

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**Appeal No. 91 of 2017**

**Dated: 23.10.2024**

**Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member  
Hon'ble Mr. Virender Bhat, Judicial Member**

**In the matter of:**

NTPC Limited  
NTPC Bhawan, SCOPE Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi – 110003

**... Appellant(s)**

**Vs.**

1. Central Electricity Regulatory Commission  
Through its Secretary,  
3rd & 4th Floor, Chanderlok Building,  
36, Janpath, New Delhi- 110001
2. Madhya Pradesh Power Management Company Limited  
Through its Managing Director,  
Shakti Bhavan, Vidyut Nagar, Jabalpur-482 008
3. Maharashtra State Electricity Distribution Company Limited  
Through its Chairman Cum Managing Director,  
'Prakashgard', Bandra (East) Mumbai-400 051
4. Gujarat Urja Vikas Nigam Limited  
Through its Chairman,  
Sardar Patel Vidyut Bhawan  
Race Course, Baroda – 390007
5. Chhattisgarh State Power Distribution Company Limited  
Through its Chairman Cum Managing Director,

Dhagania, Raipur-492 013

6. Electricity Department, Govt. of Goa  
Through its Secretary,  
Vidyut Bhavan, Panaji, Goa
7. Electricity Department  
Through its Secretary,  
Administration of Daman & Diu  
Daman-396 210
8. Electricity Department  
Through its Secretary,  
Administration of Dadra and Nagar Haveli  
Silvassa

....Respondent(s)

Counsel for the Appellant(s) : Mr. Shri Venkatesh  
Mr. Shryeshth Ramesh Sharma  
Mr. Ashutosh Kumar Srivastava  
Mr. Bharath Gangadharan  
Mr. Abhishek Nangia  
Mr. Nihal Bhardwaj  
Mr. Siddharth Nigotia  
Mr. Shivam Kumar  
Mr. Kartikay Trivedi  
Mr. Mohit Gupta  
Mr. Aashwyn Singh  
Mr. Punyam Bhutani  
Mr. Harsh Vardhan  
Mr. Suhael Buttan  
Ms. Himangi Kapoor  
Mr. Anant Singh  
Mr. Vineet Kumar  
Mr. Aditya Tiwari  
Ms. Nehal Jain  
Mr. Nikunj Bhatnagar  
Mr. Vedant Choudhary  
Mr. Aayush Sinha  
Mr. Kunal Veer Chopra

Ms. Mehak Verma  
Ms. Nishtha Kumar  
Mr. Pratyush Singh  
Mr. Krishnesh Bapat  
Mr. Vikas Maini  
Mr. Sandeep Rajpurohit  
Mr. Somesh  
Mr. Samarth Kashyap  
Ms. Natabrata Bhattacharya

Counsel for the Respondent(s) : Mr. Manu Seshadri  
Ms. Tanvi Rana  
Mr. Samarth Chowdhary  
Ms. Neha Garg  
Mr. Ishan Bisht for R-1  
  
Mr. Ravin Dubey for R-2  
  
Mr. Udit Gupta  
Mr. Anup Jain  
Ms. Divya Hirawat  
Ms. Kalyani Jha  
Mr. Vyom Chaturvedi  
Ms. Prachi Gupta  
Ms. Nishtha Goel for R-3

## **JUDGEMENT**

### **PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER**

1. The captioned Appeal has been filed by M/s. NTPC Limited (in short "NTPC" or "Appellant"), is a Government Company within the meaning of the Companies Act, 1956 engaged in the business of Generation of Electricity and is a Generating Company within the meaning of Section 2 (28) of the Electricity Act, 2003.

2. The Appellant has its power stations/projects at different regions and places in the country, however, the present appeal is filed for its Vindhyachal Super Thermal Power Station Stage – III (1000 MW) (hereinafter referred to as “Vindhyachal Stage -III” or “VSTPS Stage-III”) under section 111 of the Electricity Act, 2003 (hereinafter referred to as the “Act”) challenging the Order dated 06.02.2017(hereinafter referred to as “Impugned Order”) in Petition No. 343/GT/2014 passed by Central Electricity Regulatory Commission (hereinafter referred to as “CERC” or “Commission”).

### **Facts of the Appeal**

3. The Appellant is a generating company owned and controlled by the Central Government, *inter-alia*, falls within Section 79 (1) (a) of the Electricity Act, 2003, the tariff for the sale of Electricity from the Appellant Company is regulated by the Respondent No.1 Commission.

4. Respondent No. 1, CERC is the Appropriate Commission *inter-alia* vested with the jurisdiction to regulate the tariff of the Generation Companies owned or controlled by the Central Government under Section 79(1) (a) of the Electricity Act, 2003

5. Respondents No. 2 to 8 are the beneficiaries of the Appellant's Vindhyachal Stage -III power project.

6. Vindhyachal Stage-III, a power generating station owned by the Appellant Company in Madhya Pradesh, has an approved installed capacity of 1000 MW, consisting of two units of 500 MW each, the Commercial Operation Date (in short “COD”) for Unit I was on 01.12.2006, and for Unit II on 15.07.2007, and the electricity generated from this station is being supplied to the Respondents no 2 to 8.

7. The Respondent No.1 Commission has notified the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 (hereinafter referred to as the “Tariff Regulations 2009”) which have come into force from 01.04.2009 and specify the terms & conditions and methodology of tariff determination under Section 62 read with 79 of the Act.

