IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

Appeal No. 173 of 2013

Dated: 8th May, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

IN THE MATTER OF:

NTPC Limited,
NTPC Bhawan,
Core -7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110003. - Appellant/Petitioner

Versus

1. Central Electricity Regulatory Commission,
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi- 110001

2. Chief Engineer (Commercial), APPCC
   Transmission Corporation of Andhra Pradesh Ltd. (APTRANSCO)
   Vidyut Soudha, Khairatabad, Hyderabad – 500 082

3. Chariman & Managing Director,
   AP Eastern Power Distribution Company Ltd
   (APEPDCL)
   Sai Shakthi Bhavan, 30-14-09,
   Near Saraswathi Park
   Visakhapatnam – 530 020

4. Chairman & Managing Director,
AP Southern Power Distribution Company Ltd.
(APSPDCL)
H.No. 193-93 (M) Upstairs
Renigunta Road, Tirupathi – 517 501

5. Chairman & Managing Director
AP Northern Power Distribution Company Ltd.
(APNPDCL)
H.No. 1-1-5044, Opp.: NIT Petrol Pump
Chaitanyapuri, Warangal – 506 004

6. Chairman & Managing Director,
AP Central Power Distribution Company Ltd,
(APCPDCL)
Singareni Bhavan, Red Hills,
Hyderabad- 500 063

7. Chief Engineer (Planning),
Tamil Nadu Electricity Board (TNEB)
144, Anna Salai,
Chennai – 600 002.

8. Superintending Engineer, (Regulatory Affairs),
Karnataka Power Transmission Corporation Ltd.
(KPTCL)
Kaveri Bhawan, K.G. Road
Bangalore – 560 009.

9. Managing Director,
Bangalore Electricity Supply Company Ltd.
(BESCOM)
Krishna Rajendra Circle,
Bangalore – 560 09

10. Managing Director,
Mangalore Electricity Supply Company Ltd.
(MESCOM)
Paradigm Plaza, A.B. Shetty Circle,
Mangalore – 575 001.

11. Managing Director,
Chamundeshwari Electricity Supply Corp. Ltd.
(CESC Mysore)
927, L.J. Avenue, New Kantharajaurs Road
Saraswathi Puram
Mysore – 570 009.

12. Managing Director,
Gulbarga Electricity Supply Company Ltd.
(GESCOM)
Main Road, Gulbarga,
Gulbarga – 585 102

13. Managing Director,
Hubli Electricity Supply Company Ltd.
(HESCOM)
Corporate Office, P.B. Road, Navanagar,
Hubli – 580 025.

14. Dy. Chief Engineer (TRAC),
Kerala State Electricity Board (KSEB)
Vaidyuthi Bhavanam, Pattom,
Tiruvananthapuram – 695 004

15. Supdt. Engineer-I
Electricity Department (PUDUCHERRY)
58, NSC Bose Salai
Puducherry – 605 001.

16. Chairman & Managing Director
Grid Corporation of Orissa Limited (GRIDCO)
Janpath, Bhubaneswar – 751022
ORISSA - Respondents

Counsel for the Appellant(s) : Mr. M.G. Ramachandran

Counsel for the Respondent : Mr. K.S. Dhingra for R-1

Mr. R.B. Sharma for R-16

Ms. Swapna Seshadri for R-8 to R-13

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present appeal has been filed, under Section 111 of the Electricity Act, 2003, by the petitioner/appellant NTPC Limited against the order dated 28.05.2013, passed by the Central Electricity Regulatory Commission (hereinafter called the 'Central Commission') in Petition No. 269 of 2009, relating to the determination of generation tariff for Talcher Super Thermal Power Station (STPS), Stage-II (2000 MW) for the period from 01.04.2009 to 31.03.2014.

2. In the impugned order, the Central Commission has disallowed the following items under additional capital expenditure, namely:-

(a) Claim of Rs. 10.35 crore for purchase of Generator Transformer,

(b) Claim of Rs. 23.21 crore for balance civil works,

(c) Claim of Rs. 48 lakh for Energy Monitoring System (EMS) and

(d) Claim of Rs. 4528 lakh for purchase of wagons and locos.

3. The Central Commission has erred in disallowing the above claims on the grounds such as; the new Generator Transformer will only be used as a spare; the Balance Civil & Other Works was capitalized after the cut off period as per Regulation 9 (2) of the Tariff Regulations, 2009; the benefit of reduction in auxiliary power consumption due to energy monitoring system is not passed on to the beneficiaries and further while additional capitalization has been allowed for the MGR system but the requirement of additional rolling stock/wagons/locos has not been considered.

4. According to the appellant, in the impugned order, the Central Commission has decided that Regulation 7 (last proviso) of the Tariff Regulations, 2009 dealing with the additional capitalization of the existing station should be limited to those areas covered by Regulation 9 (2) of the Tariff Regulations, 2009 and the Regulation 7 last proviso is not an independent provision.

5. The brief facts of the case giving rise to the present appeal are as under:-

(a) that the impugned petition no. 269 of 2009 was filed by the petitioner NTPC for approval of tariff for Talcher STPS, Stage-II (2000 MW), hereinafter referred to as the Generating Station for the period from 01.04.2009 to 31.03.2014, based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as 'Tariff Regulations, 2009).

(b) that the generating station with a total capacity of 2000 MW comprises of four units of 500 MW each. The actual dates of commercial operation (COD) of the different units of the generating station are as under:

Units	**Scheduled COD**	**Actual COD**
Unit I	February, 2004	01.08.2003
Unit II	November, 2004	01.03.2004
Unit III	August, 2005	01.11.2004
Unit IV	May, 2006	01.08.2005

(c) that the tariff of the generating station for the period from 01.04.2004 to 31.03.2009 was determined by Commission's order dated 31.01.2008 in Petition No. 179 of 2004, against which order the respondent No.7, TNEB filed Review Petition No. 47 of 2008 and the same was dismissed by the Central Commission's order dated 29.5.2008 at the admission stage. Aggrieved by order dated 31.01.2008, the petitioner filed Appeal No. 66 of 2008 before this Appellate Tribunal on various issues.

