

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

**Appeal No. 38 of 2011**

**Dated: 16<sup>th</sup> Dec, 2011**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,**  
**Chairperson**  
**Hon'ble V J Talwar, Technical Member,**

**In the matter of**  
**Tamil Nadu Electricity Board,**  
**No.144, Anna Salai,**  
**Chennai-600 002**

**... Appellant(s)**

**Versus**

- 1. Central Electricity Regulatory Commission**  
**3r & 4<sup>th</sup> Floor,**  
**Chanderlok Building,**  
**36, Janpath, New Delhi-110001**
- 2. Neyveli Lignite Corporation,**  
**Block No.1, Neyveli,**  
**Cuddalore District-607 801**
- 3. Power Company of Karnataka Ltd.,**  
**Bangalore-560 001**
- 4. Kerala State Electricity Board,**  
**Vaidyuthi Bhavanam, Pattom,**  
**Thiruvanthapuram-695 004**
- 5. Pondicherry Electricity Department,**  
**Pondicherry-605 001** **....Respondent(s)**

**Counsel for Appellant(s): Mr. S Vallinayagam  
Mr. S Balaguru**

**Counsel for Respondent(s): Mr. N.A K Sharma for R-2  
Mr. S Sharma for R-2  
Ms. Raji Joseph for R-2  
Mr. R Chandrachud for R-2,  
Mr. Rathna S for R-2**

**JUDGMENT**

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

1. Tamil Nadu Electricity Board (TNEB) is the Appellant herein. Central Electricity Regulatory Commission (Central Commission) is the first Respondent. Neyveli Lignite Corporation of India Ltd (NLC) is the Second Respondent. The Appellant and other Respondents are the beneficiaries.
2. The NLC (R-2) is a Central Public Sector undertaking engaged in generation of power and it has three power Stations namely TPS-I, TPS-II and TPS-I Expansion. Aggrieved by the order passed by the Central Commission dated 31.8.2010 in favour of

NLC (R-2) allowing additional capitalization amounting to Rs.56.32 Lakhs towards the Additional Compressor and Air Dryer on the strength of the clause 9(2)(iii) of the Tariff Regulations, 2009, the Appellant has filed this present Appeal. The short facts are as under:

- (a) The Appellant, TNEB entered into a Bulk Power Purchase Agreement with the NLC (R-2) on 20.9.2001 and the Supplementary Agreement on 5.11.2002 by which the Appellant agreed to purchase power from the Thermal Power Station-I Expansion of the NLC (R-2) for a period of 25 years subject to the certain terms and conditions.
  
- (b) The Central Commission (R-1) which is vested with the powers to determine the tariff in respect of generation station owned and controlled by Government of India, issued general notice relating to the fixation of tariff on the purchase of energy and for the payment of transmission charges.

- (c) The Ministry of Coal, Government of India issued notification giving guidelines dated 27.8.2009 for the preparation of Mine Closure Plan indicating the estimated cost towards Mine Closure as Rs.6 lakhs per hectare for an opencast mine.
  
- (d) Subsequent to the issuance of the said notification, the NLC (R-2) filed a tariff petition before the Central Commission seeking for the fixation of generation tariff for the period from 1.4.2009 to 31.3.2014 based on the notification issued by Ministry of Coal.
  
- (e) The Central Commission after issuing notice and after hearing the parties including the Appellant passed the impugned order dated 31.8.2010 fixing the generation tariff and the transfer price of lignite for the period 2009-14 and allowing the additional capitalization in favour of the NLC (R-2). Aggrieved by the same, the Appellant has filed this Appeal.

