

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.59 of 2011

Dated: 03rd Jan, 2013

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**N.T.P. C.Limited
NTPC Bhawan, SCOPE Complex
7, Institutional Area, Lodhi Road
New Delhi-110003**

...Appellant

Versus

- 1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001.**
- 2. Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan,
14, Ashoka Marg
Lucknow-226 001.**
- 3. Jaipur Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Janpath, Jaipur-302 005
Rajasthan.**
- 4. Ajmer Vidyut Vitran Nigam Limited,
Old Power House, Hathi Bhatta,
Jaipur Road, Ajmer-305 001, Rajasthan.**

5. **Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Area,
Jodhpur-342 003, Rajasthan.**
6. **Delhi Transco Limited,
KOT;a Road, New Delhi-110 002.**
7. **North Delhi Power Limited,
Grid Sub Station Building ,
Hudson Lines, Kingsway Camp,
Delhi-110 009.**
8. **BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place,
New Delhi -110 009.**
9. **BSES Yamuna Power Limited,
Shakti Kiran Building,
Karkardooma, Delhi-110 092**
10. **Haryana Power Purchaser
Shakti Bhawan,. Sector VI, Panchkula,
Haryana-134 109.**
11. **Punjab State Power Corporation Limited
(Formerly Punjab State Electricity Board),
The Mall, Patiala – 147 001.**
12. **Himachal Pradesh State Electricity Board Ltd.,
Vidyut Bhawan, Shimla 1717 004.
Himachal Pradesh.**
13. **Power Development Department,
Through its Commissioner,
Government of Jammu & Kashmir,
Mini Secretariat, Jammu-180 001.**

**14. The Chief Engineer-cum-Secretary,
Engineering Department,
Chandigarh Administration
Sector-9, Chandigarh-160 009.**

**15. Uttarakhand Power Corporation Limited,
Urja Bhawan, Kanwali Road,
Dehradun-248 001.**

...Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Mr. Swetaketu Mishra

Counsel for the Respondent(s): Mr. Pradeep Misra
Mr. Manoj Kr. Sharma
Mr. Daleep Dhayani

J U D G M E N T

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

“Whether the Central Commission was right in not allowing NTPC to retain the value of the capital assets de-capitalized in the capital base for the purpose of tariff under the Electricity Act, when such de-capitalization was only for accounting purposes?”

1. This is the question posed in this Appeal for our consideration.
2. The present Appeal has been filed by the NTPC as against the impugned order dated 20.1.2011 passed by the Central Electricity Regulatory Commission(Central Commission) in petition No.182 of 2009 filed by NTPC whereby the Central Commission has determined the impact of additional capital expenditure incurred by NTPC on the fixed charge of Rihand Super Thermal Power Station, Stage-I.
3. The short facts are as follows:-
 - (a) NTPC, the Appellant is engaged in the business of generation and sale of electricity to various purchasers in India. NPTC, at present owns and operates 22 Generating Stations situated in different parts of India.
 - (b) One of the generating stations of NTPC is the Rihand Super Thermal Station, Stage-I located in Uttar Pradesh.
 - (c) The electricity generated from the Rihand Station is supplied to Respondents nos. 2 to 15, the purchasers.
 - (d) On 21.8.2009, the Appellant filed a Petition No.182 of 2009 for revision of the fixed charges after considering the impact of the additional capital expenditure incurred

by NTPC during the period from 2006-07 to 2008-09 on the tariff for Rihand Station in accordance with the Central Commission Tariff Regulations, 2004.

- (e) The Central Commission passed the impugned order on 20.1.2011 deciding the issues in question. However, the Central Commission has not allowed as an exclusion the de-capitalisation of certain unserviceable assets namely wagons, vehicles, furniture, IT and communication equipment and guest house equipments, etc; amounting to Rs.299.17 lakhs for 2006-07, Rs.36.7 lakhs for 2007-08 and Rs.65.32 lakhs for 2008-09.
4. Aggrieved over this disallowance, the Appellant has filed this Appeal. Learned Counsel for the Appellant has made the following submissions:-
- (a) Central Commission failed to consider that the above assets had become unserviceable and had been de-capitalised for accounting purposes only. The de-capitalisation of assets for accounting purposes under the Companies Act, 1956, is different from the exclusion of such de-capitalised assets for the purpose of tariff. NTPC will have to necessarily incur expenditure on the replacement of above assets in the future tariff period. The tariff is determined on the basis

of operating norms laid down by the Central Commission. The Central Commission approved the optimum capital investment to enable the generation company to function to meet the operative norms laid down.