(d) that subsequently the appellant/petitioner filed Petition No.146 of 2008 for determination of impact of additional capital expenditure incurred for the generating station during the period 2004-08 and the Commission by its order dated 05.01.2010, revised the annual fixed charges for the generating station, for the period 2004-09, after excluding un-discharged liabilities and Interest During Construction (IDC).

(e) that thereafter, the appellant/petitioner filed Petition No.138 of 2009 for determination of impact of additional capital expenditure incurred in respect of generating station during the period 2008-09 and the Central Commission, vide its order dated 19.2.2010, revised the annual fixed charges for the generating station, after exclusion of un-discharged liability of 1275.17 lakh.

(f) that subsequently, this Appellate Tribunal vide its order dated 18.8.2010, in Appeal No. 66 of 2008 partly allowed the Appeal and remanded the matter to the Central Commission to consider the question of relaxation of cut-off date of the generating station. Against the order dated 05.01.2010 in Petition No.146 of 2008, the

appellant/petitioner filed Review Petition No.46 of 2010 and the respondent-TNEB also filed Review Petition No.139/2010 on certain issues, which were disposed of by the Central Commissions orders dated 27.09.2011 and 30.05.2011 respectively.

(g) that against the order dated 19.02.2010 in Petition No.138 of 2009, the appellant/petitioner filed Review Petition No.126 of 2010 before the Central Commission against the non-consideration of un-discharged liabilities in terms of the judgment of this Appellate Tribunal dated 10.12.2008 in Appeal No.138 of 2008 and the liabilities discharged during the year 2008-09 amounting to Rs. 5.90 crore which were allowed by the order dated 06.07.2011.

(h) that Appeal No. 92 of 2010 filed by the appellant/petitioner against the order dated 19.02.2010 in Petition No.138 of 2009 was allowed by this Tribunal excepting the prayer for de-capitalization of capital spares. However, the question of consideration of relaxation of cut-off date was remanded to the Central Commission to consider the matter of relaxation of cut off date for additional capitalization for the generating station.

(i) that in terms of the above directions of the Tribunal in Appeal Nos.66 of 2008, 92 of 2010 and 64 of 2010 and taking into consideration the earlier judgments of this Tribunal dated 13.6.2007 and 16.3.2009 in Appeal Nos. 139 to 142 etc of 2006 and other connected cases and Appeal Nos. 133, 135, 136 and 148 of 2008, the tariff of the generating station for 2004-09 was revised by the Central Commission's order dated 29.12.2011 in Petition No. 179 of 2004, subject to the outcome of the Civil

Appeals filed against the judgments of this Appellate Tribunal and pending before the Hon'ble Supreme Court. Subsequently, by order dated 21.02.2012, the tariff of the generating station was further revised, after correction of certain inadvertent clerical errors, in the order dated 29.12.2011.

(j) that the impugned petition no. 269 of 2009 filed, vide affidavit dated 12.11.2009, was heard on 13.05.2010 and the Central Commission directed the petitioner to submit additional information on certain issues. Thereafter, the Central Commission after seeking many informations from the appellant/petitioner and the appellant having filed the same, the petition was finally heard on 18.12.2012 and thereafter the appellant/petitioner, vide affidavit dated 24.01.2013, filed additional information submissions. Thus, after hearing the parties, the Central Commission passed the impugned order, dated 28.05.2013, which is under challenge before us in the instant appeal.

(k) that the annual fixed charges claimed by the appellant/petitioner for the period 2009-14 are as under:-

(Rs. In Lakh)

	2009-10	2010-11	2011-12	2012-13	2013-14
Depreciation	26870	27090	27680	28175	28302
Interest on Loan	12143	10117	8421	6550	4509
Return on equity	36478	36776	37578	38249	38422
Interest on working capital	9001	9053	9152	9215	9277
O & M Expenses	26000	27480	29060	30720	32480
Cost of secondary fuel oil	3049	3049	3057	3049	3049
Compensation allowance	0	0	0	0	0
Special allowance	0	0	0	0	0
Total	113504	113564	114949	115957	116039

(l) that the appellant aggrieved, by the impugned order dated 28.05.2013, passed by the Central Commission, filed a Review Petition on 18.07.2013, on the limited issue of additional capital expenditures on purchase of locos and wagons. According to the appellant itself, the appellant/petitioner filed the Review Petition against the order dated 28.05.2013 on 18.07.2013 and without waiting for the result of the Review Petition, the instant Appeal has been filed on 22.07.2013 challenging the impugned order dated 28.05.2013.

6. We have heard Mr. M.G. Ramachandran, learned counsel for the appellant, Shri K.S. Dhingra, learned counsel for the respondent no.1, Shri R.B. Sharma, learned counsel for the GRIDCO and Ms. Swapna Seshadri, learned counsel for the respondent nos. 8-13 and perused the written submissions filed by the rival parties.

7. After considering the contentions made by the rival parties, the following issues arise for our consideration:-

(i) Whether the Central Commission has wrongly decided and disallowed the additional capital expenditure on purchase of Generator Transformer during 2009-14 on the ground that a new generator transformer will only be used as a spare?

(ii) Whether the Central Commission has wrongly disallowed the additional capital on expenditures on Energy Monitoring System (EMS) and balance civil works during 2009-14 on the ground that this exception is not covered under the purview of Regulation 9 (2) of Tariff Regulations, 2009?

