

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 180 of 2014 & IA No.292 of 2014**

**Dated : 02<sup>nd</sup> January, 2019**

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

**IN THE MATTER OF:**

GRIDCO Limited,  
Janpath,  
Bhubaneswar- 751022  
Odisha.

.....Appellant

Versus

1. NTPC Limited,  
NTPC Bhawan,  
Core-7, SCOPE Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi 110003

2. Central Electricity Regulatory Commission,  
Chanderlok Building,  
4<sup>th</sup> Floor, Janpath,  
New Delhi 110001

..... Respondents

**Counsel for the Appellant(s) : Mr. Raj Kumar Mehta  
Ms. Himanshi Andely**

**Counsel for the Respondent(s) : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Anushree Bardhan  
Ms. Poorva Saigal  
Mr. Shubham Arya R-1**

Mr. K.S. Dhingra for R-2

## **J U D G M E N T**

### **PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

1. The Appellant, GRIDCO has filed the present Appeal under Section 111 of the Electricity Act, 2003 challenging the Order dated 15.05.2014 passed in Petition No. 304 of 2009 on the file of Central Electricity Regulatory Commission (hereinafter called the Central Commission) while determining the tariff of Talchar TPS for the period 2009-14 .
2. **Brief Facts of the case:**
  - 2.1 The Appellant GRIDCO Limited is a wholly owned Company of the Government of Odisha and is carrying on the functions of Bulk Supply of Electricity to four Distribution Companies in the State of Odisha.
  - 2.2 Talcher Thermal Power Station (TTPS) is a Thermal Generating Plant located in the State of Odisha comprising of 6 units with a capacity of 470 MW State-I – 4x62.5 MW and Stage-II 2x110 MW. It was wholly owned by the erstwhile Orissa State Electricity Board (OSEB). Stage-I units were commissioned during 1967-69 and Stage-II units were commissioned during 1982-83. The power

station was taken over by NTPC after signing an MoU with the Govt. of Orissa during 1995-96.

- 2.3** On 27.11.2009 NTPC filed Petition No.304 of 2009 for approval of Tariff of TTPS for the period 01.04.2009 to 31.03.2004 on the basis of CERC Tariff Regulations (2009-2014).
- 2.4** During July, 2010 NTPC filed petition No.212 of 2010 before CERC under Regulation 10(1) of CERC Tariff Regulation 2009-14 for approval of Scheme for implementation of R&M (Phase-IV) involving total expenditure of Rs. 139.71 crore. By order dated 07.06.2013, CERC granted in principle approval for R&M (Phase-IV) Schemes for Stage-II Units beyond 31<sup>st</sup> March, 2014 with a total projected additional capitalization of Rs.64.97 crore.
- 2.5** On 25.06.2013 NTPC filed an amended Petition taking into consideration the actual expenditure for the period 2009-2012 and the Projected Capital Expenditure for the period 2012-2014.
- 2.6** By the impugned order dated 15.05.2014, CERC determined the Tariff of TTPS for the period 2009-2014.

**3. Facts in Issue :-**

The dispute in the present case pertains to the correctness of the order dated 15.05.2014 of CERC determining the Tariff of TTPS for the period 2009-2014.

**4. Questions of Law:-**

The present Appeal raises following questions of law for consideration by the Tribunal:

- 4.1** Whether the Commission is justified in not formulating the Renovation and Modernization (R&M) Policy even after 16 years of the enforcement of Electricity Regulatory Commissions Act, 1998 and 11 years after come into force of the Electricity Act, 2003?
- 4.2** Having failed to formulate the Renovation and Modernization Policy and in the absence of any guideline for sharing of benefits of efficiency improvement achieved as a result of Renovation and Modernization between the Generators and Beneficiaries, whether CERC should have adopted a 50-50 sharing mechanism between the Generator and Beneficiaries?
- 4.3** Having allowed enormous amount of Rs. 127.92 crore towards additional Capital Expenditure (in addition to the Additional

Capitalization amounting to Rs.543.32 crore upto 31.03.2009), whether the Commission was justified in applying relaxed operational norms provided under CERC Tariff Regulations (2009-2014)?

- 4.4** Whether the Commission should have exercised the Power to relax provided under Regulation 44 of the CERC Tariff Regulations 2004-2009 in order to apply the operational norms on the basis of actual performance of the station instead of applying the relaxed norms?
- 4.5** Whether the Commission was justified in rejecting the prayer of GRIDCO for a direction to NTPC for a mutual discussion for agreeing to lower operational norms under Regulation 37 of the CERC Tariff Regulation (2009-2014).
- 4.6** Having already allowed a sum of Rs.572.72 crore towards additional Capitalization on account R&M, whether the Commission was justified in allowing further expenditure amounting to Rs.127.92 crore towards Renovation and Modernization without any cost benefit analysis and merely observing that GRIDCO is getting power at a cheaper rate?

- 4.7** Whether the Commission was justified in not appreciating that the original capacity of Stage-I Units needs to be restored to 62.5 MW each in view of the sustained improved performance including higher PLF as a result of huge R&M expenditure?
- 4.8** Whether the Commission erred in not appreciating that higher capacity charges as a result of relaxed Operational Norms coupled with the Under-rated Capacity of the State-I Units of TTPS is resulting in undue and unjust enrichment of NTPC at the cost of GRIDCO and consequently the consumers of the State of Odisha?
- 4.9** Whether it was incumbent upon the Commission to undertake a Cost Benefit Analysis in view of the huge expenditure towards Renovation & Modernization to the tune of Rs. 800 crore approximately in order to determine whether the ultimate beneficiaries, i.e. the consumers of the State of Odisha are getting the benefit of such huge R&M Expenditure?
- 4.10** Whether the Commission was justified in allowing the O&M expenses as per the relaxed considerations laid down in CERC Tariff Regulations (2009-14) on the basis of the actual expenses for the period 2004-05 to 2007-08 without examining the effect of the huge R&M Expenditure?

**4.11** Whether the Commission acted erroneously in allowing the sum of Rs.127.93 crore towards R&M expenditure without deducting the accumulated depreciation already recovered from the original Project Cost as required by Regulation 10(3) of the CERC Tariff Regulation, 2009?

**5. Mr. R.K. Mehta, learned counsel for the Appellant has filed his written submission as follows:-**

**ADDITIONAL CAPITAL EXPENDITURE:**

**5.1** No Cost Benefit Analysis has been carried out by the Commission before allowing Additional Capital Expenditure amounting to Rs.128 crore in addition to the Additional Capitalization of Rs. 543 crore upto 31.03.2009.

**5.2** Commission has not formulated the Renovation and Modernization (R&M) Policy even after 16 years of the enforcement of Electricity Regulatory Commissions Act, 1998 and 11 years after coming into force of the Electricity Act, 2003, except dealing with the issue of Renovation and Modernisation along with other issues in the Explanatory Memorandum of CERC Tariff Regulations, 2009 which has also not been followed in the present case.

**5.3** The Tariff Policy 2006 issued by Ministry of Power, Government of India in Para 5.3(g) is as under:-

*“5.3 Tariff policy lays down following framework for performance based cost of service regulation in respect of aspects common to generation, transmission as well as distribution. These shall not apply to competitively bid projects as referred to in Para 6.1 and Para 7.1(6). Sector specific aspects are dealt with in subsequent sections.*

.....

**(g) Renovation and Modernization.**

*Renovation and modernization (it shall not include periodic overhauls) for higher efficiency levels needs to be encouraged. A multi-year tariff (MYT) framework may be prescribed which should also cover capital investments necessary for renovation and modernization and an incentive framework to share the benefits of efficiency improvement between the utilities and the beneficiaries with reference to revised and specific performance norms to be fixed by the Appropriate Commission. Appropriate capital costs required for pre-determined efficiency gains and/or for sustenance of high level performance would need to be assessed by the Appropriate Commission.”*

**5.4** In the order dated 28.07.2006 in Petition No. 35 of 2004 filed by NTPC for approval of Revised Fixed Charges due to additional capitalization for the year 2000-2004, CERC had observed as under:-

*“The Policy of Renovation and Modernization (R&M) is yet to be finalized. The Regulations of 2001-2004 as well as 2004-2009 are silent on the treatment of depreciation once the project has under gone life extension. We are of the view that the issue of reduction of capital cost by accumulated depreciation as claimed by GRIDCO needs to be discussed with all the stakeholders. Once Commission takes a view on the matter, same will be applicable to this generating station as well.”*



**5.5** Even though 8 years have elapsed even after the Tariff Policy and order dated 28.07.2006, Commission has not formulated the Renovation and Modernization Policy and has been allowing the Additional Capital Expenditure towards Renovation and Modernization from time to time without any guidelines resulting in serious prejudice to the Appellant.

**OPERATIONAL NORMS:**

**5.6** Even though enormous amount of Additional Capitalization amounting to Rs.543.32 crore has been allowed upto 31.03.2009, the Commission has applied relaxed operational norms provided under CERC Tariff Regulations (2009-2014). Commission should have taken the actual parameters achieved by the Station as a consequence of such enormous R&M expenditure into consideration and not followed the relaxed norms provided in the Regulations.

**5.7** In the order dated 29.03.2004 in Petition No. 67 of 2003 in the context of framing the Tariff Regulations, the Commission had refrained from laying down any norms for Operation and Maintenance Expenditure in respect of TTPS and Tanda Power Stations on the ground that since both the Stations are under R&M,

the impact of R&M on performance and operation and maintenance cost will have to be factored. The Commission further decided that it would determine the operational norms on case to case basis after prudence check by the Commission of actual expenditure during the previous 5 years. The relevant extract from the order dated 29.03.2004 of CERC is quoted below:-

*“It has also to be kept in view that both the generating stations are under R&M. The impact of R&M on performance and operation and maintenance costs will also have to be factored. Keeping this in view, we have decided that no norms for Operation and Maintenance Expenditure be fixed for these two stations for the tariff period of 2004-09. Instead, it would be determined on case-to-case basis after prudence check by Commission of actual expenditure during the previous five years or the period of operation under NTPC.”*

- 5.8** Same principle as laid down by the Commission in the context of O&M Expenditure for the period 2004-09 will apply also to the Operational Norms for the subsequent periods including 2009-14. The actual performance of the Stations as a result of huge expenditure on Renovation and Modernization.
- 5.9** Commission should have exercised the Power to relax provided under Regulation 44 of the CERC Tariff Regulations 2004-2009 in order to apply the operational norms on the basis of actual performance of the station instead of applying the relaxed norms. While the Commission has taken into consideration the actual

expenditure during the period 2009-2012 on the basis of amended petition filed by NTPC in 2013, it has failed to take into consideration the actual performance of the station while applying the relaxed norms.

