station Heat Rate and Auxiliary Consumption.

4.25 The State Commission in its Written Submissions before the Tribunal has referred to the Plant Availability Factor of the HTPS station being above the target plant availability factor. The State Commission has failed to appreciate that the Plant Availability Factor refers to the availability of the generating station to generate power and not the actual generation by the generating station. Therefore, HTPS is available even when there is no actual generation (PLF) due to backing down instructions. Admittedly, the actual generation was less than the normative. The norms of Station Heat Rate and Auxiliary Consumption are affected by the actual generation and not by Plant Availability. Therefore, the achievement of target plant availability factor has no relation to the impact of the low PLF on the norms. Further, non-achievement of norms such as Station Heat Rate and Auxiliary Consumption due to low PLF would not affect the Plant Availability Factor.

4.26 In the written submissions, the reliance of the State Commission on the judgments of the Tribunal is misplaced. The Tribunal in the case of Indraprastha Power Generation Company Limited v. Delhi Electricity Regulatory Commission and Ors, Appeal No. 168 of 2012 dated 12.12.2013 had not dealt with the issue of impact of backing down instructions on the Station Heat Rate and Auxiliary Consumption. Though the appeal had been dismissed on the point of relaxation, there was no discussion on the above issue. The Tribunal has only rejected the plea for relaxation on ground of the generating station being old and has not dealt with impact of low PLF. Implied rejection cannot be a binding precedent.

4.27 The decision of the Tribunal in Haryana Power Generation Corporation Ltd v. Haryana Electricity Regulatory Commission and Anr. Appeal No. 196 of 2014 dated 18.09.2015 only relies on the Indraprastha Case. There is no discussion on the above points raised by the Appellant. The Tribunal has not considered the actual impact of backing down instructions on the norms of Station Heat Rate and Auxiliary Consumption, particularly in the light of the CEA and the Ministry of Power's recommendation and subsequent adoption in Indian Electricity Grid Code, too.

4.28 The Tribunal in the Indraprastha Case had referred to the fact that the tariff of the generating station was already high and any relaxation would result in higher tariff. However, in the present case, HTPS tariff is not in the

higher bracket of the power purchase by the distribution company in the State. As per the Impugned Order, the power stations of the Appellant are the cheapest source of power and even among the Appellant's stations, HTPS is cheaper. Therefore, the rejection of the claim of the Appellant is equivalent to penalising the Appellant for no fault of its own and contrary to the principles of tariff determination under Section 61 of the Electricity Act, 2003.

4.29 Further unlike in the above two cases considered by the Tribunal, in the present case, the Regulations of the State Commission specifically defines the uncontrollable factors as *"….which were beyond the control of the applicant, and could not be mitigated by the applicant"*. Further Regulation 12 specifies the treatment of such uncontrollable factors.

> ***12. MECHANISM FOR PASS THROUGH OF GAINS OR LOSSES ONACCOUNT OF UNCONTROLLABLE FACTORS***
>
> ***The aggregate net gains / losses to the generating company or STU/transmission licensee or distribution licensee on account of uncontrollable items (as per the tariff order) over such period shall be passed on to beneficiaries/consumers through the next ARR or as may be specified in the Order of the Commission passed under these Regulations.***

4.30 The impact of backing down instructions/low PLF/partial load on the norms of the generating station is a technical and factual aspect and contrary to the above cases, the Appellant herein had made out a very specific case for consideration of relaxation of norms. The Appellant had produced the

details of backing down instruction (which were significant in number i.e. more than 340 in a year) and the actual impact. Further the Appellant had submitted the recommendation by the CEA (apex body for technical matters), which has not been raised in arguments before or considered by the Tribunal. In the above circumstances, the decision in the above cases cannot be said to be a precedent or otherwise barring the consideration of the issues raised by the Appellant in the present Appeal particularly when the points raised by the Appellant herein has not been considered in the previous cases. In this regard, the Appellant relies on the following decisions of the Hon'ble Supreme Court:

a. **Municipal Corporation of Delhi v. Gurnam Kaur (1989) 1 SCC 101**

b. **State of UP and Another v. Synthetics and Chemicals Ltd and Another (1991) 4 SCC 139**

4.31 The State Commission has ignored the relevant material available on record, the consequences following the reduction in the PL F on account of backing down as acknowledged and accepted even by the State Commission, the fact that the backing down leading to the impact on the operating parameters including and in particular, on the Station Heat Rate is beyond the control of the generating station and has not given the relief to the Appellant. The Impugned Order passed by the State Commission in this regard is liable to be set aside and

the Appellant should be allowed the actual Station Heat Rate of HTPS during the operation when the generation at HTPS was backed down. Similarly, the adverse impact on Auxiliary Consumption needs to be allowed to the Appellant. Further, it is submitted that if the impact of such backing down had been accounted in case of Station Heat Rate and Auxiliary Consumption, then these two parameters would also qualify as normative or better than normative.

(B) Consideration of normative transit and handling loss to DSPM power station of the Appellant on the basis of pit head generating station:

4.32 The State Commission has proceeded on the basis that DSPM is a pit head station and has allowed transit loss of only 0.30% with corresponding working capital;

4.33 DSPM station does not have a dedicated transport mechanism or Merry-go around System for handling the coal. The coal is transported through Indian Railways. Accordingly, DSPM should be treated only as a non-pit head station. This is also acknowledged by the State Commission itself when it has allowed freight charges for transportation through Indian Railways and the use of public transport system for such transportation;

4.34 In addition to the above, the Notification dated 02.01.2014 of the Ministry of Environment and Forest, Government of India defines a Pit Head Station as under **:**

> ***Means only captive or stand-alone power station having captive transportation system for its exclusive use for transportation of coal from the loading point at the mining end up to the unloading point at the power station without using the normal public transportation system.***

4.35 In terms of the above Notification, DSPM is clearly classifiable as non-pit head station. The above Notification was placed before the State Commission along with the letter dated 18.06.2014 of the South Eastern Coalfields Limited but has not been considered by the State Commission.

4.36 The Central Commission in the Statement of Reason while notifying the Central Commissions Tariff Regulations, 2014, has clarified as under:

> ***On the issue of defining pit head and non-pit head generating stations, the Commission would like to clarify that the Environment (Protection) Rules, 1986 defines pit-head generating station as a generating station having captive transportation system for its exclusive use for transportation of coal from the loading point at the mining end up to the unloading point at the generating station without using the normal public transportation system.***

4.37 Section 61 of the Electricity Act provides that State Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff. There is also no definition of pit head and non-pit head station in the Regulations notified by the State

Commission. Once the Central Commission has clarified, the State Commission ought to have considered the same. However, the State Commission has failed to consider even this submission.

4.38 The State Commission has also proceeded on the wrong basis that the Appellant itself had claimed transit loss in the MYT Order earlier passed at 0.30% whereas the Appellant had claimed the transit loss at 0.80% **(This is clear from the Order dated 22.07.2012 quoted at Page 12-13 of the Written Submissions of the State Commission)**. The State Commission had allowed at 0.30% in the tariff order on its own.

4.39 The State Commission is not right in maintaining the same based on the consideration of the main tariff order only when the it is obviously contrary to what the Central Commission and other authorities has considered.

4.40 In the circumstances, at the time of true up, the State Commission ought to have considered the relevant material instead of mechanically proceeding on the basis that in the tariff order it had allowed transit loss at 0.30%.