(iii) Whether the Central Commission has legally disallowed the additional capital expenditure on purchase of additional locos and wagons on the ground that there is no

requirement of the additional rolling stock/wagons with the present arrangement?

(iv) Whether the Central Commission has correctly interpreted the Regulations 7 & 9 of Tariff Regulations, 2009?

(v) Whether the Central Commission is justified in not giving effect to the Regulation 9 of the Tariff Regulations, 2009?

(vi) Whether the Review Petition filed against the impugned order dated 28.05.2013, filed on 18.07.2013 and the instant Appeal filed on 22.07.2013 can be maintained simultaneously?

8. **ISSUE NOS. (I), (IV) & (V)**

A. Issue Nos. (I), (IV) & (V), being inter-linked with one another, are being taken up together and decided simultaneously.

On these issues the learned counsel for the appellant has made the following submissions:-

(i) that the Central Commission has disallowed the capital expenditure on purchase of generator transformer, just on the ground that the damaged generator transformer was replaced by the spare generator transformer which was available at the generating station and the expenditure on the spare transformer had already been considered in the capital cost in the FY 2002-03.

(ii) that the impugned order of the Central Commission is not simpliciter that the above claim is outside the purview of Regulation 9(2) and therefore rejected. Since the reasonings on the merits in the impugned order had been given by the Central Commission, hence the finding that

above claim is outside the purview of Regulation 9 (2) of the Tariff Regulations, 2009, is perverse.

(iii) that the Central Commission did not consider the fact that the generator transformer had failed due to the failure of its HV bushing which, in turn, was caused due to the high voltage surge that had originated in the grid and was beyond the control of the appellant.

(iv) that Central Commission, in the impugned order itself, noted that the damaged transformer was replaced with the spare transformer available at the generating station, thereby ensuring the successful running of the generating station and yet did not consider that in the event of a similar problem in the transformer in operation, there would be an immediate need to replace such transformer and the operations of the generating station would be severely affected. If the generator transformer was required to be procured then or repaired, the loss of generation on account of non availability of transformer will be substantial.

(v) that generating station was commissioned with four units between 01.08.2003 and 01.08.2005. The generator transformer was charged on 22.09.2003 and failed on 14.03.2007. The transformer was in operation for less than four years, that is, well below the design life of the generator transformer. The damaged transformer was de-capitalised in FY 2006-07. The failure of the transformer, the use of the existing spare transformer and the need to maintain a new spare transformer are all, for no reason or failure, attributable to NTPC. The impugned order nowhere attributes any such factor to NTPC.

(vi) that established practice to maintain a spare generator transformer at all generating stations to enable immediate replacement in case any of the generator transformers in operation becoming unworkable for the sustained operations in the generating station. The Central Commission itself allowed for a spare generator transformer to be capitalized in the past, even in the case of the present generating station. There is no rationale, for disallowing the cost of the spare generator transformer, to be acquired after the existing spare transformer had been used in operation of the generating station on the failure of a generator transformer.

(vii) that the Regulation 19 (e) of the Tariff Regulations, 2009 also does not provide for any compensatory allowance as the replacement is within 10 years of commercial operation. In these circumstances, the above claim is most appropriate to be considered under Regulation 44 of the Tariff Regulations, 2009, if Regulations 5, 6, 7 and 9 do not cover the claim.

(B) Per contra on this issue, learned counsels for the respondents have submitted as follows:-

(i) that the appellant had claimed an amount of Rs. 1035 lacs during 2011-12 for purchase of another spare generator transformer (GT) which was damaged during 2006-07 and replaced by the spare GT available at the generating station.

(ii) that the appellant has also alleged that the cause of failure of the GT was the high voltage surge originated in the grid. The capital cost of the spare transformer had been

considered in the capital cost of the generating station allowed as initial spares.

(iii) that the initial spares are allowed only once during the lifetime of the power station. Subsequent spares required during the operation of the power station are part of the O & M expenses and the same are covered in the calculation of working capital wherein the maintenance spares are allowed @ 20% of the O & M expenses. The Central Commission, therefore, has rightly rejected the claim of the appellant on this issue by the impugned order. The relevant para of the impugned order dated 28.05.2013 is as under:-

> "38. *The petitioner has claimed expenditure for 1035 lakh during 2011-12 towards the purchase of Generator Transformer (GT) (as at sl. No. 10 of the table). The petitioner has submitted that the GT got damaged during 2006-07 and the same was de-capitalized, by order of the Commission dated 19.02.2010, in Petition No. 146/2008. The damaged GT was replaced with the GT available at site and was not transferred from any other generating station of the petitioner. The petitioner has also submitted that the cause of failure of GT was the failure of its HV bushing due to high voltage surge originated in the grid and the same was beyond the control of the petitioner. It has further been submitted that with the procurement of GT, the availability of energy shall be ensured for the life of the generating station. The matter has been examined. It is observed from the submissions of the petitioner that the damaged GT was replaced with spare GT which was available at the generating station and the generating station has been running successfully since the replacement of damaged GT. The procurement of new GT by the petitioner would only be used as spare in the generating station. Since the petitioner has already been allowed a spare GT and the expenditure has been considered in the capital cost, we are of the view that it would not be prudent to burden the beneficiaries by*

loading the cost of another spare GT specially when the generating station is operating successfully with the present arrangement. In view of this, the claim of the petitioner for spare GT is allowed."

(iv) that the Central Commission, in the impugned order, has clearly stated that it would not be prudent to burden the beneficiaries by loading the cost of another spare GT. The spare GT, if considered critical for sustained and reliable supply, the same can easily be repaired by replacing the HV bushings under the O & M expenses rather than purchasing a new GT. Hence, this claim is contrary to the well established practices of generating stations.