3. According to the Appellant, the Central Commission wrongly allowed additional capital expenditure claimed by NLC (R-2) towards Additional Air Compressor and Air Dryer amounting to Rs.56.32 lakhs citing clause 9 (2) (iii) even though clause 9(2) (iii) of Regulation 2009, providing for additional capital Ash Pond or Ash Handling System would not apply to the present case as it does not form part of the original scope of work. The Appellant has raised following two issues assailing the order impugned in this Appeal:

- (a) Additional Capitalization of Rs.42.13 lakhs towards the Air Compressor and Rs.14.19 lakhs towards the Air Dryer aggregating to Rs.56.32 lakhs was wrongly allowed.
- (b) Cost of Mine Closure has been wrongly allowed subject to the adjustment at the end of the tariff period.

4. Even though the Appeal has been filed on these two issues, the Appellant is not pressing the second issue. As such, the Appellant confined itself with the First issue.
5. In respect of this First Issue, it is contended by the Appellant that the Additional Capitalization was wrongly allowed on the strength of Clause 9(2) (iii) despite the fact that the Clause 9(2) (iii) of the Regulation, 2009 would not apply to the present facts of the case.
6. On the other hand, it is contended by the NLC (R-2) that the Original Scope of Work of TPS-I Expansion project was from design, engineering upto commissioning and performance guarantee test of the two units of 210 MW and by the addition of one Air Compressor and Air Dryer, the original scope of work is not altered in any way.
7. So, in the light of the above rival contentions, the following question would arise for consideration:

“Whether the Central Commission was right in allowing the Additional Capitalization of Compressor and Air Dryer under Clause 9(2) (iii) of Regulation 2009 and whether the same is provided for in that Regulation?”

8. The claims made by the NLC (R-2) before the Central Commission for additional capitalization under Clause 9 (2) (iii) of Tariff Regulations, 2009 on the basis of the two grounds:
  - (a) The Additional Compressor Projects by the NLC (R-2) was under the original scope of work.
  - (b) The Central Commission has got the regulatory powers to allow such Additional capitalization even assuming that it is not covered under Clause 9 (2) (iii) of the Tariff Regulations, 2009.

9. The Grievance of the Appellant is that the Central Commission merely based upon the affidavit filed by the NLC (R-2) allowed the Additional capitalization without even discussing the question as to whether the Compressors and Dryers were under the original scope of work or not that too against the express provisions of the Regulations.
  
10. On the other hand, the Learned Counsel for the NLC (R-2) in justification of the impugned order passed by the Central Commission submitted that the acquisition of the additional Air Compressor or Dryer does not alter the original scope of work since the original scope of work of TPS-I Expansion Project was from design, engineering upto commissioning and performance guarantee test of the two units of 210 MW and as such, the additional Compressor and Dryer were required for the exclusive use in TPS-I Expansion towards the original scope of work.
  
11. In the light of the above rival contentions, let us now analyze the question framed above.

12. TPS-I Expansion consists of 02 units of 210 MW each. They were commissioned on 9.5.2003 and 5.9.2003 respectively. The cut off date for the purpose of Central Commission Regulations in respect of both these units was 31.3.2005. The Tariff Regulations issued by the Central Commission have laid down the norms and modalities for recovery of capital cost and for the purpose of arriving at the tariff during the tariff period 2001-2004, 2004-2009 as well as 2009-2014. All the three Regulations for the period 2001-2004, 2004-2009 and 2009-2014 would contain the provisions for Additional capitalization.
  
13. In Regulation 2004, the Additional capitalization had been defined in clause 14 (ii) as “ the capital expenditure incurred after date of the commercial operation of the generating station and admitted by the Commission after prudence check subject to the provisions of Regulation 18”.

14. As per clause 18 of the Regulation 2004, the capital expenditure of the stated nature actually incurred after the cut off date may be admitted by the Commission subject to prudence check. The item listed in clause 18 (ii) (v) is “deferred works relating to ash point and Ash Handling System in the original scope of work”. Clause 18 (iv) of the Regulation 2004 stipulated impact of the Additional capitalization may be considered by the Central Commission twice in a tariff period including the revision of tariff after the cut off date. The Additional capitalization was limited to capital expenditure actually incurred. Thus, the Additional capitalization was limited to capital expenditure actually incurred as per the above Regulations.

