

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 76 OF 2015

Dated: 12th February, 2018

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

IN THE MATTER OF

NTPC Limited

NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110 003

..... Appellant

VERSUS

- 1. Uttar Pradesh Power Corporation Ltd.**
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226001
Uttar Pradesh
- 2. Tata Power Delhi Distribution Ltd.**
Grid Substation, Hudson Road,
Kingsway Camp,
Delhi-110009
- 3. BSES Rajdhani Power Ltd.**
BSES Bhawan,
Nehru Place,
New Delhi-110019.
- 4. BSES Yamuna Power Ltd.**
Shakti Kiran Building,
Karkardooma,
Delhi-110092
- 5. Central Electricity Regulatory Commission**
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi- 110001

..... Respondents

Counsel for the Appellant ... Mr. M.G. Ramachandran
Ms. Poorva Saigal
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Mr. Shubham Arya

Counsel for the Respondent(s)... Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for R-1

Mr. R.B. Sharma for R-3

J U D G M E N T

PER HON'BLE JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. NTPC Limited (hereinafter referred to as the **“Appellant”**) presented the instant Appeal, being Appeal No. 76 of 2015, under Section 111 of the Electricity Act, 2003 questioning the legality and validity so far as it relates to the Central Electricity Regulatory Commission (in short, the **“Central Commission”**) not considering the cost of the project on Gross basis while computing the value of the Initial Spares @ 2.5% in its Order dated 04.12.2014 (in short, the **“Impugned Order”**) passed in Petition No. 17/GT/2013 on the file of the Central Electricity Regulatory Commission, New Delhi wherein the Central Commission has revised the tariff applicable for the National Capital Thermal Power Station Stage-II, Dadri (2x490MW) (in short, **“Dadri Stage-II”**) of the Appellant for the period from 31.01.2010 to 31.03.2014, after true up.
2. The Appellant has presented this Appeal for considering the only question of law whether the Central Commission is right in not

computing the value of initial spares based on the project cost on gross basis.

BRIEF FACTS OF THE CASE:

3. The Appellant herein, is a Government of India Undertaking and a Company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of generation and sale of electricity to various purchasers/beneficiaries in India. The Appellant, being a generating company owned and controlled by the Central Government, is covered by clause (a) of sub-section (1) of Section 79 of the Electricity Act, 2003. The generation and sale of power by the Appellant is regulated under the provisions of the Electricity Act, 2003 by the Central Commission, the fifth Respondent herein.

4. One of the generating stations of the Appellant is Dadri Stage-II and, the electricity generated from it, is supplied to the Respondent Nos. 1 to 4 herein, the beneficiaries. The Dadri Stage-II with the total capacity of 980 MW comprises of two units of 490 MW each.

5. The Central Commission, vide its Order dated 04.12.2014 passed in Petition No. 17/GT/2013, revised the tariff for the Dadri Stage-II. In the impugned Order, the Central Commission disallowed non-inclusion of initial spares in admitted capital cost as on 31.03.2014 for the purpose of calculation of initial spares @ 2.5% and non-

consideration of cost of the project on gross basis while computing the value of the Initial Spares @ 2.5%.

6. The Appellant, feeling aggrieved by the impugned Order dated 04.12.2014 passed by the Central Commission, presented this Appeal.

SUBMISSIONS MADE BY THE LEARNED COUNSEL APPEARING FOR THE APPELLANT:

7. The learned counsel, Ms. Poorva Saigal, appearing for the Appellant submitted that, the only issue that arise for consideration in the instant appeal is non-inclusion of initial spares in admitted capital cost as on 31.03.2014 for the purpose of calculation of initial spares @ 2.5% and non-consideration of cost of the project on gross basis while computing the value of the Initial Spares @ 2.5%.

8. The non inclusion of the initial spares in the capital cost to determine the ceiling on initial spares namely extent of the cost of initial spares to be allowed is contrary to the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (in short, the "**Tariff Regulations, 2009**").

9. To substantiate her submission, she quick to point out and taken through the Regulations "2(8) – 'capital cost'; 2(29) - 'original project cost'; and 2(8) 'initial spares' relevant to this case.

