

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

**Appeal no. 44 of 2012**

**Dated: 27<sup>th</sup> January, 2014**

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

**In the matter of:**

**NTPC Limited,**

NTPC Bhavan, Scope Complex,  
Core-7, Institutional Area, Lodhi Road,  
New Delhi-110 003

... **Appellant**

Versus

1. **Central Electricity Regulatory Commission,**  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building,  
36, Janpath, New Delhi-110 001.
2. **Madhya Pradesh Power Trading Co. Ltd.,**  
Shakti Bhawan, Vidyut Nagar,  
Jabalpur-482008.
3. **Maharashtra State Electricity Distribution Company Ltd.,**  
Pradashgad, Bandra (East),  
Mumbai-400 051
4. **Gujarat Urja Vikas Nigam Limited,**  
Sardar Patel Vidyut Bhawan,  
Race Course Road,  
Vadodra-390 007.
5. **Chattisgarh State Electricity Board,**  
P.O. Sunder Nagar, Danganiya,  
Raipur-492913
6. **Electricity Department,**  
Government of Goa,  
Vidyut Bhawan, Panaji, Goa-403001

7. **Electricity Department,**  
Administration of Daman & Diu,  
Daman-396210

8. **Electricity Department,**  
Administration of Dadra and Nagar Haveli,  
Silvassa-396230

**...Respondent(s)**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran,  
Mr. Anand K. Ganesan,  
Ms. Swapna Seshdri &  
Ms. Swagatika Sahoo

Counsel for the Respondent(s) : Mr. Pradeep Misra,  
Mr. Manoj Kr. Sharma,  
Mr. Daleep Kr. Dhayani  
Mr. Suraj Singh for R-2

## **JUDGMENT**

### **RAKESH NATH, TECHNICAL MEMBER**

This Appeal involves interpretation of Tariff Regulations of 2009 of the Central Electricity Regulatory Commission regarding additional capitalization admissible to generating units in determination of generation tariff.

2. NTPC Ltd., a generating company owned by the Central Government is the Appellant. Central Electricity Regulatory Commission (“Central Commission”) is the Respondent no. 1. The beneficiaries of power from the project of NTPC are the Respondent nos. 2 to 8. The order under challenge in the Appeal is order dated 26.12.2011 passed by the Central Commission in Petition no. 258 of 2009 wherein the tariff applicable to Vindhyachal Super Thermal Power Station Stage II of 1000 MW capacity for the period 1.4.2009 to 31.3.2014 was determined.

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

(A) NTPC has set up a number of generating stations. One of the generating stations of NTPC is Vindhyachal Super Thermal Power Station-II.

(B) The tariff of Vindhyachal II Power Station for the period 2004-09 was determined by the Central Commission vide order dated 21.8.2006 in terms of the Tariff Regulations of 2004.

(C) The Central Commission notified Tariff Regulations of 2009 for the period 2009-14, *inter alia*, providing for the norms and parameters applicable to generating stations for determination of tariff.

(D) NTPC on 5.11.2009 filed a tariff Petition no. 258 of 2009 before the Central Commission for determination of tariff for Vindhyachal Station-II for the period 2009-14 in terms of the Tariff Regulations of 2009. NTPC claimed additional capitalization for the expenditure incurred on installation of some assets.

(E) The Central Commission by its order dated 26.12.2011 disposed of the Petition no. 258 of 2009 and determined the tariff of Vindhyachal Station-II of NTPC for the period 2009-14. In this order, the Central Commission held that in terms of the Tariff Regulations of 2009, additional capitalization is not allowed except for reasons such as change in law, deferred work, etc. The Central Commission also did not allow the capitalization proposed for Online CO<sub>2</sub> Monitoring System on the ground that the reference of the same was not found in environmental consent order. The Central Commission has also not included the compensation allowance under Regulation 19 (e) of the Tariff Regulations of 2009 in computing the working capital. Aggrieved by the impugned order dated 26.12.2011 passed by the Central Commission, NTPC has filed the present Appeal.

