

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.85 of 2010

Dated:03rd Jan, 2013

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**M/s. NTPC Limited
NTPC Bhawan, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110003**

...Appellant

Versus

- 1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001**
- 2. Uttar Pradesh Power Corp. Ltd (UPPCL)
Shakti Bhawan, 14, Ashok Marg
Lucknow-226 001**
- 3. Jaipur Vidyut Vitran Nigam Ltd. (JVVN)
Vidyut Bhawan, Janpath,
Jaipur-302 005**
- 4. Ajmer Vidyut Vitran Nigan Ltd.,(AVVN)
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305 001**
- 5. Jodhpur Vidyut Vitran Nigam Ltd. (JdVVN)
New Power House, Industrial Area,
Jodhpur (Rajasthan)**

6. **North Delhi Power Ltd., (NDPL)
Grid Sub Station, Hudson Lines,
Kingsway Camp, Delhi-110009**
7. **BSES Rajdhani Power Ltd., (BRPL)
BSES Bhawan, Nehru Place
New Delhi-110 019**
8. **BSES Yamuna Power Ltd., (BYPL)
Shakti Kiran Building,
Kakardooma, Delhi-110 092**
9. **Haryana Power Purchase Centre. (HPPC)
Shakti Bhawan, Sector-VI,
Panchkula, Haryana-134 109**
10. **Punjab State Electricity Board,
The Mall, Patiala-147 001
Punjab**
11. **Himachal Pradesh State Electricity Board Ltd (HPSEB)
Vidyut Bhawan,
Shimla-171 004, Himachal Pradesh**
12. **Power Development Department (J&K)
Govt of J&K,
Mini Secretariat, Jammu**
13. **The Chief Engineer-cum-Secretary
Engineering Department,
Chandigarh Administration
Sector-9, Chandigarh**
14. **Chairman,
Uttarakhand Power Corporation Ltd. (UPCL)
Urja Bhavan, Kanwali Road,
Dehradun-248 001 (Uttarakhand)**

.....Respondent(s)

Counsel for the Appellant(s) : Mr. M G Ramachandran, Sr Adv.
Mr. Anand K Ganesan
Ms. Swapna Seshadri,
Ms. Sneha Venkataramani
Ms. Sugatika Sahoo
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s): Mr. Pradeep Misra
Mr. Shashank Pandit
Mr. Manoj Kr Sharma
Mr. Daleep Kr. Dhayani
Mr. R B Sharma
Mr. Suraj Singh

J U D G M E N T

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

1. NTPC, the Appellant, has filed this Appeal challenging the order impugned, dated 11.1.2010 passed by the Central Electricity Regulatory Commission on revision of tariff due to additional capital expenditure incurred during the period 2008-09. The short facts are as under:

- (a) The Appellant, NTPC is a Central Government enterprise, engaged in the business of generation and sale of electricity to various purchasers in India.

- (b) The Appellant, at present owns and operates 22 Generating Stations situated in different parts of India.
- (c) One of the Generating Stations of the NTPC is Feroze Gandhi Unchahar Thermal Power Station, Stage-I located in the State of Uttar Pradesh.
- (d) The NTPC on 30.6.2009, filed a Petition in Petition No.129 of 2009 before the Central Electricity Regulatory Commission (Central Commission) for revision of the fixed-up charges by considering the impact of additional capital expenditure incurred by the Appellant during the period 2008-09 on the fixed up charges for the above said unit in accordance with the Tariff Regulations, 2004.
- (e) The Central Commission has ultimately disposed of the said Petition by the order dated 11.1.2010 deciding the matter on various claims made by the NTPC.
- (f) Though some of the claims were allowed in favour of the Appellant, the Central Commission disallowed the claim in respect of other issues.

(g) Challenging the order of the disallowance of the said claims, the Appellant, NTPC has filed this Appeal.

2. The issues involved in this Appeal which were decided as against the Appellant, are the following:

- (a) Liability actually incurred but payment deferred i.e. Un-discharged liabilities have been disallowed;
- (b) Depreciation amount has been treated as a normative loan repayment, thus, reducing the capital base to be serviced by loan to the above extent;
- (c) Disallowance of cost of Maintenance Spares while computing Working Capital;
- (d) Impact of de-capitalisation of assets on the cumulative repayment of loan;
- (e) De-capitalisation of capital spares and not excluding them as claimed by NTPC;
- (f) Disallowance of capitalisation of miscellaneous bought out items by NTPC.