8. Regulations 5 (2) of the Tariff Regulations 2009 provides as follows: -

*“(2). The generating Company or the Transmission licensee, as the case may be, shall make an application as per Appendix-1 to these regulations, for determination of tariff based on capital expenditure incurred duly certified by the auditors or projected to be incurred up to the date of commercial operation and additional capital expenditure incurred duly certified by the auditors or projected to be incurred up to the date of commercial operation and additional capital expenditure incurred duly certified by the auditors or projected to be incurred during the tariff period of the generating station or the transmission system.*

*Provided that in case of an existing project, the application shall be based on admitted capital cost including any additional capitalization already admitted up to 31.09.2009 and estimated additional capital expenditure for the respective years of the tariff period 2009-14:*

9. Accordingly, the Appellant filed a petition being Petition No. 260 of 2009 before the Commission for approval of tariff of Vindhychal Stage III for the period from 01.04.2009 to 31.03.2014.

10. The Commission vide its Order dated 28.5.2012 approved the annual fixed charges of VSTPS Stage III based on actual additional capital expenditure for the FY 2009-10 and projected capital expenditure for the period 2010-14.

11. Appellant claimed an amount of Rs 2473 lakhs (actual expenditure for 2009-10) in Petition No. 260 of 2009 for the work pertaining to the augmentation of Railway Siding and MGR system.

12. The Commission in its Order dated 28.05.2012 allowed the work and the actual expenditure incurred by the Appellant with respect to the augmentation of Railway Siding and MGR system, the relevant extract of the order is as follows: -

***“(d) Augmentation of Railway siding and MGR system***

*32. The petitioner has claimed the actual expenditure of `2473.00 lakh during 2009-10 for augmentation of Railway siding and MGR system under Regulation 9(1)(ii) of the 2009 Tariff Regulations. The petitioner*

*has submitted that this is balance work and due to reasons beyond the control of the petitioner, the delivery /execution of certain items and spares got delayed. As the order/ contract were placed before the cut-off date, the principle of continuity needs to be applied. The petitioner by its affidavit dated 2.2.2012 have furnished reasons for the delay in execution of the above system as under:*

*"It is submitted that the work got delayed due to the reasons that the required land was to be acquired from NCL and transfer of land to NTPC took considerable procedural time. The subsequent technical changes based on site conditions proposed by Consultant RITES, such as addition of one more silo at Nigahi end. Further to augment coal receipt facilities from various sources apart from linked source, various measures such as inclusion of 2 more spur lines and facilities for longer CSR (Clear Standing Rake) were included in the scope. It is further submitted that in view of coal shortage at various stations of NTPC, it was necessary to augment coal facilities for bringing coal from the sources other than linked mines and for the purpose, the length of the CSR was required to be increased from 550 meters to 720 meters to meet the railway norms. It is therefore submitted that due to the reasons explained above, the work could not have been completed within the stipulated cut-off date of the station....."*

33. *From the above submissions, it is observed that the main reason for the delay was on account of the procedural delay in acquiring land from NCL and transferring the same, which was beyond the control of the petitioner. Further it is observed that the augmentation of railway siding is necessary for bringing coal from non-linked mines in view of shortage of coal. In view of the justification submitted by the petitioner, capitalisation of the said expenditure has been allowed under Regulation 9(2)(vii) of the 2009 Tariff”.*

13. Regulation 6(1) of the Tariff Regulations 2009 provides as follows: -

*“(1) The Commission shall carry out truing up exercise along with the tariff petition filed for the next tariff period, with respect to the capital expenditure including additional capital expenditure incurred up to 31.3.2014, as admitted by the Commission after prudence check at the time of truing up.*

*Provided that the generating company or the transmission licensee, as the case may be, may in its discretion make an application before the Commission one more time prior to 2013-14 for revision of tariff.”*

14. In accordance with the proviso to Regulation 6(1) of the 2009 Tariff Regulation, the Appellant filed a Petition being Petition No. 148/GT/2013 before the Commission on 03.09.2012 for revision of tariff of VSTPS Stage – III for the period from 01.04.2009 to 31.03.2014 and Truing-Up of tariff determined by the Commission’s Order dated 28.05.2012 in Petition No. 260 of 2009.



15. The Commission vide its order dated 15.5.2014 revised the annual fixed charges of VSTPS Stage-III based on the actual additional capital expenditure incurred for the years 2009-10, 2010-11, and 2011-12 and projected additional capital expenditure for the years 2012-13 and 2013-14, based on the latest estimates and status of works.

16. The Commission vide its Order dated 15.05.2014 also considered and allowed the expenditure for the civil part of the work pertaining to augmentation of Railway Siding and MGR System.

17. Aggrieved by the said order dated 15.05.2014, the Appellant filed a Review Petition being RP No. 19 of 2014 on various issues namely (a) 'disallowance of work adjustments pertaining to the payments of balance works/adjustments', (b) 'disallowance of the amount of electricity duty and cess' and (c) 'disallowance of capitalization of acoustic leak detection system'.

18. The Commission, vide order dated 20.11.2014, while rejecting the prayer (c) of the Appellant allowed the review of the order on issues (a) & (b) above and directed the rectification of the errors at the time of truing up of tariff of the generating station.

19. Further in accordance with provisions of Regulations 6(1) of the Tariff Regulation 2009, the Appellant filed the final truing up Petition before the Central Commission being Petition No. 343/GT/2014 on 19.08.2014 for revision of the

Annual Fixed Charges in respect of VSTPS Stage-III for the period 01.04.2009 to 31.03.2014.

20. The said Petition was filed by the Appellant based on the admitted capital cost as of 31.03.2009 and actual capital expenditure incurred during the 5-year tariff period of 2009-14.

21. Appellant, in Petition No. 343/GT/2014, claimed Rs. 405.52 lakh for the 'Signaling and Transmission work (S&T)' under the head of augmentation of Railway Siding & MGR System, however, the Commission vide the Impugned Order dated 06.02.2017 disallowed the claim of Rs. 405.52 lakh made by the Appellant pertaining to S&T work.