10. Further, she submitted that, while computing the capital cost, the Central Commission has failed to follow the Tariff Regulations,

2009, in as much as the Central Commission has excluded the cost of initial spares not determining the ceiling limit under Regulations 9(1)(iii). Regulation 8 provides for the determination of the ceiling with reference to the Capital Cost. The term “capital cost”, as provided in Regulation 7 includes the cost incurred on Initial Spares. Therefore, as per the definition and the provisions of the Tariff Regulations, 2009, the capital cost would necessarily include the cost of initial spares.

11. She submitted that, the Central Commission erred in calculating the total Capital Cost, as exclusive of the cost of initial spares capitalized up to the Cut Off date of 31.03.2014. The Tariff Regulations, 2009 clearly stipulate that the maximum initial spares to be allowed to a thermal generating stations is 2.5% of the capital cost admitted by the Central Commission upto the Cut Off date. Therefore, the Central Commission ought to have included the value of the initial spares capitalized up to the cut-off date in the admitted capital cost while computing the value of initial spares as on 31.03.2014. The Central Commission erred in disallowing the value of initial spares relating to the period 2013-14 by considering the admitted Capital Cost excluding Initial Spares up to the Cut Off date for restricting it to 2.5% of admitted Capital Cost.

12. To substantiate her submission, she placed reliance on the judgment of this Appellate Tribunal in Appeal No. 169 of 2010 decided

on 31.05.2011 wherein admittedly, the Central Commission has not followed the relevant Regulation which states the value of the maintenance spares should be taken at 1% of the historical cost escalated at 6% per annum from the date of commercial operation. This would make it clear that the Central Commission excluded the cost of initial spares from the historical capital cost on which the working capital is calculated even though such cost of initial spares duly formed part of capital cost. Therefore, the findings on this issue in the impugned order passed by the Central Commission is liable to be set aside and the Central Commission may be directed to pass a consequential order in the light of the relevant Regulations, as referred above, and the said issue may be decided on merit after offering reasonable opportunity of hearing to the parties.

SUBMISSIONS MADE BY THE LEARNED COUNSEL APPEARING FOR THE RESPONDENTS:

13. *Per-contra*, The learned counsel, Mr. Pradeep Misra, appearing for the first Respondent (Uttar Pradesh Power Corporation Limited), *inter-alia*, contended and, thereby, substantiate that the impugned Order dated 04.12.2014 passed by the Central Commission is strictly in accordance with the relevant regulations and after considering the stand taken by the Appellant, has denied the relief sought by the Appellant towards initial spares by assigning the valid and cogent reasons in paragraphs 17 & 18 of its Order dated 04.12.2014. The

reasoning given by the Central Commission in its Order dated 04.12.2014 is just, proper and in accordance with law. There is no illegality and perversity in the reasoning given by the Central Commission in its Order dated 04.12.2014. Therefore, interference by this Appellate Tribunal does not call for and the instant Appeal is liable to be dismissed.

14. The leaned counsel, Mr. R.B. Sharma, appearing for the third Respondent, *inter-alia*, contended and submitted that, the impugned Order dated 04.12.2014 passed by the Central Commission is strictly in accordance with relevant regulations and as per the provisions of the Electricity Act, 2003. The Central Commission, after recording the specific findings regarding initial spares, in paragraph nos. 17 & 18 in its Order dated 04.12.2014, has rightly justified in denying the relief sought by the Appellant. Therefore, interference by this Appellate Tribunal does not call for nor the Appellant has made-out any ground to entertain the relief sought in the instant Appeal. To substantiate his submissions, he quick to point out the relevant provisions of the Tariff Regulations, 2009. The provisions of the Tariff Regulations, 2009 relevant to the present appeal are described at Regulations “3(2) – ‘*expenditure incurred*’; 3(8) - ‘*capital cost*’; 3(29) ‘*original project cost*’; 3(31) - ‘*project*’; and 7 - ‘*capital cost*’.

15. He submitted that, in clause 8 of the Tariff Regulations, 2009 initial spares shall be capitalized as a percentage of the original project cost, subject to the ceiling norms provided that where the benchmark norms for initial spares have been published as part of the benchmark norms for capital cost under first proviso to clause (2) of regulation 7, such norms shall apply to the exclusion of the norms specified therein.