4.41 Further, the different interpretation of pit head stations and non-pit head stations as relating to the distance of the mines from the plants, sought to be drawn by the State Commission in the Order dated 22.07.2012 cannot be maintained in view of the above Notifications. At the time, the State Commission had taken the position that since Regulations do not provide

for express definition of pit-head and non-pithead power stations, it has the obligation to apply jurisprudence. Now, in view of the Notification dated 02.01.2014 and CERC clarification, there is clarity as to the meaning of the pit-head generating stations. This has also been applied uniformly in Central as well as various State Commissions. The State Commission cannot arbitrarily interpret the term pit head and non-pit head contrary to the notifications.

4.42 The State Commission failed to notice that there would always be a difference in the transit loss which would occur with a captive transport system and a public transport system. In the later case, the utility does not have any control on the pilferage and the time consumed in the transport. Further coal is not a commodity, which can be transported under insurance as it would need covered wagons, which in turn will make loading/unloading impracticable. This is the reason for the higher normative loss for stations with public transport system.

4.43 Further, the State Commission's contention that the transit loss was approved by the State Commission in the MYT order and as no review or appeal was filed, hence the State Commission does not find it appropriate to review the same, is inappropriate in the exercise of regulatory jurisdiction. When specific contentions with fresh evidence was before the Commission, it ought to have deliberated the same and passed a reasoned order on it.

Whether review or appeal was filed against the previous order, becomes immaterial. In Appeal 89 of 2011 (decided on 14th August 2012), the Tribunal has held as under:

> ***"7.4 The learned counsel for the Appellant has relied on this Tribunal's finding in its Judgment dated 21.4.2011 reported as 2011 ELR (APTEL) 0830 July-Aug.,2011 in the matter of Madhya Pradesh Power Generation Co. vs. Madhya Pradesh State Electricity Regulatory Commission (Appeal No. 24 of 2010). In this Judgment, the Tribunal has held that if in the main order an error has been committed by the State Commission by not following the Regulations without assigning any reasons, the same error cannot be perpetuated and is required to be corrected in the true up. This decision of the Tribunal squarely applies in the present case. When the Regulation provide for interest on working capital, the same ought to have been allowed. Accordingly, this issue is decided in favour of the Appellant."***

4.44 In this regard in Distributors (Baroda) Pvt. Ltd vs Union Of India (AIR 1985 SC 1585, 1985 SCR Supl. (1) 778), the Hon'ble Supreme Court has held as under:

> ***"We have given our most anxious consideration to this question, particularly since one of us, namely, P.N. Bhagwati, J. was a party to the decision in Cloth Traders' case. But having regard to the various considerations to which we shall advert in detail when we examine the arguments advanced on behalf of the parties, we are compelled to reach the conclusion that Cloth Traders' case must be regarded as wrongly decided. The view taken in that case in regard to the construction of*** **s. 80M** ***must be held to be erroneous and it must be corrected. To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter (A.M.Y. at page 18): "a judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere***

pride of opinion and follows truth wherever it may lead: and courageous enough to acknowledge his errors".

Similar views have been taken by the Hon'ble Supreme Court in Hotel Balaji and Ors. v. State of A.P. and Ors. (AIR 1993 SC 1048) and in State Of Orissa & Anr. Vs. Mamata Mohanty Civil Appeal No. 1272 of 2011 decided on 9 February, 2011.

4.45 Contrary to the above in the present case the pleadings and facts presented have been rejected by the State Commission summarily, without any deliberation, simply on the ground that previously no appeal was filed.

(C) Disallowance of revision in Normative Annual Plant Availability Factor in KTPS Station:

4.46 This issue relates to the Plant Availability to be considered for KTPS**.** The State Commission has disallowed the normative Annual Plant Availability Factor for KTPS on the purported basis that the said factor includes the planned and forced outages of the power generating units at KTPS;

4.47 The State Commission has ignored the salient aspect that the study was conducted by the CPRI for a certain period of time on a continuously running unit under the maximum achievable load condition. As the units under shut down were not included, there was no occasion for the CPRI to include the planned/forced outages which occur from time to time;

4.48 The CPRI report should, therefore, have been taken as conforming to the performance in ideal circumstances when there is no situation of the planned/ forced outages and the State Commission ought not to have applied the conclusion in the report for determining the normative plant availability factor. In other words, the State Commission ought to have factored the aspects of planned and forced maintenance and give an appropriate adjustment to the normative availability factor computed;

4.49 Further, the salient and relevant aspects which the State Commission has ignored at the time of true up leading to an erroneous conclusion on the normative PLF to be allowed for KTPS are as under:

(a) The normative annual plant availability factor for KTPS was approved as 78.50% based on the weighted average target of 83.10% for Phase II (1X50 MW Unit 4) and 74.64% for Phase III (1X120 MW Unit 5).

(b) The computation of the normative annual plant availability factor was done based on the units under operation and excluding the units which were under outage. For example, Unit 6 (120MW) was not considered by CPRI while determining the NAPAF. The outage of Unit 6 was also recorded in the MYT Order dated 12.07.2013.

(c) If the outage of Unit 6 would have been considered then the normative annual plant availability factor/plant load factor achieved for phase III would have been 37.22% instead of 74.64%.

(d) The normative annual plant availability factor so computed takes into account only the partial losses, which such old units suffer even during the best operational period, but is exclusive of maintenance outages, which are required for plant safety and operation.

(e) In FY 2013-14, all four units of Ph-II were subjected to routine annual overhaul (AOH). The PH III units were also put on capital overhaul (COH). The annual average planned outage required for different sized units as per the Kukde Committee Report dated 03.09.2007, the normal outage period for PH II (50 MW LMZ sets) and PH III (120 MW sets) is 28 days and 33 days.

4.50 There was no basis for the State Commission to reach the conclusion that the outages and overhaul are attributable to managerial/operational inefficiency. In the present case there are two inbuilt issues one is for correction of norm from 78.50% to 66.71% and other for the relaxation for difference between the corrected norm 66.71% and the actual achieved PLF. As mentioned above, the grounds in support thereof include (but not limited to) need for elongated Capital Overhaul which was pre-approved by

the State Commission and was expedited in compliance of the directive of the State Commission.

(D) Disallowance of revision in the Normative Auxiliary Energy Consumption in KTPS Station:

4.51 The reason given by the State Commission for rejecting the report of CPRI on auxiliary consumption is that as per report, the auxiliary consumption for 120 MW unit is higher than 50 MW unit which is contrary to the general acceptance that a smaller configuration unit has higher auxiliary consumption;

4.52 There is a patent error in the above conclusion reached by the State Commission. A plain and bare reading of the study conducted by CPRI clearly shows that it has indicated higher AEC for smaller unit (and not as conversely and erroneously read out by the Commission). The report provide for auxiliary consumption of 12.98% for 50 MW set and 11.75% for 120 MW set. The factual error was specifically pointed out before the Commission**.** However, the impugned order as well as Commission's written submission is silent on the matter.

4.53 Thus, even the best AEC which could have been achieved with all the six sets running at their respective maximum achievable load throughout the year was 11.75% for 120 MW units and 12.98% for 50 MW units. As the plant has four units of 50 MW each and two units of 120 MW each, the

weighted average comes out to 12.31%. Now with the 15% margin on maximum achievable load, as is considered for all machines AEC v/s PLF graph given in the CPRI report**,** indicates that under normal circumstances :

Best AEC for four units of 50 MW = 14.18%
Best AEC for two units of 120 MW = 12.46%
Weighted average for the plant = (14.18X200+12.46X240)/440= 13.21%

4.54 Further, the State Commission has not considered the specific submissions supported by necessary details made by the Appellant on 12.3.2015 justifying the auxiliary energy consumption to be allowed at 13.33%. Also, the State Commission has not considered its own conclusion reached in Para 4.2.2 of the impugned Order dealing with the normative plant availability factor. The CPRI study clearly show that the auxiliary consumption has a steep tendency to go up as there are always common facilities which are to be shared by the lone unit in service. Hence some margin ought to have been applied as it cannot be presumed that machines would run 365 days in a year continuously at maximum achievable load.;

4.55 Moreover, regarding the Auxiliary Energy Consumption, the Commission in contradiction to its own rational and commitment has fixed the Auxiliary Energy Consumption Target arbitrarily simply because of an erroneous reading of the report and despite of specific submission in this regard, the commission, in the impugned order, has refused to undertake the correction

without assigning any reason. The Appeal No 238 of 2014 was not related to any such patent and factual correction; as such the citation is grossly out of synchronisation from the instant appeal.