4. The submissions made by NTPC are as under:

(A) The additional capitalization during the period 2009-14 under the Tariff Regulations, 2009 is to be considered under the following provisions independent of each other:

- (i) Additional capitalization from the date of commissioning of the power plant/generating units till the cut-off date, as provided in Regulation 9 (1).
- (ii) Additional capitalization after the cut-off date on certain specific aspects including change in law as provided in Regulation 9 (2).
- (iii) In case of existing projects additional capitalization under Regulation 7 (2) – last proviso.
- (iv) Renovation and Modernization after the useful life of the power plant including

alternate or Special Allowance as provided in Regulation 10.

(B) In the above, the claim of NTPC is that the existing Power plants are covered by the last proviso to Regulation 7 (2).

(C) The Central Commission has wrongly proceeded on the basis that last proviso to Regulation 7 (2) dealing with additional capitalization in case of existing projects is restricted to those which are specifically provided under Regulation 9 (2) and is not independent of the additional capitalization covered by Regulation 9(2).

(D) If interpretation of the Central Commission is accepted, namely, that in case of existing projects also provision of Regulation 9(2) would govern additional capitalization, there was no need to have last proviso

to Regulation 7 specifically dealing with additional capitalization in case of the existing projects.

(E) The Tariff Regulations, 2009 apply generally to capital cost based tariff determination i.e. on cost plus basis. The fundamental principle of cost plus tariff is that the entire cost and expenses subject to reasonability and prudent check is to be allowed. In other words, no part of the legitimate capital cost of the generating company or the transmission company should be excluded from being serviced through tariff. The Central Commission has also been consistently from the inception allowing additional capitalization, subject to prudence check.

(F) Regulation 9 deals with the additional capital expenditure in the context of such capital expenditure incurred after the Commercial Operation Date (COD)

upto the cut-off date. Therefore, Regulation 9 generally applies in a limited extent to those generating stations which come into operation during the tariff period 2009-14 and there is a continuation of works or works related liabilities. There is no negative covenant or stipulation in Regulation 9 that no other capitalization will be admissible.

(G) The combined reading of the definition of the capital cost, additional capitalization, Regulation 7 and Regulation 5 and 6 dealing with the application to be filed and truing up would clearly show that the additional capitalization incurred or projected to be incurred from time to time during the period 2009-14 will be admissible, subject to prudent check, notwithstanding that it does not fall under Regulation 9 (1) and (2).

(H) The compensation allowance under Regulation 19 (e) has been allowed as special allowance on minor assets, etc.

(I) NTPC had claimed capitalization of the CO<sub>2</sub> Monitoring System as a consequence of change in law provided in Regulation 9(2) which has been wrongly denied.

(J) The Central Commission has not included the expenditure allowed under Regulation 19 (e) in the operation & maintenance expenditure for the purpose of determining the working capital requirements. The Central Commission has not followed the Regulation 18 in computing the interest on working capital.

5. Madhya Pradesh Trading Co., the Respondent no. 2 has contested the claims of NTPC and supported the findings of the Central Commission. We shall be

dealing with the contentions of the Respondent no. 2 at the appropriate place in this judgment.

6. On the above subject we have heard Shri M.G. Ramachandran, learned counsel for the Appellant and Shri Pradeep Misra, learned counsel for the Respondent no.2.

7. Based on the rival contentions of the parties, the following questions would arise for our consideration:

- i) Whether the Central Commission is correct in holding that no additional capitalization can be allowed except under Regulation 9 of the Tariff Regulations, 2009 for NTPC's existing coal based thermal power station?
- ii) Whether the Central Commission was justified in rejecting the claim of NTPC for additional capitalization of the expenditure

incurred on installation of CO<sub>2</sub> Monitoring System?

- iii) Whether the Central Commission is correct in not including compensation allowance under Regulation 19 (e) of the Tariff Regulations, 2009 in computing the one month operation & maintenance expenditure and 20% maintenance spares for determining the working capital on which interest is admissible under the Tariff Regulations, 2009?

**8. Let us examine the first issue regarding additional capitalization admissible under the Tariff Regulations, 2009.**

9. The main argument of Shri Ramachandran, learned counsel for NTPC is that the additional capitalization in respect of the existing plants is

covered under the last proviso of Regulation 7 and therefore, expenditure incurred on additional capitalization during the period 2009-14 ought to be allowed, subject to prudent check by the Central Commission. Thus, according to him, in case of existing generating stations, the expenditure incurred on additional capitalization is not restricted to provisions of Regulation 9.

