

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 39 of 2013

Dated: 26th September, 2013

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

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

... Appellant (s)

Versus

1. Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001
2. Delhi Transco Limited,
Shakti Sadan, Kotla Road Near ITO,
New Delhi-110 002
3. Tata Power Delhi Distribution Ltd.,
33 KV Substation, Hudson Lines,
Kingsway Camp,
Delhi-110 009
4. BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place,
New Delhi-110 019.
5. BSES Yamuna Power Limited,
Shakti Kiran Building,
Karkardooma, Delhi-110 092
6. New Delhi Municipal Council,
Palika Kendra, Sansad Marg,
New Delhi-110 001.

...Respondent(s)

Counsel for Appellant(s) : Mr. M.G. Ramachandran
Ms. Swagatika Sahoo

Counsel for the Respondent(s): Mr. R.B. Sharma for R-4

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by NTPC Ltd. against the order dated 10.12.2012 passed by the Central Electricity Regulatory Commission (“Central Commission”) in Review Petition no. 3 of 2011 in Petition no. 194 of 2009 whereby the Central Commission has partly allowed the Review Petition and revised the fixed charges for the period 2006-09 on account of additional capital expenditure incurred during this period in respect of Badarpur Thermal Power Station.

2. The Central Commission is the Respondent no. 1. The beneficiaries of Badarpur Thermal Power Station are Respondent nos. 2 to 6.

3. The brief facts of the case are as under:

3.1. NTPC is a generating company. One of the generating stations of NTPC is Badarpur Thermal Power Station with total capacity of 705 MW comprising three units of 95 MW each (Stage-I) and two units of 210 MW each (Stage-II). Badarpur Thermal Power Station had achieved commercial operation on 1.4.1982. The generating station was not owned and established by NTPC from the beginning, but was vested with NTPC only in the year 2006 by the Government of India.

3.2 The tariff of Badarpur Thermal Power Station for the period from 1.4.2004 to 31.3.2009 was determined by the Central Commission on 9.5.2006 according to its 2004 Tariff Regulations. On 25.08.2009, NTPC filed Petition no. 194 of 2009 before the Central

Commission for revision of the fixed charges for the period 2006-09 on account of additional capital expenditure incurred by NTPC during this period.

3.3 On 28.09.2010, the Central Commission passed an order determining the impact of additional capital expenditure incurred by NTPC during 2006-09 on the fixed charges of Badarpur Station and accordingly, re-determined the tariff for the Station. However, certain expenditure including the expenditure incurred on replacement of condenser tubes of 210MW unit of Stage-II was disallowed. The capitalization of expenditure incurred on replacement of condenser tubes was disallowed on the ground that the same is covered in the operation & maintenance cost already allowed by the Central Commission.

3.4 On 19.11.2010, NTPC filed a Review Petition no. 3 of 2011 before the Central Commission for review of order dated 28.09.2010 in respect of disallowance of certain costs.

3.5 The Central Commission by order dated 10.12.2012 partly allowed the Review petition on certain issues. However, on the issue of capital expenditure on replacement of condenser tubes for Stage-II, the Central Commission rejected the Review petition filed by the NTPC.

3.6 Aggrieved by the order dated 10.12.2012 passed by the Central Commission, NTPC has filed the present Appeal.

4. NTPC has made the following submissions in support of its claim for capitalization of the

expenditure incurred on replacement of condenser tubes for the 210 MW unit-4 at Badarpur:

- (a) NTPC has undertaken Renovation and Modernization of the 210 MW Units under Stage-II of Badarpur Thermal Power Station as per the Renovation & Modernization Scheme approved by the Central Electricity Authority ('CEA'). In terms of the Scheme, the condenser re-tubing of Rs. 10 crores each for Unit- 4 & Unit-5 of Stage-II was approved.
- (b) Accordingly, complete condenser tubes replacement of 15,620 tubes (in both the passes A & B) was done in Unit-4 under the Renovation & Modernization Programme. The expenditure was not for keeping condenser

tubes as capital spares for replacement of tubes from time to time.

- (c) The total replacement of all condenser tubes does not form part of the revenue expenses of NTPC to be incurred in the Operation & Maintenance expenses, but is an expenditure of capital nature which is required to be considered for capitalization by the Central Commission, after prudence check.