**5.10** TTPS has achieved the PLF of 90.87% to 94.20% during the period 2008-09 to 2011-12 as stated in the order dated 07.06.2013 of the Commission in Petition No. 212 of 2010 .

|                | <b>2008-09</b> | <b>2009-10</b> | <b>2010-11</b> | <b>2011-12</b> |
|----------------|----------------|----------------|----------------|----------------|
| <b>PLF (%)</b> | 92.68          | 90.87          | 94.20          | 92.56          |

**5.11** TTPS has achieved Annual Plant Availability Factor (APAF) of 90.29% to 95.84% which is much higher than Normative Plant Availability Factor (NAPAF) of 82% as fixed by CERC under CERC Tariff Regulations, 2009.

|                 | <b>2009-10</b> | <b>2010-11</b> | <b>2011-12</b> | <b>2012-13</b> | <b>2013-14</b> | <b>Average</b> |
|-----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| <b>APAF (%)</b> | 90.29          | 93.58          | 91.88          | 95.84          | 94.56          | 93.23          |

**5.12** Even during the previous Tariff Block (2004-05 to 2008-09), TTPS had achieved APAF of 85.59% to 93-23% which is much higher than the normative APAF.

|                 | <b>2004-05</b> | <b>2005-06</b> | <b>2006-07</b> | <b>2007-08</b> | <b>2008-09</b> | <b>Average</b> |
|-----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| <b>APAF (%)</b> | 85.59          | 91.70          | 89.97          | 86.64          | 93.23          | 89.43          |

**5.13** By fixing the NAPAF at 82% in spite of the actual average APAF of 93.23%, NTPC is getting double benefit since it also gets Higher Capacity Charge as per Regulation 21 (2) of CERC Tariff Regulations (2009-14). Observations of the Commission in Para 16 that the Appellant has been benefited by the higher PLF as the cost of power appears much cheaper despite the expenditure of Rs. 800 crore towards R&M are, therefore, misconceived, misleading and untenable. In view of the above APAF achieved by the Station, the Commission acted erroneously in fixing the NAPAF at 82% for the period 2009-2014.

**5.14** The Commission erred in not accepting the prayer of GRIDCO for a direction to NTPC for mutual discussion with regard to the improved norms of operation in terms of Regulation 37 of the CERC Tariff Regulations, 2009 and in terms of PPA dated 08.03.1995/Minutes of Meeting dated 23/24.09.1996. Relevant extracts from the PPA dated 08.03.1995 and MOM dated 23/24.09.1996 are quoted below:-

**PPA dated 08.03.1995**

6. TARIFF

6.1 The following stipulations are to be taken into account while working out the tariff of TTPS:-

.....

(e) The operating parameters such as auxiliary power consumption, heat rate, specific oil consumption shall be as mentioned in Note 2 and 3 under Clause 6.2

.....

NOTE:

.....

2. The tariff would be worked out based on Aux. Consumption as 15.7%, Specific Oil Consumption as 10.5 ml/kwh and Station Heat Rate of 3550 Kcal/kwh. Joint measurements of Aux. Consumption, Specific Oil Consumption and Station Heat Rate shall be done by NTPC and OSEB based on unit wise measurement within three (3) months of the date of take over and thereafter the tariff would be reworked and adjusted based on agreed parameters for the balance period of 95-96. No adjustment in the tariff would be made during the period of above joint measurement. The methodology and procedure for joint measurement shall be mutually discussed and agreed to between NTPC and OSEB. If the joint measurement is not completed within three months, NTPC will continue to bill and OSEB will continue to

pay on provisional basis for the energy at the rate arrived at as above.

3. The above tariff would be subject to the adjustment if any, as a result of review of norms annually after completion of each year from the date of take over.”

**Minutes of Meeting dated 23/24<sup>th</sup> September, 1996.**

“The operating parameters for variable charges w.e.f. 01.04.2000 would also be mutually discussed and settled between NTPC and GRIDCO. Pending this settlement, the prevailing tariff as on March, 2000 would continue to be billed by NTPC and paid for by GRIDCO subject to adjustment retrospectively w.e.f. 01.04.2000 as mutually agreed final calculations.”

**ALLOWANCE OF FURTHER EXPENDITURE OF RS. 127.92 CRORE TOWARDS R & M.**

**5.15** Having already allowed a sum of Rs.572.72 crore towards additional Capitalization on account R&M, the Commission was not justified in allowing further expenditure amounting to Rs.127.92 crore towards Renovation and Modernization without any cost benefit analysis and merely observing that GRIDCO is getting power at a cheaper rate .

**5.16** TTPS is a Pit-Head Station and NTPC is getting coal in abundance at a much cheaper rate as compared to other Stations. The annual fixed cost of TTPS is much higher compared to other Coal Based Stations of NTPC from which GRIDCO is availing power.

**5.17** A comparative statement for fixed cost during the Tariff period 2009-14 having pit-head Stations from which GRIDCO is availing power is enumerated below for better appreciation of the Tribunal.

| Name of generating Station. | 2009-10 (P/U) | 2010-11 (P/U) | 2011-12 (P/U) | 2012-13 (P/U) | 2013-14 (P/U) |
|-----------------------------|---------------|---------------|---------------|---------------|---------------|
| TTPS                        | 111.3         | 115.04        | 118.91        | 123.54        | 127.56        |
| TSTPS-I                     | 79.6          | 79.76         | 80.22         | 82.23         | 85.36         |
| TSTPS-II                    | 79.36         | 78.84         | 78.50         | 79.03         | 80.86         |
| KhSTPS-I                    | 87.51         | 88.76         | 91.04         | 94.77         | 98.27         |
| FSTPS-I & II                | 73.57         | 75.21         | 76.49         | 79.16         | 82.51         |

**5.18** It is mainly because of the lower cost of coal that the rate of power of TTPS is less compared to other stations. The lower cost is not as a consequence of the huge R&M expenditure. It is thus submitted that the observations of the Commission that GRIDCO has benefitted by the huge R&M expenditure since it is getting power at low cost are misconceived.

**5.19** Cost of power should have been even lower in view of enormous R&M expenditure, benefit of which should have been passed on to GRIDCO.

**RE-RATING OF UNITS FROM 60 MW TO 62.5 MW:**

**5.20** Commission has erred in not appreciating that the original capacity of Stage-I Units needs to be restored to 62.5 MW each in view of the sustained improved performance including higher PLF as a result of huge R&M expenditure. As per CEA records, the rated capacity of each of the Stage-I Units of TTPS is 62.5 MW.

**5.21** In the order dated 04.03.2008 in Review Petition No. 6 of 2007 arising out of Petition No. 35 of 2004, Commission had taken the energy generation of each of the 60 MW units for 3 months, i.e. April, May & June, 2007 and on that basis come to the conclusion that the weighted average MW per unit was between 60.92 to 61.10.

|                                      | <b>April, 2007</b> | <b>May, 2007</b> | <b>June, 2007</b> | <b>Average</b> |
|--------------------------------------|--------------------|------------------|-------------------|----------------|
| <b>Weighted Average/ MW per Unit</b> | 61.10              | 60.92            | 60.94             | 60.99          |



**5.22** In view of the sustained Higher PLF and Energy generation of TTPS as a result of huge R&M expenditure, the Commission ought to have considered restoration of capacity of the Units to 62.5 MW each or at least undertaken a review.

**NO COST BENEFIT ANALYSIS CARRIED OUT BY CERC:**

**5.23** Commission erred in not appreciating that higher capacity charges as a result of relaxed Operational Norms coupled with the Under-rated Capacity of the Stage-I Units of TTPS is resulting in undue and unjust enrichment of NTPC at the cost of GRIDCO and consequently the Consumers of the State of Odisha.

**5.24** Commission ought to have undertaken a Cost Benefit Analysis in view of the huge expenditure towards Renovation & Modernization to the tune of Rs. 800 crore approximately in order to determine whether the ultimate beneficiaries, i.e. the Consumers of the State of Odisha are getting the benefit of such huge R&M Expenditure.

**5.25** Commission has not undertaken any Cost Benefit Analysis from 2000 till date inspite of having allowed such huge R&M expenditure of Rs. 800 crore. Commission has brushed aside the submission

of GRIDCO in this regard with the bald observation that GRIDCO is getting cheaper power as a result of R&M which is factually not correct. As demonstrated above, the lower power cost is mainly due to the availability of cheaper coal in abundance since TTPS is a Pit-head Station and not on account of any extra effort of NTPC.

**ALLOWANCE OF O & M EXPENSES WITHOUT EXAMINING EFFECT OF HUGE R & M EXPENDITURE:**

**5.26** Commission was not justified in allowing the O&M expenses as per the relaxed considerations laid down in CERC Tariff Regulations (2009-14) on the basis of the actual expenses for the period 2004-05 to 2007-08 without examining the effect of the huge R&M Expenditure.

**5.27** Commission ought to have examined the effect of the huge R&M on the O&M expenses and exercised the power to relax contained in Regulation 44 of CERC Tariff Regulation (2009-14) since the actual O&M expenses during the period in question would have come down substantially as a result of huge R&M expenditure.

**5.28** Commission acted erroneously in allowing the sum of Rs.127.93 crore towards R&M expenditure without deducting the accumulated depreciation already recovered from the original Project Cost as required by Regulation 10(3) of the CERC Tariff Regulation, 2009.

**5.29** In the above premises, it is most respectfully submitted that the Appeal may be allowed and the impugned order may be set aside.

**6. Mr. M.G. Ramachandran, learned counsel for the Respondent No.1 has filed his written submissions as follows:-**

**A. FORMULATION OF A RENOVATION AND MODERNIZATION (R&M) POLICY;**

**6.1** The contention of the Appellant to the effect that the Central Commission has not formulated a Renovation and Modernization Policy is contrary to the records. In fact, during the framing of the Tariff Regulations, 2009, the Central Commission had carried out a detailed discussion and analysis on the scope and purview of the Renovation and Modernization and had incorporated Regulation 10 in the Tariff Regulations, 2009 to deal with the expenditure incurred on account of Renovation and Modernization.

**6.2** Further, the Central Commission had specifically dealt with the renovation and modernization in the context of the Talcher Thermal Power Station. In this regard, NTPC would crave reference to the Explanatory Memorandum issued by the Central Commission accompanying the Draft Tariff Regulations, 2009 which reads as:

6.13 In case of poorly maintained plants like Tanda & Talcher TP Swhich were taken over by the NTPC, the R&M expenditure is worked out as follows:

| Name of Station            | Tanda TPS | Talcher TPS |
|----------------------------|-----------|-------------|
| Capacity (MW)              | 440       | 460         |
| Date of Take over          | 15.1.2000 | 1.4.1996    |
| R&M Expenditure up to 2006 | 229.06    | 431.50      |
| R&M in Rs. Lakh/MW/Year    | 8.68      | 9.38        |

6.3 In view of the above guidelines and methodology prescribed by the Central Commission, it is incorrect on the part of the Appellant to allege that no Renovation and Modernization Policy has been formulated till date.

6.4 The reference to the order dated 28.07.2006 in Petition No. 35 of 2004 passed by the Central Commission, has no relevance in the facts and circumstances of the case as the Renovation and Modernization policy has already been framed and is in operation.

#### **B. RELAXED OPERATIONAL NORMS GRANTED TO TALCHER STATION;**

6.5 The Central Commission had fixed the operating norms for the relevant tariff period in a transparent manner, after duly taking into consideration the views of all the stakeholders and then notified the Tariff Regulations, 2009.

6.6 The operating and maintenance norms for the tariff period 2009 - 14 for the Talcher Station were decided by the Central commission, after considering the actual operation and maintenance expenses of the previous periods. In this regard, NTPC would crave reference to the Statement of Reasons issued by the Central Commission along with the Tariff Regulations, 2009.