(v) that the power to relax, under Regulation 44 of the Tariff Regulations, 2009 was not claimed by the appellant before the learned Central Commission and the same is being contended, for the first time, before this Appellate Tribunal.

(vi) that the appellant has claimed this additional capital expenditure on purchase of generator transformer under Regulations, 5, 6 & 7 of the Tariff Regulations, 2009. This capital expenditure is not covered under Regulation 9 (2) of the Tariff Regulations, 2009 as this being the existing generation station with cut off date falling during 2004-09 tariff period. Accordingly, the alleged claim cannot be allowed in terms of the judgment dated 27.01.2014 in Appeal No. 44 of 2012 of this Appellate Tribunal.

(vii) that if the appellant's logic of keeping the spare generator transformer for use during emergency is accepted, it would imply that every other equipment should also be

kept as spare for use in case of emergency. Acceptance of such logic betrays the consumer interest.

(viii) that the generator transformer, in whose place another generator transformer was proposed to be acquired, during 2011-12, failed on 14.03.2007 and was out of use since then. The affairs had been managed till FY 2011-12 without feeling the need for spare generator transformer.

(ix) that as per the appellant's contention that all other generating stations are having spare generator transformers and many of such other generating stations are in the close vicinity of the generating stations, including at the location of the generating station itself, then in case of emergency, the spare generators available at other generating stations can be utilized and the view taken by the Central Commission in the impugned order serves the interest of the consumers of electricity.

(x) that lastly, the capitalization of the expenditure under this head is not admissible under 9 (2) of Regulations, 2009.

9. After hearing the rival submissions, a look at the relevant Regulation 7 of the Tariff Regulations, 2009 is necessary and the same is reproduced as under:-

"7. ***Capital Cost.****- (1) Capital cost for a project shall include:*

(a) the expenditure incurred or projected to be incurred, including interest during construction and financing charges, any gain or loss on account of foreign exchange risk variation during construction on the loan - (i) being equal to 70% of the funds deployed, in the event of the actual equity in excess of 30% of the funds deployed, by treating the excess equity as normative loan, or

(ii) being equal to the actual amount of loan in the event of the actual equity less than 30% of the funds deployed, - up to the date of commercial operation of the project, as admitted by the Commission, after prudence check;

(b) capitalised initial spares subject to the ceiling rates specified in regulation 8; and

(c) ***additional capital expenditure determined under regulation 9****:*

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

(2) The capital cost admitted by the Commission after prudence check shall form the basis for determination of tariff:

x x x x x x x x x x x x x x x x x x x x x x x

Provided also that in case of the existing projects, the capital cost admitted by the Commission prior to 1.4.2009 duly trued up by excluding un-discharged liability, if any, as on 1.4.2009 and the additional capital expenditure projected to be incurred for the respective year of the tariff period 2009-14, as may be admitted by the Commission, shall form the basis for determination of tariff."

10. The term "additional capital expenditure" used in Regulation 7 is not defined but the term "additional capitalization" which is synonymous with the term "additional capital expenditure" is defined under clause (3) of Regulation 3 of the tariff regulations as under:

'additional capitalisation' *means the capital expenditure incurred or projected to be incurred, after the date of commercial operation of the project and* ***admitted by the Commission after prudence check, subject to provisions of regulation 9.***

11. Regulation 7 read with the definition of the term "additional capitalization" entails that the expenditure incurred or projected to be incurred after the date of commercial operation qualifies to be the

"additional capital expenditure" as part of capital cost for the purpose of determination of tariff on fulfillment of the following conditions;

(a) The expenditure is admitted by the Central Commission after prudence check, and

(b) The expenditure should be "subject to" Regulation 9."

12. The last proviso to Regulation 9 of the Tariff Regulations, 2009 covers the cases of 'approval' of tariff where the project has been under commercial operation prior to 1st April, 2009, the date on which the Tariff Regulations, 2009 came into force.

13. Clause (1) of Regulation 9 of the Tariff Regulations, 2009 provides for capitalization of the expenditure incurred or projected to be incurred after the date of commercial operation but before the cut-off date, whereas clause (2) of Regulation 9 makes provision for capitalization of expenditure incurred or projected to be incurred after the cut-off date. Under clause (2), capitalization of the expenditure incurred after the 'cut-off date' is to be allowed on exercise of prudence check by the Central Commission. Regulation 9 is exhaustive on the question of capitalization of the additional expenditure incurred after the date of commercial operation of the project and capitalization of any expenditure after that date (COD) but not falling within the ambit of Regulation 9 cannot be allowed. In other words, the expenditure *de hors* Regulation 9 cannot be included in the capital cost for the purpose of tariff.

14. Accordingly, consideration of the expenditure, after the date of commercial operation, as part of capital cost has been made subservient or obedient to the conditions of Regulation 9 of the tariff regulations.

15. Before coming to this legal issue, we deem it appropriate to reproduce Regulation 9 of Tariff Regulations, 2009 as follows:-

*"9. **Additional Capitalisation.**-*

(1) x x x x x x x x x x x x x x x

(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:

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

(ii) Change in law;

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

(iv) In case of hydro generating stations, any expenditure which has become necessary on account of damage caused by natural calamities (but not due to flooding of power house attributable to the negligence of the generating company) including due to geological reasons after adjusting for proceeds from any insurance scheme, and expenditure incurred due to any additional work which has become necessary for successful and efficient plant operation; and

(v) In case of transmission system any additional expenditure on items such as relays, control and instrumentation, computer system, power line carrier communication, DC batteries, replacement of switchyard equipment due to increase of fault level, emergency restoration system, insulators cleaning infrastructure, replacement of damaged equipment not covered by insurance and any other expenditure which has become necessary for successful and efficient operation of transmission system:

(vi) In case of gas/ liquid fuel based open/ combined cycle thermal generating stations, any expenditure which has become necessary on renovation of gas turbines after 15 year of operation from its COD and the expenditure necessary due to obsolescence or non-availability of spares for successful and efficient operation of the stations.