10. On the other hand, Shri Pradeep Misra, learned counsel for the Respondent no. 2 has contended that under the Tariff Regulations, 2009, additional capitalization can be claimed only in respect of the eventualities as mentioned under Regulation 9. According to him, the last proviso to Regulation 7 is not a substantive provision under which NTPC can claim additional capitalization and as such additional capitalization cannot be claimed de hors Regulation 9.

Further, the Central Commission has made a separate provision for a fixed compensation allowance under Regulation 19 (e) in the Tariff Regulations, 2009 based on the available data for additional capitalization for NTPC, which is clear from the Object & Reasons for framing the said Regulations and, therefore, no additional capitalization is admissible except that permitted under Regulation 9.

11. Let us first examine the findings of the Central Commission in the impugned order.

12. The findings of the Central Commission arrived at after analysing the Scheme of 2009 Regulations are summarized as under:

(A) The date of commercial operation of the generating station is 1.10.2000. The cut-off date of the generating station has expired and hence the claim

of NTPC for additional capital expenditure has to be considered in terms of Regulation 9(2) of the 2009 Regulations.

(B) Regulation 3 (8) defines the capital cost as defined in Regulation 7. Regulation 7(1) provides that the capital cost shall consist of three elements, namely; (i) the expenditure incurred or projected to be incurred up to the date of commercial operation of the project as admitted by the Commission, (ii) capitalized initial spares subject to the ceiling rates as specified in Regulation 8 and (iii) additional capital expenditure as determined under Regulation 9.

(C) Regulation 7(2) provides that the capital cost admitted by the Commission after prudent check shall form the basis for determination of tariff. The last proviso to Regulation 7 (2) of the 2009 Regulations as amended on 21.6.2011, provides 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 years of the tariff period 2009-14, as may be admitted by the Commission, shall form the basis for determination of tariff.

(D) The proviso to Regulation 7 (2) does not make any exception to the word “Project” to mean new project or existing project. It follows therefrom that additional capital expenditure would be determined under Regulation 9 for new project as well as the existing projects.

(E) Regulation 9 is an independent substantive provision as regards treatment of additional capital expenditure which does not make any distinction

between the existing projects or the new projects. Therefore, the additional capital expenditure irrespective of the fact whether it is for existing project or new project has to be determined under Regulation 9.

(F) The words “as may be admitted by the Commission” in the last proviso to Regulation 7 must be read harmoniously with Regulation 7(1)(c) and Regulation 9. Therefore, in case of existing projects also, additional capital expenditure projected to be incurred for the respective year of the tariff period 2009-14 may be admitted by the Commission having regard to Regulation 9.

(G) The additional capital expenditure for existing generating stations under the last proviso to Regulation 7 (2) needs to be considered only in terms of Regulation 9(1) and 9(2) of the 2009 Regulations.

(H) In so far as the additional works and services that are necessary for efficient and successful operation of the generating station are concerned, the same has been taken care of by Regulation 19(e) which provides for compensation allowance.

(I) In response to the Commission's Notification for amendment of Regulation 9 of 2009 for additional capitalization on Renovation & Modernization (R&M) of Gas Turbines, NTPC had urged for extension of the similar provision for coal based stations stating that the compensation allowance in case of coal based station was not sufficient. However, the Central Commission while amending the provisions of Regulation 9 vide Notification dated 21.6.2011 rejected the prayer of the NTPC.

(J) The provision for compensation allowance allowed for coal based power stations was made in the 2009 Regulations based on the additional capitalization data of the generating stations from 1992 onwards as available with the Commission. The data relied upon by the Commission to arrive at the compensatory allowance in the 2009 Regulations has not been contested by the NTPC. Thus, as per the provisions of Regulation 19 (e), compensation allowance is admissible to meet the expenses of new asset of capital nature, including minor assets.

(K) The last proviso to Regulation 7 (2) carves out an exception in case of existing projects, but it cannot be construed as an exception to other provisions namely Regulation 8 and Regulation 9 of 2009 Tariff Regulations. The words “as may be admitted by the Commission” in the last proviso to Regulation 7 (2) must

be read harmoniously with Regulation 7 (1) (c) and Regulation 9.