15. However, in Regulations, 2009, there is a change in the concept in terms of clause 9 of the Regulation 2009 which is corresponding to clause 18 of the Regulation 2004 by which the provision for entertaining the request for revision of tariff twice based on impact of Additional capitalization was deleted. Thus, the scope of Additional capitalization by definition was wider in clause 3 (i) to include not

only the expenditure incurred but also projected to be incurred.

16. The Regulation 2009, items eligible for additional capitalization after the cut off date also underwent change. When such changes are made in the Regulations which are in the nature of change in law, then the Commission has to grant relief whenever justified by taking into consideration of the various applicable provisions in the Regulations as on date.
17. In the above context, it is stated that the Central Commission has passed the impugned order by means of residual powers vested with the Commission by clause 44 of the Regulation 2009.
18. All the generating stations of the NLC (R-2) are lignite based. Therefore, the removal of fly ash emitting from the boiler formed an important activity. To ensure the total evacuation of the fly ash, the compressed air is injected into the ash transportation pipe. For this purpose, Air Compressor and Dryers

are used. The number of Air Compressors to be installed would depend upon the level of generation, the ash contents and the transportation distance involved.

19. The Ash Handling System was such that the additional compressor could be added at a later stage if and when the need arises. By this process, the initial capital cost of the project remained realistic even while the permission for immediate additional capitalization was structured.
  
20. In the present case, the Additional capitalization aggregating to Rs.56.32 lakhs has been allowed by the Central Commission in terms of Regulation 9(2) (iii) which is as follows:

*“9. Additional Capitalization.(1).....*

*(2) The capital expenditure incurred on the following counts after the cut-off date may, in its discretion, be admitted by the Commission, subject to prudence check:*

(i) .....

(ii) *Change in Law*

(iii) *Deferred works relating to ash pond or Ash Handling System in the original scope of work;*

21. So, the above Regulations would reveal that the amount of expenditure incurred for deferred works relating to Ash Pond or Ash Handling System in the original scope of work can be admitted by the Commission as additional capitalization subject to prudence check.

22. It cannot be debated that in the lignite based generating stations, a suitable Ash Handling System is an essential part. On combustion of the fuel namely lignite flue gas is generated, the flue gases exiting the boiler are laden with the fly ash. This flue gas also contains certain air pollutants. The gas is let out after allowing it to pass through the flue gas stacks. In order to release the flue gas into the atmosphere, it is necessary to remove the fly ash from the flue gas. This is achieved by the Electro Static Precipitator (ESP), which captures the ash. The fly ash is collected through hoppers. It is

transported through pipes to storage silos. From there, it is loaded in trucks for removal for the permitted use. To ensure smooth and total evacuation of the fly ash, the compressed air is injected into the ash transporter.

23. In view of the fact that flue gas laden with the fly ash is generated at all times, it is necessary to ensure that the Ash Handling System is in operation nearly on 24x7 basis. The number of Air Compressors to be installed in the pipelines largely would depend upon the ash contents and the transportation distance. The number and structure of the pipelines and the intensity of air pressure to be maintained in the pipelines for efficient evacuation of fly ash would depend upon the arising of fly ash during the combustion. This would also depend upon the characteristics of the lignite and the prevailing climatic conditions.

24. In the case of Thermal Power Station-I & Thermal Power Station-II, the ash content in the lignite was found to be rarely exceeding 10%, when those stations were commissioned many years ago. When TPS-I Expansion was envisaged, the design parameters were finalized based on the

characteristics of the lignite in the concerned mines. It is pointed out that it may not be possible to precisely determine at that stage, the ash content of the lignite from TPS-I Expansion. Further, the ash content may not remain constant all through the year. According to the NLC (R-2), in the case of Thermal Power Station-I Expansion for designing the handling system, the ash content was assumed as 12%. It is stated that if the air compression was inadequate due to insufficient number of compressors, it would lead to reduction in evacuation of ash resulting in choking and puncturing of the pipeline. This in turn, would result in shut down of the boiler. Further, continuous evacuation of ash is most essential and the Air Compressor cannot be kept running continuously on 24x7 basis and so it was essential to have additional Air compressor as standby Compressor.