(E) Disallowance of Station Heat Rate and Secondary Oil Consumption in relation to KTPS Station:

4.56 In the impugned order, the State Commission has proceeded on an erroneous norm which corresponds to the best heat rate which could have been achieved with all the six sets running at their maximum achievable load throughout the year without any interruption. The State Commission ought to have allowed at least such margin as is applicable for new units.

4.57 The Regulation 39.2 (b) of MYT Regulations provides that for a new station achieving COD on or after 01.04.2010:-

The normative SHR = 1.065 X Design Heat Rate (KCal/kWh).

The Regulation states that Design Heat Rate corresponds to some specified conditions. One of them is that design heat rate corresponds to achievable heat rate at Maximum Continuous Rating of the machine.

Thus, even for the new machines, 6.5% margin over and above the SHR achievable at 100% of the maximum achievable load is allowed.

4.58 However, the state Commission has not allowed any such margin and had fixed the norm based on the SHR at Maximum Achievable Load. CPRI discovered the SHR at Maximum Achievable Load as 3209.1 kCal/ kWh

and 3013.78 kCal/ kWh respectively for 50 MW units and 120 MW units. The weighted average comes out to about 3110 kCal/ kWh and the same was fixed as the norm, without considering any margin, whatsoever it may be.

4.59 Further, The State Commission has not considered the detailed justifications given by the Appellant for relaxation in the Station Heat Rate and Secondary Fuel Oil Consumption parameters;

4.60 The State Commission ought to have considered the vintage of the generating unit of KTPS and other peculiar factors while deciding on the admissible Station Heat Rate and Secondary Fuel Oil Consumption.

(F) Inclusion of Interest on Fixed Deposits as Non-tariff Income:

4.61 The State Commission has considered the interest on fixed deposits earned by the Appellant as non-tariff income; the fixed deposits are pledged with the bank for availing the Letter of Credit, Bank Guarantee for purposes such as procurement of coal, rail transportation etc. The principal amount of fixed deposits is not considered as a capital expenditure and factored in the tariff determination process as investments made. No Tariff elements has been claimed on the fixed deposit amount. The fixed deposits are out of the retained earnings of the Appellant and has not been utilised for creation of an asset which would be entitled to servicing through tariff;

4.62 The State Commission has ignored the basic concept that all capital lying with the Appellant is not serviced through tariff, only such part of the capital investment which is reflected in the Gross Fixed Asset (GFA) is serviced through tariff. The fixed deposits do not form part of GFA and hence for the purpose of tariff determination is not serviced as capital asset/ investment. Accordingly, the interest earned on amount lying with the Appellant out of retained earnings cannot be treated as non-tariff income;

4.63 In any event, the non-tariff income is a net income, namely, income from non-tariff sources less expenditure incurred and stands on a different footing; the income generated out of the money belonging to the shareholders which has not been utilised in the creation of fixed assets and there is no servicing of the capital amount through tariff, cannot be treated as a non-tariff income. In Maharashtra State Power Generating Company Limited v. Maharashtra Electricity Regulatory Commission and Ors, Appeal No. 86 and 87 of 2007 dated 10.04.2008, the Tribunal has held as under:

> *"We feel that in cases where the Commission allows a cost to be recovered after prudent check, any deviation in the amount of such expenditure or recovery of income relating to such expenditure would be eligible to be taken up for truing up. In our view, the objective of the Tariff Regulations is broadly to ensure a predetermined return on the investments made by the utility on the one hand and to ensure availability of electricity with reasonable operational efficiency to the consumer. If in the process the utility is subjected to losses beyond its control*

or earns extra profits, the Commission has inherent powers to take necessary steps after prudence check. However, if the income cannot be reasonably linked to any cost item allowed by the Commission as part of the ARR, the same should not be adjusted against the ARR of the Appellant, in the absence of specific Regulations."

4.64 Thus, if the cost of the fixed deposit is being serviced through tariff, then the interest earned can be accounted as Non-Tariff Income. However, when expenditure has not been considered, then the income/revenue earned cannot also be considered.

(G) Non-recovery of the fixed cost for the uncontrollable outage of Unit 1 of DSPM station due to failure of balancing leak off pipe:

4.65 The State Commission has proceeded on the wrong basis that the cost incurred by the Appellant shall be covered by the Defect Liability provision under the Contract between the Appellant and BHEL; Clause 17 of the General Conditions of Contract entered into between the Appellant and BHEL is only limited to the period of 12 months upon satisfactory completion of the total operation. It does not cover the period after the expiry of 12 months and the cost incurred after 12 months is to be borne by the Appellant:

4.66 Further, clause 18 of the General Conditions of Contract restricts the liability of BHEL for payment of any consequential loss or damages and therefore BHEL cannot be called upon to pay to the Appellant in an unlimited way:

4.67 Again Clause 3 of the Special Conditions of Contract with BHEL is the appropriate clause which deals with the latent Defect in the equipment discovered during the period of 5 years after the trial operation. This compensation provided in clause 3 of the Special Conditions is also restricted to the cost of damaged equipment only and not the consequential losses:

4.68 Accordingly, the consequential loss on account of failure of the balancing leak off pipe are not covered by the liability clause and further indirect or consequential loss or damage cannot be included and all losses allowable cannot exceed the total contracted price. In short, there is a limitation of liability clause which is binding. In the absence of such a clause being agreed to, it was not possible to conclude the contract with BHEL or any other contractor:

4.69 The State Commission in the Impugned Order has not denied that the balancing leak off pipe damage was not for reasons attributable to Appellant. The State Commission has accepted the documents submitted by the Appellant on this issue. The State Commission has therefore acknowledged that the Appellant cannot be held liable for the damages; the State Commission has only proceeded on the erroneous basis that the damages would be covered by the defects liability clause.

4.70 The State Commission ought to have allowed the claim of the Appellant resulting from the failure of the balancing leak off pipe including the loss on account of outages excluding those which are covered under the BHEL Defect Liability Clause and to the extent recovered from BHEL.

4.71 The State Commission in the Written Submissions has also claimed that the outages due to force majeure events are not eligible for grant of relaxation of norms. It is patently wrong. A bare reading of the regulation shows that the force majeure events are uncontrollable factors as per Regulation 11.1 (a) of the MYT Regulations. Further it is contrary to the equity and justice as well as principles of Section 61 that the generator is required to bear the consequences of force majeure events.

4.72 Further, it is erroneous on the part of the State Commission to mechanically state that this issue too has been considered and rejected by Hon'ble Tribunal in the judgment dated 30.03.2016 passed in Appeal 238 of 2014. As a matter of fact this issue was not at all before the Tribunal.

4.73 The Appellant had made out a good case for exercise of power to relax vested in the State Commission under Regulation 77 of the MYT Regulations, 2012.

4.74 The power to relax is a judicial power vested in the State Commission to be exercised wherever circumstances warrant. The State Commission will be wrong in not exercising the power whenever a justified circumstance is shown by the State Commission. In this regard the Appellant crave reference to the cases listed in Grounds CCC, DDD and EEE of the Memorandum of Appeal.