- (d) The condenser tubes forming part of the capital spares referred to in the impugned order for an amount of Rs. 534.32 lakhs relating to the year 2006-07 is with regard to Badarpur Thermal Power Station Stage-I (3x95MW) and such expenditure under Stage-I was not considered as capital

expenditure as the units had lived their utility and there was no Renovation & Modernization Scheme approved for these units. Therefore, the expenditure of Rs. 534.32 lakhs incurred for replacement of condenser tubes during the period 2006-07 was not considered as a capital expenditure and was included in the normative Operation & Maintenance base of 2009-14, which was formed on the basis of Operation & Maintenance data furnished to the Central Commission for the period 2003-04 to 2007-08.

- (e) The Central Commission has misconstrued the issue relating to Stage-I capital spares with Stage-II where condenser tubes were changed wholesale under the approved Renovation and Modernization Scheme.

- (f) The expenses of Rs. 839.66 lakhs claimed by the Appellant in the present appeal in terms of the R&M Scheme for Stage-II was not included in the O&M expenditure for 2007-08 while submitting the data for the period 2003-04 to 2007-08 by NTPC to the Central Commission for the purpose of determining the normative O&M expenditure for the period 2009-14.
- (g) While the day-to-day expenditure on maintenance and repair need to be treated as part of the O&M expenses, a substantial expenditure of capital nature, which adds value to the capital blocks of asset, cannot be treated as part of the O&M expenses.

5. BSES Rajdhani Power Limited, the Respondent no. 4 herein, submitted that the replacement of the condenser tubes on account of wear & tear is an O&M expense as these tubes are required to be maintained regularly to avoid corroding, thinning and the replacement in the event of punctures leading to cooling water leakage into the steam condensate and, therefore, the Central Commission has rightly concluded that these expenses are under O&M expenses and cannot be capitalized. Regarding approval of the Central Electricity Authority for Renovation & Modernization Scheme, the Respondent no. 4 has submitted that the role of the CEA is confined to the technical needs of the plant but the capitalization and the recovery of such expenses through tariff is within the ambit of the Central Commission. Further the Central Commission has

already provided higher O&M expenses for Badarpur Thermal Power Station compared to other Power Stations of similar size. Therefore, the replacement of condenser tubes has to be met out of the O&M expenses allowed by the Central Commission.

6. We have heard Shri M.G. Ramachandran, learned counsel for the Appellant and Shri R.B. Sharma, learned counsel for the Respondent no. 4.

7. The only question that arises for our consideration in this Appeal is this: “whether the expenditure incurred by NTPC for replacement of all the condenser tubes of Unit 4 of Badarpur Thermal Power Station during the FY 2007-08 is to be considered as additional capital expenditure or it has to be treated as covered in the O&M expenses already

approved by the Central Commission for the year 2007-08 in its earlier order for 2004-09?”

8. We find that in the petition no. 194 of 2009 filed by the NTPC before the Central Commission, NTPC had claimed for additional capitalization *inter alia*, on account of replacement of condenser tubes for 210MW unit for the FY 2007-08, amounting to about Rs. 839 lakhs and corresponding de-capitalization of Rs. 83.9 lakhs. It was indicated by NTPC that the condenser tubes had got totally corroded, thinning had taken place causing tube punctures leading to cooling water leakage into the steam condensate and with the replacement of condenser tubes, the station had been able to maintain high generation levels.

9. Let us now examine the findings of the Central Commission in its main order dated 28.9.2010 passed

in Petition No. 194 of 2009. The relevant extracts are as under:

“From the details regarding the consumption of capital spares during the year 2006-07 submitted by the petitioner vide affidavit dated 11.1.2010, it is observed that the condenser tubes amounting to Rs. 534.32 lakh has been consumed during the year. As O&M norms specified by the Commission for the period 2004-09, provide for expenditure on this count, the said expenditure is covered under O&M expenses, and has not been allowed”.

Thus, the Central Commission rejected the claim of NTPC for capitalization of the expenditure incurred on replacement of condenser tubes of 210 MW unit on the ground that during the year 2006-07, condenser tubes amounting to Rs. 534.32 lakh have been consumed and as O&M norms specified by the Central Commission for the period 2004-09 provide for expenditure on this count, the said expenditure is

already covered under O&M expenses allowed by the Central Commission in the tariff order for 2004-09.

10. We find that in the Review Petition No. 3 of 2011 filed by NTPC, it was submitted by NTPC that the expenditure on replacement of condenser tubes for 210 MW of Stage-II has been incurred in terms of the R&M Schemes approved by the CEA and the condenser tubes have been replaced in order to maintain high generation levels at Badarpur Thermal Power Station. It was further submitted that the expenditure of Rs. 534.22 lakhs incurred in 2006-07 as referred to in the main order dated 28.09.2010 was incurred for Stage-1 Units i.e. Unit nos. 1, 2 & 3 and this revenue expenditure for Stage-1 Units has been used by the Central Commission while finalizing O&M norms for the period 2009-14 and not for 2004-09.