Provided that any expenditure included in the R&M on consumables and cost of components and spares which is generally covered in the O&M expenses during the major overhaul of gas turbine shall be suitably deducted after due prudence from the R&M expenditure to be allowed.

(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.

(viii) Any undischarged liability towards final payment/ withheld payment due to contractual exigencies for works executed within the cut-off date, after prudence check of the details of such deferred liability, total estimated cost of package, reason for such withholding of payment and release of such payments etc.

(ix) Expenditure on account of creation of infrastructure for supply of reliable power to rural households within a radius of five kilometers of the power station if, the generating company does not intend to meet such expenditure as part of its Corporate Social Responsibility."

16. The generation station of the appellant has been commercially operative since 01.08.2005 and, therefore, cut-off date to be considered for the purpose of capitalization of the expenditure incurred is 31.03.2008.

17. The tariff of the generating station owned by the appellant from the date of commercial operation to 31.03.2009 was determined by the Central Commission vide its order dated 31.01.2008 in Petition No 179 of 2004. The annual fixed charges approved vide order dated 31.01.2008 were further revised under order dated 19.02.2010 in Petition No 139 of 2009 considering the capital cost of Rs. 518192.92 lakh as on 31.03.2009.

18. The appellant filed impugned Petition No. 269/ of 2009 for approval of generation tariff for the generating station for the tariff period 01.04.2009 to 31.03.2014, wherein the appellant claimed the expenditure incurred or projected to be incurred during the tariff period, that is, after the 'cut-off date' under different provisions of the tariff regulations:

19. The appellant's claim for capitalization of expenditure was examined on the touchstone of clause (2) of Regulation 9 of the Tariff Regulations, 2009 as there is no other provision in the tariff regulations to provide for capitalization of the expenditure incurred after the date of commercial operation.

20. The Central Commission, after prudence check, disallowed the capitalization of the aforesaid expenditures incurred or projected to be incurred by the appellant, after the cut-off date, by the impugned order.

21. This Appellate Tribunal vide judgment, dated 27.1.2014, in Appeal No. 44 of 2012, captioned as NTPC vs. Central Electricity Regulatory Commission & Ors., while interpreting the Tariff Regulations, 2009, has observed as under:

> *"28. As we mentioned earlier, the Regulation 9 is a substantive Regulation for additional capitalization both for the existing projects and also for the new projects. According to learned counsel for the NTPC, any capital expenditure incurred in the existing thermal power station could be claimed as per the last proviso to Regulation 7 (2) and Regulation 9 would not govern this. We are unable to agree with the contention of the learned counsel for the NTPC for the following reasons:*
>
> *Regulation 7 regarding capital cost covers both the existing as well as new power projects. Regulation 7(1) stipulates that the capital cost of a project would include the expenditure incurred or projected to be incurred upto the COD, capitalized initial spares subject to the*

specified ceiling and additional capital expenditure determined under Regulation 9. This would apply to the existing projects which achieved COD before 1.4.2009 and new projects which attain COD on or after 1.4.2009. Regulation 7(2) stipulates that the capital cost as admitted by the Commission after prudence check shall form the basis for determination of tariff. This also applies to both the existing and new projects. The 1st and 2nd proviso to Regulation 7(2) deal with prudence check of capital cost. 3rd, 4th, 5th and 6th proviso to Regulation 7(2) deal with capital cost of hydro projects. The 7th proviso deals with the ceiling of determination of tariff on the basis of provision in power purchase agreement or transmission service agreement. The last proviso only indicates that in case of existing projects, the capital cost admitted by the Commission prior 1.4.2009 duly trued up by excluding un-discharged liabilities and the additional capital expenditure projected to be incurred for the respective year of the tariff period 2009-14, as may be admitted by the Commission shall form the basis for determination of tariff. The last proviso does not say that any additional capital expenditure incurred or projected to be incurred by the generating company in the existing power stations for successful and efficient plant operation could be permitted. Further, the capital cost as defined in Regulation 7(1) does not show that it would include the additional capital expenditure for existing projects as determined under the last proviso to Regulation 7 (2). The definition of capital cost only includes the capital cost upto the COD as admitted by the Central Commission, capitalized initial spares and additional capital expenditure determined under Regulation 9. Thus, the additional capitalization even in case of an existing power station can be considered by the Central Commission as per the provisions of Regulation 9 only.

29. We do not find merit in the contention of Shri M.G. Ramachandran, learned counsel for the NTPC that the additional capitalization has to be allowed for the existing power stations as per the last proviso to Regulation 7(2) and Regulation 9 regarding additional capitalization only pertains to new power projects and does not deal with existing projects except to a limited extent provided in Regulation 9(2). Therefore, we are of the view that the additional capitalization in case of existing power projects whose cut- off date is achieved after 1.4.2009 and new power projects within the original scope of work has to be admitted by the Commission subject to prudence check under Regulation 9(1). Similarly the capital expenditure after the cut-off date for both existing power stations and new projects has to be decided by the

Commission according to Regulation 9(2). There is nothing in Regulations 7 & 9 which would indicate that Regulation 9 is generally applicable only to the new projects and last proviso to Regulation 7(2) would be applicable to the existing projects for deciding additional capitalization.

…… ……. ……. …….