4.75 The learned counsel appearing for the Appellant vehemently submitted that the impugned order passed by the State Commission cannot be sustainable in law and is liable to be set aside and prayer sought in the instant appeal may kindly be granted as prayed for in the interest of justice and equity.

5. The learned counsel, Mr. Anand K. Ganesan, appearing for the Respondent (CSERC) submitted his submission for our consideration as follows :-

5.1 Many of the issues being raised by the Appellant (*Except Issues B & F)* are related to seeking relaxation of operating norms which form part of the Chhattisgarh State Electricity Regulatory Commission (Terms and Conditions of determination of tariff according to the Multi Year tariff principles and Methodology and Procedure for determination of Expected revenue from tariff and charges) Regulations, 2012 ('**MYT Regulations, 2012**'). The Appellant is seeking a variation in almost all the norms and parameters fixed in the MYT Regulations which amounts to a challenge of

the MYT Regulations and cannot be maintained before this Tribunal. Also, all the performance parameters were fixed by the State Commission in the Main Tariff Order which was accepted by the Appellant. The Appellant, after lapse of sufficient time is now challenging the very same parameters in the truing up proceedings.

5.2 Further, the basis of the claim of the Appellant for relaxation of norms and operational parameters is a CPRI Study which was also pleaded by the Appellant before this Tribunal in Appeal No. 238 of 2014 which was the appeal filed by the very same Appellant against the Order dated 12/06/2014. The same pleas made by the Appellant for relaxation have been broken up and raised as separate grounds in the present appeal. This Hon'ble Tribunal vide Judgment dated 30/03/2016 has rejected the prayer for relaxation of operating norms. The State Commission craves leave to quote the relevant portions of the said Judgment hereunder on the relevant issues and also rely on it in the course of hearing.

Issue A (First Part) - Disallowance of impact of backing down instruction in the gross station heat rate in relation to Hasdeo Thermal Power Station (HTPS)

5.3 The main contention of the Appellant on the above issue is that it could not maintain the Station Heat Rate at specified level of 2650 kcal/kwh of MYT Regulations 2012 and instead it has achieved it as 2668.82 kcal/kwh due to several backing down instructions from SLDC.

5.4 It is amply clear from the Regulation 11.2 of the MYT Regulations that Station Heat Rate is specified as the controllable factor. Hence, the Appellant has to maintain it as per the determination in the MYT Regulations.

5.5 Further, as per the established practice, the State Commission has considered the energy loss due to backing down as deemed generation and considered the energy as it has been actually generated by the HTPS. Hence, the State Commission has already passed due advantage of backing down which is again being claimed by the Appellant as a relaxation in the present appeal.

5.6 It is submitted that the approved Plant availability factor for HTPS in the MYT Regulations, 2012 and the Tariff Order dated 23/05/2015 at table no. 4.3-2 is as given below:

Station	**NAPAF**	**CSPGCL Petition**	**Approved PAF**
HTPS	83.00%	83.45%	83.00%

5.7 It can be seen from above that Appellant has achieved a plant availability factor 83.45% which is well above the target plant availability factor 83.00%.If the contention of the Appellant that frequent backing down

instructions resulted in non-achievement of norms, the Appellant could not have over achieved the Plant Availability Factor as it has done.

5.8 Further, with regard to the argument that the backing down instructions cause higher Station heat rate, the said argument has been rejected by this Tribunal in the following judgments –

i. **Indraprastha Power Generation Company Limited** v. **Delhi Electricity Regulatory Commission &Ors**(Judgment dated 12/12/2013 in Appeal No. 168 of 2012)

ii. **Haryana Power Generation Corporation Limited** v. **Haryana Electricity Regulatory Commission** (Judgment dated 18/09/2015 in Appeal No. 196 of 2014 & 326 of 2013)

Issue A (Part 2) - Disallowance of impact of backing down instruction in the Auxiliary Consumption in relation to Hasdeo Thermal Power Station (HTPS);

5.9 The contention of the Appellant on the above issue is that it could not maintain the auxiliary consumption at specified level of 9.70% of MYT Regulations 2012, instead it has achieved it as 9.85% due to several backing down instructions from SLDC.

5.10 Regulation 11.2 of the MYT Regulations states that Auxiliary Consumption is a controllable factor. Hence, the Appellant has to maintain it at target level of 9.70% as specified in MYT Regulations 2012 in Regulation 39.4.

5.11 The State Commission is adopting the balance submissions made on the aspect of station heat rate. In view of the same, there is no infirmity in the Impugned Order on this aspect.

Issue B - Consideration of normative transit and handling loss in DSPM power station of the appellant on the basis of pit head generating stations;

5.12 The Appellant has contended that DSPM plant should be treated as non-pithead power plant and the transit and handling loss should be allowed as 0.8% whereas State Commission has allowed 0.3% considering the same as pit head plant.

5.13 The State Commission had rendered a finding on this issue in original tariff order for FY 2013-14 dated 22/07/2012.

For DSPM TPS, except for transit loss, CSPGCL has claimed normative parameters as per the Regulations; the same has been accepted by the Commission. Regarding Transit loss it is noted that CSPGCL has considered the plant as non pit head plant. Commission opines otherwise. It's true that the regulations do not provide express definition of pit head and non pit head stations. This puts an obligation on Commission to apply jurisprudence. The DSPM TPS has coal linkage from nearby mines (less than 30 Km). The plant has been established at Korba which is generation hub and not the load centre just to take advantage of pit head mines. In view of proximity and the assured linkages with well established rail connectivity, the Commission finds it prudent to allow transit loss as is applicable for pit head stations. Accordingly transit loss for the control period is allowed at 0.30%."

5.14 The above finding was accepted by the Appellant. The main reason is that DSPM TPS has coal linkage from nearby mines (less than 30 Km). The DSPM TPS plant has been established at Korba which is generation hub and not the load centre just to take advantage of pit head mines. In view of proximity and the assured linkages with well established rail connectivity, the State Commission had found it prudent to allow transit loss which is applicable for pit head stations. Accordingly transit loss for the control period was allowed at 0.30%. The same approach has been followed in the truing up order.

5.15 The basic difference in the pit head and non pit head stations is that the pit head stations are located close by to the coal mines and receive coal through a dedicated MGR system. However, non pit head stations are located at great distances from the mines and coal needs to be transported to these stations through rail / road etc. Therefore, the transit losses for pit head stations are allowed at 0.30% and for non pit head stations at 0.80%.

5.16 However, this is a special combination where the station is located only 30 Kms from the mines but the coal is received through railways and not an MGR system. In normal cases, power stations are not so close and therefore a transit loss of 0.80% is allowed. However, allowing the same in case of stations for mines locating only 30 km apart will not be in the interest of

consumers. Hence, State Commission found it prudent to allow transit loss as is applicable for pit head stations. Accordingly transit loss for the control period has been allowed at 0.30%.

5.17 The Appellant was well aware of the fact that State Commission has treated DSPM TPP as pit head power plant in main order for FY 2013-14 and continued the same view while truing up for FY 2013-14.

5.18 As per the Regulations, State Commission has given benefit of the loss incurred due to non achievement of normative transit loss by sharing the loss between appellant and its beneficiary in ratio of 50:50. In view of the above, there is no infirmity in the Impugned Order on this aspect.

Issue C - Disallowance of revision on normative annual plant availability factor in Korba Thermal Power Station (KTPS);

5.19 The contention of the Appellant is that State Commission has not considered the Appellant's representation for revising the normative annual plant availability factor in the true up tariff order for FY 2013-14 for Korba Thermal Power Station (KTPS). The Appellant has also stated that the non-achievement of the NAPAF is due to technical reasons which affected the power plant.