Also this expenditure on Stage-1 Unit has not been capitalized.

11. Let us now examine the findings of the Central Commission in the impugned Review Order dated 10.12.2012. The relevant extracts are as under:

“13. The submissions of the parties have been examined. It is observed that the petitioner has sought to justify the capitalization of this asset based on the grounds which had already been raised in the original petition and rejected by the Commission on prudence check. In short, the petitioner has sought to reopen the case on merits, which had already been considered and disposed of by the Commission by order dated Order dated 28.9.2010. This is not permissible in review. The Commission by a conscious decision had disallowed the capitalization of the asset, on prudence check, based on the submissions of the petitioner. Moreover, the petitioner has not demonstrated the existence of any error apparent in the face of the order or the existence of any new

or important matter which was not within the knowledge of the petitioner and which after due diligence could not produced by the petitioner at the time of passing the order dated 28.9.2010. Hence, we are of the view that the grounds raised by the petitioner do not fall within the scope of review under Rule 1 Order 47 of the CPC. Therefore, the prayer of the petitioner is rejected and review on this ground fails”.

Thus, the Central Commission rejected the claim of the Appellant in the Review Petition on the ground that the NTPC has not demonstrated the existence of any error apparent on the face of record.

12. Before considering the issue, let us examine the provisions of the Regulation regarding additional capitalization. The relevant Regulation is Regulation 18 of 2004 Regulations which is reproduced as under:

“Additional Capitalization:

(1) The following capital expenditure within the original scope of work actually incurred after the date of commercial operation and up to the cut off date may be admitted by the Commission, subject to prudence check:

- (i) Deferred liabilities;*
- (ii) Works deferred for execution;*
- (iii) Procurement of initial capital spares in the original scope of work, subject to ceiling specified in regulation 17;*
- (iv) Liabilities to meet award of arbitration or for compliance of the order or decree of a court; and*
- (v) On account of change in law;*

Provided that original scope of work alongwith estimates of expenditure shall be submitted alongwith the application for provisional tariff.

Provided further that a list of the deferred liabilities and works deferred for execution shall be submitted alongwith the application for final tariff

after the date of commercial operation of the generating station”.

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

- (i) Deferred liabilities relating to works/services within the original scope of work;*
- (ii) Liabilities to meet award of arbitration or for compliance of the order or decree of a court;*
- (iii) On account of change in law;*
- (iv) Any additional works/services which have become necessary for efficient and successful operation of the generating station, but not included in the original project cost; and*
- (v) Deferred works relating to ash pond or ash handling system in the original scope of work.*

(3) Any expenditure on minor items/assets like normal tools and tackles, personal computers, furniture, air-conditioners, voltage stabilizers, refrigerators, fans, coolers, TV, washing machines, heat-convectors, carpets, mattresses etc. brought after the cut off date shall not be considered for additional capitalization for determination of tariff with effect from 1.4.2004.

The list of items is illustrative and not exhaustive.

(4) Impact of additional capitalization in tariff revision may be considered by the Commission twice in a tariff period, including revision of tariff after the cut off date.

Note-1

Any expenditure admitted on account of committed liabilities within the original scope of work and the expenditure deferred on techno-economic grounds but falling within the original scope of work shall be serviced in the normative debt-equity ratio specified in regulation 20.

Note-2

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

Note-3

Any expenditure admitted by the Commission for determination of tariff on account of new works not in the original scope of work shall be serviced in the normative debt-equity ratio specified in regulation 20.

Note-4

Any expenditure admitted by the Commission for determination of tariff on renovation and modernization and life extension shall be serviced on normative debt-equity ratio specified in regulation 20 after writing off the original amount of the replaced assets from the original project cost.

13. According to the above Regulations any additional works/services which have become necessary for efficient and successful operation of the generating station could be admitted as additional capitalization. Further, any expenditure on replacement of old assets shall be considered after writing off the gross value of the original assets from the original project cost except the minor items/assets as listed in clause (3) of the Regulation. The Regulations also specify that the expenditure admitted on renovation & modernization and life extension will be serviced after writing off the original amount of replaced assets from the original project cost.