13. On the basis of above findings, the Central Commission rejected the interpretation of the Regulations made by NTPC for additional capitalization for existing power stations, as also the claim for additional capitalization except for the assets covered under the provision of Regulation 9.

14. Let us now examine the Tariff Regulations, 2009 notified by the Central Commission on 19.1.2009 as amended by notification dated 21.6.2011.

15. The relevant definitions as per the Regulations are reproduced below:

*“3(3) ‘**additional capitalization**’ 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”.*

*“3(8) ‘**capital cost**’ means the capital cost as defined in regulation 7; ”*

*“3(11) ‘**cut-off date**’ means 31st March of the year closing after two years of the year of commercial operation of the project, and in case the project is declared under commercial operation in the last quarter of a year, the cut-off date shall be 31st March of the year closing after three years of the year of commercial Operation;*

*“3.16 ‘Existing project’ means the project declared under commercial operation from a date prior to 1.4.2009”.*

16. According to above definitions, Vindhyachal STPS Stage II is an existing projects and its cut-off date is prior to 1.4.2009, i.e. the beginning of the control period of the Regulation, 2009. The definition of additional capitalization includes the capital expenditure incurred or projected to be incurred after

Commercial Operation Date (COD) of the project and admitted by the Commission, subject to the provision of Regulation 9.

17. Regulation 7 regarding capital cost of the Tariff Regulation as amended on 21.6.2011 is reproduced below:

**“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:*

*Provided that in case of the thermal generating station and the transmission system, prudence check of capital cost may be carried out based on the benchmark norms to be specified by the Commission from time to time:*

.....

*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 years of the tariff period 2009-14, as may be admitted by the Commission, shall form the basis for determination of tariff”.*

18. Thus, according to Regulation 7(1), the capital cost shall include the expenditure incurred upto the date of COD of the project, capitalized initial spares subject to ceiling rates as per Regulation 8 and additional capital expenditure determined under Regulation 9. Regulation 7(2) stipulates that the capital cost after prudence check shall form the basis for determination of tariff. The first and second proviso to Regulation 7(2) deal with prudence check of capital cost of thermal projects. The third, fourth, fifth and sixth proviso to Regulation 7(2) deal with capital cost of hydro projects. The seventh proviso to

Regulation 7(2) deals with ceiling for determination of tariff.

The last proviso to Regulation 7(2) only stipulates that the capital cost for determination of tariff in case of the existing projects will be based on the capital cost prior to 1.4.2009 i.e. before the commencement of the tariff period 2009-14, and the additional capital expenditure projected to be incurred for the respective year of the tariff period 2009-14.

19. Regulation 8 stipulates the initial spares which could be capitalized subject to the ceiling norms specified as percentage of the original project cost.

20. Regulation 9 regarding Additional Capitalization of the Tariff Regulation as amended on 21.6.2011 is as under:

*“9. **Additional Capitalization.** (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:*

*(i) Undischarged liabilities;*

*(ii) Works deferred for execution;*

*(iii) Procurement of initial capital spares within the original scope of work, subject to the provisions of regulation 8;*

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

*(v) Change in law:*

*Provided that the details of works included in the original scope of work along with estimates of expenditure, undischarged liabilities and the works deferred for execution shall be submitted along with the application for determination of tariff.*

*(2) The capital expenditure 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:*

*Provided that in respect sub-clauses (iv) and (v) above, any expenditure on acquiring the minor items or the assets like tools and tackles, furniture, air-conditioners, voltage stabilizers, refrigerators, coolers, fans, washing machines, heat convectors, mattresses, carpets etc. brought after the cut-off date shall not be considered for additional capitalization for determination of tariff w.e.f. 1.4.2009.*

*“(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-materialization 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.”*

21. Regulation 9(1) stipulates the counts under which the capital expenditure incurred or projected to be incurred within the original scope of work after the COD and upto the cut-off date shall be admitted by the Commission. Thus, the claims for existing projects whose cut-off date is on 1.4.2009 and thereafter and new projects commissioned on 1.4.2009 and thereafter for additional capitalization within the original scope of work can be made under Regulation 9(1) under the heads mentioned at (i) to (v) in the Regulation. As the cut-off date of Vindhyachal Stage II was before 1.4.2009, Regulation 9(1) would not be applicable to Vindhyachal Stage-II project.

