

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

Appeal No. 158,161,192,193,194, 195,196, 206 of 2005 and 33 and 46 of 2006

N.T.P.C.

Appellant(s)

Versus

C.E.R.C. & Others

Respondent(s)

Under Section 111 (2) of Electricity Act, 2003

**Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A. A. Khan, Technical Member**

September 7th 2006

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Mr. Keshav Mohan.
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Mr. L.N. Mahapatra, Ms. Suman Kukreti

Appeal No. 158 of 2005

National Thermal Power Corporation Ltd.

...Appellant

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
7th Floor, Core -3, SCOPE Complex

2. Lodhi Road, New Delhi – 110003
Madhya Pradesh State Electricity Board
Shakti Bhawan, Vidyut Nagar
Jabalpur – 482008
3. Maharashtra State Distribution Co. Ltd.
Prakashgad, Bandra (E)
Mumbai – 400051
4. Gujarat Urja Vikas Nigam Ltd. (GUVNL)
Vidyut Bnavan, Race Course
Vadodra - 390007
5. Chhattisgarh State Electricity Board,
P.O. Sundar Nagar
Danganlya, Raipur - 492013
6. Government of Goa
Through its Chief Engineer (Electrical)
Electricity Department
Vidyut Bhawan,
Panji, Goa
7. Electricity Department
Administration of Daman & Diu
Daman – 396210
8. Electricity Department,
Administration of Dadra & Nagar Haveli,

...Respondents

Appeal No. 161 of 2005

National Thermal Power Corporation Ltd.

...Appellant

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
7th Floor, Core -3, SCOPE Complex
Lodhi Road, New Delhi – 110003
2. Transmission Corporation of Andhra Pradesh
Vidyut Saudha, Khairabad
Hyderabad - 500082
3. Tamil Nadu Electricity Board
800, Ana Salai
Chennai – 600002
4. Karnataka Power Transmission Corporation Limited
Kaveri Bhawan, K.G. Road, Bangalore – 560009
5. Kerala State Electricity Board

- Vidyut Bhavanam, Pattom
Thiruvananthapuram - 695004
6. Government of Pondicherry
Through its Superintendent Engineer
Electricity Department, NSC Bose Salai
Pondicherry – 605001
7. Government of Goa
Through its Chief Engineer (Electrical)
Electricity Department
Vidyout Bhavan, Panji
Goa- 403001

...Respondent(s)

Appeal No. 192, 193, 195 of 2005

National Thermal Power Corporation Ltd.

...Appellant

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
7th Floor, Core -3, SCOPE Complex
Lodhi Road, New Delhi – 110003
2. Uttar Pradesh Power Corpn. Ltd. (UPPCL)
Shakti Bhawan
14, Ashoka Marg
Lucknow – 226001
3. Jaipur Vidyut Vitran Nigam Ltd. (JVVN)
Vidyut Bhawan, Janpath
Jaipure - 302005
4. Ajmer Vidyut Vitram Nigam Ltd. (AVVN)
Old Power House, Hathi Bhata,
Jaipur Road,
Ajmer
5. Jodhpur Vidyut Vitran Nigam Ltd (JdVVN)
New Power House, Industrial Area,
Jodhpur
6. Delhi Transco Ltd. (DTL)
Shakti Sada
Kotla Road, Near ITO
New Delhi
7. Haryana Vidyut Paasaran Nigam Ltd. (HVPNL)
Shakti Bhawan, Sector –VI

- Panchkula
Haryana - 134109
8. Punjab State Electricity Board(HPSEB)
The Mall
Patiala
 9. Himachal Pradesh State Electricity Board
Kumar Housing Complex Building –II
Vidyut Bhawan
Shimla - 171004
 10. Power Development Department (J&K)
Government of J & K
Secretariat
Jammu
 11. Power Department (Chandigarh)
Union Territory of Chandigarh
Addl. Office Bjuilding
Sector – 9 D
Chandigarh
 12. Uttranchal Power Corporation Ltd. (UPCL)
Urja Bhavan
Kanwali Road

...Respondents

Appeal No. 194 of 2005

National Thermal Power Corporation Ltd.

...Appellant

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
7th Floor, Core -3, SCOPE Complex
Lodhi Road, New Delhi – 110003
2. Uttar Pradesh Power Corpn. Ltd. (UPPCL)
Shakti Bhawan
14, Ashoka Marg
Lucknow – 226001
3. Delhi Transco Ltd. (DTL)
Shakti Sada
Kotla Road, Near ITO
New Delhi

...Respondents

Appeal No. 196 of 2005

National Thermal Power Corporation Ltd.