38. According to Shri Ramachandran, learned counsel for NTPC, Regulation 9 does not specify that besides Regulation 9(1) and (2) no other additional capitalization shall be admissible. Even in terms of Regulation 5 and 6, there is no limitation of the additional capitalization being only limited to Regulation 9 and not covering any other aspect. We are not able to accept the above contention of Shri Ramachandran because firstly, Regulation 9 is a substantive provision for additional capitalization. Secondly, Regulation 7(1) clearly indicates that the capital cost will include the capital expenditure incurred or projected to be incurred upto the CoD, capitalized initial spares subject to the specified ceiling and additional capital expenditure determined under Regulation 9. There is no other component of additional capitalization other than that provided for in Regulation 9 which has to be included in the capital cost as per Regulation 7(1). Thirdly, the explanation given in Statement of Reasons for 2009 Tariff Regulations and Statement of Reasons for amendment dated 21.6.2011 clearly indicate that the Central Commission had not agreed to provide for additional capital expenditure on new works not within the original scope and expenditure on minor assets but instead provided for compensation allowance under Regulation 19(e). Fourthly, the Regulation 5 and 6 provides for application to be made by the generating company for determination of tariff including the claim for additional capital expenditure and truing up of capital expenditure including the additional capital expenditure upto 31.3.2014 in the next tariff period. These Regulations do not provide for as to how the additional capitalization will be allowed. How the additional capitalization has to be admitted by the Commission is specified only under Regulation 9.

39. In view of above, the first issue is decided as against the Appellant.

…… ……. ……. …….

48. We find that Regulation 18 provides that the working capital shall cover inter alia, maintenance spares @ 20% of O&M expenses specified in regulation 19 and operation & maintenance expenses for one month. Sub-clause (a) of Regulation 19 specifies the normative

O&M expenses for coal based generating stations given in terms of Rs. lakh/MW. The norms for O&M expenses are not based on a percentage of the capital cost. Sub-clause (b) of Regulation 19 provides for O&M expenses allowed for certain old thermal power projects of NTPC and DVC. The compensation allowance provided in Regulation 19(e) is to meet the expenses on new assets of capital nature. Therefore, we find no merit in the contention of NTPC for inclusion of compensation allowance in normative O&M expenses for computing the working capital requirement. Thus, we do not find any infirmity in the impugned order of the Central Commission in not including the compensation allowance in the O&M expenses while computing the working capital requirement."

22. This Appellate Tribunal while interpreting the Regulation 9 of the Tariff Regulations, 2009 in its judgment dated 11th April, 2014 in Appeal No. 188 of 2013 titled NTPC Limited Vs. Central Electricity Regulatory Commission & Ors., held as under:

"The Appellant cannot legally question or challenge the interpretation of Regulation 7 & 9 of the Tariff Regulations, 2009 which has already been settled or answered by this Appellate Tribunal vide judgment dated 27.01.2014 in Appeal No. 44 of 2013. This Tribunal in its judgment dated 27.01.2014 has clearly observed that additional capitalization has to be allowed only according to Regulation 9 of Tariff Regulations, 2009 which will apply to both existing and new power projects. We also affirm the same view of this Tribunal as recorded in our judgment dated 27.01.2014 in Appeal No. 44 of 2012".

23. In view of the above discussions, we observe that the learned Central Commission has rightly disallowed the capital expenditure on purchase of generator transformer during FY 2009-14 on just and legal ground that the damaged generator transformer was replaced by the spare generator transformer which was already available at the generating station of the appellant and the expenditure on the spare transformer had already been considered in the capital cost for FY 2002-03. The learned Central Commission has correctly and legally interpreted and given effect to the Regulations 7 & 9 of Tariff

Regulations, 2009. We agree to the findings recorded by the learned Central Commission in the impugned order. Accordingly, issue nos. (i), (iv) & (v) are decided against the appellant.

24. **ISSUE NO.(II)**

(i) As per the submissions of learned counsel for the appellant, the learned Central Commission has not allowed the additional capital expenditure on Energy Monitoring System on the ground that the alleged reduction in auxiliary power consumption due to energy monitoring system is not passed on to the beneficiaries. The Central Commission did not consider the fact that the expenditure was claimed for energy monitoring system as per the requirements of the Central Electricity Authority, vide Notification, dated 17.3.2006, which was on account of the statutory mandate. The consideration of passing on the benefit to the beneficiaries is an irrelevant act because the said claim would squarely fall within the ambit of change in law in Regulation 9(2)(ii) of the Tariff Regulations, 2009, which Regulation 9 (2) (ii) does not say that the expenditure will be allowed only if there is no otherwise any savings to NTPC.

In the same way the Central Commission has not allowed the capital expenditure on the balance of civil works during 2009-14 on the ground that this exception is not covered under the purview of Regulation 9 (2) of Tariff Regulations, 2009 and also on the ground that such expenditure was incurred and the asset was capitalized after the cut-off date, as per Regulation 9 (2) of the Tariff Regulations, 2009.

(ii) The other contention of the appellant on this issue is that the Central Commission ought to have considered the issues from the point of view of commercial entities, but it has proceeded on a theoretical basis that NTPC had sufficient time to complete.