3. According to the Appellant, **the issues (a) to (d)** have already been decided by this Tribunal in favour of the Appellant and therefore, the issues regarding the claims involving those issues can be allowed by this Tribunal.
4. The Learned Counsel for the Appellant has elaborated the **issues (e) and (f)** since these are the fresh issues which need to be considered.
5. The Learned Counsel for the Appellant, has made the submissions on the issues (e) and (f):
 - (a) **The Issue No.(e)** relates to Disallowance of the exclusion of de-capitalization of capital spares from the capital base of the project for determination of tariff;
 - (b) **The Issue No.(f)** would relate to the Disallowance of the cost of miscellaneous bought out items as an exclusion from de-capitalization.
6. On these issues, the submissions made by the Appellant are as follows:
 - (a) The unserviceable assets are to be replaced with new assets. Such replacement of new assets would normally take time. In the accounts books, the value of unserviceable assets gets de-

capitalized on the day when the assets become unserviceable.

- (b) The non availability of unserviceable assets does not lead to any relaxation to the NTPC. In case, the NTPC is not able to maintain the norms and parameters, there will be a proportionate reduction in the capacity charges. During the period between the day of the assets becoming unserviceable and the day from which the new asset is commissioned and till the capitalized value of the new asset is considered for tariff, the Appellant maintains and operates the generating station on the same norms and parameters. Thus, the value of such assets should be excluded from de-capitalization for the purpose of tariff for the above period.
- (c) In terms of Regulation 18 (3) of the Tariff Regulations, 2004 some of the assets were categorized as minor for the first time. Some of these minor assets became unserviceable during the period 2004-09.
- (d) The Capital Asset becomes unserviceable and the new capital assets are commissioned after 1.4.2009. The Central Commission has

interpreted the Tariff Regulations, 2009 as not providing for additional capitalization except for some specific items. So, the order of the Central Commission is for non consideration of the additional capitalization.

(e) The conclusion of the Central Commission is erroneous since even after the assets have become unserviceable, the generating Company still has an obligation to meet the norms and the parameters under Regulation 7 of the Tariff Regulations, 2009. However, the Central Commission has taken a wrong position that for the Tariff period 1.4.2009–31.3.2014, that no additional capitalization on such miscellaneous assets will be allowed in the tariff in terms of the Regulation 7 of the Tariff Regulations, 2009.

7. In refuting these submissions, the learned Counsel for the Respondents have elaborately explained the legal position and pointed out the various parameters available on record in defending the impugned order passed by the Central Commission.
8. We have carefully considered the submissions made by the parties.

9. The **First Issue (a)** is relating to the Exclusion of part of the capital expenditure validly incurred but pending actual disbursement/payment from the capital cost for the purposes of tariff.
10. It is pointed out that this issue is covered in favour of the Appellant in the following decisions rendered by this Tribunal:
 - (a) 16th March, 2009 in Appeal No.133, 135 etc of 2008 NTPC v. CERC & Ors. 2009 ELR (APTEL)337
 - (b) 10th December, 2008 in Appeal No.151 & 152 of 2007- NTPC v. CERC & Ors. 2008 ELR (APTEL) 916
11. Therefore, the First Issue as referred to above, is decided in favour of the Appellant.
12. The **Second Issue (b)** relates to Equating depreciation with normative loan repayment. This issue also has been covered in favour of the NTPC in the following judgments of this Tribunal:

(a) 16th March, 2009 in Appeal No.133, 135 etc of 2008 NTPC v. CERC & Ors. 2009 ELR (APTEL)337

(b) 13th June, 2007 in Appeal No.139, 140 etc of 2006

Accordingly, this issue also is decided in favour of the Appellant.

13. The **Third Issue (c)** is relating to Disallowance of cost of maintenance spares. The same has been decided in favour of the Appellant, NTPC in the following judgments of this Tribunal:

(a) 13th June, 2007 in Appeal No.139, 140 etc of 2006

(b) 21 August, 2009 in Appeal No.54 of 2009- NTPC v. CERC & Ors 2009 ELR (APTEL) 705

Accordingly, this issue also is decided in favour of the Appellant.

14. The **Fourth Issue (d)** is relating to Impact of de-capitalization of assets on cumulative repayment of loan. This issue has also been covered in favour of the NTPC by the judgment dated 13th June, 2007 in Appeals No.139, 140 etc., of 2006 rendered by this Tribunal. Accordingly, this issue is also decided in favour of the Appellant.

15. Thus, the above issues (a) to (d), in terms of the judgment earlier referred to above, are decided in favour of the Appellant.