...Appellant

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
7th Floor, Core -3, SCOPE Complex
Lodhi Road, New Delhi – 110003
2. West Bengal State Electricity Board
Vidyut Bhawan, block DJ,
Sector – I, Salt Lake City
Kolkata – 8700091
3. Bihar State Electricity Board
Vidyut Bhawan, Bailey Road
Patna – 800021
4. Jharkhand State Electricity Board
Engineering Bhawan
Heavy Engineering Corporation
Dhurwa
Ranchi – 834004
5. Grid Corporation Orissa Ltd.
Vidyut Bhawan, Janpath
Bhubaneswar – 751007
6. Damodar Valley Corporation
DVC Towers, VIP Road
Kolkata – 700054
7. Power Department
Govt. of Sikkim
Kazi Road
Gangtok
Sikkim – 737101
8. Tamil Nadu Electricity Board
NPKRP Maaligail
800, Anna Salai
Chennai – 600 002.
9. Union Territory of Pndicherry,
Electricity Department,
58, Subhash Chandra Bose Salai,
Pondicherry- 605001.
10. Uttar Pradesh Power Corpn. Ltd.,
Shakti Bhawan,14, Ashoka Marg,

- Lucknow- 226 001.
11. Power Development Department (J&K),
Govt. of J&K,
Secretariat, Srinagar.
 12. Power Department,
Union Territory of Chandigarh,
Addl. Office Building,
Sector 9D, Chandigarh.
 13. Madhya Pradesh State Elec. Board,
Shakti Bhawan, Vidyut Nagar,
Jabalpur -482 008.
 14. Gujarat Electricity Board,
Sardar Patel Vidyut Bhawan,
Race Course, Baroda – 390 007.
 15. Electricity Department,
Administration of Daman & Diu (DD),
Daman- 396 210.
 16. Electricity Department,
Administration of Dadra and Nagar Haveli (DNH),
Srivassa, Via VAPI.
 17. Delhi Transco Ltd. (DTL),
Shakti Bhawan,
Kotla Road, Near ITO, New Delhi.
 18. Maharashtra State Elec. Board,
'Prakashgad'
Bandra (East),
Mumbai-400 051.

Appeal No. 206 of 2005

National Thermal Power Corporation Ltd.

...Appellant

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
7th Floor, Core -3, SCOPE Complex
Lodhi Road, New Delhi – 110003
2. Madhya Pradesh State Elec. Board,
Shakti Bhawan, Vidyut Nagar,
Jabalpur -482 008.
3. Maharashtra State Elec. Board,
'Prakashgad' Bandra (East),

- Mumbai-400 051.
4. Gujarat Urja Vikas Nigam Ltd.,
Sardar Patel Vidyut Bhawan,
Race Course, Baroda – 390 007.
 5. Chattisgarh State Electricity Board
P.O. Sunder Nagar,
Danganiya, Raipur- 492 913.
 6. Government of Goa,
Through its Chief Engineer (Electrical),
Electricity Department, Vidyut Bhawan,
Panaji, Goa- 403 001.
 7. Administration of Daman & Diu,
Through its Secretary (Power)
Electricity Department,
Administration of Daman & Diu (DD),
Daman- 396 210.
 8. Administration of Dadra and Nagar Haveli (DNH),
Through its Secretary (Power),
Electricity Department,
Srivassa, Via VAPI- 396 230.

...Respondents

Appeal No. 33 of 2006

National Thermal Power Corporation Ltd.

...Appellant

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
7th Floor, Core -3, SCOPE Complex
Lodhi Road, New Delhi – 110003
2. Grid Corporation of Orissa Limited
Vidyut Bhawan, Janpath
Bhubaneswar - 751007

...Respondents

Appeal No. 46 of 2006

National Thermal Power Corporation Ltd.

...Appellant

Versus

1. Cenntal Electricity Regulatory Commission
Through its Secretary
7th Floor, Core -3, SCOPE Complex
Lodhi Road, New Delhi – 110003
2. Madhya Pradesh Electricity Board,
Shakti Bhawan, Vidyut Nagar
Jabalpur – 482008
3. Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, Bandra (East)
Mumbai
4. Gujrata Urja Vikas Nigam Limited
Sardar Patel Marg,
Vadodra
Gujarat
5. Chattisgarh State Electricity Board
P.O. Sundar Nagar
Danganiya, Raipur – 492913
6. Government of Goa
Through its Chief Engineer (Electrical)
Electricity Department, Vidyut Bhawan,
Panji, Goa – 403001
7. Administration of Daman & Diu
Through its Secretary (Power)
Electricity Department
Daman – 396210
8. Administration of Dadar and Nagar Haveli,
Through its Secretary (Power)
Electricity Department
Silvasa – 396230

...Respondent(s)

COMMON JUDGEMENT

Per Hon'ble Mr. A.A. Khan, Member Technical

Batch of Appeals preferred by N.T.P.C.

Appeal No. 158 and 161 of 2005

- (a) These appeals have been preferred by the appellants under Section 111(1) of the Electricity Act 2003 against the order dated 11.08.2005 passed in Petition Nos. 56 & 57 of 2005 by the Central Electricity Regulatory Commission.