*“19. O & M Expenses (Regulation 19)*

19.1 *The draft Regulation provided separate set of norms for coal/ lignite based station depending upon unit sizes without distinguishing between new and existing stations. In respect of some of the coal/lignite based station of NTPC, namely Talcher, Tanda and Badarpur, DVC namely Chandrapura, Bokaro and Durgapurand, NLC’s TPS-I and TPS-II, relaxed norms were prescribed.....*

**19.2 *The norms were specified after considering actual of thermal generating stations of Central Utilities and some of the generating stations State Utilities and IPPs for the period 2004-05 to 2006-07 and factoring in 45% increase (30% increase for transmission system due to inadvertent mistake instead of 45% increase) in employee cost due to pay revision and considering annual escalation factor of 5.17%. The annual escalation factor was based on the average of last last five years”***

.....

20.11 *In respect of other stations of NTPC namely, Badarpur TPS which has 210 MW units and 95 MW units, Talcher which has 60 MW units and 110 MW units, and Tanda TPS which has 110 MW units, the Commission had proposed following O&M norms based on data of 2004-05 to 2006-07:*

(Rs. in lakh/MW)

| Year    | Talcher TPS | Tanda TPS | Badarpur TPS |
|---------|-------------|-----------|--------------|
| 2009-10 | 28.50       | 24.00     | 27.00        |
| 2010-11 | 28.50       | 25.24     | 27.00        |
| 2011-12 | 28.50       | 26.55     | 27.00        |
| 2012-13 | 28.50       | 27.92     | 27.00        |
| 2013-14 | 28.50       | 29.36     | 27.00        |

20.12 The NTPC was expected to rationalize man power in their Talcher TPS and Badarpur TPS and considering this no escalation was provide during the tariff period. However, NTPC has submitted that it would not be possible for them to rationalizeman power to this extent and that there would be escalation in other heads of the O&M.NTPC has indicated rationalization of man power to the extent of 5-8% in case of Badarpur TPS whereas they have shown their helplessness in case of Talcher TPS. Assuch, in case of Badarpur TPS no escalation has been considered on the employee cost whereas escalation has been provided on other component of O&M cost. **Accordingly following norms have been worked out based on the actual O&M expenses of 2004-05 to 2007-08:**

(Rs. in lakh/MW)

| Year    | Talcher TPS | Tanda TPS | Badarpur TPS |
|---------|-------------|-----------|--------------|
| 2009-10 | 32.75       | 26.25     | 31.35        |
| 2010-11 | 34.62       | 27.75     | 32.25        |
| 2011-12 | 36.60       | 29.34     | 33.17        |
| 2012-13 | 38.70       | 31.02     | 34.12        |
| 2013-14 | 40.91       | 32.79     | 35.09        |

**6.7** In terms of the above, it is evident that the norms were determined by the Central Commission based on the actual Operation and Maintenance Expenditure and not otherwise, as alleged by the

Appellant. Therefore, the reference to the order dated 29.03.2004 passed by the Central Commission in Petition No. 67 of 2003, has no relevance as the operating norms have already been determined by the Central Commission.

**6.8** The Talcher Station was taken over by NTPC from OSEB. At the time of takeover, the performance of the Talcher Station was significantly lower involving much higher operation and maintenance expenses. Accordingly, a differential treatment was required to be given for the said Station, as compared to other generating stations established by NTPC.

**6.9** The actual Operation & Maintenance expenses for the Talcher Station are much higher than those provided in the Tariff Regulations, 2009. NTPC is in fact under-recovering to the tune of 30% of the Operation & Maintenance expenditure actually incurred (under recovery of Rs 358.8 Crs in 2009-14 period) on account of the high employees cost as the employees were transferred from the erstwhile OSEB at the time of takeover. This is not the position, as applicable to a generating Station established by NTPC itself.

**6.10** In any event, the issue being raised by the Appellant in the present appeal i.e. grant of relaxed parameters to Talcher Station, is a claim contrary to the Tariff Regulations, 2009 notified by the Central Commission. The Appellant cannot challenge the scope

and import of the Tariff Regulations, 2009 in the appeal before this Tribunal arising out of a tariff order passed by the Central Commission. As held by the Hon'ble Supreme Court in PTC India Limited v Central Electricity Regulatory Commission (2010) 4 SCC 603, the statutory regulations of the Central Commission cannot be challenged in an appeal under Section 111 of the Act.

**6.11** The contention of the Appellant as regards the exercise of the power to relax under regulation 44, is also misconceived. The Appellant has not placed on record any plea/pleading wherein the Appellant had prayed for or invoked the Power to Relax under Regulation 44 of the Tariff Regulations, 2009. The power to relax can by no stretch of imagination be exercised to make the norms and parameters more stringent.

**6.12** Without prejudice to the above, NTPC submits that the norms of availability had been fixed by the Central commission on the basis of the actual performance of the generating station for the previous period.

***“16.0 Target Availability for recovery of Full Fixed Charges (AFC) and for the payment of Incentive:***

*.....*  
**16.2.1** *The availability of the various coal/Lignite based generating stations in the last 5 years i.e. 2002-03 to 2006-07 is as follows:*

| <b>Generating Station</b>                      | <b>2002-03</b> | <b>2003-04</b> | <b>2004-05</b> | <b>2005-06</b> | <b>2006-07</b> |
|--|----------------|----------------|----------------|----------------|----------------|
| <b>Talcher takeover<br/>(4x60 MW+2x110 MW)</b> | <b>56%</b>     | <b>68%</b>     | <b>80%</b>     | <b>88%</b>     | <b>88%</b>     |

**16.2.2** *The actual PLF of the various coal/Lignite based generating stations in the last 5 years i.e. 2002-03 to 2006-07 are as follows:*



| Generating Station                     | 2002-03 | 2003-04 | 2004-05 | 2005-06 | 2006-07 |
|--|---------|---------|---------|---------|---------|
| Talcher takeover<br>(4x60 MW+2x110 MW) | 73%     | 82%     | 82%     | 84%     | 90%     |

16.2.3 The average availability and average PLF of the various coal/Lignite based generating stations of the last 3 years i.e. 2004-05 to 2006-07 are as follows:

| NTPC's station                         | Availability | Actual PLF |
|--|--------------|------------|
| Talcher takeover<br>(4x60 MW+2x110 MW) | 85%          | 85%        |

**16.2.4 It can be seen that most of the coal based stations of indicated above has average availability (Declared) and average PLF (actual availability) in the range of 85% to 96% and 85% to 101% respectively except Farakka & Unchahar stations of NTPC.....In case of Talcher and Tanda TPS, revised norms of 80% have been specified about a year back. These stations being old stations, Commission would like to keep the normative plant availability factor for these stations at 82% slightly lower than the other thermal generating stations.”**

**6.13** Further, in the Statement of Reasons to the Tariff Regulations, 2009, the Central Commission had noted as under:

*“28.4 The beneficiaries have sought for higher availability norm for Badarpur, Tanda and Talcher TPS of NTPC. The commission had kept the lower availability norm for these stations having regard to their vintage. However, Tanda is performing at fairly high level consistently above 90% for the last two years and has still not completed its useful life. As such, we are inclined to set a norm for Tanda TPS at 85%. But in case, of Talcher TPS and Badarpur TPS, we intend to keep the norm same as provided in the draft regulations at 82% for the reasons specified in draft regulation.”*

**6.14** The Central Commission has, from time to time, been increasing the Target Availability for the Talcher Station, as is evident from the following table:

| Operating parameter          | Takeover (1994-95) | Apr'00 - Mar'01 | Apr'04 - Sep'07 | Oct'07 - Apr'09 | Apr'09 - March'14 | April'14 - March'19 |
|------------------------------|--------------------|-----------------|-----------------|-----------------|-------------------|---------------------|
| Target Availability/ PLF (%) | 29.02 (Actual PLF) | 61.76           | 75.00           | 80              | 82                | 85                  |

**6.15** NTPC has improved the performance of the station by continuous efforts and has achieved a Plant load factor of more than 90% for last five years from 29.02 PLF % in 1994-95. The increase in generation due to higher availability and increase in Plant Load Factor have been availed by the sole beneficiary, i.e. the Appellant.

**6.16** In view of the above, it is wrong on the part of the Appellant to allege that the Central Commission has not taken into consideration the actual performance of the Talcher Station while determining the Normative Plant Availability Factor at 82% for the period 2009-14. Due consideration had been granted to the Talcher Station on account of its vintage.

**C. APPLICABILITY OF REGULATION 37 OF THE TARIFF REGULATIONS, 2009**

**6.17** The scope of Regulation 37 of the Tariff Regulations, 2009 which provides for the norms of operation to be the ceiling norms, is intended for cases where the generator and the beneficiaries had agreed to specific norms in the Power Purchase Agreement etc. In the case of the Talcher Station, the Central Commission has already prescribed norms substantially stringent than those agreed to in the Power Purchase Agreement and therefore, Regulation 37 will not be applicable. The relevant clause of the PPA dated 8.03.1995 entered into between the OSEB and NTPC reads as under:

*“6.2 – Note*

*2. The tariff would be worked out based on the Aux. consumption as 15.7%, Specific Fuel Oil Consumption as 10.5 ml/Kwh and Station Heat Rate of 3350 Kcal/kWh.....”*

#### **D. COST BENEFIT ANALYSIS TO GRIDCO FOR THE THE R&M CARRIED OUT**

**6.18** The Appellant has availed benefits of improved generation level, on account of the renovation and modernisation carried out by NTPC, and has enjoyed the benefits of upgraded operating norms, as decided by the Central commission from time to time, the details of which are as under:

| Operating parameter               | Takeover (1994 -95) | Apr'00 - Mar'01 | Apr'04 - Sep'07 | Oct'07 - Apr'09 | Apr'09 – March'14 | April'14-March'19 |
|-----------------------------------|---------------------|-----------------|-----------------|-----------------|-------------------|-------------------|
| Heat Rate (kcal/kwh)              | 4109                | 3200            | 3100            | 2975            | 2950              | 2850              |
| Specific oil consumption (ml/kwh) | 14.02               | 3.50            | 3.50            | 2.00            | 1.00              | 0.5               |
| Aux. Energy Cons. (%)             | 15.70               | 11.75           | 11.00           | 10.50           | 10.50             | 10.5              |
| Target Availability / PLF (%)     | 29.02 (Actual PLF)  | 61.76           | 75.00           | 80.00           | 82.00             | 85.00             |

**6.19** In such circumstances, it is not open to the Appellant to contend that the benefit of the renovation and modernisation expenditure is not being passed on to them. Further, the fixed costs of the Talcher Station, i.e. Rs 1.26/kwhr is comparable with the fixed costs of the other power plants from which the Appellant is availing supply.

**6.20** It is only on account of the progressive renovation and modernisation carried out that the station is performing at the levels prevalent today. Talcher Station, being an old Station and taken over by NTPC in 1995, cannot avail compensation allowance and special allowance benefits and therefore the performance levels are being entirely sustained through the

additional capitalisation allowed under renovation and modernisation.

**6.21** It was after a detailed discussion/scrutiny and after careful examination of the various schemes of renovation and modernisation, that the Appellant accorded its approval for the phased renovation and modernisation schemes. It is only due to the renovation and modernisation works that the Appellant has been able to avail sustained power at a much reduced per unit rate since the takeover of the plant.