22. Regulation 9(2) stipulates the counts under which the capital expenditure incurred shall be admitted after the cut-off date. The heads under which the additional capitalization can be allowed after the cut-off date in a coal based thermal power station are liabilities to meet the arbitral award or order or decree of a court, change in law and deferred works related to ash pond or ash handling system in the original scope of work. However, by amendment dated 21.6.2011 the capital expenditure necessitated on account of modification in fuel receipt system arising due to non-materialization of coal linkage in respect of coal based thermal power station as a result of circumstances beyond the control of the generation station and certain undischarged liabilities will also be eligible for claim under additional capitalization.

23. Regulation 10 provides for expenditure for renovation and modernization of the plant for the purpose of extension of life beyond the useful life of the generating station or a unit thereof. There is also an alternative available to the generating companies under Regulation 10 to opt for special allowance from the date of completion of useful life of a generating unit.

24. Regulation 19 (e) provides for compensation allowance admissible to the projects to meet the expenses on new assets of capital nature.

***“19. Operation and Maintenance Expenses.***

*Normative operation and maintenance expenses shall be as follows, namely:*

.....

*(e) In case of coal-based or lignite-fired thermal generating station a separate compensation*

*allowance unit-wise shall be admissible to meet expenses on new assets of capital nature including in the nature of minor assets, in the following manner from the year following the year of completion of 10, 15, or 20 years of useful life:*

| <i>Years of operation</i> | <i>Compensation Allowance (Rs. lakh/MW/year)</i> |
|---------------------------|--|
| <i>0-10</i>               | <i>Nil</i>                                       |
| <i>11-15</i>              | <i>0.15</i>                                      |
| <i>16-20</i>              | <i>0.35</i>                                      |
| <i>21-25</i>              | <i>0.65”.</i>                                    |

25. Regulation 19 (e) provides for a separate compensation allowance to meet the expenses of capitalization of new assets including minor assets.

26. Harmonious construction of the Regulations would be as under:

(A) Additional capitalization is the expenditure incurred or projected to be incurred, after the date of commercial operation of the project as admitted by the

Central Commission after prudence check, subject to the provisions of Regulation 9.

(B) According to Regulation 7(1) the capital cost for a project shall comprise of: (a) the expenditure incurred or projected to be incurred up to the date of commercial operation of the Project as admitted by the Central Commission after prudence check; (b) capitalized initial spares subject to the ceiling rates as specified in Regulation 8 and (iii) additional capital expenditure as determined under Regulation 9. The last proviso to Regulation 7(2) only indicates that in case of existing projects the capital cost admitted by the Commission prior to 1.4.2009 duly trued up by excluding un-discharged liabilities, if any, and the additional capital expenditure projected to be incurred for the tariff period 2009-14, as may be admitted by the Central Commission, shall form the basis for

determination of tariff. The last proviso to Regulation 7 (2) does not indicate what type of additional capitalization would be admissible to be admitted by the Central Commission. However, Regulation 7(1) clearly indicates that the capital cost shall *inter alia*, include the additional capital expenditure as determined under Regulation 9. Regulation 7(1) does not specify that the additional capital expenditure as determined under the last proviso of the Regulation 7 (2) would also be included in the capital cost.

(C) Regulation 9 stipulates the heads under which additional capitalization can be admitted by the Central Commission. Additional capitalization to be allowed under section 9 has been classified under two categories: (a) capital expenditure incurred or projected to be incurred within the original scope of work, after the date of commercial operation and up to the cut-off

date under Regulation 9(1); (b) capital expenditure incurred after the cut-off date under Regulation 9(2).

(D) Thus, the projects whose cut-off date falls on or after 1.4.2009 can claim additional capitalization within the original scope of work on account of undischarged liabilities, works deferred for execution, procurement of initial capital spares within the original scope of work, subject to the provisions of regulation 8, liabilities to meet the award of arbitration or for compliance of the order or decree of a court and change in law upto the cut-off date. The capital expenditure after the cut-off date can be claimed by the coal based thermal power projects as per Regulation 9 (2) for liabilities to meet award of arbitration or for compliance of the order or decree of a court, change in law and deferred works relating to ash pond or ash handling system in the original scope of work. By amendment dated 21.6.2011, the coal based thermal power project can also claim

additional capitalization for the expenditure necessitated on account of modification in fuel receipt system due to non-materialization of full coal linkage as a result of circumstances beyond the control of the power station and certain undischarged liability.