22. The relevant extract of the Commission's Impugned Order is reproduced as below: -

***"Augmentation of Railway Siding & MGR System***

***22. We have examined the matter. From the submission of the petitioner, it is not clear as to how there is a significant increase in the cost incurred in respect of the said work. The justification of the petitioner that the delay is on account of non-availability of working front, poor manpower mobilization & delay in critical supply of material cannot be a ground for consideration of the said claim since these reasons cannot be said to be beyond the control of the petitioner. In addition, the petitioner has also not furnished the steps taken by it to mitigate the delay in the***

**execution of the said work, and the LD, if any imposed on the contractor. Considering the fact that there has been lack of proper coordination and project management on the part of the petitioner, the delay in execution of the work is attributable to the petitioner to undertaken the said work. In this background, the additional capital expenditure of `405.52 lakh claimed during the year 2012-13 is not allowed.”**

23. Being aggrieved, the Appellant filed the present Appeal.

24. The only issue before us is the disallowance of the actual Additional Capital Expenditure of Rs. 405.52 lakh for the Signalling and Transmission (S&T) work of MGR under the head of augmentation of Railway Siding and MGR system of the Appellant.

### **Submissions of the Appellant**

25. The Appellant submitted that as per the provision under Regulation 9(2) (vii) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 generating stations to claim additional capital expenditure even if such expenditure was not previously projected.

26. The word used in regulation 9(2) is “or” therefore, the Appellant had an alternative, i.e., either to claim additional expenditure on an actual basis or projected basis.

27. The Appellant submitted that there had never been cost overrun on account of additional capitalization claimed for S&T work as the same formed part of the projected expenditure approved in the tariff order dated 28.05.2012 passed in Petition No. 260 of 2009.

28. In Petition No. 260 of 2009, the Appellant sought approval for tariff related to Vindhyanchal Stage-III for the 2009-14 control period, including projected expenditures for the augmentation of the Railway Siding and MGR System, while civil work expenditures were projected, expenditures for S&T Work were not included, as the Appellant was unable to anticipate the completion date of the S&T Work at that time.

29. The Appellant argued before the Commission that the additional expenditure for S&T Work is justified under the 'prudence check' established by this Tribunal in Appeal No. 152 of 2010, the S&T Work was crucial for the augmentation of the MGR system, which is currently in use by beneficiaries, and thus the related expenditure should be recoverable through tariffs.

30. The Commission itself acknowledged in its Order dated 28.05.2012 that the augmentation of the railway siding and MGR system, including S&T Work, was necessary for transporting coal from non-linked mines, the S&T Work was completed and put to use during 2012-14, and therefore, the Appellant only sought capitalization after the asset was operational, consistent with the legal principle that capitalization is permitted only after an asset is put to use.

31. It is, therefore, important to note the relevant part of the Order dated 28.05.2012, as under:

***“(d) Augmentation of Railway siding and MGR system***

32. *The petitioner has claimed the actual expenditure of `2473.00 lakh during 2009-10 for augmentation of Railway siding and MGR system under Regulation 9(1)(ii) of the 2009 Tariff Regulations. The petitioner has submitted that this is balance work and due to reasons beyond the control of the petitioner, the delivery /execution of certain items and spares got delayed. As the order/ contract were placed before the cut-off date, the principle of continuity needs to be applied. The petitioner by its affidavit dated 2.2.2012 have furnished reasons for the delay in execution of the above system as under:*

*"It is submitted that the work got delayed due to the reasons that the required land was to be acquired from NCL and transfer of land to NTPC took considerable procedural time. The subsequent technical changes based on site conditions proposed by Consultant RITES, such as addition of one more silo at Nigahi end. Further to augment coal receipt facilities from various sources apart from linked source, various measures such as inclusion of 2 more spur lines and facilities for longer CSR (Clear Standing Rake) were included in the scope. It is further submitted that in view of coal shortage at various stations of NTPC, it was necessary to augment coal facilities for bringing coal from the sources other than linked mines and for the purpose, the length of the CSR was required to be increased from 550 meters to 720*

*meters to meet the railway norms. It is therefore submitted that due to the reasons explained above, the work could not have been completed within the stipulated cut-off date of the station....."*

33. *From the above submissions, it is observed that the main reason for the delay was on account of the procedural delay in acquiring land from NCL and transferring the same, which was beyond the control of the petitioner. Further it is observed that the augmentation of railway siding is necessary for bringing coal from non-linked mines in view of shortage of coal. In view of the justification submitted by the petitioner, capitalisation of the said expenditure has been allowed under Regulation 9(2)(vii) of the 2009 Tariff Regulations."*

32. From the above said Order, it is clear that the claim of the Appellant is concerning "augmentation of Railway siding and MGR system", however, there is no mention of S&T work, as claimed by the Appellant and rejected by the CERC vide the Impugned Order

33. The Appellant had also informed both the CERC and the Madhya Pradesh Power Management Company Limited (MPPMCL), Respondent No. 2, that due to difficulties encountered during the execution of the S&T Work, it was unable to project the year of completion and, consequently, did not project the expenditure for capitalization during FY 2009-12.

34. It is submitted that Regulation 9 (2) (vii) of the Tariff Regulations, 2009 allows for the inclusion of capital expenditures required for modifications to the fuel

receipt system due to the non-materialization of full coal linkage, Regulation 9 (2) (vii) of Tariff Regulations, 2009 is reproduced as follows:

*“9. Additional Capitalisation. (1) The capital expenditure incurred or projected to be incurred, on the following counts within the original scope of work, after the date of commercial operation and up to the cut-off date may be admitted by the Commission, subject to prudence check:*

-----

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

-----

*(vii) Any capital expenditure found justified after prudence check necessitated on account of modifications required or done in fuel receipt system arising due to non-materialisation of full coal linkage in respect of thermal generating station as result of circumstances not within the control of the generating station.”*

35. Regulation 9(2) concerning claims for additional capital expenditure uses the term "or," indicating a disjunctive effect, this provides the Appellant with the option to claim additional expenditure either on an actual basis or on a projected basis, allowing flexibility in their approach.