(iii) Refuting the aforesaid contention of the appellant, the respondents have contended that the alleged claim of Rs. 48,00,000/- is against the expenditure towards 'Energy Monitoring System' which has been disallowed on the ground that the benefit of reduction in the auxiliary power consumption due to energy monitoring system is not passed on to the beneficiaries during the tariff period 2009-14 after the study of the CEA notification dated 17.03.2006. The relevant part of the impugned order is quoted as under:-

> *"25. The petitioner vide its affidavit dated 13.01.2011 has submitted the details of the expenditure along with supporting documents in justification of its claim under Regulation 9(2) (ii) of the 2009 Tariff Regulations. The respondent, TNEB has submitted that the expenditure claimed by the petitioner under this head is in the nature of computer and is covered under Regulation 19(e) of the 2009 Tariff Regulations. The petitioner has claimed expenditure of Rs. 100.00 lakh during 2010-11 towards ambient air monitoring & control and Rs. 48.00 lakh during 2010-11 towards Energy Monitoring system under this head. The petitioner has submitted that these are statutory requirement for air pollution monitoring and control and energy monitoring respectively. It has also submitted that the installation and commissioning of the ambient air monitoring & control system got delayed since the locations of the AAQMS stations are outside the main plant and commissioning could not be completed due to non-availability of proper security at such distant locations. As regards Energy Monitoring System, it has been submitted that as per CEA notification dated 17.03.2006 all LT & HT equipments need to have separate*

meters to measure and monitor the energy consumption of various equipments and the delay is on account of shut down required for installation. We have considered the submissions. We are of the considered view that expenditure towards Energy Monitoring System cannot be allowed and should be borne by the petitioner since the benefit of reduction in the auxiliary power consumption due to energy monitoring system is not passed on to the beneficiaries during the tariff period 2009-14. We order accordingly. However, the expenditure incurred towards ambient air monitoring is in compliance with the statutory requirements and the same is allowed to be capitalized."

The appellant, in order to get double benefit, intends to pass on the additional capital expenditure to the beneficiaries and also enjoyed the fruits of the reduction in the auxiliary consumption which is norm based and hence the Commission has dealt with this issue in an equitable manner.

(iv) The learned counsels for the respondents have further submitted that the alleged claim of Rs. 2321 lakh is against the civil and other works, which were not completed by the appellant within the cut off period, in spite of the extension of time allowed by the Commission. The appellant cannot take advantage of its own lapses by not completing the work during the tariff period 2004-09 and the net result is that the additional capitalization, on this account during 2009-14 tariff period, is not allowed under Regulation 9(2) of the Tariff Regulations, 2009. The Commission has, therefore, rightly rejected the claim of the appellant, vide para 37 of the impugned order, which is quoted below:-

"37. The petitioner has claimed total expenditure of Rs. 2321 lakh in respect of balance works (as at sl.nos 1 to 3 of the table above) namely, civil works in PTS, boundary wall, quarters, roads balance work in training center etc. which are within the original scope of work. The respondent GRIDCO

has submitted that the petitioner has not submitted any document indicating that the proposed additional capitalization is part of the original scope of work and adequate amount is available to undertake the said work within the original scope. The petitioner has claimed total expenditure of Rs. 107 lakh (Rs. 98 lakh in 2009-10 and Rs. 9 lakh in 2010-11) (as at sl.no 4 of the table above) towards the Supply, transport, erection, commissioning of switchgear panels for inter connection job at 11 KV station bus level & cable laying works which are within the original scope of work. The petitioner has claimed total expenditure of Rs. 365 lakh during the period 2009-11 in respect of certain assets like Air Compressor, rotating element of CEP, 400 kV Breaker and CW pump Motor (as at sl.nos 5 to 8 of the able above), which are in the nature of spares. The matter has been examined. It is observed that the Commission by its order dated 29.12.2011 in Petition No.179/2004 had extended the cut-off date of the generating station to 31.3.2008 in terms of the direction of the Tribunal after relaxation in terms of Regulation 12 of the 2004 Tariff Regulations. Also, the provisions of Regulation 9(2) of the 2009 Tariff Regulations do not provide for capitalization of these assets after the cut-off date. In view of this, the expenditure claimed as above in respect of the balance works/spares are not allowed to be capitalized."

(v) The additional capitalization on this account is not covered under Regulation 9(2) of the Tariff Regulations, 2009, as the required civil work and other works were required to be done within the cut –off date, falling within tariff period 2004-09 and the appellant must realize that it is functioning in a regulatory environment and it is in its interest to follow such regulations and not following the regulations by the appellant would be at its own peril.

(vi) After considering the aforesaid rival submissions of the learned counsel for the parties, we agree to the submissions raised on behalf of the respondents and we also agree to the findings, recorded in the impugned order,

by the learned Central Commission, whereby the learned Central Commission has rightly disallowed the aforesaid claims. The Issue No. (ii) is hereby decided against the appellant.

25. **ISSUE NO. (III)**

PURCHASE OF ADDITIONAL LOCOS & WAGONS

(i) According to the appellant, the learned Central Commission has wrongly disallowed the additional capital expenditure on purchase of additional locos and wags on the ground that the station is achieving 85% Plant Load Factor (PLF) with the current arrangement. Further contention of the appellant on this issue is that the Central Commission has not considered the peculiar aspects of the case justifying the requirement of locos and wagons under Regulation 9 (2) (vii) of Tariff Regulations, 2009 which provides for claim against any modification in fuel receipt system due to non-materialization of coal linkage beyond the control of generating station. The additional wagons and locos are required as an integral part of the transportation of coal. While, the Central Commission has allowed the expenditure related to MGR System, but it has not allowed the procurement of wagons and locos required. Prior to the commencement of the supply of coal from Kaniha Mines, NTPC was procuring coal, besides the Lingaraj Mines, from other mines such as IB Valley, Talchar Coal Field and the appellant/NTPC had been using the locos and wagons from the Indian Railways for transportation of coal from such other mines. NTPC has necessarily to procure wagons and locos for Lingaraj and Kaniha Mines, without locos and wagon facility from

the Indian Railways. The locos and wagons are necessary to optimize the cycle time in view of the shifting of coal source to Kaniha Mines and non availability of the wagons from the Indian Railways. In addition to it , NTPC is required to import, from time to time, coal on account of the shortage in coal availability from the linked mines and the imported coal need to be transported from Paradeep Port, again necessitating procurement of wagons and locos. The mere availability of MGR system (i.e. track etc.) should not be the basis for disallowance of the expenditure against the procurement of locos & wagons.