16. In respect of other two remaining issues i.e. (e) and (f), the following questions would arise for consideration:

(a) **Whether the Central Commission was right in not allowing NTPC to exclude certain amounts from de-capitalization for the purchase of tariff in regard to capital spares which have become unserviceable?**

(b) **Whether the Central Commission was right in not allowing NTPC to exclude the cost of certain miscellaneous bought out items from de-capitalization for the purpose of tariff?**

17. Before dealing with these questions, let us refer to the discussion and finding given on these issues by the Central Commission through the impugned order dated 11.1.2010:

“(b) De-capitalization of capital spares: The Petitioner has de-capitalized capital spares amounting to Rs.9.16 lakh in books during the year 2008-09 on their becoming unserviceable. The Petitioner has submitted that the spares have been de-capitalized for accounting purposes only and are not to be de-capitalized for the purpose of tariff. The ground on which the exclusion has been sought by the Petitioner is as under:

“The unserviceable spares have been de-capitalized for accounting purposes. However, as new purchase of capital spares is not being allowed to be capitalized for tariff purposes by the Commission (R.1.063 Crs. In tariff period 2001-04), this de-capitalization may be excluded for tariff purposes.”

The prayer of the Petitioner for exclusion of de-capitalized spares is justified if the de-capitalized MBOA are the ones which were disallowed for the purpose of tariff. However, as per affidavit dated 10.9.2009, these spares were accounted for in the capital base of the generating station for the purpose of tariff since date of take over. Hence, exclusion of negative entries on account of de-capitalization of unserviceable spares not in use is not justified and not allowed for the purpose of tariff.

(c) De-capitalization of vehicles, school equipment, and hospital equipment, furniture, IT equipment in books: The Petitioner has de-capitalized MBOA as mentioned above in books of accounts amount to Rs.150.44 lakh during the year 2008-09 on its becoming unserviceable. However, the Petitioner has prayed that negative entries arising out of de-capitalization of MBOA are to be retained in the capital base for the purpose of tariff. The ground on which the exclusion has been sought by the petitioner is as follows:

“Vehicles and other miscellaneous assets have been de-capitalized. Since, Hon’ble Commission is not permitting capitalization of same, when they are procured, de-capitalization may also be excluded.

The prayer of the Petitioner for exclusion of de-capitalized MBOA is justified if the de-capitalized MBOA are the ones which were disallowed for the purpose of tariff. However, considering the fact that capitalization of minor assets for the purpose of tariff was disallowed for the tariff period 2004-09, it can be concluded that these de-capitalized assets are the ones which were procured prior to 1.4.2004. The Petitioner in its Affidavit dated 10.9.2009 has confirmed that these de-capitalized MBOA are in service from the date of takeover of the generating station i.e. 13.2.1992. As such, the exclusion of negative entries arising due to de-capitalization of unserviceable MBOA is not justified and cannot be allowed to remain in the capital base for the purpose of tariff”.

18. Let us now discuss these questions one by one.

19. **1st Issue (e)** relates to disallowance to exclude certain amounts from de-capitalization. In the present case, the additional capitalization is claimed by the Appellant during the period 2008-2009; hence the same will be governed by the Statutory Regulations known as CERC (Terms and Conditions of Tariff) Regulations, 2004. The relevant provisions of these Regulations are being reproduced below:

“1. Short title and Commencement: (1) These Regulations may be called the Central Electricity Regulatory Commission (Terms and Conditions) Regulations, 2004

“(2). These Regulations shall come into force on 1.4.2004, and unless reviewed earlier or extended by

the Commission, shall remain in force for a period of 5 years.

2. Scope and extent of application: (1) Where tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government, the Commission shall adopt such tariff in accordance with the provisions of the Act.

(2). These Regulations shall apply in all other cases where tariff is to be determined by the Commission based on capital cost”.

18. Additional Capitalisation:

(2) Subject to the provisions of clause(3) of this regulation, the capital expenditure of the following nature actually incurred after the cut off date may be admitted by the Commission, subject to prudence check:

i) Deferred liabilities relating to works/services within the original scope of work;

(ii) Liabilities to meet award of arbitration or for compliance of the order or decree of a court;

(iii) On account of change in law;

(iv) Any additional works/services which have become necessary for efficient and successful operation of the generating station, but not included in the original project cost; and

(v) Deferred works relating to ash pond or ash handling system in the original scope of work.

(3) Any expenditure on minor items/asserts like normal tools and tackles, personal computers, furniture, air-conditioners, voltage stabilizers, refrigerators, fans, coolers, TC, washing machines,

heat-convectors, carpets, mattresses etc. brought after the cut off date shall not be considered for additional capitalization for determination of tariff with effect from 01.4.2004.