Appeal No. 192, 193, 194, 195, 196 of 2005

- (b) These appeals has been preferred by the appellants under Section 111(1) of the Electricity Act 2003 against the order dated 19.10.2005 passed in Petition Nos. 69, 78, 77, 89, and 71 of 2005 by the Central Electricity Regulatory Commission.

Appeal No. 206 of 2005

- (c) This appeal has been preferred by the appellant under Section 111(1) of the Electricity Act 2003 against the order dated 02.11.2005 passed in Petition No. 114 of 2005 by the Central Electricity Regulatory Commission.

Appeal No. 33 of 2006

(d) This appeal has been preferred by the appellant under Section 111(1) of the Electricity Act 2003 against the order dated 12.12.2005 passed in Petition No. 108 of 2005 by the Central Electricity Regulatory Commission.

Appeal No. 46 of 2006

(e) This appeal has been preferred by the appellant under Section 111(1) of the Electricity Act 2003 against the order dated 25.01.2006 passed in Petition No. 136 of 2005 by the Central Electricity Regulatory Commission.

BACKGROUND

1.0 In these appeals the appellant has challenged the impugned orders detailed above on the common ground that the Central Electricity Regulatory Commission was not justified in rejecting the claim of the appellant based on more than normalized O & M expenses incurred on account of the increased employees cost due to pay revision in the years 1997-98 to 1999-2000 for determining the tariff for the period 01.04.2001 to 31.03.2004. Since the appeals are raised on identical grounds against the impugned orders we propose to dispose of the matters together by a common order. We also consider appropriate to refer the facts of one of the appeals, being appeal No. 158 of 2005, for the purpose of appreciating the controversy.

- 1.1 The appellant, NTPC, a central enterprise, is a company incorporated under the Companies Act 1956 with the registered office at NTPC Bhawan, SCOPE Complex, 7, Institutional Area, Lodhi Road, New Delhi. NTPC generates and sells energy to the respondents. Generation and sale of energy is regulated by the Central Electricity Regulatory Commission (hereinafter called Central Commission), under the provisions of Electricity Act 2003.

FACTS OF THE CASE

- 2.0 Appeal No. 158, of 2005 has been directed against the Central Electricity Regulatory Commission's (hereinafter referred as Central Commission) order dated 11.08.2005 passed in Petition No. 56 of 2005, whereby the Central Commission has rejected the claim of the petitioner, National Thermal Power Corporation Ltd. (herein after called as NTPC) to consider more than the normalized O & M expenses incurred in the operation of the Korba Super Thermal Power Station during the tariff period 01.04.2001 to 31.3.2004.
- 2.1 Central Commission, vide its order dated 21.1.2000, has decided the Operation and Financial norms for Central Thermal Power Stations. The norms, inter-alia, provided:
- (a) The practice of fixing base level O & M expenses as a percentage of capital is not appropriate and should be discontinued.

- (b) Base level O & M expenses should be determined based on previous 5 years actual O & M expenses after ironing out spikes and more than the normalized expenses in the year-wise data.
- (c) More than the normalized expenses incurred by the utilities in operating and maintaining their plants should not get reflected in the norms but should be dealt separately on a case to case basis through separate petition.
- (d) Escalation in O & M expenses should be on the basis of weighted Consumer Price Index (CPI) and Whole Sale Price Index (WPI) which mimic the non-employee cost of power generating stations.
- (e) The base level of O & M expenses for stations will lie between what they are permitted as per the existing norms and what they actually incurred. As the Central Commission has not carried out any test of prudence on the actual O & M expenses incurred by NTPC, the norms as proposed is justified. In future, however, a test of prudence shall be applied wherever “actuals” are taken as the base.

2.2 Pursuant to the aforesaid order, the terms and conditions for determination of tariff were notified in the Official Gazette on 26.03.2001 by the Central Commission titled as Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations 2001 (hereinafter referred to as Tariff Regulations -2001). The same had been laid before both the Houses of Parliament as required under Section 56 of the 1998 Act and is legislative

- in character. The Tariff Regulations - 2001 applicable for the period from 01.04.2001 to 31.03.2004, are enforceable and have the force of law and should only form the basis for determining the terms and conditions of tariff.
- 2.3 The Electricity Regulatory Commission Act- 1998, was repealed by Electricity Act, 2003 (herein after referred as Act- 2003) and came into force with effect from 10.06.2003. The provisions of the 'Act 2003' are generally in *pari material* with the provisions of the 'Act - 1998' in so far as the functions of the Central Commission relating to determination of tariff are concerned.
- 2.4 The Tariff Regulations- 2001 in clause 2.1 defines the Operation and Maintenance Expenses (O&M Expenses) in relation to a period which means the expenditure incurred in operation & maintenance of the generating station including manpower, spares, consumables, insurance and overheads. The Tariff Regulations- 2001, in regard to O&M expenses for a station, inter alia, provides at regulation 2.7 (d) as under:-

“ Operation & Maintenance expenses including insurance

- i) *Operation & Maintenance expenses including insurance (hereinafter referred to as O&M expenses) for the existing stations of NTPC and NLC which have been in operation for 5 years or more in the base year of 1999-2000, shall be derived on the basis of actual O&M*

expenses, excluding abnormal O&M expenses, if any, for the year 1995-96 to 1999-2000 duly certified by the statutory auditors. (Emphasis supplied).