25. While it is desirable to determine the optimal number of compressors and dryers, there were several factors which made the task difficult. In other words, if the number was less, reduced evacuation with consequent interruptions would entail. If the number was excessive, then there

would be an increased capital cost and at the same time there would be sub-optimal use of Air Compressors. It is also a technologically recognized position that in the initial years of operation, all the equipment would be at near peak efficiency. This means that even if the arising of ash was more, the evacuation may be adequate owing to the efficiency of the Compressors.

26. Keeping these factors into consideration, it was decided to restrict the number of Air Compressors to 04 i.e 02 for each of the Units (one main and one standby ) at the design stage of TPS-I Expansion. This is mainly with a view to make it possible to add one or more Compressors depending upon the need. Thus, in effect at the initial stage, instead of installing more compressors, a decision was taken to defer the installation of more compressors to a later date when the need arises in the future. As for air dryer, it was specified that at the time of commissioning of the project, the same would be procured if the need arises at a later stage.

27. Eventually, in the initially years of the units of TPS-I Expansion, it was possible to maintain normalcy by putting in operation 3 of the 4 compressors. But by

2009, it was found that the Ash Handling System could not cope up with the increased arising of ash which was happening for about 80 days in an year, resulting in choking. As a result, it became necessary to put in operation all the 04 compressors otherwise the unit had to be shut down.

28. In the above process, the Ash Handling System was left with no standby compressors. Therefore, it became unavoidable to procure a 5<sup>th</sup> compressor. Similarly due to frequent choking of pipelines, it was proposed to purchase a dryer for transportation of air. Hence, the proposal for Additional capitalization in this regard for 2009 & 2010 came to be included in the Petition No.230 of 2009.
29. All the details sought for have been furnished by the Respondent NLC to the Central Commission on a specific direction given to the NLC for clarifying the position.
30. According to the NLC (R-2) it has furnished all these details to the Appellant as well as to the other beneficiaries. The Central Commission only after hearing all the parties including the Appellant and taking into consideration all the materials, available

on record, passed the impugned order allowing the additional capitalization of Rs.56.32 lakhs towards the Air Compressors and Air Dryer.

31. In view of the above facts, it cannot be contended that the Central Commission passed the impugned order without application of mind.
32. The main objection raised by the Appellant is that such expenditure does not fall under clause 9 (2) (iii) of the Regulations 2009. As quoted above, the Central Commission can allow Additional capitalization towards the deferred works of Ash Handling System in the original scope of work. Deferred work does not mean deferred liabilities. The expression used in Clause 9 (2) (iii) of Regulations 2009 is only a 'deferred work' and not 'deferred liabilities'. In the present case, the provision of additional compressor and dryer is evidently a deferred work. It is not as if a new type of equipment/component is being introduced or installed in the system. 04 Air compressors formed part of the initial installation including the one stand by compressor. The additional compressor which was sought to be capitalized in 2009-10 was for supplementing the existing 04 compressors and not

to meet a purpose which had not been intended at the inception of the project.

33. It is contended by the Appellant that if an additional compressor was required, the same should have been included in the list of items at the inception stage itself. This is misconceived. If 05 compressors had been included as part of the original scope of work so as to meet any additional need that may arise in future, even at the stage of inception, there would have been 05 compressors capitalised which would result in the unwarranted increase in the project cost with the consequential tariff effects.
34. Neither the Regulation nor the Financial prudence required that at the inception of the project a list must be drawn up of the components which may become necessary at a future date.
35. In view of the above position, the acquisition of Air compressor for the year 2009-10 and of an Air Dryer in 2010-11 squarely come under the clause 9 (2) (iii) of Regulation 2009. By adding one more compressor, there was no additional unit being created nor the capacity of either of the generating units would get increased. The variation in ash content is a feature

which suddenly erupted in 2009-2010. At all times, certain variation in ash arising existed but Ash Handling System was super efficient in the initial years and could cope-up with the increased load. At that stage, it was thought that it was unnecessary to incur additional cost right from the inception stage since the power stations could work efficiently with 04 compressors for some years. Under those circumstances, it has to be held that requirement of the Air Compressor and Dryer which was realized in 2008-09 is a deferred work in the original scope of work which attracts clause 9(2) (iii) of Regulations 2009.

