

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

Appeal Nos. 151 & 152 of 2007

Dated : 10th December, 2008

**Coram : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member**

Appeal No. 151 of 2007:

NTPC Ltd.
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110 003

... Appellant

Versus

1. Central Electricity Regulatory Commission
Core-3, Floor-6, SCOPE Complex-7
Lodhi Road, New Delhi – 110 003
2. Uttar Pradesh Power Corporation Ltd.
Shakti Bhawan, 14 Ashoka Marg,
Lucknow – 226 001
3. Jaipur Vidyut Vitran Nigam Ltd.
Vidyut Bhawan, Janpath,
Jaipur – 302 005, Rajasthan
4. Ajmer Vidyut Vitran Nigam Ltd.
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer – 305 001
Rajasthan

5. Jodhpur Vidyut Vitran Nigam Ltd.
New Power House, Industrial Area,
Jodhpur – 342 003
Rajasthan
6. Delhi Transco Ltd.
Shakti Sadan, Kotla Road,
New Delhi – 110 002
7. Haryana Power Generation Co. Ltd.
Shakti Bhawan, Sector-VI,
Panchkula,
Haryana – 134 109
8. Punjab State Electricity Board
The Mall,
Patiala – 147 001
9. Himachal Pradesh State Electricity Board
Vidyut Bhawan, Shimla – 171 004
10. Power Development Department
Through its Commissioner
Government of Jammu & Kashmir
Mini Secretariat, Jammu – 180 001
11. The Chief Engineer-Cum-Secretary
Engineering Department
Chandigarh Administration,
Sector-9, Chandigarh – 160 009
12. Uttaranchal Power Corp. Ltd.
Urja Bhawan, Kanwali Road,
Dehradun – 248 001
Uttaranchal (Through its Chairman and Managing Director) ... Respondents

Appeal No. 152 of 2007:

NTPC Ltd.
NTPC Bhawan, SCOPE Complex,
7, Institutional Area,
Lodhi Road,
New Delhi – 110 003

... Appellant(s)

Versus

1. Central Electricity Regulatory Commission
Through its Secretary,
7th Floor, Core-3, SCOPE Complex,
Lodhi Road,
New Delhi – 110 003
2. Transmission Corporation of Andhra Pradesh Ltd.
(APTRANSCO)
Vidyut Soudha,
Khairatabad,
Hyderabad – 500 082.
3. AP Eastern Power Distribution Co. Ltd. (APEPDCL)
Sai Shakthi Bhavan,
30-14-09,
Near Saraswathi Park,
Visakhapatnam – 531 020
4. AP Southern Power Distribution Co. Ltd. (APSPDCL)
H. No. 193-93 (M) Upstairs
Renigunta Road,
Tirupathi – 517 501
5. AP Northern Power Distribution Co. Ltd. (APNPDCL)
Opp. NIT Petrol Pump,
Chaitanyapuri, Warangal – 506 004

6. AP Central Power Distribution Co. Ltd. (APCPDCL)
Singareni Bhavan,
Red Hills,
Hyderabad – 500 004
7. Tamil Nadu Electricity Board (TNEB)
800, Anna Salai,
Chennai – 600 002
8. Karnataka Power Transmission Corp. Ltd. (KPTCL)
Kaveri Bhawan, K. G. Road,
Bangalore – 560 009
9. Bangalore Electricity Supply Co. Ltd. (BESCOM)
Krishna Rajendra Circle,
Bangalore – 560 009
10. Mangalore Electricity Supply Co. Ltd. (MESCOM)
Paradigm Plaza, A.B. Shetty Circle,
Mangalore – 575 001.
11. Chamundeshwari Electricity Supply Corp. Ltd.
(CESC Mysore)
927, L. J. Avenue,
New Kantharajours Road,
Saraswathi Puram,
Mysore – 570 009
12. Gulbarga Electricity Supply Co. Ltd. (GESCO)
Main road, Gulbarga,
Karnataka – 585 102
13. Hubli Electricity Supply Co. Ltd. (HESCOM)
II floor, Eureka Junction,
T. B. Road,
Hubli – 560 029

14. Kerala State Electricity Board (KSEB)
Vaidyuthi Bhavanam,
Pattom
Thiruvananthapuram – 695 004

15. Electricity Department (PUDUCHERRY)
NSC Bose Salai,
Govt. of Puducherry,
Pondicherry – 605 001

Respondent(s)

Counsel for the appellant(s) : Mr. M. G. Ramachandran
Ms. Swapna Seshadri and
Mr. Anand K. Ganesan

Mr. Pranav Kapoor, Rep. of
NTPC

Counsel for the Respondent(s) : Mr. Kailash Vasdev, Sr. Adv.
Mr. P. R. Kovilan, Mr. Krishna
Swamy, DFO, TNEB

Mr. Manwinder Arora,
Mr. Arvind Kumar for Delhi
Transco Ltd.