The average of actual O&M expenses for the years 1995-96 to 1999-2000 considered as O&M expenses for the year 1997-98 shall be escalated twice at the rate of 10% per annum to arrive at O&M expenses for the base year 1999-2000, as given below:

$$BO\&M2000i = AVO\&Mi \times (1.10)^2$$

Where BO&M2000i = Base level O&M expenses for 1999-2000 for ith generation station.

AVO&Mi = Average O&M expenses from 1995-96 to 1999-2000 for the ith generation station.

The Base O&M expenses for the year 1999-2000 shall be further escalated at the rate of 6 per cent per annum to arrive at permissible O&M expenses for the relevant year.

- ii) In the case of new thermal stations of NTPC and NLC which have not been in existence for a period of five years, the Base O&M expenses shall be fixed at 2.5 per*

cent of the actual capital cost as approved by the Authority or an appropriate independent agency, as the case may be, in the year of commissioning and shall be escalated at the rate of 10 percent per annum for subsequent years to arrive at O&M expenses for the base year 1999-2000 level. Thereafter the Base O&M expenses shall be further escalated at the rate of 6 percent per annum to arrive at permissible O&M expenses for the relevant year.

iii) For plants commissioned during the tariff period (2001-02 to 2003-04), the Base O&M expenses shall be fixed at 2.5 percent of actual capital cost as approved by the Authority or an appropriate independent agency, as the case may be, in the year of commissioning and shall be subject to an annual escalation of 6 percent per annum from the subsequent year.

iv) The escalation factor of 6 percent per annum shall be used to revise the base figure of O&M expenses. A deviation of the escalation factor computed from the actual inflation data that lies within 20 percent of the

above notified escalation factor of 6 percent(which works out to be 1.2 percentage points on either side of 6 percent) shall be absorbed by the utilities/beneficiaries. In other words if the escalation factor computed from the observed data lies in the range of 4.8 to 7.2 percent, this variation should be absorbed by the utilities. Any deviations beyond this limit shall be adjusted on the basis of the actual escalation factor arrived at by applying a weighted price index of CPI for industrial workers (CPI_IW) and an index of select components of WPI (WPIOM) as per formula given in note below clause (v) herein below, for which the utility shall approach the Commission with a petition.

- v) *The escalation of yearly expenses from the published data for the tariff period shall be computed as follows:*

$$0.4 \times \text{INFL CPI} + 0.6 \times \text{INFL WPIOM}$$

Whereas:

INFL CPI = Annual Average inflation in CPI_IW

INFL WPIOM = Annual Average inflation in WPIOM

Whereas CPO_IW is directly published by the Government WPIOM shall be computed from

disaggregated data on wholesale prices published by Ministry of Industry”.

- 2.5 The Appellant filed petitions on or about 28.5.2001 before the Central Commission for the period 01.04.2001 to 31.03.2004 in respect of its' various generating stations including the one located at Korba (Petition No. 30 of 2001) and included O&M expenses for six immediate years (i.e. 1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-01). Employees cost of the year 2000-01 included the entire arrears of the increased remuneration paid to the employees for the years 1997-98, 1998-99 and 1999-2000.

It may be pertinent to note that the salaries, allowances etc. for Central Public Sector Undertakings arising out of the Justice Mohan Committee's recommendations, which were finalized during the year 2000 are implemented by the Appellant on 06.07.2000 (for executives); 02.03.2001 (for workmen) and 19.04.2001 (for supervisors). Also the Appellant in anticipation of the revision in the salaries etc. had budgeted the increase in employee cost on provisional basis for the year 1997-98, 1998-99 and 1999-2000 for the tariff period from 1995-96 to 1999-2000. However, when the actual employee cost was determined, the Appellant submitted the employees cost of the year 2000-01 which also included the arrears of

the increased remuneration paid to the employees for the year 1997-98, 1998-99 and 1999-2000.

- 2.6 The petitions by the Appellant seeking tariff determination were not in accordance with the provision of 2.7 (d) (i) of the Tariff Regulations- 2001, in so far as the computation of average actual O&M expenses for the year 1997-98 was specified to be based on year-wise actual O&M cost for 5 years from 1995-96 to 1999-2000 and not for six years from 1995-96 to 2000-2001. Similar statements were filed by different appeals in case of other stations of the Appellant. The details, though, are also provided by the Appellant in respect of arrears paid for the employees cost in 2000-01, the same was not in the window of consideration as per the Tariff Regulations - 2001. Accordingly, the Central Commission while determining the tariff of the concerned stations for the period 01.04.2001 to 31.03.2004 proceeded to determine the employees cost forming part of the tariff, taking into account the provisional expenses as against the actual expenses required by the regulations, for the period 1995-96 to 1999-2000 only. The Central Commission has notified the tariff for the period from 01.01.2001 to 31.03.2004 by its order dated 06.08.2003.