5.20 The findings rendered by the State Commission in the order for true up for FY 2013-14 for KTPS are reproduced below:

"***Commission's Analysis***

The Commission has scrutinised the submissions of CSPGCL. The Commission does not find merit in the submissions of CSPGCL regarding the revision of NAPAF for KTPS for FY 2013-14. The Commission in the MYT Order ruled as under:

"10.2.1.2 KTPS – Korba East

Regulation 39.5 of CSERC MYT Regulations, 2012 specifies as under:

> *"39.5 notwithstanding anything contained anywhere else, the norms of operation i.e. NAPAF, SHR, Station Heat Rate and Auxiliary Consumption for Korba East Thermal Station (KTPS), shall be decided by the Commission at the time of determination of MYT Tariff for the control period."*

In accordance with Regulation 39.5 of CSERC MYT Regulations, 2012, PLF was proposed in the MYT petition. In MYT tariff petition for 2013-16, CSPGCL had proposed NAPAF of 77.18% for all three years of the control period. In the true-up petition CSPGCL has submitted various reasons for not achieving the norms specified in the MYT order. It may be appropriate to analyse the actual performance regarding the PLF of KTPS.

"In the recent years, generation of CSPGCL has deteriorated and expenses have increased, CSPGCL has to find a reason & solution to it as excuses are not going to help for a long"

Hence, the Commission has not revised the NAPAF for KTPS in the final true up for FY 2013-14."

5.21 The only grounds raised are with reference to the effect of backing down instructions which have already been rejected by this Tribunal in the other judgments (quoted hereinabove). With regard to the impact of the CPRI

Report, this Tribunal in the Judgment dated 30/03/2016 in Appeal No. 238 of 2014 has already held as under –

> *"20.2 The Appellant has contested that the KTPS Thermal Power Station is having smaller generating units of 50 MW capacities and 120 MW capacities each and also stated that the units of KTPS Thermal Power Station completed their useful life and hence the performance is deteriorated and prayed the Commission to consider higher/actual performance parameters.*
>
> *20.3 The State Commission considering the arguments and requests of the Appellant directed to engage a neutral reputed third party agency such as CEA/CPRI/NTPC to conduct study within three months to assess reasonable performance parameters.*
> *The Appellant has engaged M/s CPRI to carry out the study. Accordingly, the State Commission took the cognizance of CPRI report for fixation of target for the next control period i.e. from 2013-14 onwards.*
>
> *20.4 The CPRI Report was not placed before this Tribunal. However, we direct the Appellant to initiate the guidelines specified in the CPRI Report for improving the performance parameters of the CSPGCL thermal plants.*
>
> *20.5 We do not find any infirmity in the Impugned Order of the Commission. Thus, we are deciding this issue against the Appellant."*

5.22 The State Commission has not penalized the Appellant for taking overhaul of the generating station in any manner. Further, the inferior quality of coal being used by the Appellant is an issue to be taken up by the Appellant with the coal supplier and not loaded on to the consumers. This aspect has also been considered by the Tribunal in the HPGCL Judgment. The State Commission craves leave to refer to the same.

Issue D - Disallowance of revision of auxiliary consumption in Korba Thermal Power Station (KTPS);

5.23 This issue has been considered and rejected by the Tribunal in the Judgment dated 30/03/2016 in Appeal No.238 of 2014.

> *"We find the norms specified in the MYT regulations towards Auxiliary Consumption for the FY 2011-12 and FY 2012-13 is 10.3% which is very much reasonable in case of smaller power plants like KTPS. Thus, the contention of the Appellant to consider 11.5% towards Auxiliary Consumption is not correct."*

5.24 Regulation 39.5 of the MYT Regulations 2012 is as reproduced below:

> *"Notwithstanding anything contained anywhere else, the norms of operation i.e NAPAF, SHR, Station Heat Rate and Auxiliary Consumption for Korba East Thermal Station (KTPS), shall be decided by the Commission at the time of determination of MYT Tariff for the control period."*

5.25 According to above provision, the State Commission fixed the normative auxiliary consumption as 11.25% in Tariff Order for FY 2013-14 dated 12/07/2012.

5.26 The Appellant did not challenge the Tariff Order and is now seeking a deviation in the challenge to the truing up order. Further, in the tariff petition, the Appellant itself proposed the normative auxiliary consumption 10.63% but still the State Commission approved the same at a higher rate, namely, 11.25%. At this stage, to further increase the same due to the inefficiencies on the part of the Appellant would not be correct.

Issue E - Disallowance of Station Heat Rate in relation to KTPS;

5.27 Once again, this issue has been considered and rejected by the Tribunal in the Judgment dated 30/03/2016 in Appeal No.238 of 2014. The finding of the Tribunal is as under-

> *The Appellant has engaged M/s CPRI to carry out the study. Accordingly, the State Commission took the cognizance of CPRI report for fixation of target for the next control period i.e. from 2013-14 onwards.*
>
> *20.4 The CPRI Report was not placed before this Tribunal. However, we direct the Appellant to initiate the guidelines specified in the CPRI Report for improving the performance parameters of the CSPGCL thermal plants.*
>
> *20.5 We do not find any infirmity in the Impugned Order of the Commission. Thus, we are deciding this issue against the Appellant."*

5.28 The finding as mentioned by State Commission in the tariff order for true up for FY 2013-14 for KTPS is reproduced below:

The Commission has approved the actual GSHR for FY 2013-14 as submitted by CSPGCL for the purpose of sharing of efficiency gains and losses. Further, the Commission has considered the normative GSHR for FY 2013-14.

Issue F - Disallowance of Secondary Oil Consumption in relation to KTPS;

5.29 This is another facet of the above two issues raised by the Appellant. The Appellant is once again asking for revising the normative secondary oil consumption in Korba Thermal Power Station (KTPS) because of the

reason that this power station is very old design and coal quality. All these aspect have been considered in the Judgment dated 30/03/2016 and rejected by this Tribunal. The same cannot be reargued in the present matter.

5.30 The findings of the State Commission in the tariff order for true up for FY 2013-14 for KTPS is reproduced below:

The Commission has approved the actual SFOC for FY 2013-14 as submitted by CSPGCL for the purpose of sharing of efficiency gains/losses. Further, the Commission has considered the normative SFOC for FY 2013-14.

<u>Issue G - Inclusion of interest on Fixed Deposits as Non Tariff Income;</u>

5.31 The contention of the Appellant on the above issue is that Sate Commission has not considered request of Appellant for non-inclusion of interest earned on fixed deposits (which are pledged with banks for availing letter of credit and bank guarantee for coal requirement of the power station) are from retained earnings and are not a part of gross fixed assets serviced by tariff under the MYT Regulations.

5.32 The finding in the Tariff Order dated 23/05/2015 is as under –

Commission's Analysis

The Commission in the MYT Order had approved the NTI for FY 2013-14. The Commission, in the true up for FY 2013-14, has considered the actual station wise Non-Tariff Income as per the books of accounts in true up for FY 2013-14. The Commission does not find merit in CSPGCL's contention that the interest accrued on other FDRs do not qualify for consideration as NTI for regulatory

purposes, and that the interest on these FDRs are the cost of the FDRs. The Commission is of the view that interest income earned by CSPGCL on all FDRs, irrespective of whether they are utilised to obtain LCs or BGs, has to be included in the NTI. This is also standard accounting practice.

5.33 Any money earned by the Appellant is an income in its hand. The money earned from FDs is a non-tariff income and needs to be accounted for. As per established procedure adopted for tariff calculation, 'other income' mentioned in the Annual Accounts in treated as a non-tariff income. This process has been followed by the State Commission for the Appellant even in the past. In view of the above, there is no infirmity in the Impugned Order on this aspect.