Refuting the aforesaid contention of the appellant, it has been argued on behalf of the respondents that the said claim towards purchase of wagons and locos was disallowed by the Central Commission as this generating station of the appellant was already achieving the 85% of PLF with the current level of arrangement. The normal tendency of the generating company, driven by cost plus tariff, is to have as much assets as possibly they can, irrespective of their utilization as the Central Commission, after considering all other aspects of the issue including the CEA recommendation, may allow and the Central Commission has rightly disallowed the additional capitalization of the assets which are expected to remain idle. The Central Commission in the impugned order, in para 32, has observed as under:

> *"32. The petitioner has claimed total expenditure of Rs.4528 lakh (Rs.2124 lakh for 2010-11 and Rs. 2404 lakh for 2011-12) towards the purchase of additional locos and wagons to reduce cycle time of rakes. The petitioner has submitted that CEA vide its letter dated*

22.2.2008 had recommended the procurement of these additional wagons and locos as coal from linked mine is not available. It has also submitted de-capitalization of some old condemned wagons have been approved by the Commission. The respondent GRIDCO in its reply dated 2.6.2011 has submitted that the requisite amount of coal to the generating station would never be met from the Kaniha coal mines in the past and therefore additional assets in rolling stock would most likely be idle assets for which beneficiaries would not like to pay. It has further submitted that CEA has incorporated the additional rolling stock under R&M and hence the petitioner is required to file a separate application under Regulation 10 of the 209 Tariff Regulations. It has thus prayed that the claim of the petitioner may be taken out of the petition. In response, the petitioner has submitted that the requirement of additional rolling stock is to cater to the increased coal requirement due to higher PLF and to meet the demand of additional power to the respondents. It has also submitted that CEA had approved the procurement and therefore Regulation 10 has no relevance. We have examined the matter. It is noticed that MGR system to Kaniha Mines is being installed to receive coal from the linked mines. With the current arrangement of coal receiving system for the generating station, it is noticed that the generating station has been achieving 85% PLF. Based on the additional capitalization allowed for MGR system to Kaniha mines as stated in the above para, the coal for the generating station would be received through MGR from the linked mines (Kaniha) in future. In view of this, we do not feel the requirement of additional rolling stock/wagons at this stage, which would only burden the beneficiaries. Accordingly, the prayer of the petitioner for capitalization of the said expenditure under this head is not allowed."

(ii) The learned counsel for the respondents, having taken us through the Tariff Regulations 2009, have vehemently argued that as per the appellant, the said claim has been made under Regulation 9 (2) (vii) of the Tariff Regulations, 2009 (2nd Amendment) but this Regulation provides for

modification required fuel receipt system like wagon tippler at the generating station arising due to non-materialization of full coal linkage in respect of thermal generating station and not the coal transport system containing the rolling stock/wagons.

After giving serious consideration to the rival submissions and having a look at the relevant part of the impugned order, we do not find any force in the submissions made by the appellant. We agree to all the findings recorded on this issue in the impugned order and there is no reason to deviate there-from. This issue is also decided against the appellant.

26. **ISSUE NO. VI**

In this matter, the Review Petition seeking review of the impugned order dated 28.05.2013, has been filed on 18.07.2013, and the instant Appeal has also been filed on 22.07.2013 after filing of the review petition. Thus, the instant Appeal has been filed after four days of the filing of the Review Petition. The admitted position, as on today, is that the Review Petition as well as the instant Appeal, both are pending against the impugned order. According to the appellant, both the Review Petition as well as Appeal can go on simultaneously and there is no legal bar in simultaneous continuance of both of them. The settled position of law, as also admitted by the learned counsel for the rival parties, is that if an Appeal is decided prior to the decision in Review Petition, the Review Petition will not be maintainable and thereafter the Review Petition will then be dismissed without any further orders.

Since all the issues have been decided against the appellant, it is not necessary for us to go into the controversy of maintainability of

both the Review Petition as well as the Appeal simultaneously. Since all the issues, as held above, have been decided against the appellant and the Appeal has no merits and is liable to be dismissed, the result would be that the Review Petition would then be dismissed without any further order, if any, pending before the learned Central Commission.

Consequently, the Appeal does not hold water and merits dismissal.

27. **SUMMARY OF FINDINGS**

(i) The learned Central Commission has not committed any illegality or perversity in disallowing the additional capital expenditure on purchase of generator transformer during tariff period 2009-14 on the ground that new generator transformer will only be used as a spare.

(ii) The learned Central Commission has also not committed any illegality or perversity in disallowing the additional capital expenditure on Energy Monitoring System (EMS) and balance Civil Works during 2009-14, on the ground that this is not covered under the purview of Regulation 9 (2) of Tariff Regulations, 2009. The Central Commission has correctly interpreted the Regulations 7 & 9 of Tariff Regulations, 2009. The Central Commission's view to these Regulations is justifiable and proper and we also agree to the same interpretation.

(iii) The expenditure on additional capital expenditure on purchase of additional locos and wagon is not permissible under Regulation 9(2)(vii).

28. When the Review Petition as well as the Appeal, against the same impugned order are pending, if Appeal is decided first, the Review Petition is liable to be dismissed without any further orders.

29. In view of foregoing discussions, the instant Appeal is dismissed as it has no merits and the impugned order dated 28.05.2013, passed by the learned Central Commission is hereby upheld. No order as to costs.

PRONOUNCED IN OPEN COURT ON THIS 8TH DAY OF MAY, 2014.

(Justice Surendra Kumar)	**(Rakesh Nath)**
Judicial Member	**Technical Member**

√ **REPORTABLE/~~NON-REPORTABLE~~**

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