- 2.7 The relevant extracts of the orders dated 06.08.2003 passed in Korba Station (Appeal No. 158 of 2005) dealing with O&M expenses and the employees cost reads as under:

“O&M Expenses

As per the notification dated 28.03.2001, operation and maintenance (O&M) expenses including insurance for the stations belonging to the petition, in operation for 5 years or more in the base year of 1999-2000, are derived on the basis of actual O&M expenses, excluding abnormal O&M expenses, if any, for the year 1995-96 to 1999-2000 duly certified by the statutory auditors. The average of actual O&M expenses for the years 1995-96 to 1999-2000 is considered as O&M expenses for the year 1997-98 which is escalated twice at the rate of 10% per annum to arrive at O&M expenses for the base year 1999-2000. Thereafter, the base O&M expenses for the year 1999-2000 are further escalated at the rate of 6% per annum to arrive at permissible O&M expenses for the relevant year. The notification dated 26.3.2001 further provides that if the escalation factor computed from the observed data lies in the range of 4.8% to 7.2% this variation shall be absorbed by the petitioner. In case of deviation beyond this limit, adjustment shall be made by applying actual

escalation factor arrived on the basis of weighted price index of CPI for industrial workers (CPI iW) and index of selected component of WPI (WPIOM) for which the petitioner shall approach the Commission with an appropriate petition. The notification dated 28.3.2001 thus implies that the variations between $\pm 20\%$ over the previous year's expenses are to be absorbed by the petitioner.

- 3.1 *The petitioner has claimed O&M expenses as under based on the actual expenses for the year 1996-97 to 2000-2001 which is not as per the methodology discussed above. The actual O&M expenses for the years 1995-96 to 1999-2000 are furnished in the petition, the details of which are as follows:*

(Rs. In Crores)

<i>Year</i>	<i>1995-96</i>	<i>1996-97</i>	<i>1997-98</i>	<i>1998-99</i>	<i>1999-00</i>
<i>O&M</i>	<i>99.37</i>	<i>104.27</i>	<i>122.99</i>	<i>133.21</i>	<i>146.44</i>
<i>Water Charges</i>	<i>4.43</i>	<i>4.43</i>	<i>5.00</i>	<i>7.30</i>	<i>7.07</i>
<i>Total O&M without Water Charges</i>	<i>94.94</i>	<i>99.94</i>	<i>117.99</i>	<i>125.91</i>	<i>139.37</i>

- 3.2 *The petitioner's claim on account of O&M expenses has been examined in terms of the notification dated 26.3.2001 as discussed in the succeeding paragraphs.*

Employees Cost.

3.3 *The petitioner has indicated following amounts under this head for 1995-96 to 1999-2000-*

(Rs. In lakhs)

<i>1995-96</i>	<i>1996-97</i>	<i>1997-98</i>	<i>1998-99</i>	<i>1999-2000</i>
<i>2560.92</i>	<i>2848.71</i>	<i>3919.41</i>	<i>4669.77</i>	<i>5483.35</i>

Note:- It is observed that an auditor certified statement giving the break down details of O&M expenses for the year 2000-01 for Korba Station on Form – 16 was also submitted in the petition. It indicated the employees cost being Rs. 6617.78 lacs inclusive of the arrears for the year 1997-98, 1998-99 and 1999-2000. (Note is supplied)

3.4 *There has been increase of 34.08% in the year 1997-98 over the expenses for the previous year and 22.26% in the year 1998-99 over those for 1997-98. The petitioner has clarified that the increase is on account of pay revision of employees, that was due from 01.04.1997 and therefore a provision was kept in 1997-98 for higher wages to employees. The increase in 1998-99 is also due to pay revision. The petitioner has also claimed incentive and ex gratia paid to the employees under the employees cost. The petitioner has also claimed incentive and ex gratia paid to the employees under the employee cost.*

The petitioner has clarified that incentive and ex gratia payments are under the productivity linked bonus scheme. The respondents have contested that incentive and ex gratia should not be included in the employees cost, should be payable from the incentive earned by the petitioner and should not be charged from beneficiaries in the O&M cost. The Commission's policy in this regard is to allow only the obligatory minimum bonus payable under the Payment of Bonus Act. As such, the following amount of incentive and ex gratia has not been considered for arriving at the normalized O&M expenses for the purpose of tariff:

(Rs. In lakhs)

<i>1995-96</i>	<i>1996-97</i>	<i>1997-98</i>	<i>1998-99</i>	<i>1999-2000</i>
<i>293</i>	<i>385</i>	<i>253</i>	<i>712</i>	<i>501</i>

”

- 2.8 As it could be seen from the Central Commission's order extracted above, it has been clearly explained as to why the actual expenses furnished for the year 2000-2001 could not be considered and why the actual expenses incurred for the year 1995-96 to 1999-2000 are only being considered for tariff determination for the period from 01.04.2001 to 31.03.2004. On this account the Central Commission's order can not be faulted.