**6.22** Further, It is denied that the low cost of the Talcher Station is only on account of the fact that it is a Pithead Station, as is sought to be alleged by the Appellant. As is evident from the table hereinabove, it is clear that the performance of the Talcher Station has consistently improved and the same can be attributed only to the Renovation and Modernization carried out by NTPC as the station had been a pithead station even back in 1994-95, at the time it was taken over from NTPC.

**6.23** GRIDCO has raised the question of additional capitalisation towards R&M of Rs 800 Cr (which is actually RS 673 crores) up to 31.03.2014 without receiving commensurate benefits. GRIDCO seeks to ignore the fact that the takeover of the power station from the OSEB by NTPC was on the basic condition that NTPC will be

entitled to undertake the R&M. Such R&M would involve capital expenditure. The Appellant cannot claim that NTPC should take over the Plant and run it at a higher PLF without undertaking the R&M. In this regard, the Talcher Station (Acquisition and Transfer) Act, 1994 dealing with the acquisition from Orissa State Electricity Board and transfer of the Talcher Station to NTPC itself provides as under:

*“and whereas the said power station has not been able due to financial and technical constraints to operate continuously at its optimum capacity resulting loss in generation of electricity;*

*and whereas the said Board (OSEB) or the State Government is not in a position to provide additional funds necessary to achieve optimum production.”*

Accordingly, it is not bona fide on the part of the Appellant to challenge the R&M expenditure. The prudence of the R&M expenditure has been considered by the Central Commission.

**6.24** The operating norms have been constantly tightened over the years and the benefit of this has been passed on to GRIDCO. The amount saved by GRIDCO in its energy bills because of efficiency improvement (better Heat rate norms) and reduction in Auxilliary Power Consumption norms %, besides having availed benefits of surplus cheaper power over the years due to improved station

availability, is estimated as Rs. 1386 Cr approximately on account of improvement in Heat rate and Auxiliary Consumption alone during the period 2004-15 itself and if prior period (i.e.1995-2004) is taken into consideration then the gains will be much higher against an R&M expenditure of Rs673 Cr.

**6.25** Further, the Memorandum of Understanding dated 11<sup>th</sup> October 1994 and the PPA dated 8.03.1995 entered into between OSEB and NTPC provide that the actual cost of Renovation and Modernization shall be payable by the Appellant to NTPC.

**E. RESTORATION OF CAPACITY OF THE STAGE I UNITS TO 62.5 MW**

**6.26** The issue of restoration of rated capacity has already been held against the Appellant by the Hon'ble Tribunal in its Order dated 8.11.2011 in Appeal No. 86, 87, 227 of 2006 & 14 of 2009. The relevant extract of the Order dated 8.12.2011 reads as under:

*“18. The eighth question is regarding up-rating of the capacity of 60 MW units of Talchar.*

*18.1. According to learned counsel for the GRIDCO, 60 MW units should have been up-rated to 62.5 MW. According to him, even though the lost capacity had already been restored, the same was not recognized by the Central Commission as a result of which GRIDCO was paying incentive as well as Unscheduled Interchange charges to NTPC every month on the basis of the de-rated capacity.*

*18.2. According to learned counsel for the NTPC, on the basis of actual capacity test done, the Central Commission*

had concluded that the rating of the four units at 60 MW was in order.

18.3. Let us now examine the findings of the Central Commission on this aspect in the impugned order dated 26.09.2007. The relevant extracts of the order are as under:

*“10. The respondent has pleaded that one of the agreed objectives of R&M was the restoration of the lost capacity and deteriorated efficiency. Since the majority of R&M works on all 60 MW units of Stage-I are over, the respondent has contended that the declared capacity of these units should be restored to its original nameplate capacity of 62.5 MW each. This issue was not raised by the respondent in Petition No. 62/2000 when norms of operation were being prescribed for the period 2000-04. We find that the major emphasis by the parties has been on the extension of the life of the generating station and improving its performance level as a result of R&M. We could not find any record to show any agreement between the parties on the definite performance level and the capacity restoration. In view of this we are not able to accept the argument of the respondent. Accordingly, for the purpose of the present petition the capacity of each unit of Stage has been considered as 60 MW”.*

18.4. Further the Central Commission has dealt with this issue in the impugned order dated 4th March, 2008 wherein the Central Commission has gone into the relevant clauses of Power Purchase Agreement, the circumstances leading to de-rating of 62.5 MW to 60 MW and the actual data of generation of the 60 MW unit and came to the conclusion that there was no case for re-rating the four units of 60 MW to 62.5 MW each. We are in agreement with the findings of the Central Commission and do not want to interfere with this finding of the Central Commission. Thus, this issue is decided against GRIDCO.”

**6.27** The Appellant has challenged the above order by way of CA No. 7361 – 62 of 2012 and the same is pending before the Hon’ble Supreme Court. There is however, no stay on the Judgment of this



Hon'ble Tribunal. Further, the CEA website and reports also indicate station capacity for Talcher Station as 460 MW which implies that Stage-I units are of 60 MW only.

**6.28** For the reasons mentioned herein above, there is no merit in the appeal filed by the Appellant and the same is liable to be dismissed.

**7. Mr. K.S. Dhingra, the learned counsel appearing for the Respondent No.2 has filed the written submissions as under:-**

**7.1** The appellant has raised the following issues, namely:

(a) Rejection of the appellant's prayer for direction to Respondent No 1, NTPC or mutual discussion to agree to improved operational norms [Para 8 (b) V of Memo of Appeal];

(b) Approval of additional capital expenditure without conducting Cost-Benefit Analysis [Para 8 (b) IX of Memo of Appeal];

**Non-formulation of Renovation and Modernization (R&M) Policy**

**7.2** The first grievance of the appellant is that the Central Commission has not formulated R&M Policy on sharing of benefits on R&M undertaken. The appellant has relied upon Para 5.3 (g) of the Tariff

Policy to support its contention. Para 5.3 (g) of the Tariff Policy provides as under:

**“(g) Renovation and Modernization**

*Renovation and modernization (it shall not include periodic overhauls) for higher efficiency levels needs to be encouraged. **A multi-year tariff (MYT) framework may be prescribed which should also cover capital investments necessary for renovation and modernization and an incentive framework to share the benefits of efficiency improvement between the utilities and the beneficiaries with reference to revised and specific performance norms to be fixed by the Appropriate Commission.** Appropriate capital costs required for pre-determined efficiency gains and/or for sustenance of high level performance would need to be assessed by the Appropriate Commission.” (Emphasis added)*

**7.3** A bare perusal of the above provision of the Tariff Policy would show that it is not mandatory for the Appropriate Commission to formulate R&M Policy as it stipulates that multi-year tariff “framework may be prescribed”. Further, according to the above extracted portion of the Tariff Policy, the Appropriate Commission is required to “fix” the “revised specific performance norms”. In the 2009 Tariff Regulations the Central Commission has fixed the “revised specific performance norms” applicable exclusively to the generating station for the control period 2009-14, a reference to which is made hereafter.

7.4 The Central Commission had formulated and applied “specific performance norms” applicable to the generating station which was undergoing R&M for the earlier tariff blocks also. Another specific incentive provided in clause (3) of Regulation 10 of the 2009 Tariff Regulations pertains to adjustment of accumulated depreciation in the capital cost of a generating station on completion of R&M. Coming to the specific issue of formulation of R&M Policy, it was first raised by the appellant in Petition No.35/2004 which pertained to revision of tariff after additional capitalization for the period 2000-01 to 2003-04.

7.5 The Central Commission in its order dated 28.7.2006 indicated a broad roadmap for the policy framework on R&M as under:

**“6. The policy on Renovation and Modernisation (R & M) is yet to be finalised. The Regulations of 2001-2004 as well as 2004-2009 are silent on the treatment of depreciation once the project has under gone life extension. We are of the view that the issue of reduction of capital cost by accumulated depreciation as claimed by GRIDCO needs to be discussed with all the stakeholders. Once Commission takes a view on the matter, same will be applicable to this generating station as well.” (Emphasis added)**

7.6 Accordingly, after extensive consultation with the stakeholders, the Central Commission incorporated a suitable provision on Renovation and Modernisation in Regulation 10 of the 2009 Tariff

Regulations, effective from 1.4.2009. Similarly, policy in regard to R&M has been incorporated in Regulation 15 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, valid for the period of 2014-19.

**7.7** It is, therefore, incorrect for the appellant to allege that the Central Commission has not formulated policy on R & M. While R&M policy was not even contemplated, the Appellant, in 1999, on its own agreed to and approved R&M schemes in Phase-I and Phase-II at the cost of 437 crore. Subsequently, in 2004 the appellant approved R&M in Phase-III at a cost of `205.06 crore and R&M for switchyard at a cost of 18.26 crore. The Appellant would not have agreed to R&M in Phase I, II and III and the switchyard on the proposals of NTPC unless it was satisfied about the usefulness, or the benefits flowing out, of R&M to be undertaken. The Central Commission in the impugned order allowed actual expenditure on R&M for the schemes agreed to between the Appellant and NTPC after the prudence check and disallowed a substantial amount of the capitalization claimed.

**7.8** From the above narrated facts it is apparent that the appellant has not been made to suffer on account of non-formulation of specific

R&M policy till 31.3.2009; as shown above R&M Policy has been in position since 1.4.2009. R&M of Phase IV was approved by the Central Commission vide its order dated 7.6.2013 in Petition No 212/2010, after hearing NTPC and the Appellant. The Appellant was obviously satisfied with the approval of R&M accorded by the Central Commission as it did not take any further proceedings against the said order dated 7.6.2013.

**7.9** It is trite to say that formulation of R&M Policy, adverted to in the Tariff Policy, cannot be said to be a condition precedent for approval of R&M expenditure or R&M schemes and determination of tariff based on the capital expenditure so incurred on R&M. The above proposition of law flows from the judgment of the Hon'ble Supreme Court in **U.P. State Electricity Board Vs. City Board, Mussoorie (AIR 1985 SC 883)**, wherein it was held that framing of Regulations, under Section 79(h) of the Electricity (Supply) Act, 1948 was not a condition precedent for fixation of grid tariff.

**7.10** A similar view has been expressed by the Constitution Bench of the Hon'ble Supreme Court in **PTC India Ltd Vs Central Electricity Regulatory Commission (AIR 2010 SC 1338)**.

## **Sharing of benefits of Efficiency Improvement After R&M**

**7.11** The appellant has argued that in the absence of any guidelines under R&M Policy for sharing of the benefits of efficiency improvement achieved as a result of R&M, the Central Commission ought to have adopted a 50:50 sharing mechanism between NTPC and the Appellant.

**7.12** No such submission was made by the Appellant before the Central Commission in the proceedings culminating in the impugned order and there is no basis for sharing of benefits in the ratio of 50:50, as urged by the Appellant. The above provisions have been made in the 2009 Tariff Regulations which cause benefit to the Appellant. The Appellant is sharing the benefits of R&M as operational norms applicable to the generating station have been improved over norms for earlier periods, as is being demonstrated hereafter.