14. Let us now examine the O&M expenditure allowed by the Central Commission to Badarpur Station for the period 1.4.2004 to 31.3.2009 by the order dated 9.5.2006. The O&M norms for the period 2004-09

were not laid down for Badarpur in the 2004 Tariff Regulations but were decided separately by this order. NTPC had claimed O&M expenses of Rs. 208.69 crores for 2006-07 and Rs. 217.04 crores for 2007-08 based on the actual expenses for the period 1998-99 to 2002-03. However, the Central Commission decided O&M expenses of Rs. 142.75 crores per year without any escalation for the period 2004-05 to 2008-09 considering scope for reduction in O&M expenses. Thus, it cannot be said from this order that the cost of en-masse replacement of the condenser tubes of Stage-II units had been included in the O&M expenses approved by the Central Commission.

15. It is also seen from the tariff order dated 9.5.2006 that as regards Renovation & Modernization of Stage-II, NTPC had submitted that CEA had already approved an R&M expenditure of Rs. 329 crores which

is likely to extend life of the generating station by about 15 years. In this order, the Central Commission held that it had no objection to R&M of Stage-II, in principle, in view of CEA approval and the R&M expenditure for Stage-II can be admitted after prudence check as per the usual practice of the Central Commission.

16. We also find from the Petition of the NTPC filed before the Central Commission for additional capitalization being Petition no. 194 of 2009 that NTPC had submitted the details of exclusions from additional capitalization for the year 2006-07 which inter alia, included the capital spares for Stage-I amounting to Rs. 55287614 as spares required for safety against breakdown and to avoid long outages of units. It was stated that it was necessary to maintain stock of these spares in the capital accounts of spares.

It was further stated that the impact of expenditure on these spares would be claimed as part of the O&M expenditure as and when these spares are consumed. According to the NTPC, the expenditure on condenser tubes of Rs. 534.32 lakhs was included in the amount of Rs. 552.8761 lakhs for capital spares referred to in the list of exclusions.

17. As rightly pointed out by NTPC, the amount of Rs. 534.32 lakhs as capital spares for Stage-I Units has not been claimed as capital expenditure but has been excluded from the additional capital expenditure claimed by NTPC.

18. It is also clear from the letter dated 22.2.2008 from CEA, that the condenser re-tubing for Unit nos. 4 & 5 (210 MW Units of Stage-II) has been included in the Renovation & Modernization/Life Extension Works

in respect of turbine generator and auxiliaries of the Units 4 & 5 amounting to Rs. 10 crores for each unit. Thus, the replacement of condenser tubes is a part of the Renovation & Modernization and Life Extension Scheme of Stage-II Units. According to the NTPC, they have carried out wholesale replacement of the condenser tubes of Unit no. 4 of Stage-II under Renovation & Modernization Programme.

19. Considering the above, we come to the following conclusion:

- (a) The expenditure of Rs. 552.876 lakhs incurred on capital spares pertains to Stage-I of Badarpur. This amount was not claimed for capitalized and was excluded from additional capitalization.

- (b) The amount of Rs. 839.66 lakhs claimed for additional capitalization pertains to Stage-II units for wholesale replacement of condenser tubes. This amount could not be mixed up with the amount of Rs. 552.876 lakhs incurred on capital spares for Stage-I.
- (c) The en-masse replacement of condenser tubes of Stage-II of Badarpur was not included in the O&M cost as approved by the Central Commission by its tariff order dated 9.5.2006.
- (d) The Renovation & Modernization & Life Extension Scheme as concurred by the Central Electricity Authority includes replacement of condenser tubes for Stage-II Units amounting to Rs. 10 crores for each unit.

- (e) The Tariff Regulations of 2004 provide for capitalization of any additional works/services which have become necessary for efficient and successful operation of the generating stations after the cut off date.

- (f) The 2004 Regulations also specify that any expenditure on replacement of old assets shall be considered after writing off the gross value of the original asset. Further, the expenditure admitted by the State Commission on renovation & modernization and life extension would be serviced after writing off the original amount of the replaced asset from the original project cost.

20. In view of above, the amount incurred by NTPC on replacement of the condenser tubes of Unit-4 of Stage-II is to be considered for capitalization after writing off the cost of the replaced condenser tubes, after prudence check, as per the Tariff Regulations. Accordingly, the matter is remanded to the Central Commission for reconsideration.

21. **Summary of our findings:**

The claim of NTPC for additional capitalization of expenditure incurred on replacement of condenser tubes of Unit no. 4 of Stage-II at Badarpur Thermal Power Station has to be considered according to Regulation 18 of the Central Commission's Tariff Regulations of 2004.

22. In view of above, the Appeal is allowed and the matter is remanded back to the Central Commission

for reconsideration and passing the consequential order as per the directions given above. However, there is no order as to costs.

23. Pronounced in the open court on this **26th day of September, 2013.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE/~~NON-REPORTABLE~~

vs