Note 2

Any expenditure on replacement of old asserts shall be considered after writing off the gross value of the original assets from the original project cost, except such items as are listed in clause(3) of this regulation.

Note 3

Any expenditure admitted by the Commission for determination of tariff on renovation and modernization and life extension shall be serviced on normative debt-equity ration specified in regulation 20 after writing off the original amount of the replaced assets from the original project cost.

20. These Regulations nowhere provide for tariff to be worked out on de-capitalised assets which have stopped rendering useful service. This apart, there is no provision in the Tariff Regulations 2004 permitting the generator to de-capitalise its assets without revising its capital base merely because new assets in place of de-capitalised assets have to be purchased in future. On the other hand Note-2 of Regulation 18 provides for expenditure on replacement of old assets to be considered after writing off the gross value of the original assets from the original Project cost.

21. There cannot be any dispute in the fact that the capital cost of a generating station is a cost which incurred in commissioning the plant. The additional capital expenditure is a cost incurred for making efficient running of the plant. The tariff of the Appellant's generating Station is determined on cost plus basis. This means that any capital expenditure done which will enhance the efficiency of the plant will be capitalized and the tariff will be determined accordingly.
22. The Appellant in its Petition dated 129 of 2009 has claimed to retain the de-capitalized amount in respect of spares amounting to Rs.9.16 lakhs and miscellaneous bought out items amounting to Rs.150.44 lakhs during the period 2008-2009.
23. Even according to the Appellant, these items have become unserviceable. If the aforesaid spares are not rendering any service, the same cannot be retained in the capital cost for the purpose of tariff. Therefore, the assets which are not in service have to be excluded from the capital cost of the Generating Station, as the same are not rendering any useful service to the beneficiaries. In the cost plus principle any amount spent by the Appellant which gives benefit to the beneficiaries has to be capitalized.
24. The tariff of the Appellant Generating Stations has to be determined by the CERC Regulations, 2004. The CERC

Regulations, 2009 cannot be applied in the present case for the purpose of determining additional capitalization.

25. The Tariff Regulations, 2009 shall come into force on 1.4.2009. Admittedly, the provisions of the Regulations, 2009 are not applicable for the period in question. This means, as and when the Appellant will acquire the assets the same will be considered by the Commission as per 2009 Regulations. Therefore, the exclusion of negative entries on account of the de-capitalization of unserviceable spares not in use is not justified.
26. Therefore, the findings given by the Central Commission on this issue is perfectly justified. Hence, this issue is decided as against the Appellant.
27. In regard to **the issue regarding disallowance of the cost of miscellaneous bought out items**, it is noticed that the NTPC had de-capitalized the miscellaneous bought out items as mentioned in the books of accounts amounting to Rs.150.44 lakhs during the year 2008-09 on its becoming unserviceable.
28. In the impugned order, the Central Commission concluded that the exclusion of the negative entries arising due to de-capitalization of unserviceable spares not in use is not justified and as such, it cannot be allowed to remain in

capital base for the purpose of tariff. In view of the explanation given in respect of item (e) this conclusion arrived at on the basis of the Regulation also in our view is correct. Thus, this issue is also decided as against the Appellant.

29. Summary of Our Findings

- (a) Issue (a) i.e. Liability actually incurred but payment deferred i.e. Un-discharged liabilities have been disallowed; is allowed in favour of the Appellant.**
- (b) Issue (b) i.e. Depreciation amount has been treated as a normative loan payment, thus, reducing the capital base to be serviced by loan to the above extent; is decided in favour of the Appellant.**
- (c) Issue (c) i.e. Disallowance of cost of maintenance spares while computing working capital, is allowed in favour of the Appellant.**
- (d) Issue (d) i.e. Impact of de-capitalization of assets on the cumulative repayment of loan; is decided in favour of the Appellant.**
- (e) Issue (e) i.e. De-capitalization of capital spares and not excluding them as claimed by NTPC; is rejected and decided as against the Appellant.**

(f) Issue (f) i.e. Disallowance of capitalization of miscellaneous bought out items by NTPC; is rejected and decided as against the Appellant.

30. As indicated in the above findings, the Appeal in respect of issue No.(a) to (d) are allowed in favour of the Appellant and Issue No. (e) and (f) are decided as against the Appellant. Accordingly, the Central Commission may pass consequential orders in terms of this judgment.

31. The Appeal is partly allowed. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 03rd Jan, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~