Mr. Pradeep Misra, Mr. Manoj
Kumar for UPPCL

Mr. B. Sreekumar, Asst.
Chief(L), CERC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

These are two appeals filed by NTPC Ltd. challenging two orders, both dated 15.10.2007, passed by Central Electricity Regulatory Commission (Commission for short), determining tariff in respect of two of its generating stations.

2. The appeal No. 151 of 2007 challenges the tariff order in respect of Rihand Super Thermal Power Station, Stage-II (2 x 500 MW) (herein referred to as Rihand-II), for the period of 15.08.05 to 31.03.09. Rihand-II was commissioned for commercial operation on 15.08.05 (Unit-I) and 01.04.06 (Unit-II).

3. Appeal No. 152 of 2007 challenges another order dated 15.10.07 determining tariff in respect of Ramagundam Super Thermal Power Station, Stage-III (500 MW) (hereinafter referred to as Ramagundam-III) for the period of 25.03.2005 to 31.03.2009).

4. Challenges to the two impugned orders are similar and therefore the two matters have been heard together and the two are being disposed of by this common judgment.

5. The two issues involved in this appeal are as under:

- (a) Whether the Central Commission was right in excluding committed liabilities in relation to the capital assets established, commissioned and put to use to the extent of amount that has been retained by NTPC by way of retention money, security deposit or similar such things to ensure performance of the work undertaken by the Contractors and others in accordance with the contract and is to be released in due course.
- (b) Whether the Central Commission has dealt properly the tariff adjustments for repayment of the common loan taken by NTPC on its Balance Sheet for two or more generating stations in regard to interest during construction which should form part of the capital cost.

Issue No.1:

6. On 21.09.06, the appellant NTPC, filed a petition, being Petition No. 106 of 2006, pertaining to determination of tariff in respect of Rihand-II for the tariff period 15.08.05 to 31.03.09. NTPC, *inter alia*, claimed the capital cost based on actual cost incurred by NTPC on the assets capitalized on 15.08.05 to 31.03.06 in respect of Rihand-II, Unit-I and II respectively. NTPC also

claimed interest on loan during construction as part of capitalized cost in respect of loans taken by NTPC from various lenders. The Commission, vide the impugned tariff order, excluded the capital expenditure incurred by NTPC in respect of liabilities for which payment have not been made till the date of operation of Rihand-II. The Commission also disallowed, vide the same order, some portion of Interest During Construction (IDC for short). Thus as against the claim for capital cost of Rs.1506.95 Crores as on 15.08.05, claimed for Unit-I of Rihand-II, the Central Commission allowed only Rs.1374.60 Crores and excluded Rs.132.31 Crores. Similarly, as against the claim for capital cost of Rs.2792.58 Crores claimed by NTPC for Units I & II the Central Commission allowed only Rs.2656.84 Crores and excluded Rs.135.74 Crores.

7. Similarly, in the case of Ramagundam, the Commission vide another tariff order of the same date disallowed the part of capital cost claimed by the appellant. NTPC filed a tariff petition, being Petition No. 140 of 2005 for Ramangundam III which was declared commercial on 25.03.05. The appellant sought tariff for this station for the period of 20.05.03 to 31.03.09 and, *inter alia*, claimed capital cost based on expenditure incurred by it on assets capitalized on 25.03.05. The Central Commission excluded from the claim all expenditure and liabilities for which payment had not been made till the date of operation of Ramagundam-III and also

disallowed some portion of the IDC. Thus as against the capital cost of Rs.1424.91 Crores, claimed by NTPC for Ramagundam-III, the Central Commission allowed only Rs.1313.56 Crores and excluded Rs.111.35 Crores.