3.0 According to the clause 2.7 (d) (i) of the Tariff Regulations- 2001, the O&M expenses including insurance, shall be derived on the basis of actual O&M expenses, excluding abnormal O&M expenses, if any, for the years 1995-96 to 1999-2000 duly certified by the statutory auditors. The said regulations do not specify as to how the “abnormal O&M expenses” needs to be treated. The treatment of “abnormal” or “more than the normalized O&M” expenses incurred by the Utilities, however, has been allowed by the Central Commission’s order dated 21.12.2000 to be dealt separately on a case to case basis through separate petition. The clause 4.3.6 of the order dated 21.12.2000 specifically provides as under:

“Any abnormal expenses incurred by utilities in operating and maintaining their plants should not get reflected in the norms but should be dealt with separately on a case to case basis through separate petitions. This will provide an opportunity to all the stakeholders to assess the merit of claims on the basis of these expenses in a transparent way”.

4.0 Thus, from the aforesaid, it is obvious that subsequent to the order dated 06.05.2003 whereby the Appellant’s request for consideration of the arrears of the actual remunerations paid in the year 2000-2001 having not been accepted due to that being inconsistent with the Tariff Regulations-

2001, the Appellant was legally entitled to approach the Central Commission with a specific petition separately to claim arrear of employees cost for the respective years of 1997-98, 1998-99 and 1999-2000. Appellant's contention that it had no option but to wait till the close of the tariff period on 31.03.2004 to file a petition to raise the issue of abnormal increase in the employees cost during the period 2001-2002 to 2003-2004, is, therefore, unfounded. However, it is felt that the Tariff Regulations – 2001 ought to have specified the actions required to be taken by the Utilities to recover the “abnormal” expenses incurred on account of O&M expenses through the tariff.

- 4.1. Aggrieved by certain aspects of the Central Commission's tariff order; the Appellant filed a Review Petition No. 68 of 2003 dated 1.10.2003 before the Central Commission, which did not include the issue of employees cost. The Appellant filed a petition on 04.01.2005 being No. 196 of 2004 for determination of escalation to be adjusted in the O&M expenses in the tariff period 1.4.2001 to 31.3.2004 as per the provisions contained in the tariff regulations-2001. Appellant did not raise the issue of employees cost even in this petition, though, it was well after the end of the last tariff period i.e. 31.03.2004. Appellant, however, on 25.05.2005 filed the petition being No. 56 of 2005 for allowing more than the normalized O&M expenses

incurred during the period 01.04.2001 to 31.03.2004. Similar delays in filing petitions have occurred in respect of other stations.

5.0. The Central Commission, on 11.08.2005, rejected the Appellant's petition No. 56 of 2005, inter alia, on the following grounds:-

- (a) In the Tariff Order passed earlier no liberty was granted to the Petitioner (NTPC) to seek revision of O&M charges on account of the expenditure under head 'Employees Cost'.
- (b) The complete employees cost data on account of the revision of pay and allowances was available with NTPC during April 2001 when the petition for determination of tariff was filed by NTPC on 28.5.2001 and the data in this regard could be placed before the Central Commission by NTPC in the petition itself.
- (c) The amended tariff petition filed by NTPC on 30.01.2002 did not also incorporate the actual data on the employees cost.
- (d) Thus, there were ample opportunities available to NTPC to seek revision of the employees cost under head 'O&M Expenses' and NTPC did not avail of the opportunity. NTPC should, therefore, be deemed to have relinquished its claim as regard employees cost.
- (e) NTPC is not entitled to such revision now claimed in view of the Order 2 Rule 2 and also Section 11 of the Civil Procedure Code, 1908. The principles of constructive res-judicata and also the

principles that all claims were not included in the first instance would apply.

f) The Central Commission cannot revisit the tariff already determined.

6.0 Appellant has submitted that in the case of Rihand Station in its petition No. 38 of 2001 which was decided much after the tariff period (01.04.2001 to 31.03.2004) was over and after the Central Commission had passed the impugned order dated 11.08.2005 and rejected the petition No. 56 of 2005, the increase in employees cost was allowed by the Central Commission by its order dated 02.06.2006. It is observed that the Commission at para 30 of its order dated 02.06.2006 for Rihand Station under the subject heading of "Employee Cost" states as under:-

"During pendency of the present petition, the petitioner filed the interlocutory application (IA No. 9/2006) to place on record the impact of revision of wages with effect from 1.1.1997 on the employee cost for the generating station and the Corporate Office expenses, and the revised employee cost data/Corporate Office expenses for the years 1995-96 to 2000-01. The petitioner has submitted that since payments of arrears on account of revision of wages were made in the year 2000-01, data for the year 1996-97 to 2000-01 be taken into account for normalization instead of data for the years 1995-