16. Further, he submitted that, the Appellant has contended that the Commission has failed to follow the Tariff Regulations, 2009 in computing the Capital cost by excluding the cost of initial spares for the purpose of determining the ceiling limit up to which the cost of initial spares to be allowed under Regulation 9(1)(iii) of the Tariff Regulations, 2009. The contention of the Appellant on this issue is wholly misleading and misconceived as the basis of determining the initial spares under Regulation 8 of the Tariff Regulations, 2009 is the Original Project Cost and not the Capital Cost.

17. Further, he quick to point out and placed reliance on the definition of the Original Project Cost as defined in the Tariff Regulations, 2009 under Regulations 3(29) and the Capital Cost as defined under 3(8) of the Tariff Regulations, 2009 would clearly show that the Capital cost included the capitalized initial spares subject to the ceiling rates specified in regulation 8 of the Tariff Regulations, 2009 whereas the Original Project Cost contains the capital

expenditure incurred by the generating company within the original scope of the project up to cut off date. This is further explained as under:

Original Project Cost = Expenditure incurred up to cut-off date.

Capital Cost = Expenditure incurred up to date of commercial operation + capitalized initial spares + additional capital expenditure determined under Regulation 9.

18. The Capital Cost is the basis for determination of tariff at various point of time during the life span of the generating station. However, the Original Project Cost refers to the expenditure incurred up to the cutoff date and it is this cost which is the basis for determination of the initial spares subject to the ceiling rates specified in Regulation 8. It may also be noted that the difference between the Capital Cost and the Original Project Cost at one point of time say the cutoff date is the capitalized initial spares. Thus, on the cutoff date the Original Project Cost can be determined by deducting the capitalized initial spares from the Capital Cost. And in this case, the Commission has done the same procedure and has rightly considered and recorded the valid reasoning towards initial spares in paragraphs 17 & 18 of its Order dated 04.12.2014. It may, therefore, be noted that the Commission has not determined the Initial Spares in accordance with the provisions of Tariff Regulations, 2009 and the Appellant has no grievance on this issue. Therefore, the ground taken by the Appellant is liable to be rejected (threshold).

19. The learned counsel for the third Respondent submitted that, towards cost of project on gross basis, the Appellant has contended that the Commission has erred in considering the capital cost of the project on cash basis instead on a Gross basis while computing the cost for the value of the initial spares. This contention of the Appellant is also misconceived and misleading. The word 'expenditure incurred' appearing in the 'Capital Cost' and the 'Original Project Cost' have been defined under the definition clause. The Capital Cost as contained in Regulation 3(8) and the 'Original Project Cost' have been defined under the definition clause. The Capital Cost as contained in Regulation 3(8) and the 'Original Project Cost' as contained in Regulation 3(29) when read in conjunction with Regulation 3(2) defining 'expenditure incurred' would clearly mean that the 'Capital Cost' and the 'Original Project Cost' is to be considered on cash basis. Thus, the Commission has considered the issue strictly in accordance with the provisions of the Tariff Regulations, 2009. Accordingly, the Appeal filed by the Appellant may be dismissed as devoid of merits.

20. Further, he vehemently submitted that, the reliance placed by the learned counsel for the Appellant on the principles laid down by this Appellate Tribunal has no relevance to the present case hence it is not applicable to the facts and circumstances of the case. Therefore, he submitted that, the Central Commission, after due consideration of the oral submissions and documentary evidences available on record

and after considering the relevant Act and Rules, has rightly dismissed the claim of the Appellant towards initial spares. Therefore, interference by this Appellate Tribunal does not call for and the instant appeal is liable to be dismissed as devoid of merits.

OUR CONSIDERATION:

21. We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for Respondent Nos. 1 & 3 at considerable length of time. The other Respondents served unrepresented.