**7.13** When the generating station was acquired by NTPC in 1995-96, it was operating at a very low PLF of 29%. At the time of transfer of the generating generation to NTPC in 1995, a Power Purchase Agreement dated 8.3.1995 (**PPA**) was executed between the State

Government of Orissa, Orissa State Electricity Board (predecessor of the appellant) and NTPC.

**7.14** After successive R&M, the Central Commission has specified the tightened operational norms, resulting in passing of the benefits to the Appellant by way of much lower energy charges and ensuring higher availability as compared to the earlier parameters. The improvement in the operational parameters since 1.4.2000 clearly amounts to sharing of benefits of R&M by the appellant as the improved operational parameters have caused reduction in Energy Charge.

### **Application of Operational Norms**

**7.15** The Appellant's next grievance relates to application of operational norms specified in the 2009 Tariff Regulations for determination of tariff of the generating station. The operational norms applicable to the generating station, like those applicable to other power projects, were specified under the 2009 Tariff Regulations, notified in January 2009, after following the transparent process of consultation with the stakeholders, including the Appellant. The Appellant did not formally raise any grievance about the specified

operational norms immediately after notification of the 2009 Tariff Regulations.

**7.16** At this stage in the collateral proceedings, the appellant is estopped from questioning the operational norms specified under the 2009 Tariff Regulations before the Appellate Tribunal, in view of the law laid down by the Constitution Bench of the Hon'ble Supreme Court in **PTC India Ltd Vs Central Electricity Regulatory Commission (AIR 2010 SC 1338)**, wherein it was held by the Hon'ble Supreme Court that exercise of power of judicial review of the statutory regulations is not vested in the Appellate Tribunal.

### **Exercise of Power to Relax in Respect of Operational Norms**

**7.17** The Central Commission specified the following operational norms in the 2009 Tariff Regulations, applicable to the generating station and other power projects with units having capacity of 200/210 MW:

|  | Talcher TPS | General Coal-based |
|--|-------------|--------------------|
| Normative Annual Plant Availability Factor (NAPAF) (%) | 82          | 85                 |
| Gross Station Heat Rate (k Cal/kWh)                    | 2950        | 2500               |
| Secondary Fuel Oil Consumption (ml/kWh)                | 1.0         | 1.0                |



|                                  |      |     |
|----------------------------------|------|-----|
| Auxiliary Energy Consumption (%) | 10.5 | 8.5 |
|----------------------------------|------|-----|

**7.18** The operational norms specified for the generating station for the 2009-14 were closer to the general operational norms, as may be seen from the above table. The Appellant has submitted that the Central Commission should have invoked “Power to Relax” under Regulation 44 of the 2009 Tariff Regulations to apply the operational norms on the basis of actual performance of the generating station, instead of applying the relaxed norms specified under the 2009 Tariff Regulations. The Appellant in the Memo of Appeal has given details of Annual Plant Availability Factor (**APAF**) achieved during the periods 2004-05 to 2008-09 and 2009-10 to 2013-14.

**7.19** The Appellant has argued that despite the average APAF of 89.43% achieved during 2004-09 and 93.23% during 2009-14, the Central Commission has erroneously fixed NAPAF at 82% for the period 2009-14. No such submissions were made by the appellant before the Central Commission when the matter was pending there. The Appellant did not plead before the Central Commission to apply tighter norms than those specified under the 2009 Tariff Regulations.

**7.20** The data for the period 2009-14 was obviously not available in January 2009 when the 2009 Tariff Regulations were notified and therefore this data has to be kept out of consideration for the present purpose. The Central Commission specified the operational norms after due consideration of R&M carried out and based on parameters guaranteed by OEM as a result of R&M. The specified operational norms are considered to be reasonable and the contention of the Appellant for upward revision of NAPAF by exercising power to relax is untenable.

**7.21** “Power to Relax” conferred on the Central Commission under the 2009 Tariff Regulations can be exercised only in exceptional circumstances as such relaxation acts to the detriment of the other party. In the guise of the present appeal, the Appellant is in effect seeking amendment of 2009 Tariff Regulations by pleading exercise of power to relax which is not permissible.

### **Direction for Mutual Discussion**

**7.22** Regulation 37 of the 2009 Tariff Regulations is extracted below:

***“Norms of operation to be ceiling norms.*** Norms of operation specified in these regulations are the ceiling norms and shall not preclude the generating company or the transmission licensee, as the case may be, and the beneficiaries and the long-term transmission customers from agreeing to the improved norms of

*operation and in case the improved norms are agreed to, such improved norms shall be applicable for determination of tariff.*

**7.23** In its affidavit dated 18.11.2013 the Appellant had sought direction to NTPC for mutual discussion on improved operational norms in view of Regulation 37 of the 2009 Tariff Regulations. The Central Commission rejected the appellant's plea for a direction for mutual discussion after recording the reasons for the same in the impugned order.

*“16. .... Considering the above factors and since the respondent has given its approval to the R&M schemes under Phases-I, II and III and Switchyard, **we find no reason for a direction to the petitioner for a mutual discussion for agreeing to lower norms of the generating station under Regulation 37 as prayed for by the respondent.**” (Emphasis added)<sup>1</sup>*

**7.24** There is nothing in Regulation 37 even to suggest that the Central Commission is under an obligation to direct the parties to mutually discuss the issue of improved norms of operation whenever a request to that effect is made by either party. Any such direction will not only prolong the process of tariff determination but will also render the specified norms as redundant.

**7.25** As per Regulation 37, it is left to the generating company or the transmission licensee and beneficiaries to agree to the improved norms of operation and in case there is an agreement between the

parties, the Central Commission is to apply the improved (agreed) norms for determination of tariff.

**7.26** As a result of R&M, the useful life of the generating station has been extended till the year 2021, the benefits of operational performance and efficiency have been passed on to the appellant through the improved operational parameters specified in the tariff regulations notified by the Central Commission from time to time.

**7.27** The appellant has been availing the benefits of higher Plant Load Factor/Annual Plant Availability Factor on sustained basis, in addition to the benefit of cheaper power from the generating station through the improved operational norms.

### **Absence of Justification for Additional Capitalization**

**7.28** NTPC had claimed additional capitalization of `227.62 crore for the period 2009-14, against which the Central Commission had allowed additional capitalization of `146.82 crore after prudence check. The appellant has questioned the justification for allowing additional capitalization for the period 2009-14. The appellant has, not cited any specific grounds for disallowing additional capitalization.

### **Non-restoration of Original Capacity of 62.5 MW of Stage 1 Units**

**7.29** Originally, Stage I Units of the generating station had nameplate capacity of 62.5 MW. These units were de-rated to 60 MW with the approval of CEA before take over of the generating station by NTPC. The Appellant has urged that the Central Commission ought to have restored original nameplate capacity of 62.5 MW for Stage 1 units of the generating station in view of sustained improved performance as a result of R&M expenditure.

**7.30** The PPA executed between NTPC and the Appellant at the time of take over takes note of the de-rated capacity as under:

**“INSTALLED CAPACITY OF TTPS**

*Installed capacity of TTPS on date is 460 MW (4 x 60 MW + 2 x 110 MW). The installed capacity is, however, subject to derating/rerating of the generating units as determined from time to time.\, after following the prescribed procedure as laid down by Central Electricity Authority.”*

**7.31** In the affidavit dated 18.11.2013 in the tariff petition, the Appellant pointed out that NTPC was deriving huge benefits *inter alia* on account of de-rated capacity. No specific request for re-rating of the units of Stage I was, however, made by the Appellant. Earlier, the Central Commission in its order dated 25.9.2006 in Petition No 35/2004 (National Thermal Power Corporation Ltd Vs Grid Corporation of India Ltd) had rejected the appellant’s plea for

restoration/re-rating of capacity of Stage I units, as per the following order:

*“10. The respondent has pleaded that one of the agreed objectives of R&M was the restoration of the lost capacity and deteriorated efficiency. Since the majority of R&M works on all 60 MW units of Stage-I are over, the respondent has contended that the declared capacity of these units should be restored to its original nameplate capacity of 62.5 MW each. This issue was not raised by the respondent in Petition No. 62/2000 when norms of operation were being prescribed for the period 2000-04. We find that the major emphasis by the parties has been on the extension of the life of the generating station and improving its performance level as a result of R&M. We could not find any record to show any agreement between the parties on the definite performance level and the capacity restoration. In view of this we are not able to accept the argument of the respondent. Accordingly, for the purpose of the present petition the capacity of each unit of Stage has been considered as 60MW.”*

**7.32** The matter was again examined by the Central Commission in Review Petition (No 6/2007) filed by the Appellant for review of the order dated 25.9.2006. The Central Commission again rejected the appellant’s plea for restoration/re-rating of the original capacity in the order dated 14.3.2008.

**7.33** The above findings of the Central Commission were upheld by Appellate Tribunal in its judgment dated 12.1.2011 in **Appeal No 81/2009 (Gridco Ltd Vs Central Electricity Regulatory Commission and another)**. The Appellate Tribunal after an elaborate discussion concluded as under:

“(vi) If the machines are able to generate slightly higher than 100% of the capacity, this cannot be taken as installed capacity being available at 62.5 MW on a sustained basis. Admittedly, no evidence had been produced before the Central Commission that required re-rating of planned capacity of 62.5 MW. As a matter of fact, it is pointed out that the NTPC Limited submitted all such details as was called for by the Central Commission during the proceedings before it.”

“(ix) We cannot find fault with the Central Commission in not re-rating the units in the Impugned Order in view of its earlier orders dated 25.09.2006 and 4.3.2008.”

**7.34** The Appellant is re-agitating the issue on the basis of the generation data for the months of April, May and June 2007 which was considered by the Central Commission in its order dated 14.3.2008, finally upheld by the Appellate Tribunal in the judgment dated 12.1.2011 *ibid.* As after the judgment of the Appellate Tribunal the issue has attained finality. Re-agitation in the present proceedings of the issue decided by the Appellate Tribunal is barred by application of the principle of *res judicata*.

### **Cost-Benefit Analysis**

**7.35** The Appellant has urged that the Central Commission did not undertake cost-benefit analysis before approving additional capitalization. The Appellant did not approach the Central Commission for undertaking cost-benefit analysis. It was in the interest of the Appellant itself to produce the details in support of cost-benefit analysis, in case it was to seek any such study, but

the Appellant failed to do so. The failure on the part of the Appellant has been specifically taken note of by the Central Commission in the impugned order as under:.

*“16. We have examined the submissions of the parties. .... **The respondent, in support of its contention that it has derived no benefit from the generating station commensurate with the huge R&M undertaken by the petitioner at a cost of `80000 lakh, has not been able to demonstrate the same through Cost-Benefit analysis.** On the contrary, we notice that in addition to the benefits of higher PLF derived by the respondent, on sustained basis, the cost of power appear to be much cheaper, despite the expenditure of `80000 lakh (approx) for the generating station.....”<sup>1</sup>*

**7.36** The Appellant has not in any manner contested correctness of the above observation of the Central Commission in the present appeal but has sought to pass the blame on to the Central Commission for not undertaking the cost-benefit analysis.

**7.37** The Central Commission while approving the additional capitalization carried out the prudence check. The basic premise of the prudence check was whether the additional capital expenditure had resulted, or would result, in benefits to the beneficiary (appellant) and the consumers. The benefits of the R&M of the generating station need to be appreciated in its



historical perspective, the data for which has been noticed hereinabove.