36. In the case of *Commissioner, Customs Central Excise and Service Tax, Patna v. Union of India & Ors.*, 2023 SCC Online SC 1330, the Supreme Court

discussed the use of the word "or" in a statute, stating that it signifies the legislative intent to provide an alternative option within the clause.

*“as well as the word "and" is a conjunction; and it is well known that a conjunction is used to join words, phrases, or clauses. On how the conjunctions "or" and "and" are to be read, guidance could be drawn from authoritative texts and judicial decisions. As per Justice GP Singh's Principles of Statutory Interpretation, the word "or" is normally disjunctive while the word "and" is normally conjunctive. In English law, the position is clear as crystal, as explained by Lord Scrutton in Green v. Premier Glynrhonwy Slate Co., that one does not read "or" as "and" in a statute unless one is obliged, because "or" does not generally mean "and" and "and" does not generally mean "or".*

*23. When the meaning of the provision in question is clear and unambiguous by the usage of "or" in clause 2(s), there remains no force in the submission of Ms. Bagchi that "or" should be interpreted as "and". In our opinion, the word "or" employed in clause 2(s) manifests the legislative intent of prescribing an alternative. Going by the golden rule of interpretation that words should be read in their ordinary, natural, and grammatical meaning, the word "or" in clause 2(s) clearly appears to us to have been used to reflect the ordinary and normal sense, that is to denote an alternative, giving a choice; and, we cannot assign it a different meaning unless it leads to vagueness or makes clause 2(s) absolutely unworkable. We are fortified in our view by the decision of this court in Sri Jeyaram Educational Trust v. A. G. Syed Mohideen\*\*, where it was held thus:”*



37. The same consideration was also of the Allahabad High Court in *M/s Shree Sai Palace vs. State of U.P & Ors., Writ Tax No. 50 of 2023*, use of the word "or" in a statute creates a disjunctive effect, signifying that two or more alternatives are presented, with each option needing to be considered independently.

*“6. When the word ‘or’ is used in a statute, it serves as a disjunctive conjunction, indicating two or more alternatives. Each option presented is to be considered independently. It is crucial to recognize that the disjunctive nature of “or” precludes its interpretation as a conjunctive conjunction, such as “and”. Unlike, “and”, which implies a requirement for the simultaneous fulfilment of multiple conditions, “or” allows for flexibility and choice by permitting compliance with any one of the alternatives presented. Attempting to read “or” as “and” in a statute would fundamentally alter its meaning and undermine the legislative intent behind its use. Such an interpretation would impose stricter criteria or conditions than intended by the statute, potentially leading to absurd or unreasonable outcomes.”*

38. Therefore, Regulation 9(2)(vii) of the Tariff Regulations, 2009 allows generating stations to claim additional capital expenditure for modifications to the fuel receipt system due to non-materialization of full coal linkage, even if these expenses were not initially projected in the tariff petition.

39. In its order dated 28.05.2012 in Petition No. 260/2009, the Commission observed that the augmentation of railway siding and MGR system (including S&T work) is essential for bringing coal from non-linked mines.

40. The Appellant further submitted that the additional claim for the S&T Work, essential for the MGR system to transport coal from non-linked mines, aligns with Regulation 9(2)(vii) of the Tariff Regulations, 2009, which permits capital expenditure for modifications in the fuel receipt system due to the non-materialization of full coal linkage.

41. It is submitted by the Appellant that in Petition No. 260 of 2009, the Appellant sought tariff approval for Vindhyanchal Stage-III, projecting expenses for Railway Siding and MGR System augmentation, including civil and S&T Work, however, only civil work expenses were projected as the Appellant could not anticipate the completion date for the S&T Work.

42. The Appellant further contended that the Respondent's argument that additional capitalization should be disallowed because it was not projected in Petition No. 260 of 2009 is unpersuasive, as the Impugned Order does not address this issue, and no changes can be made to the findings at this stage.

43. The Appellant submitted that it has claimed capitalization for the S&T Work only after its completion and use during 2012-14, in accordance with the legal principle that capitalization is permitted only when an asset is put to use.

44. Reliance was placed on the judgment of this Tribunal in *Haryana Vidyut Prasaran Nigam Limited vs. Haryana Electricity Regulatory Commission and Ors.*, Appeal No. 2 of 2013, wherein it has been held that returns are permitted only on assets that are fully commissioned and operational, not on those still under construction or not yet in use, the relevant paragraph is reproduced herein below:

*"25. It has also been a settled position that return is to be allowed only on such assets that are commissioned and put to use and not on works which are in progress and not yet put to use. The consumers could not be expected to pay the return on equity capital deployed on the projects which had not been commissioned and put to use. The capital deployed on a work can only be serviced when it is commissioned and put to use to provide the service".*

45. The Appellant faced challenges in executing the S&T work for the MGR system, which made it impossible to predict the completion date, and therefore, could not capitalize the assets between 2009-2012 as they were not operational, however, since the S&T work was essential for the MGR system benefiting current users, the related expenses should be allowed through the tariff.

46. The Commission approved an additional capital expenditure of ₹2,473 lakh, covering the actual costs incurred by the Appellant in 2009-10 for the Railway Siding and MGR System (Civil portion), however, the cost ₹405.52 lacs disallowed by the Commission did not include these actual expenditures, as evidenced by the Auditor Certificates submitted by the Appellant on 29.09.2014 in Petition No. 343 of 2014.

47. Once the S&T work is operational and benefits the beneficiaries, the related expenses should be included in the tariff.