8. Capital cost of a project is a major determinant of tariff. Capital cost to be allowed as pass through in tariff is regulated by Regulations 17 & 18 of the Tariff Regulations 2004. The relevant parts of the two provisions are extracted below:

*“17. **Capital Cost:** Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the generating station and shall include Capitalised initial spares subject to following ceiling norms as a percentage of the original project cost as to the cut off date:*

- (i) Coal-based/lignite-fired generating stations
- 2.5%*
- (ii) Gas Turbine/Combined Cycle generating stations
- 4.0%*

Provided that where the power purchase agreement entered into between the generating company and the beneficiaries provides a ceiling of actual expenditure, the capital expenditure shall not exceed such ceiling for determination of tariff;

3*[Provided further that any person intending to establish, operate and maintain a generating station may make an application before the Commission for ‘in principle’ acceptance of the project capital cost and financing plan before taking up a project through a petition in accordance with the procedure specified in the Central Electricity Regulatory Commission (Procedure for making application for determination of tariff, publication of the application and other related matters) Regulations, 2004, as applicable from time to time. The petition shall contain information regarding salient features of the project including capacity, location, site specific features, fuel, beneficiaries, break up of capital cost estimates, financial package, schedule of commissioning, reference price level, estimated completion cost including foreign exchange component, if any, consent of beneficiary licensees to whom the electricity is proposed to be sold etc.*

Provided further that where the Commission has given 'in principle' acceptance to the estimates of project capital cost and financing plan, the same shall be the guiding factor for applying prudence check on the actual capital expenditure:]

Provided further that in case of the existing generating stations, the capital cost admitted by the Commission prior to 1.4.2004 shall form the basis for determination of tariff”

Note

Scrutiny of the project cost estimates by the Commission shall be limited to the reasonableness of the capital cost, financing plan, interest during construction, use of efficient technology, and such other matters for determination of tariff.

3 Inserted vide Regulation 2 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment) Regulations, 2005 published in the Gazette of India (Extraordinary) Part III, Section 4 (No. 120) on 25.8.2005.

18. **Additional capitalization:** (1) *The following capital expenditure within the original scope of work actually incurred after the date of commercial operation and up to the cut off date may be admitted by the Commission, subject to prudence check:*

- (i) *Deferred liabilities;*
- (ii) *Works deferred for execution;*
- (iii) *Procurement of initial capital spares in the original scope of work, subject to ceiling specified in regulation 17;*
- (iv) *Liabilities to meet award of arbitration or for compliance of the order or decree of a court; and*
- (v) *On account of change in law.”*

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9. The Commission noticed that expenditure of Rs.279258 lacs, claimed by the appellant, included expenditure on account of liabilities incurred but not actually discharged. The appellant was thereafter directed to furnish certain information: (a) details of expenditure incurred up to 15.08.05 (date of commercial operation of Unit-I Rihand-II) and 01.04.06 (date of commercial operation of Unit-II) and capitalized, and (b) liability included in the capital cost

on accrual basis i.e. liabilities for which provision was made in the capital cost. Similar information was also called for, for Ramagundam-III, relevant for the period up to 25.03.05 (date of commercial operation of the generating station). The Commission went into the interpretation of the words actual expenditure incurred and opined that the expenditure on account of liabilities incurred but not actually discharged will not be included by the term “actual expenditure incurred” and therefore disallowed that portion of the capital cost claimed by the appellant. The Commission as well as the beneficiaries of these power plants namely Uttar Pradesh Power Corporation Ltd. (UPPCL) and Delhi Transco Ltd. (DTL), Tamil Nadu Electricity Board (TNEB) has opposed the appeal. All the parties have been heard by us.

10. The principal issue, as is clear from the narration of facts, is whether actual expenditure incurred included such liabilities which had come upon the appellant towards capital cost but had not actually been disbursed by cash outflow. It is not disputed that till the tariff year in question the Commission had included capital expenditure for which payment has actually been made as well as capital expenditure for which payment was deferred as forming part of capital base. In these two impugned tariff orders the Commission took a different view. The appellant submitted before the Commission that the “actual expenditure incurred” cannot be

restricted to actual cash outflow i.e. actual amounts paid for meeting the capital expenditure. According to the appellant, the liability incurred or obligations served formed part of “actual expenditure incurred” and accordingly the details furnished on the information called for, which were inclusive of liability incurred needed to be considered for determination of tariff. The appellant in support relied upon Black Law Dictionary and Section 209 of the Companies Act. Before this court, the learned counsel appearing for both sides are in agreement that “expenses incurred” include the liabilities assumed for which actual payment has not been made. Nonetheless, on behalf of the respondents it is contended that when the Regulations used the word “actual” in addition to the words “expenditure incurred”, the meaning of the phrase “actual expenditure incurred” would indicate only such liabilities which has been incurred and paid for and would not include such liability for which payment is yet to be made. The word “actual”, as per Black’s Law Dictionary, means “real” or “existing in fact”. The Commission was of the opinion that Tariff Regulations 2004 emphasized that tariff was to be determined on “actuals” and in this context noticed the use of the word “actual”/ “actually” in other provisions of the Regulations 2004. It may be reiterated that in Regulation 18, extracted above, also the words used are “work actually incurred”. It is submitted by the respondents that the portion of the liabilities assumed which are paid for in the subsequent years can be taken

care of as additional capitalization covered by Regulation 18. The Commission was of the opinion that if the tariff is fixed on the basis of expenditure incurred without a corresponding cash outflow it would amount to enrichment of the utility at the cost of consumers who ultimately bears the burden of tariff. That the Commission had in the past fixed the tariff including such capital expenditure which had actually been disbursed is acknowledged in the tariff order impugned in appeal No. 151 of 2007 in the following lines:

“... it has come to the notice of the Commission that in the past in several cases, the petitioner charged tariff after accounting for liabilities in the capital cost, for many years without incurring the actual expenditure. We do not find recurrence of these cases. We may add that as and when liabilities are settled by the petitioner, it becomes entitled to additional capitalization and consequently revision of tariff”.

11. The arguments for not including the portion of the capital cost for which payment had not been disbursed enumerated in the tariff order impugned in appeal No.151 of 2007 were adopted by the Commission in the tariff order impugned in appeal No. 152 of 2007.

12. Parties are not at variance in their view that 'incurred' means liability assumed – whether paid for or not. Thus if the capital asset has been acquired, the cost thereof has been incurred even if cash has actually not passed from the buyer to the seller. But the Commission, as also the utility purchasing from the appellant would want that when the regulation says 'actually incurred' it means more than 'incurred' and further that it means incurred and paid for. It is submitted by Mr. Pradeep Misra that no word in the regulation should be rendered redundant by interpretation. According to him, no other interpretation of the word 'actually' is possible.

13. Mr. Ramachandran on the other hand submits that tariff is always based on actuals except when the actuals are not known when an estimate is substituted for the actual. Such estimates are also eventually replaced by actuals when the truing up exercise is done. 'Actuals', according to Mr. Ramachandran has to be something distinct from estimates. For example, the project may have been undertaken on an estimated cost of Rs.1,00,000 crores but the actual cost may be less or more depending upon the time taken for construction and other factors affecting the cost. According to Mr. Ramachandran when the Tariff Regulation says 'actual cost incurred' it is only pointing to the actual cost incurred, as distinct from the cost which was estimated or the cost for which

approval may have been obtained from appropriate authorities. In other words, if the project is completed at a cost lower than the estimated or anticipated or approved, the generating company will be entitled to recover only the cost actually incurred and the estimates on approved cost.

14. In our opinion, the interpretation offered by Mr. Ramachandran is more rational than the interpretation offered by Mr. Vasdev or Mr. Misra. Even the Commission, in the past, has included in 'capital cost', costs which had been incurred but not paid for. The Commission, in the impugned order has attempted to give a new interpretation of the term 'actually incurred' but has not explained why in the past it has taken another view. The Commission does not say that the earlier interpretation was wrong but merely says that the appellant in the past had claimed under 'capital cost' the capital asset paid for as well capital asset not paid for and has expressed disapproval for the same. The Commission has not attempted to clarify the reason for the change in its interpretation. The generating companies generally enter into Power Purchase Agreement (PPA) even before the project is completed and supply of energy there from is begun. Such PPAs are entered into on the basis of estimated cost. Any person intending to establish a generating station may obtain an 'in principle' acceptance of the project capital cost from the

Commission. The words 'actually incurred' have to be understood in that context. The proviso, Regulation 17 of the tariff Regulations 2004, clearly indicate the same context. The first proviso refers to a PPA in which a ceiling of actual expenditure may have been contemplated and provides that capital expenditure shall not exceed such limit. The second proviso refers to 'in principle' acceptance of the project capital cost. The third proviso makes it clear that even when an 'in principle' acceptance has been given, the 'actual capital expenditure' alone will go into tariff.

15. Assuming that the interpretation offered by the respondents and the Commission is a possible interpretation, once the Commission has adopted one interpretation, which is also possible, it should not alter that interpretation. This is particularly so because no one in the past challenged the interpretation adopted by the Commission. In our opinion, the Commission's previous view is the correct view and the same should not have been substituted by the view expressed in the impugned order.

16. According to the Commission, that part of payment of capital which is retained and paid subsequently should be considered under Regulation 18 which provides for additional capitalization.