- 7.38** After takeover of the generating station by NTPC, the Appellant agreed to a total R&M expenditure of `436.52 crore up to October, 2003 on the main consideration that it would result in improvement in PLF and other operating parameters which were abysmally low at the time of transfer.
- 7.39** Since April 2000, there is not only extension of life of the plant by 20 years effective from 1.4.2001, but also there has been gradual improvement in PLF and other operational parameters as shown above. The improved operational parameters achieved as a result of R&M are indicators of the benefits accruing to the Appellant as a consequence of R&M exercise being undertaken since 1996.
- 7.40** The sustenance of improved operational norms since 2000 along with strict regulation of emission control for protection of environment requires legitimate expenditure and this has been the core consideration before the Central Commission while allowing capitalization of the expenditure.

### **O&M Expenses Norms**

**7.41** Clause (b) of Regulation 19 of the 2009 Tariff Regulations provide the following O&M expense norms for this generating station:

(` in lakh/MW)

| <b>2009-10</b> | <b>2010-11</b> | <b>2011-12</b> | <b>2012-13</b> | <b>2013-14</b> |
|----------------|----------------|----------------|----------------|----------------|
| 32.75          | 34.62          | 36.60          | 38.70          | 40.91          |

**7.42** The appellant has submitted that the actual O&M expenses during the period in question would have come down substantially due to huge R&M expenditure. The Appellant has urged that the Central Commission ought to have examined the effect of huge R&M on the O&M expenses and exercised its power to relax under Regulation 44 of the 2009 Tariff Regulations.

**7.43** The appellant has further urged that the Central Commission ought to have allowed actual expenses in case they were lower than the normative O&M expenses. The Appellant did not raise the issue of allowing actual O&M expenses before the Central Commission as may be seen from the impugned order. The appellant has not furnished any data of actual O&M expenses even in the present appeal.

**7.44** NTPC in its reply to the petition has sought to demonstrate that actual O&M expenses have been on the higher side as compared to the normative O&M expenses allowed.

**7.45** The Appellant in terms of its submissions is in effect seeking for allowing the O&M expenses on the basis of the norms or actual whichever is lower. The plea of the appellant contravened the Tariff Policy which in para 5.3(f) provided that *“the operating parameters in tariff should be at ‘normative levels’ only and not at ‘lower of normative and actuals’*. The objective of the above stipulation in the Tariff Policy is essentially to encourage better operating performance, which is in the interest of overall economy.

**7.46** It is the fundamental principle that the norms should be efficient, relatable to past performance, capable of being achieved and progressively reflecting increased efficiencies and should also take into consideration latest technological advancements, fuel, vintage of equipments, nature of operation and level of service to be provided to the consumers.

**7.47** O&M norms in the 2009 Tariff Regulations have been specified in due recognition of the above principles. The purpose of specifying normative O&M expenses will get lost if these are allowed by comparing with actual expenditure.

**7.48** The exercise of considering actual O&M expenses was undertaken at the time of framing of the 2009 Tariff Regulations, Even

otherwise, the Appellant is precluded from raising the issue of relaxation in the present appeal as no such plea was made before the Central Commission.

- 8. We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondents at consideration length of time and we have gone through the written submissions carefully and evaluated the entire relevant material available on record. The following main issues emerge out of Appeal for our consideration:**

**Issue No.1:** Whether the Central Commission is justified in allowing additional capital expenditure on renovation and modernisation without formulating the R&M Policy?

**Issue No.2:** Whether the Central Commission has erred in not considering higher operational norm resulting from such huge R&M expenditures in calculating the capacity charges payable to NTPC?

**Issue No.3:** Whether it was not essential for the Central Commission to undertake a cost benefit analysis in view of the huge expenditure towards renovation and modernisation

**Issue No.4:** Whether the Central Commission is justified in considering the unit capacity of Stage I as 60 MW each instead of 62.5 MW?

**Issue No.5:** Whether the Central Commission is justified in non-exercising the Regulation 37 of the Tariff Regulations, 2009 for issuing directions to NTPC for mutual discussions?

## **9. Our Findings & Analysis:-**

**9.1 Issue No.1:-** Learned counsel, Mr.R.K. Mehta, appearing for the Appellant submitted that even after lapse of several years from the enactment of Electricity Regulatory Commissions Act, 1998 and Electricity Act, 2003, the Central Commission has not formulated the Renovation and Modernization (R&M) Policy and has been allowing capital expenditures to this account in an unrealistic manner. He cited the relevant provision of the Tariff Policy 2006 issued by Ministry of Power, Government of India which, among others, lays emphasis on R& M activities. The learned counsel further contended that despite the provisions in the tariff policy and its own findings in the order dated 28.07.2006 in Petition No. 35 of 2004 filed by NTPC for approval of Revised Fixed Charges due to

additional capitalization for the year 2000-2004, the Central Commission has admitted that policy of R&M is yet to be finalised. Even though, 8 years have elapsed but the Commission has not formulated the aforesaid policy and has been allowing the additional capital expenditure towards R&M from time to time without any guidelines resulting in serious prejudice to the Appellant.

**9.2** *Per contra*, learned counsel, Mr. M.G. Ramachandran, appearing for the first Respondent/ NTPC contended that the contention of the Appellant to the effect that the Central Commission has not formulated a Renovation and Modernization Policy is contrary to the records as during the framing of the Tariff Regulations, 2009, the Central Commission had carried out a detailed discussion and analysis on the scope and purview of the Renovation and Modernization and had incorporated Regulation 10 in the Tariff Regulations, 2009 to deal with the expenditures on account of R&M activities and as far as Talchar Power Station is concerned, the Commission has specifically dealt with the renovation and modernization in the context of this station. The learned counsel further submitted that it is incorrect on the part of the Appellant to allege that no R& M policy has been formulated till date and

accordingly, his reference to the order dated 28.07.2006, in Petition No. 25 of 2004 passed by the Central Commission has no relevance in the facts and circumstances of the case.

**9.3** Learned counsel, Mr. K.S. Dhingra, appearing for the Respondent Commission submitted that a bare perusal of the provision in the Tariff Policy, 2006 would show that it is not mandatory for the Appropriate Commission to formulate R&M Policy instead, the Commission is required to “fix” the “revised specific performance norms”. He was quick to submit that in the 2009 Tariff Regulations, the Central Commission has fixed the “revised specific performance norms” applicable exclusively to the generating stations for the control period 2009-14. He further submitted that another specific incentive provided in clause (3) of Regulation 10 of the 2009 Tariff Regulations clearly pertains to adjustment of accumulated depreciation in the capital cost of a generating station on completion of R&M. Learned counsel emphasized that the said regulation was incorporated after extensive consultation with the stakeholders by the Central Commission and similarly policy in regard to Renovation and Modernisation has been incorporated in Regulation 15 of the Central Electricity Regulatory Commission (Terms and Conditions

of Tariff) Regulations, 2014. He vehemently submitted that it is incorrect on the part of the Appellant to allege that additional capital expenditures on R&M are being allowed without any policy whereas the Appellant himself had agreed to R&M in Phase-I, II and III and the switchyard on the proposals of NTPC. The Central Commission in the impugned order allowed actual expenditure on R&M for the schemes agreed to between the appellant and NTPC after the prudence check and disallowed non-admissible amount of the capitalization claimed. To substantiate his contentions, learned counsel placed the reliance of the judgment of the Hon'ble Supreme Court in ***U.P. State Electricity Board Vs. City Board, Mussoorie (AIR 1985 SC 883)***, wherein it was held that framing of Regulations, under Section 79(h) of the Electricity (Supply) Act, 1948 was not a condition precedent for fixation of grid tariff. Learned counsel highlighted that a similar view has also been expressed by the Constitution Bench of the Hon'ble Supreme Court in ***PTC India Ltd Vs Central Electricity Regulatory Commission (AIR 2010 SC 1338)***.

### **Our Findings & Analysis:**

**9.4** We have gone through the submissions of the learned counsel for the Appellant and learned counsel for the Respondents and took



note of judgments cited by the parties. It is not in dispute that the generating units at Talchar Power Station were quite old to have operated for more than 40 years and their rehabilitation necessitating huge R&M works was essential. Accordingly, NTPC after taking over the station during 1995-96, prepared the comprehensive scheme for R&M after vetting from the Appellant and submitted to the Central Commission for its approval. It is relevant to note that the Central Commission after detailed deliberations and analysis on the scope and purview of the Renovation & Modernisation had incorporated Regulation 10 in its Tariff Regulation, 2009 which specifically dealt with expenditure on account of R&M activities. Talchar TPS being an old station and taken over by NTPC primarily for its rehabilitation and improvement of operating efficiencies had got specific mention in the explanatory memorandum issued by the Central Commission. Thus, we opine that the Central Commission had framed sufficient guidelines for dealing the subject of R&M and the Phase I, II & III including the switchyard of R&M programme was formulated by NTPC duly consulting the Appellant. We do not find any legal infirmity or perversity in the methodology or otherwise, in findings of the Commission in the impugned order is not in accordance with law. Hence, interference of this Tribunal does not call for.

10. **Issue No.2:-** Learned counsel for the Appellant submitted that even though enormous amount of Additional Capitalization for R&M of the station has been allowed up to 31.03.2009, the Central Commission has only applied relaxed operational norms provided under its Tariff Regulations . He further submitted that the Commission ought to have taken the actual parameters achieved by the Station as a consequence of such huge R&M expenditure into consideration. The Central Commission vide its order dated 29.03.2004 decided that it will determine the operational norms on case to case basis after prudence check by the Commission of actual expenditure during the preceding 5 years. The relevant provision of the order dated 29.03.2004 of CERC is quoted below:-

*“It has also to be kept in view that both the generating stations are under R&M. The impact of R&M on performance and operation and maintenance costs will also have to be factored. Keeping this in view, we have decided that no norms for Operation and Maintenance Expenditure be fixed for these two stations for the tariff period of 2004-09. Instead, it would be determined on case-to-case basis after prudence check by Commission of actual expenditure during the previous five years or the period of operation under NTPC.”*

*(Emphasis supplied)*

Learned counsel for the Appellant contended that the Commission ought to have exercised the ‘power to relax’ provided under Regulation 44 of the CERC Tariff Regulations 2004-2009 so as to

apply the actual operational norms instead of applying the relaxed norms. He further highlighted the actual performance parameters of the station relating to the PLF, Annual Plant Availability Factor (APAF) vis.a.vis.the normative parameters considered by the Commission to argue that the Commission should have taken the higher operational parameters based on the actual performance considering large expenditure on R&M. Learned counsel further submitted that TTPS being pithead station is getting coal at cheaper rates as compared to other stations, however, the fixed cost of the station is much higher compared to other coal based stations of NTPC from which GRIDCO is availing power. He contended that it is mainly because of lower cost of coal that rate of power of TTPS is less compared to other stations and the lower cost of power is not as a result of huge R&M expenditure.