96 to 1999-2000, specified in the notification dated 26.03.2001. Although it is not possible to consider the data for the year 2000-01 for normalization since it would be contrary to the provisions of the notification dated 26.03.2001, the total expenditure on this count incurred during 2000-01, but pertaining to period from 1.1.1997 to 31.3.2000, has been considered in the respective year. Accordingly, the revised expenditure under this head is summarized below:

(Rs. In lakhs)

1995-96	1996-97	1997-98	1998-99	1999-2000
1284	1559	2241	2325	2411

”

7.0 Also at para 31 of the said order for Rihand Station it is stated that there has been an increase of 43.74% in year 1997-98 over the expenses for the previous year and the increase is on account of pay revision of employees, which has been allowed. It appears that the Central Commission did not give the similar treatment to Appellant's other Stations including the plant located at Korba.

8.0 The Appellant has filed the instant Appeal No. 158 of 2005 in respect of Korba Station challenging the impugned order dated 11.08.2005 of the

Central Commission before the Appellate Tribunal. Similar Appeals (Nos. 161, 206 of 2005; 192-196 of 2005 and 33, 46 of 2006) for Appellant's other Stations have also been filed before the Appellate Tribunal.

ISSUES

9.0 From the details of the case as described in the afore-mentioned paragraphs, the responses of the following issues formulated will guide us to the decision on the Appeal:

- (A) Whether the Tariff Regulation – 2001 or any other Orders have made provisions to consider the “above normal” or “more than the normal” expenses incurred in O&M expenses for determination of tariff ?
- (B) Did the Appellant in it's petition No. 30/2001 filed on 28.05.2001 for approval of tariff for Korba Station and the subsequently amended petition filed on 31.01.2002, provide the actual data of employees cost ?
- (C) After tariff order dated 06.08.2003, when did the Appellant first approached the Central Commission with actual data on employees expenses to seek revision of O&M expenses for the year 1997-98 to 1999-2000 ?
- (D) Is Order 2 Rule 2 of Code of Civil Procedure and the principle of constructive res-judicata applicable to the in the instant case ?

- (E) If there is injustice manifest in a tariff order can the Commission re-visit the order ?
- (F) What affect, if any ?

Discussions and Analysis

10. We now set out to address the issues as framed in paragraph 9 and decide to take each of them in the following paragraphs.

10.1 Issue (A): From the documents furnished and submissions made during the hearing of the Appeal, the following points are observed:

- (a) The Central Commission's Order dated 21.12.2000 which creates the foundation for terms & conditions of Tariff Regulations – 2001 and provide statements of justifications for arriving at operational and financial norms for tariff-setting stipulates at para 4.3.6 of the order as under:
 - (i) The base-level of O&M should not be computed as given proportion of Capital Cost but should be derived on the basis of actual O&M expenses in the last five years after ironing out the spikes and abnormalities in the year-wise data.
 - (ii) Any abnormal expenses incurred by the utilities in operating and maintaining these plants should not get reflected in the norms but should be dealt with separately on a case by case

basis through separate petitions. This will provide an opportunity to all the stakeholders to assess the merit of claims on the basis of these expenses in a transparent way.

- (b) The Tariff-Regulations – 2001 notified on 26.03.2001 at para 2.7 (d) (i) stipulates that Operation & maintenance expenses including insurance for the existing stations of NTPC and NLC which have been in operation for 5 years or more in the base year of 1999-2000, shall be derived on the basis of actual O&M expenses, excluding abnormal O&M expenses, if any, for the years 1995-96 to 1999-2000 duly certified by the statutory auditors.
- (c) The Tariff- Regulations – 2001 having legislative force of law does not specify as to how the “excluded abnormal O&M expenses” are to be treated for consideration of its recovery through tariff. It is silent on this aspect. The Central Commission’s order dated 21.12.2000, however, as mentioned in (a) above provides that it should be dealt with separately on a case by case basis through separate petitions. In the Circumstances, the Appellant could only rely on this order.
- (d) It appears that the Central Commission in its tariff order dated 06.08.2003 on petition No. 30 of 2001 has given special dispensation for “professional expenses” (forming a part of O&M expenses) by stating in para 49 that “It is made clear that if the petitioner incurs any expenditure during the tariff period, it may

approach the Commission for re-imbusement on actual basis with due justification". Appellant also has pointed this in the Appeal, and it was requested, inter-alia, that the same principles should apply in case of the 'abnormal expenses' incurred on increase in 'employees cost'. We, too, do not comprehend the justification for this selective bias to a component of O&M expenses.