(E) Thus, Regulation 9 is a substantive Regulation both for the existing projects i.e. the project existing prior to 1.4.2009, as well as for new projects commissioned during the period 2009-14.

(F) Regulation 19 (e) provides for compensation allowance for coal based thermal power projects to meet the expenses on new assets of capital nature.

(G) There is no provision for additional capitalization for coal based thermal power project for any additional work which has become necessary for successful and efficient operation of the plant except for reasons covered under Regulation 9.

27. By amendment dated 21.6.2011, the Central Commission allowed the additional capitalization after the cut-off date for gas/liquid fuel based open/combined cycle thermal generating stations for any expenditure necessary due to obsolescence or non-availability of spares for successful and efficient operation of the stations after 15 year of operation from its COD. The Central Commission by this amendment also provided for additional capitalization of any capital expenditure necessitated on account of modifications required or done in fuel receipt system arising due to non-materialization of full coal linkage in respect of thermal generating station as a result of circumstances not within the control of the generating station. However, no amendment was made for coal based thermal power stations for additional capitalization necessary for successful and efficient

operation of the plant. We notice that NTPC at the time of proposal for amendment to Regulation 9 of 2009 Regulations had made a request for additional capitalization in respect of coal based thermal power stations to be allowed after cut-off date for expenditure incurred for successful and efficient operation of the plant. However, this was rejected by the Central Commission. In this regard, the following has been recorded in the Statement of Reasons for amendment to 2009 Tariff Regulations dated 21.6.2011:

*“28. The expenditures arising out of obsolescence and non availability of spares and assets of minor nature are covered under the compensatory allowance in the 2009 regulations was not contested by NTPC. Instead, NTPC merely sought more compensatory allowance without supporting its claim with any reliable and verifiable data. On this consideration, we do not find any justification for providing similar provision for the coal/lignite*

*based stations or review of compensatory allowance”.*

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 1<sup>st</sup> and 2<sup>nd</sup> proviso to Regulation 7(2) deal with prudence check of capital cost. 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> proviso to Regulation 7(2) deal with capital cost of hydro projects. The 7<sup>th</sup> 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.

30. We also find that in the Statement of Reasons for the 2009 Tariff Regulations dated 3.2.2009, the Central Commission has given explanation on the additional capital expenditure on new assets not in the original scope of work prior to and after cut-off date.

The relevant paragraph is reproduced below:

*“(2) The capital expenditure of the following nature 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) On account of change in law;*

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

*“10.2.2 The above provision was on similar lines as in the Tariff Regulations for 2004-09 except for additional capital expenditure on new assets not in original scope of work prior to and after cut-off date, and deferred liabilities and works after the cut-off date. The generating companies in their comments have sought to allow additional capitalization on new assets not in original scope of work and deferred liabilities and deferred works within the original scope after cut off date.”*

*“10.2.5 As regards new works not within the original scope and expenditure on minor assets, a provision has been made in the regulations dealing*

*with O&M expenses for a compensation allowance starting from 11<sup>th</sup> year from COD of units in respect of coal/lignite based stations as discussed elsewhere in this SOR.”*

31. It is clear from the above explanation that the generating companies had sought additional capitalization for new works not within the original scope and expenditure on minor assets, prior to or after cut-off date under Regulation 9. However, this was not accepted by the Central Commission. The Central Commission, however, allowed a provision in the regulations dealing with operation & maintenance expenses for a compensation allowance starting from 11<sup>th</sup> year from COD of units in respect of coal/lignite based thermal power stations.

32. We find that in the Tariff Regulations, 2009 a provision has been made under Regulation 19(e) for

compensation allowance in respect of coal-based or lignite-fired thermal generating station to meet expenses on new assets of capital nature including in the nature of minor assets. According to Shri Pradeep Misra, learned counsel for Respondent no. 2, instead of allowing additional capitalization in case of existing projects for expenditure necessary for successful and efficient plant operation, the compensation allowance has been provided in the 2009 Regulations which was not available in the 2004 Tariff Regulations.