48. Regulation 9(2)(vii) of the 2009 Tariff Regulations provides discretion to the Commission to permit additional capital expenditure for modifications in the fuel receipt system caused by incomplete coal linkage.

49. The judgment of this Tribunal dated 20.11.2011 in *Appeal No. 152 of 2010, Dodson-Lindblom Hydro Power Private Limited v. Maharashtra Electricity Regulatory Commission* has explained the scope of 'Prudence Check' by the Appropriate Commission, the relevant extract is as follows:

*"10. Both the Regulations and the judgement of the Tribunal would indicate that the State Commission was bound to conduct a detailed 'prudence check' and prudence check is not limited to the verification of whether an expenditure has actually been incurred or not. The prudence check involves the following factors: (a) Whether such expenditure has been incurred exclusively towards the project or not; (b) Whether such expenditure is justifiable having regard to the industry norms for such expenses; (c) Whether such expenditure is such that a prudent businessman would have incurred on his business at the stage at which it was incurred; (d) Whether such expenditure was necessitated having regard to all the surrounding circumstances of the project;*

(e) *Whether such expenditure is aligned to the "project specific requirements";*

(f) *What is the efficacy of such expenditure and whether such expenditure has actually resulted in some benefit or likely benefit to the project;*

(g) *Whether such expenditure is such that it ought to be passed through to the consumers in a cost-plus oligopoly situation."*

50. Therefore, it is clear that any expenditure required due to the project's circumstances meets the criteria for a 'Prudence Check.'

51. The additional expenditure of ₹405.52 lakhs spent on the railway siding and MGR system (including S&T work) was essential for transporting coal from non-linked mines and was necessary due to the project's circumstances, the Commission had recognized this necessity in its order dated 28.05.2012, therefore, the expenditure meets the 'Prudence Check' standard set by this Tribunal in Appeal No. 152 of 2010.

**Submissions of the Respondent No. 2, MPPMCL**

52. The Respondent No. 2 submitted that the Appellant has claimed that the Commission wrongly disallowed ₹405 lakhs of actual additional capital expenditure for the MGR's Signalling and Transmission (S&T) work in the 2012-13 financial year, based on the following incorrect premise;

(i) *The Appellant failed to justify the significant cost increase for the work; and*

(ii) *The delay in executing the S&T work was not beyond the appellant's control.*

53. It is submitted that the Commission thoroughly reviewed the capital expenditure under "Other Capital Works," considering the Appellant's claims and evidence, and correctly rejected the Appellant's claim for Signalling & Transmission work under "Augmentation of Railway Siding & MGR System."

54. The relevant portion of the Impugned Order is as follows:

*"Other Capital Works*

*Augmentation of Railway Siding & MGR System*

*18. The petitioner has claimed actual additional capital expenditure of ₹ 405.52 lakh in 2012-13 towards Augmentation of Railway siding & MGR system under Regulation 9(2) (vii) of the 2009 Tariff Regulations. In justification of the same, the petitioner has submitted that the work of augmentation of railway siding is part of the original scope of work which consists of civil portion and S&T portion. It has further submitted that the component of civil portion was capitalised earlier in different phases and the S&T portion has been completed and capitalised during the period 2012-14.*

*19. The respondent, MPPMCL has submitted that the petitioner has claimed additional capital expenditure for augmentation of Railway siding and MGR system under Regulation 9(2)(vii), which inter-alia provides for consideration of any capital expenditure found justified for modification in fuel receipt system arising due to non-materialisation of full coal linkage. It has therefore prayed that the*

*Commission may not allow the said expenditure as there is no incidence of non-materialisation of full coal linkage in respect of the generating station as result of circumstances not within the control of the generating station. It has also pointed out that there is no documentary evidence of incidence of non-materialisation of full coal linkage furnished by the petitioner. Accordingly, the respondent has prayed that the excess expenditure allowed earlier may be disallowed. ....*

*20.....*

*21.....*

*22. We have examined the matter. From the submission of the petitioner, it is not clear as to how there is significant increase in the cost incurred in respect of the said work. The justification of the petitioner that the delay is on account of non-availability of working front, poor manpower mobilization & delay in critical supply of material cannot be a ground for consideration of the said claim since these reasons cannot be said to be beyond the control of the petitioner. In addition, the petitioner has also not furnished the steps taken by it to mitigate the delay in the execution of the said work, and the LD, if any imposed on the contractor. Considering the fact that there has been lack of proper coordination and project management on the part of the petitioner, the delay in execution of the work is attributable to the petitioner to undertaken the said work. In this background, the additional capital expenditure of ₹ 405.52 lakh claimed during the year 2012-13 is not allowed.”*

55. The Commission vide its Order dated 28.05.2012 passed in Petition No. 260 of 2009, reviewed the Additional Capital Expenditure claimed under "Augmentation of Railway siding & MGR system", while the order acknowledged the actual and projected claims for this expenditure, it did not provide any projected capital expenditure for future financial years under this category.

56. The Commission, in its order, approved an Additional Capital Expenditure of ₹2,473.00 Lakh for the entire "Augmentation of Railway Siding and MGR System," with no portion classified as Capital Work in Progress (CWIP), this approval covered the period from 2009-10 to 2013-14.

57. Further, in its Order dated 15.05.2014, in Petition No. 148 of 2013, the Commission reviewed the Additional Capital Expenditure claimed under "Augmentation of Railway Siding & MGR System" for the period 2009-14, the Appellant once again did not project any additional expenditure for subsequent years under this category.

58. In Petition No. 343/GT/2014, the Appellant for the first time claimed an additional ₹405 lakhs for the financial year 2012-13, specifically for signalling and transmission work under the "Augmentation of Railway Siding and MGR System" category.