- (e) It is also noted that the Central Commission in case of the Appellant's petition No. 38 of 2001, for Rihand Station allowed the increase in employees cost by its order dated 02.06.2006. The Commission in its order at para 30 states as under:

"Although it is not possible to consider the data for the year 2000-01 for normalization since it could be contrary to the provisions of the notification dated 26.03.2001, the total expenditure on this account incurred during 2000-01, but pertaining to period from 01.01.1997 to 31.3.2000, has been considered in the respective year".

If that is so, the same yardstick should have been applied in the instant Appeal for Korba and other Stations of the Appellant.

In view of the aforesaid discussions the issue is decided in the affirmative.

10.2. **Issue (B)**

(i) It is not possible for us to ascertain whether, in its original petition No. 30 of 2001 filed on 28.05.2001, the Appellant had provided the actual data of employees expenses incurred during 1995-96 to 1999-2000, or not as it is not in the submissions made before us. Moreover, it is of no consequence also, since the petition was based on the terms and conditions for tariff determination of the Ministry of Power's notification dated 31.3.1992 and was superseded by the Tariff Regulations- 2001. It is, however, observed that in the amended petition No. 30 of 2001 submitted on 30.01.2002 to the Central Commission, the Appellant has, beside submitting the auditor-certified year-wise employees-cost-statement for the period from 1995-96 to 1999-2000, has also submitted the breakdown details of O&M expenses (including employees cost of Rs. 6617.78 lacs) for the year 2000-01 in Form -16 for Korba Station. Please see para 33 of the said order dated 06.08.2003 brought out at para 2.7 above and our observation as a 'Note' in the end of para 33 of the order.

(ii) The Central Commission proceeded to consider year-wise actual data for the period 1995-96 to 1999-2000 disregarding the abnormal expenses paid on the employees cost in the year 2000-2001 for the period 1997-98 to 1999-2000. Since this was the first time, after notification of the Tariff Regulations – 2001, the tariff filing was being done and the regulation was silent on as to how the “abnormal

expenses” is to be processed, a clear direction could have been given to the Appellant.

- (iii) It appears to be a mere coincidence that the finalization of increased salaries, allowances etc., being beyond the control of the Appellant, the disbursement could not be synchronized in time within the specified period as per the Tariff Regulations- 2001 and the payment of the arrears in 2000-01, became unavoidable. The Central Commission could have decided the Appeal in the same way as petition No. 38 of 2001 for Rihand Station mentioned in para 10.1 (e) above.

In view of the aforesaid discussions the issue is decided in the affirmative.

10.3 **Issue (C):-**

The Appellant, after the tariff order dated 06.08.2003, has approached the Central Commission for the first time, on 25.08.2005 with a separate petition No. 56 of 2005 for allowing ‘more than the normalized expenses’ incurred during the period 01.04.2001 to 31.03.2004. This was done in the belief that the ‘abnormal expenses’ incurred in 2000-01 for the period 1995-96 to 1999-2000 could only be claimed after the expiration of the tariff period of 01.04.2001 to 31.03.2004. When seen in the back drop of the fact that the information regarding the total actual cost incurred year-

wise on account of the employees expenses was furnished by the appellant on 30.1.2002 and the Central Commission chose to ignore the arrears paid in 2000-01 without issuing any specific direction, the lapse on the part of the appellant in delaying the petition against the tariff order dated 06.08.2003 is mitigated. The issue is decided accordingly.

10.4 **Issues (D) and (E):-**

The Appellant in its amended petition No. 30 of 2001 filed on 30.01.2002 had furnished the data on the actual expenses on account of employees cost including the arrears paid in 2000-01 but the Central Commission ignored the data of arrears paid and decided the tariff without determining the actual expenses in the respective years of 1997-98, 1998-99 and 1999-2000. It may be clarified that Order 2 Rule 2 of the Code of Civil procedure is applied to civil suits or litigations between the parties which is adversarial in nature, and has no application in tariff determination process. Application of the principle of constructive res-judicata are also not applicable in proceedings for determination of tariff. Acceptance of the employee cost for the years 1997-98, 1998-99 and 1999-2000 as 'actuals' without taking into account the arrears paid in 2000-01 was factually incorrect and inconsistent with the Tariff Regulations- 2001. The issue is, therefore, decided accordingly.

11.0 CONCLUSION: -

In view of the aforesaid findings and having regard to the interest of justice and fair play, we allow the appeal, being Appeal No. 158 of 2005, and set aside the Central Electricity Regulatory Commission's order dated 11.08.2005 passed in Petition No. 56 of 2005 and direct that the amounts of arrear paid by the appellant in the year 2000-01, on account of employees cost, incurred in the respective years, be considered in the tariff fixation for re-imburement, as admissible by the Regulations, in the forthcoming tariff period in a manner that tariff shock, if any, to the respondents is minimized.

On parity of reasoning we also allow the other appeals, being Appeal Nos. 161,192,193,194,195,196,206 of 2005 and 33 and 46 of 2006, set aside the impugned orders and issue the above directions in all these appeals.

(A.A. Khan)
Member Technical

(Justice Anil Dev Singh)
Chairperson