17. This Regulation is fully comprehensible with the above understanding of the word “actually incurred”. Regulation 18 is dealing with capital expenditure incurred after the date of commercial operation and up to the cut off date. The nature of such capital expenditures can be : deferred liability and work deferred for execution and the like. Such capital expenditures which were contemplated for being under taken originally but was deferred and actually undertaken after the date of commercial operation will be treated as additional capitalization. In Regulation 18, the word repeatedly used is “deferred liability”. Obviously deferred liability is the liability which has not yet been assumed. When a capital asset is purchased, the liability is assumed. Such liability is not deferred. Only the payment is deferred. Regulation 18 is not dealing with deferred payments but is dealing with deferred liabilities. Work deferred for execution means works not already undertaken. Certain works, within the original scope of work may not have been undertaken before the date of commercial operation. Such work may be undertaken after the date of commercial operation. If it is so done, the same will be available for recovery through tariff under Regulation 18. It must however be ensured that no capital expenditure which is claimed under Regulation 17 is claimed again as Additional Capitalization under Regulation 18.

18. There is yet another angle to this aspect. As soon as the plant is put into operation the depreciation will begin. Even if 10% of the capital cost for the plant is retained with the intention of payment on a subsequent date depending upon satisfactory performance of the plant, the capital asset that depreciates is not the 90% of it but the whole or 100% of it. There is no reason why the generating company should be deprived of its entitlement to recover such depreciation on 100% value of the asset simply because a part of the value has been retained to ensure efficient performance of the capital asset.

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

20. Mr. Vasdev reminded us of our jurisdiction as an appellate forum and submitted that the appellate court should not interfere with the impugned order if the view expressed therein is a possible view. We do feel that the view taken by the Commission in the two impugned orders is wrong

particularly in the light of the settled practice in the past. The same has to be set aside and capital cost as defined in the Regulations has to include that part of capital cost for which actual payment is still to be made.

Issue No.2:

21. The other issue in the matter relates to repayment of loan and interest during construction. The appellant NTPC has several generating stations. It takes loans on the strength of corporate balance sheet and allocates the borrowed funds to its generating stations instead of borrowing separately for each project. When a plant is under construction, the appellant is entitled to Interest During Construction (IDC for short) on the funds which had to be borrowed. The repayment would begin as per terms of the loan agreement. The appellant claimed that it be allowed to firstly adjust the entire installments falling due to the lender in the debt repayment of the generating projects under commercial operation and not to apportion and allocate the same to the project under construction. According to NTPC this would allow costliest loan to be retired first fully thereby reducing the interest on outstanding debts. This method has been described as First In First Out method (FIFO). The Commission rejected the FIFO method. Appellant in the appeal asked for

implementation of its FIFO method. However, during arguments the appellant has given up the claim for adopting FIFO method for repayment of corporate loan. However, it is contended on behalf of the appellant that if the loans repaid are attributed proportionately to certain projects under construction for which tariff is yet to be fixed and revenue is yet to be earned, such repayment should be deemed to have been made out of the internal or borrowed funds. NTPC submits that if the repayment of loan taken by NTPC is accounted for during the period prior to the commercial operation of the generating station in the ratio of allocation of loan to respective generating stations, the amount of repayment should be considered as having come from internal sources of NTPC or from other borrowings. This submission is quite logical in as much as before the date of commercial operation the project under construction does not earn any revenue and does not generate any fund from which loan can be repaid. In such situation if the project under construction repays a part of the loan, the funds for the same has to come either from the NTPC i.e. owner or from funds borrowed from other sources. In either case such sum will entail a return in the form of interest.

22. The NTPC submits that deployment of such internal sources of NTPC for the purpose of repayment of loan of the project under construction before the date of commercial operation should be considered as deemed loan from NTPC to the project. Accordingly, NTPC should be entitled to claim notional interest on such loan as interest during construction.

23. The respondents do not dispute this proposition. On behalf of the respondent No.7, TNEB, it is contended that funds deployed for repayment of loan during construction should earn interest only if such amount is actually borrowed and not if the amount comes from NTPC's own sources. This, however, is not a correct view. If NTPC employs its own funds, over and above equity, there is no reason why NTPC should not earn interest thereon.

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

25. Accordingly, we allow both the appeals in part. We direct that the appellant be allowed to recover capital cost incurred including the portion of such cost which has been retained or has not yet been paid for. We also direct that in case the Commission attributes any loan taken at the corporate level to a particular project under construction and considers any repayment out of it before the date of commercial operation the sum deployed for such repayment would earn interest as pas through in tariff.

26. The Commission is directed to give effect to the directions given herein in the truing up exercise and consequent subsequent tariff orders.

Pronounced in open court on this **10th day of December, 2008.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member