22. After going through the impugned Order, dated 04.12.2014 passed by the Central Commission, the grounds urged and submissions made by the learned counsel appearing for the Appellant and the submissions made by the learned counsel appearing for the Respondent Nos. 1 & 3, the only issue that arise for our consideration is as follows:

“Whether non-consideration of cost of the project on gross basis while computing the value of the Initial Spares @ 2.5% is sustainable in law and the only question of law”

23. The submissions made by the learned counsel appearing for the Appellant are that, the Central Commission has erred in not considering the inclusion of initial spares in admitted capital cost for the purpose of calculation of initial spares @ 2.5% and not considering the cost of the project on Gross basis while computing the value of the

Initial Spares @ 2.5% and also failed to consider Regulation 2(8) of the Tariff Regulations, 2009 provides for the Initial Spares as 2.5% of the Project Cost. The Central Commission should have considered the capital cost of the project on Gross basis (i.e. capital cost including un-discharged liabilities up to the Cut Off date) instead on a Cash basis while computing the value of the Initial Spares to be admitted by the Central Commission. The Central Commission has been taking an inconsistent stand and without assigning any valid and cogent reason in paragraphs 17 & 18 of the impugned Order has denied the relief sought by the Appellant which is not at all justifiable and, therefore, it is liable to be set-aside and the Central Commission may be directed to consider the matter afresh.

24. Whereas, it is the case of the Respondent Nos. 1 & 3 that the Central Commission after due deliberation in the matter and considering all the relevant facts and circumstances of the case including documentary evidence/material available on record and taking into consideration the relevant regulations and the stand taken by the respective parties, the Central Commission has recorded the findings in paragraphs 17 & 18 of its Order, impugned herein, towards the initial spares and has specifically refers the Regulation 8 that Initial Spares shall be capitalized as a percentage of the original project cost, subject to following ceiling norms:

- (i) Coal-based/lignite-fired thermal generating stations - 2.5%

(ii) Gas Turbine/Combined Cycle thermal generating stations-	4.0%
(iii) Hydro generating stations	- 1.5%
(iv) Transmission system	
(a) Transmission line	- 0.75%
(b) Transmission Sub-station	- 2.5%
(c) Series Compensation devices and HVDC Station	- 3.5%

Provided that where the benchmark norms for initial spares have been published as part of the benchmark norms for capital cost under first proviso to clause (2) of regulation 7, such norms shall apply to the exclusion of the norms specified therein and has been detailed as stated above, Therefore, the Appellant has failed to make out any case to interfere in the well-considered Order passed by the Central Commission. Therefore, the instant appeal filed by the Appellant is liable to be dismissed as devoid of merits.

25. Taking into consideration the stand taken by the Appellant and the case made out by the Respondent Nos. 1 & 3, as stated above, and after careful perusal of the impugned Order dated 04.12.2014 passed by the Central Commission, the only point arise for our consideration is regarding Initial Spares. As rightly pointed out by the learned counsel appearing for the third Respondent in his written submission, the relevant provisions of the Tariff Regulations, 2009 is reproduced hereunder:

“3 Definitions:

.....

(2) ‘expenditure incurred’ means the fund, whether the equity or debt or both, actually deployed and paid in cash or cash equivalent for creation or acquisition of a useful asset and does not include commitments or liabilities for which no payment has been released;

.....

(8) ‘capital cost’ means the capital cost as defined in regulation 7;

(29)

‘original project cost’ means the capital expenditure incurred by the generating company or the transmission licensee, as the case may be, within the original scope of the project up to the cut-off date as admitted by the Commission;

(31) ‘project’ means a generating station or the transmission system, as the case may be, within the original scope of the project up to the cut-off date as admitted by the Commission;”

.....

7. Capital cost.

(1) Capital cost for a project shall include:

- (a) The expenditure incurred or projected to be incurred, including interest during construction and financing charges, any gain or loss on account of foreign exchange risk variation during construction on the loan- (i) being equal to 70% of the funds deployed, in the event of the actual equity in excess of 30% of the funds deployed, by treating the excess equity as normative loan, or (ii) being equal to the actual amount of loan in the event of the actual equity less than 30% of the funds deployed, - up to the date of commercial operation of the project, as admitted by the Commission, after prudence check;
- (b) Capitalized initial spares subject to the ceiling rates specified in regulation 8; and
- (c) Additional capital expenditure determined under regulation 9;

Provided that the assets forming part of the project, but not in use shall be taken out of the capital cost’.