36. It has been contended by the Appellant that the Additional capitalization allowed by the Central Commission was contrary to clause 19 (e) of the Regulation 2009. Admittedly, this objection was never raised either before the Commission or pleaded in the Appeal's grounds. However, the Learned Counsel for the NLC (R-2) refuted this, by contending that the Additional capitalization claimed was not towards the new items for routine maintenance nor in feature of minor assets as

contemplated under clause 19 (e), as it was not in the contemplation of the original scope of the work.

37. As correctly pointed out by the Learned Counsel for the Respondent, clause 19 of the Regulation 2009 deals with the normative maintenance and expenses. Therefore, the clause 9 (2) (iii) and clause 19 (e) are intended to meet different situations. Neither clause 9(2)(iii) is subject to clause 19(e) nor 19(e) is subject to 9 (2)(iii). The difference is that clause 9(2)(iii) is subject to prudence check by the Commission but in the case of clause 19 (e) it is a lump sum allowance depending upon the age of the unit.

38. In the present case, the Central Commission has applied its mind and after due prudence check allowed the some of Rs. 56.32 lakhs as Additional capitalization under clause 9(2) (iii) by interpreting the said clause correctly so as to achieve the laid down statutory objectives. It is a settled law that the power to regulate in respect of the Central Commission carries with it full powers over the matter subject to regulation and in the absence of the restrictive words, the power must be regarded as plenary over the entire subject. This principle has been laid down by the Hon'ble Supreme Court in the

case of K. Ramanathan Vs State of Tamil Nadu & Anr (1985) 2 SCC 116. The relevant portion is as follows:

*“19. It has often been said that the power to regulate does not necessarily include the power to prohibit and ordinarily the word ‘regulate’ is not synonymous with the word ‘prohibit’. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word ‘regulation’ cannot have any inflexible meaning as to exclude ‘prohibition’. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the Legislature seeks to remedy”.*

39. In view of the discussion made above, we are to conclude that the findings which have been rendered by the Central Commission by applying the clause

9(2) (iii) of the Regulation 2009 and allowing the Additional capitalization towards the Air Compressors and Air Dryers is in our view perfectly valid and justified.

#### **40. Summary of Our Findings**

**As per Clause 9 (2) (iii) of the Regulation, 2009, the amount of expenditure incurred for the deferred works relating to the ash pond or Ash Handling System in the original scope of work can be admitted by the Central Commission as an additional capitalization subject to the prudence check. The expression used in clause 9 (2) (iii) of the Regulation, 2009 is only a deferred works and not a deferred liabilities. The term deferred work does not mean deferred liabilities. In the present case, it is not as if a new type of equipment is being installed in the system. The Additional Compressor which was sought to be capitalized in 2009-2010 was for supplementing the existing four compressors and not to meet the purpose it had not been intended at the inception of the project. Therefore, the provision of additional**

**Compressor and Dryer is evidently a deferred work of the Ash Handling System in the original scope of work attracting clause 9(2) (iii) of the Regulation, 2009.**

41. In view of the above findings, there is no merit in the Appeal. Accordingly, the Appeal is dismissed.

42. However, there is no order as to cost.

**(V J Talwar)**

**(Justice M. Karpaga Vinayagam)**

**Technical Member**

**Chairperson**

Dated: 16<sup>th</sup> Dec, 2011

REPORTABLE/NON-REPORTABLE