59. The Respondent No. 2 further submitted that in the Record of Proceedings dated 19.04.2016, in Petition No. 343/GT/2014, the Commission asked the Appellant to explain why no projected expenditure was claimed for the augmentation of railway sidings and the MGR system, the Appellant responded to



this query vide Additional Submissions on 23.06.2016, but the Commission rejected the explanations of the Appellant on being unsatisfactory and disallowed the ₹405 lakhs claimed for the financial year 2012-13 as Additional Capital Expenditure for S&T work under "Augmentation of Railway Siding and MGR System."

60. The Appellant's statements regarding its claim for Additional Capital Expenditure on the Augmentation of Railway Siding and MGR System contain inconsistencies, in Petition No. 260 of 2009, the Appellant claimed an actual expenditure of ₹2,473.00 Lakhs for the civil portion of the augmentation during FY 2009-10 but did not claim any expenditure for the S&T work, which was only completed in May 2012 due to delays.

61. The Appellant's statement contradicts the "Put to Use" principle for assets, as the Railway Siding and MGR System (Civil Portion) could not have been operational without the S&T system, consequently, the Commission allowed the capitalization of the expenditure for the Railway Siding and MGR System as a complete package, including both Civil and S&T portions, this decision was made especially since the Appellant had not projected any additional capital expenditure for this system in either Petition No. 260 of 2009 or in Petition No. 148 of 2013.

***Submissions of the Respondent No. 3, MSEDCL***

62. The submissions of the MSEDCL are identical to Respondent No. 2, MPPMCL.

63. Respondent No. 3 submitted that the Commission in its order dated 28.05.2012 in Petition No. 260 of 2009, reviewed the Appellant's Additional Capital Expenditure claims for 2009-14, specifically under the "Augmentation of railway siding & MGR system.", the Appellant did not project any Capital Expenditure for this category beyond the 2009-10 financial year, as a result, the Central Commission has approved only the Actual Capital Expenditure incurred up to 2009-10 for this augmentation.

64. Vide its order dated 15.05.2014 in Petition No. 148 of 2013, the Commission reviewed the Appellant's claim for Additional Capital Expenditure for 2009-14 under the "Augmentation of railway siding & MGR system.", the Appellant's claim of Rs. 105.17 lakh for 2010-11 was rejected due to a lack of proper justification, furthermore, no projected expenditure was shown for subsequent years under this head and therefore the Commission disallowed the unsubstantiated and unjustified expenditure.

65. Subsequently, In Petition No. 343/GT/2014, the Appellant claimed Rs. 405 lakhs for FY 2012-13 as Additional Capital Expenditure under "Augmentation of railway siding & MGR system" for the first time, the Commission, in its Record of Proceedings dated 19.04.2016, directed the Appellant to justify why this expenditure was not previously projected, considering the additional submissions of the Appellant made on 23.06.2016, the Appellant failed to provide sufficient reasons, consequently, the claim of Rs. 405.52 lakh was disallowed in the Impugned Order.

66. The Commission previously rejected the Appellant's claim of Rs. 105.17 lakh for Additional Capital Expenditure under "Augmentation of Railway Siding & MGR System" for FY 2010-11 in Petition No. 148 of 2013 due to insufficient justification, approving only Rs. 2473 lakh for FY 2009-10, the Appellant's subsequent claim of Rs. 405.52 lakh for FY 2012-13, related to Signalling & Transmission work under the same head, was first made in the Impugned Petition and had not been projected in any prior Tariff Petitions, the Appellant also failed to provide details of efforts to mitigate delays in the work, nor did they submit any supporting documentation, such as evidence of penalties imposed on contractors, to justify the claimed costs.

**Submissions of the Respondent No. 5, CSPDCL**

67. Respondent No. 5 submitted that the cut-off date for the Appellant to claim additional capitalization was 15.07.2009, as their last unit achieved COD on 15.07.2007, the Appellant sought additional capitalization under Regulation 9(2) (vii) after the cut-off date, under this Regulation, the Central Electricity Regulatory Commission (CERC) may allow such claims after a prudence check, provided the justifications for the expenses are satisfactory, however, the Commission found the Appellant's reasons for the delay in execution unjustified and, therefore, correctly disallowed the costs amounting to Rs 405.52 lakhs towards the additional capitalization of S&T of MGR.

68. The Appellant had previously filed Petition No. 260 of 2009 with CERC for tariff determination, based on actual expenditure for FY 2009-10 and projected expenses for FY 2010-14, in that petition, they reported an actual expenditure of Rs 2473 Lakhs for FY 2009-10 under the "Augmentation of Railway siding and

MGR system" but did not indicate any projected additional capital expenditures for FY 2010-14, consequently, any subsequent claims for additional capital expenditure under this head appear to be an afterthought by the Appellant.

69. The Appellant had submitted "Projected Additional Capital Expenditures" under other heads as per order dated 28.05.2012 of the Commission in Petition no. 260 of 2009:

( ` in lakh)

Sl. No.	Regulation	Actual/Projected Capital Expenditure					
		2009-10	2010-11	2011-12	2012-13	2013-14	
<b>A. Ash Handling System</b>							
...	....	....	....	....	....	....	
<b>B. Environmental Systems</b>							
...	....	....	....	....	....	....	
<b>C. Other Capitalization</b>							
i	Wagon Tippler	9(1)(ii)	0.00	0.00	0.00	11050.00	0.00
ii	Locomotive	9(1)(ii)	0.00	2923.00	0.00	0.00	0.00
iii	ICT and Shunt reactor	9(1)(ii)	0.00	0.00	450.00	0.00	0.00
iv	MGR-wagons	9(1)(ii)	0.00	0.00	75.00	0.00	0.00
	Elevator	9(1)(ii)	0.00	0.00	64.00	0.00	0.00
v	<b>Augmentation of Railway siding &amp; MGR system</b>	9(1)(ii)	<b>2473.00</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>
...	....	....	....	....	....	....	....