**10.1 *Per contra*,** learned counsel for the first Respondent submitted that the Central Commission has fixed the operating norms for the relevant tariff period in a transparent manner after duly taking into consideration the views of all the stakeholders while notifying the Tariff Regulations, 2009. The O&M norms for TTPS were decided after considering its actual O&M expenses of the previous periods

and to support his contentions, the learned counsel cited the reference of statements of reasons issued by the Central Commission along with the Operation Regulations, 2009. Learned counsel contended that at the time of take over of TTPS by NTPC, the station was operating at very low performance factors and accordingly a different treatment was required to be given for the said station as compared to other generating stations of NTPC. The learned counsel pointed out that the actual O&M expenses for TTPS are much higher than those provided in the Tariff Regulations, 2009 and in fact, NTPC under recovery is to the tune of 30% of the O&M expenses actually incurred by it. This is on account of high employee cost as the employees were transferred from the erstwhile OSEB at the time of take over and this is not a position as applicable to other generating stations. The learned counsel contended that the issue being raised by the Appellant regarding the grant of relaxed parameters to TTPS is in fact a claim contrary to the Tariff Regulations, 2009 notified by the Central Commission. Regarding exercise of power to relax under Section 44, the learned counsel submitted that the Appellant has not placed on record any plea / pleading wherein the Appellant had prayed for invoking the power to relax under Regulation 44. The power to relax can by no stretch of imagination be exercised to make the

norms and parameters more stringent. The learned counsel for the first Respondent submitted that NTPC has improved the performance of TTPS by its continuous effort and has achieved a PLF of more than 90% for the last 5 years from 29.02 % in 1994-95 and the benefit on account of increased generation due to higher availability and increase in PLF is being availed by the sole beneficiary i.e. the Appellant.

**10.2** Learned counsel for the Respondent Commission submitted that the operational norms applicable to Talchar were specified under 2009 Tariff Regulations notified in January, 2009 after following the transparent process of consultation with the stakeholders including the Appellant. It is relevant to note that the Appellant did not formally raise any objections over the specified operational norms after the said notification of the tariff regulations. The learned counsel further submitted that the operational norms specified for TTPS for the period 2009-14 were closure to the general operational norms and there was no question of invoking power to relax under Section 44 of Tariff Regulations so as to apply higher operational norms on the basis of actual performance. The learned counsel pointed out that no such submissions were made by the Appellant before the Central Commission when the matter was under adjudication there. The learned counsel highlighted that the

Central Commission has applied more and more stringent operating norms on the station in year on year basis after considering the parameters guaranteed by OEM as a result of R&M. He further contended that the operating norms specified by the Commission are quite reasonable as compared to other generating stations and the contentions of the Appellant for further upward revision of availability factor or PLF by exercising power to relax is untenable. The Central Commission, after due consideration of entire material on records has rightly justified passing the impugned order, therefore, interference by this Tribunal does not call for.

### **Our Findings:-**

**10.3** We have analysed the submissions of the learned counsel for the Appellant as well as learned counsel for the Respondents and also took note of the analysis carried out by the Central Commission in its impugned order. Admittedly, the performance of TTPS after completion of R&M has improved considerably and its PLF has gone up to 90% against low PLF of 29.02% during 1994-95. Besides, after carrying out R&M, the life of the generating units has also been extended for another 20 years and it may be considered as good as a new station performing efficiently to such high

availability and increased PLF. The Central Commission has considered the operating parameters reasonably which are well comparable with the operating parameters of other similar generating stations. Further, there did not appear any scope or ground for invoking its power to relax under Regulation 44 as the parameters are fixed on normative basis considering average of preceding years and not on maximum achieved basis as claimed by the Appellant. We, thus opine that the findings of the Central Commission are just and right and provides a judicious wisdom in the interest of the generator and the beneficiaries / consumers. Accordingly, no interference from this Tribunal is necessitated.

11. **Issue No.3:-**The learned counsel for the Appellant submitted that, as result of relaxed operational norms, the Respondent / NTPC is getting undue and unjust advantage at the cost of GRIDCO and consequentially the consumers of the State of Orissa. He emphasised that the Central Commission ought to have undertaken a cost benefit analysis in view of the huge expenditure towards R&M and in order to determine whether the ultimate beneficiaries are getting due benefit of such expenditure. The learned counsel pointed out that the Central Commission has brushed aside the submission of GRIDCO in this regard with the barred observation

that GRIDCO is getting cheaper power as a result of R&M which is factually not correct. The learned counsel contended that the lower power cost at TTPS is mainly on account of cheaper coal and not on account of any extra effort of NTPC through R&M. This point has not been considered.

**11.2 *Per contra*,** learned counsel for the first Respondent contended that the Appellant has availed benefits of improved generation level on account of renovation & modernisation carried out by NTPC and has enjoyed the benefits of upgraded operative norms. He submitted that it is not open to the Appellant to contend that the benefit of R&M is not being passed through them and it is only on account of progressive R&M carried out that the station is performing at higher levels as prevalent today. Learned counsel vehemently submitted that the low cost of power from TTPS is not only on account of being a pit head station but also on account of improved operating parameters as a result of major R&M. He clarified that the actual expenditure towards R&M has been Rs.673 crores instead of Rs.800 crores as indicated by the Appellant and station has been performing at highly improved levels even comparable to new generating stations. The Central Commission has constantly tightened the operative norms for the station over



the years of which the sole benefit has gone to the Appellant. The learned counsel highlighted that only during the period 2004-15 itself, the amount saved by the Appellant in its energy bills is estimated about Rs.1400 crores approximately and if prior period i.e. 1995 to 2004 is also taken into consideration then the accrued benefits to GRIDCO will be much higher against the R&M expenditure of only Rs.673 crores. Accordingly, it is not bona fide on the part of the Appellant to question the Central Commission for allowing R&M expenditures or not carrying out any cost benefit analysis thereto. The Commission has allowed R&M expenditures after prudence check and the accruing benefit therefrom is clearly visible from the improvement in operating norms and increased operating availability and increased PLF.

**11.3** Learned Counsel for the Respondent Commission submitted that the Appellant did not approach the Commission for undertaking any cost benefit analysis and it was in the interest of the Appellant itself to produce the details regarding cost benefit analysis so as to seek the relief, if any, to this account. He was quick to point out that the failure on the part of the Appellant has been specifically taken note of by the Central Commission in the impugned order as under:-

*“16. We have examined the submissions of the parties.  
..... **The respondent, in support of its***

**contention that it has derived no benefit from the generating station commensurate with the huge R&M undertaken by the petitioner at a cost of `80000 lakh, has not been able to demonstrate the same through Cost-Benefit analysis.** *On the contrary, we notice that in addition to the benefits of higher PLF derived by the respondent, on sustained basis, the cost of power appear to be much cheaper, despite the expenditure of `80000 lakh (approx) for the generating station.....”*

*(Emphasis supplied)*

Learned counsel further pointed out that the Appellant has not in any manner contested correctness of the above observation of the Central Commission and instead, has sought to pass the blame on to the Central Commission for not undertaking the cost-benefit analysis. He vehemently submitted that the benefits of the R&M of the generating station need to be appreciated in its historical perspective that what was the prevailing performance of the generating station when it was taken over by NTPC and the level of performance after carrying out exhaustive R&M by NTPC. The learned counsel further submitted that while approving the additional capitalisation in lieu of R&M carried out, the Central Commission had undertaken prudence check on the same with a basic premise that whether the approved expenditures would result in benefits to the Appellant / the beneficiary and in turn the consumers. He further contended that since April 2000, there is

not only extension of life of the plant by over 20 years but also consistent improvement in PLF and other operational parameters which are clear indicators of the benefit accrued to the Appellant as a consequence of R&M. Besides the R&M has resulted into strict regulation of emission control for protection of environment which coupled with considerable enhancement in PLF and plant availability has been the core consideration before the Commission while allowing capitalisation of R&M expenditures. These aspects clearly reflected the overall benefits from the station after completion of R&M and do not necessitate any specific cost benefit analysis report. Therefore, interference of this Tribunal does not call for.

**Our Findings:-**

**11.4** We have considered the rival contentions of the learned counsel for the Appellant as well as learned counsel for the Respondents and also took note of the findings of the Central Commission on the issue. What is relevant to note that after carrying out the R&M, the Talchar Station has been performing in an excellent manner yielding high PLF of more than 90% and also plant availability of over 82%. The R&M has also resulted into extension of plant life by 20- years or more besides generating at its full capacity with

high PLF. The very premise on which Talchar Station was transferred to NTPC through Talchar Station (Acquisition and Transfer) Act, 1994 was that the said power station was not operating at its optimum capacity resulting into loss of generation and OSEB or the State Govt. was not in a position to provide additional funds necessary to achieve optimum production. After taking over the plant, NTPC in consultation with the Appellant formulated detailed R&M Scheme and after due approval of the Central Commission, the same has been implemented in its entirety. It has been stated by the Respondents that at the time of transfer of the station to NTPC during 1995-96, the plant was operating at a very low PLF of 29% which has now gone up to more than 90%. We also note that before approving any expenditure on R&M, the Central Commission has applied prudence check and approved only genuine expenditures keeping in view the overall benefits likely to accrue after completion of R&M. It is not in dispute that there has been significant improvement in the operating parameters of the plant besides getting a life extension of 20 years or more mainly on account of R&M, whatsoever may be the expenditure on R&M whether Rs.800 crores or Rs.673 crores, the quantum of benefits out of R&M has been considerable and on a rough estimate indicated by the

Respondents, it has resulted into direct financial benefit of over Rs.1386 crore during the period of 2004-2015 and if the prior period of 1995-2004 is taken into consideration then the financial gains will be much more. These visible gains are clear indicators for cost benefit analysis and there does not appear any specific necessity of taking cost benefit analysis by the Central Commission to exhibit the benefits vis.-a-vis. Cost incurred. We, accordingly opine that there is no legal infirmity or error in the impugned order passed by the Central Commission to this account.

- 12. Issue No.4:-** Learned Counsel for the Appellant contended that the Central Commission has erred in not appreciating that the original capacity of Stage-I Units needs to be restored to 62.5 MW each keeping in view the consistent improved performance as a result of huge R&M expenditure. He submitted that as per records of the Central Electricity Authority (CEA), the rated capacity of each of the Stage-I Units of TTPS is 62.5 MW. The learned counsel was quick to point out that the Central Commission had taken the energy generation of each of the 60 MW units for 3 months during April to June, 2007 and on that basis, the weighted average MW per unit was between 60.92 to 61.10. Accordingly, in view of the sustained Higher PLF and Energy generation as a result of huge R&M

expenditure, the Commission ought to have considered restoration of capacity of Stage-I Units to 62.5 MW each or at least undertaken a review.

**12.2 Per contra**, learned counsel for the first Respondent submitted that the issue of restoration of rated capacity has already been held against the Appellant by the Hon'ble Tribunal in its Order dated 8.11.2011 in Appeal No. 86, 87, 227 of 2006 & 14 of 2009.