- (b) The assets in question in the present case, are important components for the purpose of the generating stations and will have to be procured and installed by NTPC in order to run generating stations to its optimum capacity. Therefore, the Central Commission ought to have allowed NTPC to treat the same as an exclusion from de-capitalisation.

On these grounds, the learned Counsel for the Appellant submits that the impugned order is liable to be set-aside.

5. Per Contra, the learned Counsel for the Respondent No.2 i.e. U.P. Power Corporation has vehemently argued the matter in justification of the impugned order and submitted that the impugned order is perfectly valid in law in view of the fact that the Central Commission has given correct reasonings for disallowing the claim of the Appellant.

6. On the basis of these rival contentions, the question will arise for consideration as quoted above. The said question is again reproduced here-under:-

“Whether the Central Commission was right in not allowing NTPC to retain the value of the capital assets de-capitalised in the capital base for the purpose of tariff under the Electricity Act, when such de-capitalisation was only for accounting purposes?”

7. We have carefully considered the submissions made by the learned Counsel for both the parties, on this question.
8. Before dealing with this question, we would refer to the relevant discussion and findings given by the Central Commission on this issue:-

“(a) De-capitalization of unserviceable assets: the petitioner has de-capitalised unserviceable asserts like wagons, vehicles, furniture, IT and communication and guest house equipments in book of accounts amounting to (-) 299.17 lakh, (-) 36.70 lakh and (-) 65.32 lakh for the years 2006-07, 2007-08 and 2008-09, respectively. However, the petitioner has prayed that negative entries arising of de-capitalisation of these assets are to be ignored for the purpose of tariff i.e. de-capitalised unserviceable assets are to be retained in the capital base for the purpose of tariff. The ground on which the exclusion has been sought by the petitioner is as under:-

“Unserviceable wagons/vehicles have been de-capitalised. The same are proposed to be replaced shortly. Therefore, it is submitted that pending replacement,

Hon'ble Commission may not exclude the same from the tariff base. Notwithstanding the above, if Hon'ble Commission decides not to allow the exclusion, it is submitted that Hon'ble Commission may be pleased to allow for re-inclusion in tariff base on replacement."

"Obsolete/unserviceable assets have been de-capitalized in books for accounting purposes. However, the replacement of these items may not be allowed in tariff, so this may not be excluded from the claim.

In view of the fact that these assets were a part of capital cost for the purpose of tariff and have been de-capitalized on their being unserviceable, their de-capitalization is not to be allowed to be excluded as these assets do not render any useful service to the generating station."

9. Bearing this finding in our mind, we would now discuss the issue.
10. Admittedly, the proceedings in the petition No.182 of 2009 filed by the Appellant were for additional capitalization in respect of the tariff period from 2006-07 to 2008-09. Since the additional capitalization is claimed during the period 2004-2009, the same will be governed by the statutory Regulations i.e. CERC(Terms and Conditions of Tariff), Regulations,2004. The said Regulation is as follows:

"1. Short title and commencement (1) These regulations may be called the Central Electricity Regulatory Commission(Terms and Conditions of Tariff) Regulations,2004.

"(2). These regulations shall come into force on 1.4.2004, and unless reviewed earlier or extended by

the Commission, shall remain in force for a period of 5 years.

2. *Scope and extent of applications* (1) *Where tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government, the Commission shall adopt such tariff in accordance with the provisions of the Act.*

(2). *These regulations shall apply in all other cases where tariff is to be determined by the Commission based on capital cost”.*

18. Additional Capitalization:

(2) *Subject to the provisions of clause(3) of this regulation, the capital expenditure of the following nature actually incurred after the cut off date may be admitted by the Commission, subject to prudence check:*

i) Deferred liabilities relating to works/services within the original scope of work;

(ii) Liabilities to meet award of arbitration or for compliance of the order or decree of a court;

(iii) On account of change in law;

(iv) Any additional works/services which have become necessary for efficient and successful operation of the generating station, but not included in the original project cost; and

(v) Deferred works relating to ash pond or ash handling system in the original scope of work.

(3) *Any expenditure on minor items/assets like normal tools and tackles, personal computers, furniture, air-conditioners, voltage stabilizers, refrigerators, fans, coolers, TC, washing machines,*

heat-convectors, carpets, mattresses etc. brought after the cut off date shall not be considered for additional capitalization for determination of tariff with effect from 01.4.2004.

Note 2

Any expenditure on replacement of old asserts shall be considered after writing off the gross value of the original assets from the original project cost, except such items as are listed in clause(3) of this regulation.