70. Further, Petition No. 148 of 2013 was filed by the Appellant and here also in this petition the Appellant did not indicate any projected additional expenditure under "Augmentation of Railway Siding & MGR System" head, the Appellant had submitted the following table as per the order dated 15.05.2014 of the Commission, Petition no. 148 of 2013:

Package Name	Actual			Projected		Total
	2009-10	2010-11	2011-12	2012-13	2013-14	
....	....	....	....	....	....	....
Augmentation of Railway Siding & MGR System.	2473.48	105.17	0.00	0.00	0.00	2578.65

71. The Commission disallowed the Appellant's claim for an actual additional capital expenditure of Rs 105.17 Lakhs under the "Augmentation of Railway Siding & MGR System" due to the lack of justification for the cost increase provided by the Appellant, the relevant para of the order dated 15.05.2014 in Petition No. 148 of 2013 is reproduced hereunder:

*"Augmentation of Railway Siding & MGR System "*

*18. The Commission in order dated 28.5.2012 had allowed actual expenditure of 2473.00 Lakh in 2009-10 for Augmentation of Railway Siding & MGR System. The petitioner has now claimed actual expenditure of '2473.48 lakh in 2009-10 and '105.17 lakh in 2010-11. It is noticed that the actual expenditure claimed is higher than the expenditure approved by the Commission in order dated 28.5.2012. Since, no justification has been furnished by the petitioner justifying the increase in the actual expenditure; we do not allow the increased expenditure. In view of the above, expenditure of 2473.48 lakh as approved by the Commission is allowed."*

72. Further, the Appellant in Petition No. 343/GT/2014 also did not provide any valid explanation for not claiming the expenditure on a projected basis towards Augmentation of Railway Siding & MGR System during 2012-13 and based on lack of explanation by the Appellant, the Commission disallowed Rs. 405.52 lakh towards Additional Capital Expenditure for S&T work of MGR.

### **Analysis and Conclusion**

73. After hearing the contesting parties at length and examining the pleadings on record, it is seen that the Appellant filed Petition No. 260 of 2009 before the

Commission for the approval of tariff of the Vindhyachal Stage-III project for the period 01.04.2009 to 31.03.2014 in which the Commission passed a detailed order on 28.05.2012.

74. It is evident from the rival submissions of the contesting parties that the Appellant reported an actual expenditure of Rs 2473 Lakhs for FY 2009-10 under the "Augmentation of Railway Siding and MGR System" in the petition but did not forecast any additional capital expenditures for FY 2010-14.

75. Further, Petition No. 148/GT/2013 was filed by the Appellant for Revision of the tariff of Vindhyachal Super Thermal Power Station Stage-III (1000 MW) for the period from 01.04.2009 to 31.03.2014 - Truing up of tariff determined by order dated 28.5.2012 in Petition No. 260/2009 and order dated 03.05.2013 in R.P. No. 19/2012.

76. In this petition also, the Appellant did not provide any projected additional expenditure under the head- "Augmentation of Railway Siding & MGR System".

77. The Central Commission rejected the Appellant's claim for an additional capital expenditure of Rs 105.17 Lakhs under the "Augmentation of Railway Siding & MGR System" due to insufficient justification for the cost increase.

78. Further, the Appellant filed Petition No. 343/GT/2014 for Revision of tariff of Vindhyachal Super Thermal Power Station, Stage-III (1000 MW) for the period from 01.04.2009 to 31.03.2014- Truing up of tariff determined by order dated 15.05.2014 in Petition No. 148/GT/2013, herein also the Appellant failed to provide

a valid explanation for not projecting the expenditure for the Augmentation of Railway Siding & MGR System during 2012-13, due to this lack of justification, the Central Commission disallowed Rs. 405.52 Lakhs towards additional capital expenditure for S&T work of MGR.

79. From the submissions of the Appellant, it is clear that the Appellant has placed reliance on the following in support of its claim:

- a. There is no cost overrun on account of additional capitalization claimed for S&T work as the same formed part of the projected expenditure approved in the tariff order dated 28.05.2012 passed in Petition No. 260 of 2009.
- b. In Petition No. 260 of 2009, the Appellant projected expenditures for the augmentation of the Railway Siding and MGR System, whereby civil work expenditures were projected, expenditures for S&T Work were not included, as the Appellant was unable to anticipate the completion date of the S&T Work at that time.
- c. The Commission itself acknowledged in its Order dated 28.05.2012 that the augmentation of the railway siding and MGR system, including S&T Work, was necessary for transporting coal from non-linked mines.

80. It is, therefore, important to note the relevant part of the Order dated 28.05.2012, as under:

***“(d) Augmentation of Railway siding and MGR system***

32. *The petitioner has claimed the actual expenditure of `2473.00 lakh during 2009-10 for augmentation of Railway siding and MGR system under Regulation 9(1)(ii) of the 2009 Tariff Regulations. The petitioner has submitted that this is balance work and due to reasons beyond the control of the petitioner, the delivery /execution of certain items and spares got delayed. As the order/ contract were placed before the cut-off date, the principle of continuity needs to be applied. The petitioner by its affidavit dated 2.2.2012 have furnished reasons for the delay in execution of the above system as under:*

*"It is submitted that the work got delayed due to the reasons that the required land was to be acquired from NCL and transfer of land to NTPC took considerable procedural time. The subsequent technical changes based on site conditions proposed by Consultant RITES, such as addition of one more silo at Nigahi end. Further to augment coal receipt facilities from various sources apart from linked source, various measures such as inclusion of 2 more spur lines and facilities for longer CSR (Clear Standing Rake) were included in the scope. It is further submitted that in view of coal shortage at various stations of NTPC, it was necessary to augment coal facilities for bringing coal from the sources other than linked mines and for the purpose, the length of the CSR was required to be increased from 550 meters to 720 meters to meet the railway norms. It is therefore submitted that due to the reasons explained above, the work could not have been completed within the stipulated cut-off date of the station....."*