Issue H - Non recovery of the fixed cost for the uncontrollable outage of unit 1 of Dr. Shyama Prasad Mukharjee Power Station (DSPM) due to failure of balancing leak off pipe.

5.34 The contention of the Appellant on the above issue is that Appellant was not able to recover the fixed cost for the uncontrollable outage of Unit – 1 of DSPM station due to failure of balancing leak pipe.

5.35 The finding in the Tariff Order dated 23/05/2015 is as under –

Commission's Analysis

The Commission asked CSPGCL to submit the SLDC's certificate for actual Plant Availability Factor for its stations for FY 2013-14, which was submitted by CSPGCL.

As detailed in the preceding paragraphs, the Commission has not considered the reasons submitted by CSPGCL for relaxing the NAPAF for its stations for FY 2013-14, and has considered the NAPAF for CSPGCL's stations as approved in the MYT order.

5.36 This contention has also been considered and rejected by this Tribunal in the Judgment dated 30/03/2016 in Appeal No. 238 of 2014. The Tribunal has held that non achievement of target parameter for the alleged force majeure conditions shall not be eligible for granting a relaxation of target / norms. The State Commission craves leave to refer to the same.

6. We have heard learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent at considerable length of time and also carefully considered their stand in the written submissions and also gone through relevant material available on record. The following issues arise for our consideration:-

Issue No.1: Disallowance of impact of backing down instructions on Gross Station Heat Rate and Auxiliary Consumption for Hasdeo Thermal Power Station (HTPS).

Issue No.2: Consideration of normative, transit and handling loss of DSPM Power Station.

Issue No.3: Disallowance of revision in Normative Plant Availability Factor (NAPAF) for KTPS.

Issue No.4: Disallowance of revision in the Normative Auxiliary Energy Consumption for KTPS.

Issue No.5: Disallowance of Station Heat rate and Secondary Oil Consumption or KTPS.

Issue No.6: Inclusion of interest of fixed deposits as Non-tariff income.

Issue No.7: Non-recovery of fixed cost for uncontrollable outage of Unit I of DSPM station due to failure of balancing leak off pipe.

Our Finding & Analysis

6.1 **Issue No.1**:

The learned counsel for the Appellant has contended that the State Commission has not considered the implication of the repeated backing down instructions from the SLDC on the performance of generating units. There was a direct adverse impact on the maintenance of the GSHR and auxiliary energy consumption at the norms determined by the State Commission in the MYT Order. The counsel for the Appellant has further brought out that the Central Electricity Authority (CEA) as well as the standard bidding document for Case II Ultra Mega Power Project issued by the Ministry of Power acknowledged the impact of backing down instructions for part load operation requiring relaxation of station heat rate. The CEA has recommended increase in Station Heat Rate for despatches below 85% of the ex-bus declared capacity. This clearly establishes the natural consequence of operating the generating station by backing down but the State Commission has not given due effect to the above recognition by CEA as well as Ministry of Power.

6.2 The counsel for the Appellant has further submitted that the State Commission has also recognised the impact of backing down on the PAF and has allowed the loss of generation due to such backing down to be considered in the true up as deemed generation but has disallowed the relief in respect of the Station Heat Rate and Auxiliary Consumption. The only reasoning purported to be given by the State Commission for maintaining the normative Station Heat Rate is that another power plant of the Appellant, namely, DSPM was working within the normative value even with backing down instructions.

6.3 The counsel for the Appellant has pointed out that the State Commission has proceeded on a simplicitor basis on such comparison of unequal generating stations without considering the commissioning period of both the generating stations as DSPM got commissioned in 2008 and HTPS was commissioned in 1986. The counsel has contended that in addition to the Station Heat Rate, backing down instructions and generation at a lower PLF also affects the auxiliary consumption at the power generating unit. The State Commission has totally ignored the basic aspect that the power consumption in the auxiliary consumption does not get reduced in the same proportion as the backing down of a generating unit. The counsel has brought out that the non-reduction of the auxiliary consumption proportionately during the backing down duration is not on account of any

act of omission or commission on the part of the generating station and has a natural consequence and is beyond the control of the generating station;

6.4 The very fact that backing down has a direct adverse impact on operational parameters such as Station Heat Rate and Auxiliary Consumption has been duly accepted both by Central Commission and the State Commission. The Central Commission vide the fourth amendment to Indian Electricity Grid Code (hereinafter referred to as **'IEGC'**) dated 06th April 2016 has notified the same and also accepted by the State Commission. The Appellant has alleged that despite all such recommendations by the competent authority, the State Commission has not allowed any relief on SHR and auxiliary consumption arising due to backing down instructions merely on the consideration of such corrective measures to be effected only in future and not for the past period.

6.5 ***Per contra,*** the learned counsel for the State Commission has contended that the Appellant is seeking a variation in almost all the norms and parameters fixed in the MYT Regulations which amounts to a challenge of the MYT Regulations and cannot be maintained before this Tribunal. Besides, all the performance parameters were fixed by the State Commission in the Main Tariff Order which was accepted by the Appellant. It is further submitted by the counsel for the Respondent that the Appellant is now challenging the very same parameters in the truing up

proceedings after a lapse of sufficient time. It is further brought out by the learned counsel for the Respondent Commission that the Appellant contending mainly on this issue relating to the maintenance of the Station Heat Rate at specified level of 2650 kcal/kwh of MYT Regulations 2012 against which the Appellant has achieved as 2668.82 kcal/kwh due to several backing down instructions from SLDC.

6.6 The counsel emphasised further by referring the Regulation 11.2 of the MYT Regulations which has specified the SHR as controllable factor. As per the established practice, the State Commission has considered the energy loss due to backing down as deemed generation and considered the energy as it has been actually generated by the HTPS and hence due advantage of backing down has already been passed to the Appellant by the State Commission.

6.7 The counsel for the Respondent Commission has further placed its reliance on the judgment of this tribunal dated 30.03.2016 in Appeal No. 238 of 2014 filed by the Appellant . The Appellant in Appeal No.238 of 2014 has prayed for relaxation of operating norms which was rejected by this Tribunal. Further, with regard to the argument that the backing down instructions cause higher Station heat rate, the said argument has been rejected by this Tribunal in the following judgments –

i. **Indraprastha Power Generation Company Limited** v. **Delhi Electricity Regulatory Commission &Ors**(Judgment dated 12/12/2013 in Appeal No. 168 of 2012)

ii. **Haryana Power Generation Corporation Limited** v. **Haryana Electricity Regulatory Commission** (Judgment dated 18/09/2015 in Appeal No. 196 of 2014 & 326 of 2013)

6.8 Regarding the impact of backing down instructions in the auxiliary consumptions, the learned counsel for the Respondent has submitted that the Appellant could achieve the auxiliary consumption as 9.8 % against the specified level of 9.7% of MYT Regulations 2012, and the main reasons for the same are being attributed to backing down instructions from SLDC. The learned counsel further referred to the Regulation 11.2 of the MYT Regulations which stipulates the Auxiliary Consumption as a controllable factor. The learned counsel further contended that the State Commission has adopted the same rationale as on the aspect of station heat rate and as such, there is no infirmity in the Impugned Order on this aspect.