33. We find that the Central Commission in the Object and Reasons for framing 2009 Regulations has made the following observations regarding compensation allowance:

*“21. Compensation Allowance (Regulation 19)*

*21.1 The draft regulations provided for following compensation allowance in respect of coal/lignite based station.*

| <i>Years of operation</i> | <i>Compensation allowance<br/>(Rs. Lakh/MW)</i> |
|---------------------------|---|
| <i>0-10</i>               | <i>NIL</i>                                      |
| <i>11-15</i>              | <i>0.15.</i>                                    |
| <i>15-20</i>              | <i>0.35</i>                                     |
| <i>20-25</i>              | <i>0.65</i>                                     |

*21.2 Generating companies like NTPC have submitted that amounts of compensation allowance are not sufficient to meet the expenditure on new works required for successful plant operation. NTPC and NLC have sought following compensation allowance.*

| <i>Years of operation</i> | <i>As per NTPC</i> | <i>As per NLC</i> |
|---------------------------|--------------------|-------------------|
| <i>0-5</i>                | <i>0.15</i>        | <i>NIL</i>        |
| <i>6-10</i>               | <i>0.15</i>        | <i>0.1</i>        |
| <i>11-15</i>              | <i>0.25</i>        | <i>0.2</i>        |
| <i>15-20</i>              | <i>0.44</i>        | <i>0.35</i>       |
| <i>20-25</i>              | <i>0.82</i>        | <i>0.65</i>       |

*21.3 NTPC has sought above compensation allowance excluding additional capital expenditure on buildings, road, spares, batteries etc. citing the expenditure in case of Singrauli STPS, though the claims have not supported with any details. The Commission's decision to introduce compensation allowance was based on available data on*

*additional capitalization in the tariff petitions of NTPC stations. For this purpose expenditure on new assets in the nature of Environment Action Plan (EAP), arising on account of change of law or dealing with design deficiency etc has not been considered.*

*21.4 In view of the above, the compensation allowance as proposed in the draft Regulation has been retained as clause (e) of Regulation 19.”*

34. It is clear from the Objects and Reasons for framing of the Regulations that Regulation 19(e) has been introduced to provide for compensation allowance to meet expenses on new assets of capital nature on the basis of available data on additional capitalization available with the Central Commission. NTPC wanted a higher compensation allowance as they felt that the amount proposed by the Central Commission was not sufficient to meet the capital expenditure on new works required for successful operation of the power

station. However, this plea was rejected by the Central Commission and it was decided to allow compensation allowance as proposed in the draft Regulation under clause (e) of Regulation 19.

35. Learned counsel for the NTPC has contended that Regulation 19 (e) only provided for expenditure on new assets on minor nature. We do not agree with the contention of the learned counsel for the NTPC since Regulation 19(e) clearly indicates that the compensation allowance specified in the Regulation 19 (e) covers the expenses of new assets of capital nature including the minor assets.

36. Mr. M.G. Ramachandran, learned counsel for the NTPC has argued that while allowing compensation allowance, the Central Commission from the available data on additional capitalization deducted the expenditure on new assets in the nature of Environment

Action Plan, change in law or dealing with design deficiency. We do not find any force in this contention of the learned counsel for the NTPC because in the Regulation 19 (e) the compensation allowance has been specified after considering the submissions of the NTPC. Admittedly, these Regulations have not been challenged by NTPC. Further, the new assets in the nature of Environment Action Plan and change in law are already covered in Regulation 9. Further, there is no Regulation which allows for expenditure incurred on new assets on account of design deficiency in the old assets. In view of the above, the Central Commission has rightly deducted the claim for expenditure incurred on new assets on account of design deficiency in the old assets from the data on expenditure on additional capitalization of NTPC

alongwith the expenditure on new assets in the nature of Environmental Action Plan and Change in Law.