33. *From the above submissions, it is observed that the main reason for the delay was on account of the procedural delay in acquiring land from NCL and transferring the same, which was beyond the control of the petitioner. Further it is observed that the augmentation of railway siding is necessary for bringing coal from non-linked mines in view of shortage of coal. In view of the justification submitted by the petitioner, capitalisation of the said expenditure has been allowed under Regulation 9(2)(vii) of the 2009 Tariff Regulations.”*

81. From the aforesaid Order, it is clear that as far as the claim of the Appellant concerns related to “*augmentation of Railway siding and MGR system*”, there is no mention of S&T work, either in the pleadings recorded vide the aforesaid order or any observation of the Commission, as claimed by the Appellant and rejected by the CERC vide the Impugned Order.

82. Therefore, the Appellant’s submissions that the Central Commission has approved the augmentation of Railway siding and MGR system including the S&T works is contrary to the Order passed by the Commission.

83. We are not inclined to accept the submission of the Appellant that the Commission has agreed to the S&T as part of the augmentation of the Railway Siding and MGR System.

84. The Appellant also argued that the Signalling and Transmission work is necessary for augmentation of the Merry-Go-Round (MGR) system and also the legal principle allows capitalization only when an asset is put to use, accordingly,

has claimed capitalization for the S&T Work only after its completion and use during 2012-14, further, it has since been under use by the beneficiaries, accordingly, the Central Commission after carrying out prudent analysis ought to have approved it.

85. It is his argument that they have claimed capitalization of S&T work only after the said work was completed and put to use during the period 2012-2014.

86. However, the same was countered by the Respondents stating that the Appellant's statement contradicts the "Put to Use" principle for assets, in case the S&T is a necessary component of the MGR system without which the Railway Siding and MGR System (Civil Portion) could not have been operational, then, the Appellant should either have claimed the expenditure after "Put to Use" of the entire augmentation of Railway siding and MGR system or should have claimed on the projected basis, it cannot decide and made claims arbitrarily.

87. The Respondents vehemently argued that the Commission allowed the capitalization of the expenditure for the Railway Siding and MGR System as a complete package and the failure of the Appellant to either project the costs of S&T or mention it as part of the MGR system, cannot be considered at this stage to his benefit.

88. Regulation 9 (2) (vii) of Tariff Regulations, 2009 includes any capital expenditure necessitated on account of modifications required or done in fuel receipt system arising due to non-materialisation of full coal linkage, the relevant paragraph is as follows:

*“9. Additional Capitalisation. ...*

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

*...*

*(vii) Any capital expenditure found justified after prudence check necessitated on account of modifications required or done in fuel receipt system arising due to non-materialisation of full coal linkage in respect of thermal generating station as result of circumstances not within the control of the generating station.”*

89. The contention of the Appellant is that their claim can either be on the basis of the actual expenditure incurred or projected to be incurred, however, Regulation 9(2) (vii) of the Tariff Regulations, 2009 does not restrict a generating station from claiming additional capital expenditure for modifications in the fuel receipt system due to incomplete coal linkage, even if such expenditure was not initially projected in the tariff petition.

90. The above submission of the Appellant indicates that they failed to include and project the costs of S&T works as part of the augmentation scheme, however, after completion of the scheme realized it and as an afterthought included it as part of the scheme considering its necessity.

91. The Central Commission in Petition No. 260 of 2009 vide order dated 28.05.2012 has stated that augmentation of railway siding and MGR system is necessary for bringing coal from non-linked mines and has approved the total cost

incurred on it, however, considering that the Appellant has failed to bring satisfactory reasons for the claim of costs for the S&T works, the Commission rejected the additional costs.

92. The Appellant's reliance on this Tribunal's judgment in *Haryana Vidyut Prasaran Nigam Limited vs. Haryana Electricity Regulatory Commission and Ors.*, Appeal No. 2 of 2013 that return is to be allowed only on such assets that are commissioned and put to use and not on works which are in progress and not yet put to use is misplaced, as S&T works as claimed by him is a necessary and integral part of the Railway Siding and MGR head, therefore, its actual claim for the Railway Siding and MGR works should either have included S&T works or otherwise has wrongly projected the completion of Railway Siding and MGR works.

93. We are satisfied that the final claim of the Appellant on the condition of "Put to Use" for the Railway Siding and MGR cannot be modified at this stage based on additional works.

94. As per the cited Regulation, the claim can be made on the basis of projected costs or the actual cost incurred, however, for any item, it cannot be claimed in parts i.e. part of the item claimed on a projected basis and balanced for completion basis.

95. A return on investment (such as a return on equity) is only permitted for assets that have been completed, commissioned, and are in use, Consumers should not be charged for the return on equity capital invested in projects that are

still under construction and not yet operational, i.e. the capital invested in a project can only start earning a return once the project is fully functional and providing the intended service.

96. The claim of the Appellant cannot be accepted because S&T work is an integral part of Railway Siding and MGR and non-completion of this part shall render the whole Railway Siding and MGR system as non-operation.

97. We are satisfied that the Central Commission after prudent analysis has rejected the claim of the Appellant, we find no infirmity in the Impugned Order passed by the Commission.

### **ORDER**

For the reasons stated above, the captioned Appeal No. 91 of 2017 is dismissed as being devoid of merit.

**PRONOUNCED IN THE OPEN COURT ON THIS 23<sup>rd</sup> DAY OF OCTOBER, 2024.**

**(Virender Bhat)**  
**Judicial Member**

**(Sandesh Kumar Sharma)**  
**Technical Member**

pr/mkj