Our Findings:

6.9 We have considered the contentions of the leaned counsel appearing for the Appellant as well as the Respondent and also perused the findings contained in the judgments of this Tribunal cited by the parties. The SHR and auxiliary consumption are two important parameters of a generating plant and are closely linked with plant load factor at which the units are

made to operate. It is an admitted fact that the backing down instructions impact the operating parameters namely SHR and auxiliary consumption. It is, however, relevant to note that the backing down instructions by the respective SLDC, operation of the generating units at reduced / part load etc. are the ground realities and integral part of the operations of grid as well as generating plants. The Appellant has claimed that the adverse impacts of backing down have been acknowledged by CEA, CERC and Ministry of Power and duly incorporated in the IEGC Amendment (06.04.2016) and standard bidding document for Case-II. On the other hand, the Respondent Commission has considered the SHR and auxiliary consumption as controllable factors as per Regulation 11.2 of MYT Regulations, 2012. After due analysis of the submissions, made by learned counsel for the Appellant and the Respondent, we find that the amendments in IEGC and Standard Bidding Documents which came into force after 06.04.2016 cannot be applied retrospectively for tariff order / true-up for 2013-14. Moreover, the State Commission has already given the advantage of deemed generation in lieu of Energy loss due to backing down and also, the corrective measures for SHR etc. as per IEGC Amendment, 2016 to the future tariff orders / true-up. In view of these facts, we do not find any infirmity or ambiguity in the impugned order on this issue.

7. **Issue No.2:**

The learned counsel for the Appellant contended that DSPM station does not have a dedicated transport mechanism or Merry-go around System for handling the coal. The coal is transported through Indian Railways. Accordingly, DSPM should be treated as a non-pit head generating station. The learned counsel has further relied over the Notification dated 02.01.2014 of the Ministry of Environment and Forest, Government of India which defines a Pit Head Station as under **:**

> ***Means only captive or stand-alone power station having captive transportation system for its exclusive use for transportation of coal from the loading point at the mining end up to the unloading point at the power station without using the normal public transportation system.***

The learned counsel has further cited the definition of pit head or non-pit head stations as per CERC Regulations, 2014 as per which DSPM clearly falls under the category of non-pit head station.

7.1 It has further been brought out that Section 61 of the Electricity Act provides that State Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff. As there is no definition of pit head and non-pit head station in the Regulations notified by the State Commission, it should adopt the same definition which has been referred by CERC. The learned Counsel has further submitted that, the State Commission ought to

have considered the relevant material at the time of true-up instead of mechanically proceeding on the basis that in the tariff order, it had allowed transit loss of 0.3 %. The learned counsel has stated that when specific contentions with fresh evidence was made before the Commission, it ought to have deliberated the same and passed a reasoned order on it. The learned counsel has cited the judgment dated 14.08.2012 in Appeal No.89 of 2011 of this Tribunal which among others, held that any error in the main order of the State Commission cannot be perpetuated and is required to be corrected in the true-up. The learned counsel has also relied on the judgment of the Hon'ble Supreme Court "***Distributors (Baroda) Pvt. Ltd vs Union Of India (AIR 1985 SC 1585, 1985 SCR Supl. (1) 778)***".

Similar views have been taken by the Hon'ble Supreme Court in Hotel Balaji and Ors. v. State of A.P. and Ors. (AIR 1993 SC 1048) and in State Of Orissa &Anr vs Mamata Mohanty Civil Appeal No. 1272 of 2011 decided on 9 February, 2011.

7.2 ***Per contra***, the learned counsel for the Respondent Commission has submitted that DSPM plant was considered as pit head station hence the transit and handling loss was allowed 0.3% while rendering its finding on this issue in original tariff order for FY 2013-14 dated 22-07-2012. The above finding was accepted by the Appellant. The learned counsel has further contended that DSPM TPS has coal linkage from nearby mines (less

than 30 Km) and has an assured linkages with well established rail connectivity. With these factors, the State Commission found it prudent to consider DSPM station as good as pit head station to allow transit and handling loss at 0.3% even in the true-up. It is further brought out that the non pit head stations are located at great distances from the mines and transportation of coal to these stations through rail / road etc. suffer heavy transit losses and handling losses for which 0.8 % is provided. Hence allowing the same in case of DSPM station, which is located only 30 Kms from the coal mines will not be in the interest of consumers. Moreover, the State Commission has given benefit of the loss incurred due to non achievement of normative transit loss by sharing the loss between appellant and its beneficiary in ratio of 50:50.

Our Findings :

7.3 We have considered the rival submissions of the learned counsel appearing for the Appellant and Respondent on this issue and also took note of the decisions of this Tribunal as well as Hon'ble Supreme Court relating to the error arising in the original order to be corrected in the true-up. It is a fact that in the pit head generating plants, normally there is a captive coal transport system but in the present case, the State Commission has considered DSPM station as pit head plant on account of its close proximity in the coal mines assuming less transit and handling loss (0.3%). Besides,

the State Commission has also given benefit of the loss incurred due to non-achievement of normative transit loss by sharing the same between the Appellant and its beneficiary in the ratio of 50:50.

7.4 In the light of the above mentioned facts, we find that finding of the State Commission in its original Tariff Order dated 22.07.2012 cannot be considered as an error as the findings are backed by adequate, valid and cogent reasoning. Accordingly, we opine that the State Commission has rightly taken a balanced and judicious view while deciding the transit and handling loss as 0.3%.

8. <u>Issue No.3:</u>

The counsel for the Appellant has submitted that the State Commission has disallowed the normative annual plant availability for KTPS on the purported basis that the said factor includes the planned and forced outages of the generating units at KTPS. The learned counsel has further contended that the CPRI report has been wrongly interpreted for determining the normative plant availability factor. In fact the State Commission ought to have factored the aspects of planned and forced maintenance and appropriate adjustments to the normative availability factor accordingly. The learned counsel has further pointed out that the State Commission has wrongly concluded that the outages and overhaul are contributed to the managerial/operational inefficiency.

8.1 ***Per contra,*** the counsel for the State Commission referred to the findings in the impugned order that *"in the recent years, generation of CSPGCL had deteriorated and expenses have increased, CSPGCL has to find reason and solutions and its excuses are not going to help for a long*". The learned counsel further brought out that with regard to the impact of CPRI report, this Tribunal under judgment dated 30.03.2016 in Appeal No.238 of 2014 has already rejected the contentions of the Appellant regarding revision in the normative operating parameters. The counsel further indicated that the State Commission has not penalised the Appellant for taking overhaul of the generating station in any manner. As far as inferior quality of coal being used by the Appellant is an issue to be taken up with the coal supplier and not to be loaded on the consumers. The counsel further cited the judgment of this Tribunal in the HPGCL case to support his contentions in this regard.

Our findings:

8.2 We have carefully gone through the contentions of the Appellant as well as the Respondent Commission and also the findings of this Tribunal in similar cases as cited hereinabove. It has been categorically held by this Tribunal on several occasions that normative parameters cannot be revised due to inefficient operational management of the generating plants. We

thus hold that the State Commission has taken a right decision as far as this issue is concerned.

9. Issue No.4:

The counsel for the Appellant has submitted that the State Commission has disallowed the revision in the normative auxiliary energy consumption in KTPS station primarily because of non-consideration of CPRI report on auxiliary consumption. The CPRI report has indicated higher auxiliary consumption for a smaller unit and not as conversely and erroneously read out by the State Commission. The learned counsel has further contended that the specific submission supported by necessary details made by the Appellant on 12.03.2015 justifying the auxiliary energy consumption to be allowed as 13.33% has not been considered. It is an admitted fact and also indicated by CPRI in its report that the auxiliary consumption has a steep tendency to go up as there are other common facilities which are to be shared by the lone unit in service. The learned counsel has further brought out that the Commission has rendered its findings on this issue in contradiction to its own rationale and commitment and has fixed the normative auxiliary consumption target arbitrarily.