11. These Regulations do not provide for including the cost of the de-capitalized assets which have become unserviceable and stopped rendering useful service. There is also no provision in the 2004 Regulations permitting the generator to de-capitalize its assets without revising the capital base merely because new assets in place of de-capitalized assets have to be purchased in future. On the other hand, Note-2 of Regulation 18 provides for expenditure on replacement of old assets to be considered after writing off the gross value of the original assets from the original Project cost.
12. The capital cost for the generating station is the cost which incurred in commissioning the plant and any additional expenditure made for efficient running of the plant. The tariff of the generating stations is, thus determined on the cost plus basis. This means any capital expenditure incurred which will enhance the efficiency of the plant will be capitalized. Accordingly, the tariff will be determined.

Similarly, if any asset is taken out of service, then its gross value will be deducted from the capital cost of the plant.

13. The statement made by the Appellant in petition No.182 of 2009 relating to the issue is as follows:-

“11.3. It is submitted that some coal wagons have become unserviceable and the same have been decapitalized in the books as required by Accounting Practice. It is further submitted that the same shall be replaced shortly, and hence the value may be retained in the Gross Block. Notwithstanding the above, if the Hon’ble Commission decides to remove the value from the Gross Block, the Hon’ble Commission may be pleased to allow for re-inclusion in tariff base as replacement.

14. On the basis of the above averment, the Appellant has claimed to retain the de-capitalized amount in respect of MGR wagons vehicles furniture, communication equipments and guest house equipment, IT equipment during 2006-07 stating that these items have become unserviceable.

15. The above equipments are not rendering any service and the de-capitalized amount on account of these equipments can not be retained in the capital base for the purpose of tariff as no benefit out of the same is given to the beneficiaries. The assets which are not in service are to be excluded from the capital cost of the generating station, as the same are not rendering any service to the beneficiaries.

In the cost plus principle, any amount spent by the Appellant which gives benefit to the beneficiaries alone has to be capitalized.

16. It can not be debated that the tariff of the Appellant generating stations has to be determined by the CERC Tariff Regulations, 2004. The other Regulation namely, CERC(Terms and Conditions for Determination of Tariff) Regulations,2009 can not be invoked for the purpose of determining the additional capitalized cost. 2009 Regulations are applicable for the period only from 01.4.2009 to 31.3.2014. At this juncture, it would be worthwhile to refer to relevant provision of 2009 Regulations.

“1. Short title and commencement.(1) These regulations may be called the Central Electricity Regulatory Commission(Terms and Conditions of Tariff) Regulations, 2009.

(2) These regulations shall come into force on 01.4.2009, and unless reviewed earlier or extended by the Commission, shall remain in force for a period of 5 years from the date of commencement.

Provided that where a project, or a part thereof, has been declared under commercial operation before the date of commencement of these regulations and whose tariff has not been finally determined by the Commission till that date, tariff in respect of such project or such part thereof for the period ending 31.3.2009 shall be determined in accordance with the Central Electricity Regulatory Commission(Terms and Conditions of Tariff) Regulations, 2004.

2. Scope and extent of application. These regulations shall apply in all cases where tariff for a generating station or a unit thereof (other than those based on non-conventional energy sources) and the transmission system is to be determined by the Commission under Section 62 of the Act read with Section 79 thereof).

17. The above provision makes it clear that the provisions of 2009 Regulations are not applicable for the period in questions. As and when the Appellant will acquire, the same will be considered by the Central Commission as per 2009 Regulations. The finding which has been given by the Central Commission on the basis of 2004 Regulations is perfectly valid in law.

18. The above issue has also been decided in this Tribunal's Judgment dated 21.12.2012 in Appeal No.58 of 2011 in the matter of NTPC Ltd Vs CERC & Others.

19. Summary of our findings:

(i) According to Tariff Regulations, 2004, any expenditure on replacement of old assets can be considered after writing off the gross value of the original assets from the original Project cost. When the unserviceable assets/equipments have been written off and discarded, the cost of the same could not be allowed to form the part of the Capital Cost for determination of tariff.

(ii) The Central Commission has correctly disallowed the negative entry on account of de-capitalisation of unserviceable assets/equipments claimed by NTPC in the capital base for determination of tariff.

20. In view of our above findings, there is no infirmity in the impugned order dated 20.01.2011 passed by Central Commission. Therefore, the Appeal is liable to be dismissed, being devoid of merits. Accordingly, the Appeal is dismissed. No order as to cost.

21. Pronounced in the open court on **03rd day of January, 2013.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 03rd Jan, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~