37. It is also contended by Shri M.G. Ramachandran, learned counsel for NTPC that the Central Commission had consistently been allowing additional capitalization for the expenditure incurred on works which became necessary for efficient and successful operation of the generating station but not included in the original project cost. We find that under 2004 Tariff Regulations, the additional capitalization under Regulation 18(2) provided for capital expenditure incurred after the cut-off date on additional works/services which have become necessary for efficient and successful operation of the generating station, but not included in the original project cost. Accordingly, the Central Commission had been allowing additional capitalization under this head

during the period 2004-09. However, in the 2009 Tariff Regulations, provision for expenditure incurred on additional works and services which became necessary for efficient and successful operation of the generating stations not included in the original project cost has not been provided for in the additional capitalization. Instead, the Central Commission in the 2009 Tariff Regulations has provided a compensation allowance for the additional expenditure on new capital assets. Hence, this contention of the NTPC would also fail.

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.

**40. The second issue is regarding the claim of NTPC for additional capitalization projected to be incurred for online CO2 Monitoring System.**

41. We find that NTPC in the affidavit filed before the Central Commission had claimed the capitalization of expenditure projected to be incurred on CO<sub>2</sub> Monitoring System as a consequence of change in law provided in Regulation 9(2) of the 2009 Tariff Regulations.

42. We find that NTPC in its affidavit dated 8.4.2010 filed before the Central Commission had given the following justification for expenditure on online CO<sub>2</sub> Monitoring System:

*“As regards expenditure of Rs. 30 lakhs towards online CO<sub>2</sub> monitoring system, it is submitted that in order to monitor the combustion quality of fossil fuel in the boiler, this system needs to be installed and is in procurement stage. It will help in optimizing the coal combustion and cutting the CO<sub>2</sub> gas emission which is a green house gas. India being a signatory of Kyoto protocol is committed to reduce the emission of green house gases. Therefore, this expenditure has become necessary.”*

43. The Central Commission has given the following findings on the claim of NTPC for CO<sub>2</sub> Monitoring System as under:

*“49. The Petitioner’s claim for expenditure of Rs. 30.00 lacs under this head towards on-line CO<sub>2</sub> monitoring system in terms of the Environmental consent order of the Ministry of Environment & Forests, Government of India, has been examined in view of the clarification submitted vide affidavit dated 08.04.2010 (as quoted in Paragraph 40 above) and no reference of this work/asset has been found in the said environmental consent order referred to by the Petitioner. Hence, the expenditure of Rs. 30.00 lacs is not allowed for capitalization under this head.”*

44. Thus, the Central Commission rejected the claim for online CO<sub>2</sub> Monitoring System as there was no reference of this work/assets in the Environmental consent order referred to by NTPC. The Central

Commission has considered the affidavit dated 8.4.2010 filed by NTPC as also the environmental clearance of Ministry of Environment & Forests dated 5.2.2009.

45. In our opinion the claim of NTPC would not be covered under any of the provisions of Regulation 9 for additional capitalization and therefore, we do not find any infirmity in the findings of the Central Commission in this regard in the impugned order.

**46. The last issue is regarding inclusion of compensation allowance in operation & maintenance expenditure in determining the working capital.**

47. According to NTPC, while calculating the interest on working capital, one month O&M expenses and maintenance spares @ 20% of O&M cost inclusive of the compensation allowance for the period 2011-12 to

2013-14 were claimed by them but the Central Commission has wrongly excluded the amount pertaining to the compensation allowance for calculation of one month O&M expenses and maintenance spares.

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.

49. Accordingly, this issue is also decided as against the Appellant.

**50. Summary of our findings:**

**i) The additional capitalization has to be allowed only according to the Regulation 9 of the 2009 Tariff Regulations which will apply to both existing and new power projects.**

**(ii) The claim of NTPC for online CO<sub>2</sub> Monitoring System is not covered under Regulation 9 and, therefore, cannot be allowed.**

**(iii) There is no merit in the claim of NTPC for including the compensation allowance as allowed under Section 19 (e) in the O&M expenses for computing the working capital.**

51. In view of above, the Appeal is dismissed as devoid of any merit. No order as to costs.

52. Pronounced in the open court on this **27<sup>th</sup> day of January, 2014.**

**( Rakesh Nath)  
Technical Member**

**(Justice M. Karpaga Vinayagam)  
Chairperson**

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**REPORTABLE / ~~NON-REPORTABLE~~**

vs