9.1 ***Per contra***, the counsel appearing for the Respondent Commission had contended that this issue has been considered and rejected by this Tribunal in the judgment dated 30.03.2016 in Appeal No.238 of 2014. Further, in

line with Regulation 39.5 of the MYT Regulation, 2012, the State Commission fixed normative auxiliary consumption as 11.2% in the tariff order for FY 2013-14. The learned counsel has further indicated that the Appellant did not challenge the tariff order and is now seeking a deviation in the challenge to the trueing up order. It is noteworthy that in the tariff petition, the Appellant itself had proposed the normative auxiliary consumption as 10.63% but still the State Commission approved the same at a higher rate i.e. 11.25%.

Our findings:-

9.2 In view of the contentions of learned counsel appearing for the Appellant as well as Respondent mentioned hereinabove, we find that the State Commission has fixed normative auxiliary consumption strictly in accordance with its relevant regulations and also trued up in line with the judgment of this Tribunal dated 30.03.2016. It is relevant to note that the Appellant itself had proposed 10.63% for auxiliary consumption in the tariff petition against which the State Commission allowed 11.25%. Thus, we do not observe any unjustness in the impugned order.

10. Issue No.5:

The counsel for the Appellant has contended that the State Commission has proceeded on an erroneous norm which corresponds to the best heat rate which could have been achieved with all the six sets running at their

maximum achievable load throughout the year without any interruption. The learned counsel further argued that the State Commission ought to have allowed at least such margin as is applicable for new generating units. It has been brought out that even in the new machines, 6.5% margin over and above the SHR achievable at 100% of the maximum achievable load is allowed. The state Commission has not allowed any such margin and had fixed the norm based on the average SHR recommended by CPRI namely 3110 kCal/ kWh. The learned counsel has further submitted that the State Commission ought to have considered the vintage of the generating units at KTPS while deciding on the admissible Station Heat Rate and Secondary Fuel Oil Consumption in line with the detailed justifications given by the Appellant in this regard.

10.1 ***Per contra***, the counsel for the Respondent Commission submitted that this issue has been considered and rejected by this Tribunal in the judgment dated 30.3.2016 in Appeal No.238 of 2014. The learned counsel further contended that the Appellant has once again been asking for revising the normative secondary oil consumption in KTPS because of the reason that this power station is of very old design. Further, based on the judgment of this Tribunal cited above, the contention of the Appellant is not tenable.

Our findings:

10.2 After thorough evaluation of the entire material available on records and submissions of the learned counsel appearing for the Appellant and Respondent also, we have gone through carefully the judgment of this Tribunal as referred above. The issue has arisen, in a nutshell, on account of re-arguing the settled case by the Appellant. Thus, we firmly opine that the findings of the State Commission namely disallowance of revision in SHR and secondly fuel oil consumption are reasonably justified.

11. Issue No.6:

The counsel for the Appellant has submitted that the State Commission has wrongly considered the interest on fixed deposits as non-tariff income. As a matter of fact, the fixed deposits are pledged with the bank for availing the Letter of Credit, Bank Guarantee etc. for purposes such as procurement of coal, rail transportation etc. The learned counsel has further contended that the State Commission has ignored the basic concept that all capital lying with the Appellant is not serviced through tariff and only such part of the capital investment which is reflected in the Gross Fixed Asset (GFA) is serviced through tariff. It is categorically brought out by the learned counsel that in any event, the non tariff income is a net income namely income from non tariff sources less expenditure incurred and stands on a different footing. To support his contention, the learned counsel has cited a

judgment of this Tribunal dated 10.04.2008 in Appeal Nos. 86 and 87 of 2007 of Maharashtra State Power Generating Company Limited v. Maharashtra Electricity Regulatory Commission and Ors..

11.1 ***Per contra***, the counsel for the Respondent Commission has contended that any money earned by the Appellant is an income in its hand and accordingly, income earned from FDs' is a non tariff income and needs to be accounted for. This process has been followed by the State Commission for the Appellant even in the past and the same is based on established procedure adopted for tariff calculations.

Our findings:

11.2 We have examined the rival contentions of the learned counsel appearing for the Appellant and as well as Respondent on this issue and also referred the cited judgment of this Tribunal dated 10.04.2008 in Appeal Nos. 86 and 87 of 2007. We also note the findings of the State Commission in the impugned order dated 23.5.2015 which reads as "*that interest income earned by CSPGCL on all FDs' irrespective of whether they are used to obtain LCs' or BGs' has to be included as NTI. This is also standard accounting practice*".

In view of the foregoing facts, we are of the opinion that State Commission has rightly included the interest of FDs' as non tariff income.

12. <u>Issue No.7:</u>

The counsel for the Appellant has submitted that the State Commission has proceeded on the wrong basis that the cost incurred by the Appellant shall be covered by the Defect Liability provision under the Contract between the Appellant and BHEL. The learned counsel has pointed out that as per the Contract Agreement with BHEL, the Defect Liability is limited to the period of 12 months after satisfactory completion of the plant and does not cover the period beyond expiry of 12 months beyond which the cost is to be borne by the Appellant. Further, as per Clause 3 of the Special Conditions of Contract with BHEL stipulates the latent Defect in the equipment discovered during the period of 5 years after the trial and this too, is restricted to the cost of damaged equipment only and not the consequential losses:

12.1 The counsel further contended that after admitting the facts submitted by the Appellant on this issue, the State Commission ought to have allowed the claim of the Appellant resulting from the failure of the balancing leak off pipe including the loss on account of outages. It has also been submitted by the learned counsel that the State Commission has mechanically stated that this issue too has been considered and rejected by this Tribunal in the judgment dated 30.3.2016 passed in Appeal No.238 of 2014. As a matter of fact, this issue was not at all before the Tribunal. The Appellant has

claimed that in the facts and circumstances of the case, the State Commission could have exercised its judicial power to relax under Regulation 77 of MYT Regulations, 2012.

12.2 ***Per contra,*** the counsel for the Respondent submitted that this contention of the Appellant had also been considered and rejected by this Tribunal in the Judgement dated 30.3.2016 passed in Appeal No.238 of 2014. The Tribunal has held that non achievement of target parameters for the alleged force majeure conditions shall not be eligible for granting a relaxation of target / norms.

Our findings:

12.3 We have considered the submissions made by the Appellant and the Respondent. We, now refer to the findings of the State Commission on this issue in the impugned order which read as under:-

"The Commission has scrutinised the material placed on record. The Commission understands that the damages for failure of "balancing leak off pipe" are covered under the defect liability clause of the contract. If the recovery of full fixed cost is allowed at actual availability as claimed by CSPDCL, it would lead to undue burdening of the consumers as the damages are already covered under the contract. The Commission does not consider it prudent to allow the recovery of full fixed cost as claimed by CSPGCL. Hence, the Commission has considered reduction in AFC for DSPM for FY 2013-14 in accordance with the CSERC MYT Regulations, 2012".

In the light of the aforesaid facts placed by the Appellant and the Respondent, we agree with the decisions of the State Commission in the impugned order on this issue.

13. **Summary of findings :-**

After thorough critical evaluation of the oral and documentary evidence available in the file and after considering the relevant material on records and submissions of the learned counsel appearing for both the parties, we are of the considered view that the issues raised in the present appeal are devoid of merits and the findings of the State Commission in the impugned order are just and reasonable. We do not find any error or material irregularity in the impugned order. Therefore, the instant appeal filed by the Appellant is liable to be dismissed as devoid of merits.

ORDER

For the forgoing reasons, as stated supra, we are of the considered opinion that the issues raised in the present appeal being Appeal No. 222 of 2015 are devoid of merits. Hence, the Appeal is dismissed and the impugned order passed by Chhattisgarh State Electricity Regulatory Commission dated 22.06.2015 read with order dated 23.05.2015 is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **25th day of July , 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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