26. As per definition under Regulation 2(8) - Initial Spares, in the Tariff Regulations, 2009, Initial Spares shall be capitalized as a percentage of the original project cost, subject to following ceiling norms:

- | | | | |
|-------|--|---|-------|
| (i) | Coal-based/lignite-fired thermal generating stations | - | 2.5% |
| (i) | Gas Turbine/Combined Cycle thermal generating stations | - | 4.0% |
| (ii) | Hydro generating stations | - | 1.5% |
| (iii) | Transmission system | | |
| | a) Transmission line | - | 0.75% |
| | b) Transmission Sub-station | - | 2.5% |
| | c) Series Compensation devices and HVDC Station | - | 3.5% |

Provided that where the benchmark norms for initial spares have been published as part of the benchmark norms for capital cost under first proviso to clause (2) of regulation 7, such norms shall apply to the exclusion of the norms specified herein.

27. It is the case of the Appellant that the Central Commission has failed to follow the Tariff Regulations, 2009 while computing the capital cost by excluding the cost of initial spares for the purpose of determining the ceiling limit up to which the cost of initial spares to be allowed under Regulation 9(1)(iii) of the Tariff Regulations, 2009. The said contention of the learned counsel for the Appellant on this issue is contrary to the material available on record as basis for determining the initial spares under Regulation 8 of the Tariff Regulations, 2009 is the original project cost and not the capital cost. It is pertinent to note

that as per the definition of the 'Original Project Cost' as defined in the Tariff Regulations, 2009 under Regulations 3(29) and the 'Capital Cost' as defined under Regulations 3(8) of the Tariff Regulations, 2009 would clearly show that capital cost included capitalized initial spares subject to the ceiling rates specified in regulation 8 of the Tariff Regulations, 2009, whereas, the 'Original Project Cost' contains the capital expenditure incurred by the generating company within the original scope of the project up to cut-off date. It further explained that

$$\text{Original Project Cost} = \text{Expenditure incurred up to cut-off date and Capital Cost} = \text{Expenditure incurred up to date of commercial operation} + \text{capitalized initial spares} + \text{additional capital expenditure determined under Regulation 9.}$$

28. The Capital Cost is the basis for determination of tariff at various point of time during the life span of the generating station. However, the Original Project Cost refers to the expenditure incurred up to the cutoff date and it is the cost which is the basis for determination of the initial spares subject to the ceiling rates specified in Regulation 8. It may also be relevant to note that the difference between the Capital Cost and the Original Project Cost at one point of time say the cutoff date is the capitalized initial spares. Thus, on the cutoff date the Original Project Cost can be determined by deducting the capitalized initial spares from the Capital Cost. Therefore, the Central Commission has rightly justified in following the same procedure and

by assigning a valid and cogent reasoning in paragraphs 17 & 18 of its Order dated 04.12.2014 in respect of the Initial Spares. The said reasoning given by the Central Commission is in accordance with relevant provisions of Tariff Regulations, 2009. Therefore, submissions made by the learned counsel for the Appellant has no force nor the Appellant has made out any good ground as such to consider the relief sought in this Appeal so far as it relates to the Initial Spares. The Central Commission, after due appreciation of the factual and legal aspects of the matter and after considering the case made out by the Appellant as well as the Respondents, has rightly justified in denying the relief sought towards Initial Spares as the same is just, proper and in accordance with law and we do not find any error, illegality and perversity in passing the Order dated 04.12.2014 by the Central Commission. Accordingly, the Appellant, inspite of having sufficient opportunity, has failed to make out the case for consideration. The Central Commission, after due critical evaluation of the oral and documentary evidence available on record, has rightly justified in holding the issue no.1 against the Appellant which is just, proper and reasonable. We accept the valid and cogent reason assigned by the Central Commission is strictly in accordance with the provisions of the Tariff Regulations, 2009. Therefore, we are of the considered view that the reasoning assigned by the Central Commission is well founded and well reasoned. We hold that the Appellant has failed to make out the

case for consideration. Hence, the instant Appeal filed by the Appellant is liable to be dismissed.

ORDER

29. In the light of the foregoing reasons, as stated above, the instant Appeal, being Appeal No. 76 of 2015 on the file of the Appellate Tribunal for Electricity, New Delhi is hereby dismissed and the impugned Order dated 04.12.2014 passed in Petition No. 17/GT/2013 on the file of the Central Electricity Regulatory Commission, New Delhi is hereby confirmed. There shall be no order as to costs.

30. Order accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS 12TH DAY OF FEBRUARY, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

√ **REPORTABLE**

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