The relevant extract of the said Order reads as under:

*“18. The eighth question is regarding up-rating of the capacity of 60 MW units of Talchar.*

*18.1. According to learned counsel for the GRIDCO, 60 MW units should have been up-rated to 62.5 MW. According to him, even though the lost capacity had already been restored, the same was not recognized by the Central Commission as a result of which GRIDCO was paying incentive as well as Unscheduled Interchange charges to NTPC every month on the basis of the de-rated capacity.*

*18.2. According to learned counsel for the NTPC, on the basis of actual capacity test done, the Central Commission had concluded that the rating of the four units at 60 MW was in order.*

*18.3. Let us now examine the findings of the Central Commission on this aspect in the impugned order dated 26.09.2007. The relevant extracts of the order are as under:*

*“10. The respondent has pleaded that one of the agreed objectives of R&M was the restoration of the lost capacity and deteriorated efficiency. Since the majority of R&M works on all 60 MW units of Stage-I are over, the respondent has contended that the declared capacity of these units should be restored to its original nameplate capacity of 62.5 MW each. This issue was not raised by the respondent in Petition*

No. 62/2000 when norms of operation were being prescribed for the period 2000-04. We find that the major emphasis by the parties has been on the extension of the life of the generating station and improving its performance level as a result of R&M. We could not find any record to show any agreement between the parties on the definite performance level and the capacity restoration. In view of this we are not able to accept the argument of the respondent. Accordingly, for the purpose of the present petition the capacity of each unit of Stage has been considered as 60 MW”.

18.4. Further the Central Commission has dealt with this issue in the impugned order dated 4th March, 2008 wherein the Central Commission has gone into the relevant clauses of Power Purchase Agreement, the circumstances leading to de-rating of 62.5 MW to 60 MW and the actual data of generation of the 60 MW unit and came to the conclusion that there was no case for re-rating the four units of 60 MW to 62.5 MW each. We are in agreement with the findings of the Central Commission and do not want to interfere with this finding of the Central Commission. Thus, this issue is decided against GRIDCO.”

*(Emphasis supplied)*

The learned counsel further submitted that the Appellant has challenged the above judgment of this Tribunal before the Hon’ble Supreme Court against which, however, there is no stay. He, accordingly, contended that for the reasons mentioned hereinabove, there is no merit in the appeal filed by the Appellant and the same is liable to be dismissed with cost.

12.3 Learned counsel for the Respondent Commission contended that the Stage I Units of the station originally had nameplate capacity of

62.5 MW but these units were de-rated to 60 MW with the approval of CEA before the Talchar Station was taken over by NTPC. The Appellant has urged that the Central Commission ought to have restored original nameplate capacity of 62.5 MW in view of sustained improved performance as a result of R&M expenditure. Learned counsel referred to the PPA executed between NTPC and the Appellant at the time of taking over by NTPC, takes note of the de-rated capacity as under:

*“INSTALLED CAPACITY OF TTPS*

*Installed capacity of TTPS on date is 460 MW (4 x 60 MW + 2 x 110 MW). The installed capacity is, however, subject to derating/rerating of the generating units as determined from time to time.\, after following the prescribed procedure as laid down by Central Electricity Authority.”*

*(Emphasis supplied)*

Learned counsel vehemently submitted that earlier the Central Commission in its order dated 25.9.2006 in Petition No 35/2004 (National Thermal Power Corporation Ltd Vs Grid Corporation of India Ltd) had rejected the appellant’s plea for restoration/re-rating of capacity of Stage I units, as per the following order:

*“10. The respondent has pleaded that one of the agreed objectives of R&M was the restoration of the lost capacity and deteriorated efficiency. Since the majority of R&M works on all 60 MW units of Stage-I are over, the respondent has contended that the declared capacity of these units should be restored to its original nameplate capacity of 62.5 MW each. This issue was not raised by the*



*respondent in Petition No. 62/2000 when norms of operation were being prescribed for the period 2000-04. We find that the major emphasis by the parties has been on the extension of the life of the generating station and improving its performance level as a result of R&M. We could not find any record to show any agreement between the parties on the definite performance level and the capacity restoration. In view of this we are not able to accept the argument of the respondent. Accordingly, for the purpose of the present petition the capacity of each unit of Stage has been considered as 60MW.”*

Learned counsel further submitted that the Central Commission in Review Petition (No 6/2007) filed by the appellant for review of the order dated 25.9.2006. again rejected the appellant’s plea to this account for restoration/re-rating of the original capacity in the order dated 14.3.2008 which was subsequently upheld by this Tribunal in its judgment dated 12.1.2011 in ***Appeal No 81/2009 (Gridco Ltd Vs Central Electricity Regulatory Commission and another)***.

Hence, the Appeal filed by the Appellant is liable to be dismissed.

### **Our Findings:-**

12.4 We have analysed the submissions of the learned counsel for both the parties and also took note of various orders of the Central Commission as well as judgments of this Tribunal on this issue itself. It is the contention of the Appellant that when the Stage-I units are giving excellent performance with high PLF and increased plant availability, the generating units could be re-rated

to its original nameplate capacity of 62.5 MW instead of 60 MW which has been considered by the Central Commission. It is not in dispute that these units are giving higher level of performance, however the same cannot be taken as a basis for uprating the unit based on the higher performances of the units. The Appellant itself had de-rated the units to 60 MW from its original nameplate capacity of 62.5 MW after taking due approval of Central Electricity Authority. Admittedly, there may be a scenario that the generation from 60 MW units may be higher than the benchmark or even comparable to higher unit size due to excellent performance parameters but the same does not necessarily mean that the units can be re-rated/uprated to higher capacity. Moreover, this issue has already been decided in catena of judgments of this Tribunal and it is not a case now to re-open without making any specific ground for such determination. We, thus opine that the Central Commission has decided this issue legally in accordance with law and considering in host of judgments of this Tribunal. Accordingly, any interference from this Tribunal does not call for.

- 13. Issue No.5:-** Learned counsel for the Appellant submitted that the Central Commission has erred in not accepting the prayer of the Appellant for a direction to NTPC for mutual discussion with regard

to the improved norms of operation in terms of Regulation 37 of the CERC Tariff Regulations, 2009 and in terms of PPA dated 08.03.1995/Minutes of Meeting dated 23/24.09.1996. Learned counsel further submitted that as per the PPA, the operating parameters such as auxiliary power consumption, heat rate, specific oil consumption etc. was to be mutually agreed upon between the parties. The extract of the minutes of the meeting dated 23/24.09.1996 is reproduced as under:-

*“The operating parameters for variable charges w.e.f. 01.04.2000 would also be mutually discussed and settled between NTPC and GRIDCO. Pending this settlement, the prevailing tariff as on March, 2000 would continue to be billed by NTPC and paid for by GRIDCO subject to adjustment retrospectively w.e.f. 01.04.2000 as mutually agreed final calculations.”*

*(Emphasis supplied)*

**13.1 Per contra**, learned counsel for the first Respondent submitted that the scope of Regulation 37 of the Tariff Regulations, 2009 which provides for the norms of operation to be the ceiling norms, is intended for cases where the generator and the beneficiaries had agreed to specific norms in the Power Purchase Agreement etc. In the case of the Talcher Station, the Central Commission has already prescribed norms substantially more stringent than those agreed to in the Power Purchase Agreement and therefore, Regulation 37 will not be applicable. The relevant clause of the

PPA dated 8.03.1995 entered into between the OSEB and NTPC reads as under:

*“6.2 – Note*

*2. The tariff would be worked out based on the Aux. consumption as 15.7%, Specific Fuel Oil Consumption as 10.5 ml/Kwh and Station Heat Rate of 3350 Kcal/kWh.....”*

13.2 Learned counsel for the Respondent Commission submitted that the Central Commission had rejected the Appellants plea for a direction for material discussions under Regulation 37 after recording the reasons for the same in the impugned order as under:-

*“16. .... Considering the above factors and since the respondent has given its approval to the R&M schemes under Phases-I, II and III and Switchyard, **we find no reason for a direction to the petitioner for a mutual discussion for agreeing to lower norms of the generating station under Regulation 37 as prayed for by the respondent.**” (Emphasis added)<sup>1</sup>*

Learned counsel further contended that there is nothing in Regulation 37 even to suggest that the Central Commission is under an obligation to direct the parties to mutually discuss the issue of improved norms of operation norms whereas in the case here, the Commission itself specifies the norms. Learned counsel vehemently submitted that the Appellant has been availing the

benefits of improved performance on sustained basis in addition to the benefit of cheaper power and there does not appear nay scope for any direction by the Commission under Regulation 37 to either party.

**Our findings:-**

**13.3** Having regard to the contentions of the learned counsel for the Appellant and the Respondents, we hold that the norms considered by the Central Commission in Tariff determination have been more stringent then those mentioned in the reference PPA between the parties. Besides the units after R&M have been performing with considerable improvement parameters. Thus, prima facie, there does not appear any ground for the Central Commission to issue directions under Regulation 37 to any of the parties for mutual discussions or any re-conciliation of operating parameters. We, thus hold that there is no irregularity or ambiguity in the approach and findings of the Central Commission in this regard.

**Summary of Our Findings:-**

- 14.** In the light of foregoing deliberations and our findings thereon, the various issues along with our decisions are summarised as under:-
- (i) We hold that the Central Commission has allowed additional capitalisation on account of R&M for TTPS after applying prudence check and duly considering the anticipated benefits to be accrued out of the same.
  - (ii) The Central Commission has considered the operating norms of the power station in calculating the tariff in a judicious manner striking balance between the generator and the beneficiaries / consumers and there was not a case to invoke its Regulation 44 i.e Power to relax.
  - (iii) After carrying out R&M, the station has been performing in an excellent manner giving over 90% PLF from its original PLF of 29% during 1994-95 at the time when the station was transferred to NTPC for operation and rehabilitation. Since the year 2000 onwards, the station has yielded into a benefit of over Rs.1400 + crores at an expenditure of Rs.673/800 crores on R&M besides resulting into extension of station life for more than 20 years with high performance parameters. In view of these visible performance and benefit indicators, we hold that specifically, there

was no condition precedent to bring out any separate cost benefit analysis report by the Commission. The entire R&M expenditure indicated by the parties works out to Rs.700-800 crores which is about Rs.1.6 crores per MW and reasonably, cheaper than any new thermal station of that period which may cost in the range of Rs. 4-5 crores per MW having same level of performance.

- (iv) The unit capacity of Stage-I has been ratified by CEA as 60 MW and also held in several judgments of this Tribunal. Accordingly, we too, hold the unit capacity to be 60 MW only and there is no rationale to re-rate them to 62.5 MW on the basis of higher PLF etc..
  
- (v) We hold the decision of the Central Commission just & reasonable for not applying Regulation 37 for issuing direction to NTPC for discussions with the Appellant and finalising the operating parameters. This is because of the fact that the operating norms specified by the Commission were superior to those agreed between the Appellant and the first Respondent in the PPA or subsequent bilateral meetings.

Accordingly, we arrive at the conclusion that the Appeal lacks in merit and is liable to be dismissed.

**ORDER**

In view of the facts and findings, as stated supra, we are of the considered view that the issues raised in the present appeal being Appeal No. 180 of 2014 are devoid of merits. Hence, the Appeal filed by the Appellant is dismissed as devoid of merits.

The impugned order passed by Central Electricity Regulatory Commission dated 15.05.2014 in Petition No. 304 of 2009 is hereby upheld.

Needless to say, the pending IAs, if any, shall stand disposed of.

No order as to costs.

Pronounced in the Open Court on this 02<sup>nd</sup> day January, 2019.

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE / NON-REPORTABLE**

Pr