

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 07th Mar, 2014

Present:

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

Appeal No. 30 of 2013

NHDC Limited
(A JV OF NHPC & GoMP),
NHDC Parisar,
Shyamla Hills,
Bhopal-462 013

... Appellant

Versus

- 1. Central Electricity Regulatory Commission**
3rd & 4th Floor,
Chanderlok Building,
36, Janpath,
New Delhi-110 001

- 2. Madhya Pradesh Power Management Company Ltd.,**
(MPPMCL),
Shakti Bhawan, Vidyut Nagar,
Jabalpur (MP)
PIN-482 008

- 3. Narmada Valley Development Department (NVDD, GoMP),**
Govt of Madhya Pradesh,
Mantralaya, Vallabh Bhawan,
Bhopal (MP)
PIN-462 004

Respondent(s)

Counsel for the Appellant (s): Ms. Suparna Srivastava

**Counsel for the Respondent (s): Mr. G Umapathy
Ms. R Mekhala for R-2**

J U D G M E N T

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

1. NHDC, Bhopal, is the Appellant herein.
2. Aggrieved by the Order dated 5.9.2012 passed by the Central Commission in the Review Petition filed by the Appellant rejecting the question of computation of weighted average rate of interest on loan, the Appellant has filed this Appeal.
3. The short facts are as follows:
 - (a) The Appellant, i.e. NHDC, Bhopal is a Generating Company.
 - (b) The Appellant filed a Petition in Petition No.265 of 2010 before the Central Commission, the first Respondent for the approval of the generation tariff of its project Omkareshwar Hydroelectric Project.
 - (c) The Central Commission by the Order dated 16.1.2012, has determined the final tariff and allowed

the Annual Fixed Charges for Omkareshwar Project besides admitting the capital cost as on 31.03.2009.

(d) Aggrieved by the disallowance of some of the claims, the Appellant filed the Review Petition on 5.3.2012 seeking for the removal of the errors in respect of five items. Those five items are as follows:

(i) Error in calculation of Depreciation

(ii) Non consideration of un-discharged liability during the period between 1.4.2008 and 31.3.2009 in the capital cost;

(iii) Error in the computation of Advance Against Depreciation;

(iv) Error in the computation of Weighted Average Rate of Interest on loan capital for the period 2008-09 and;

(v) Error in computation of Maintenance Spares for Working Capital for the year 2008-09.

(e) When this Review Petition was pending, the Central Commission on 14.3.2012, suo-motu revised the tariff of the generating station by correcting the errors indicated in the items 1 to 3 i.e. (i) Error in calculation of Depreciation (ii) Non consideration of un-discharged liability during the period between

1.4.2008 to 31.3.2009 in the capital cost and (iii) Error in computation of Advance Against Depreciation;

(f) In view of the corrections which have been made by the Central Commission, suo-motu by the order dated 14.3.2012, the Appellant restricted the items No.4 and 5 for review. The restricted items are as follows:

4. Error in computation of weighted average rate of interest on loan capital for the period 2008-09 and;

5. Error in computation of Maintenance Spares for Working Capital for the year 2008-09.

g) Accordingly, the Central Commission admitted the Review Petition only in respect of these two items i.e. 4 & 5 and heard the Appellant as well as the contesting Respondent namely Madhya Pradesh Power Management Company Limited (R-2).

h) Ultimately, the Central Commission passed the Impugned Order on 5.9.2012 and allowed the item No.5 relating to the issue namely Error in computation of Maintenance Spares for Working Capital for the year 2008-09 and disallowed the Review with regard to the Item No.4 namely Error in

Computation of Weighted average Rate of interest on loan capital for the period 2008-09.

- i) Thus, though the Appellant filed review in regard to the five issues, the Central Commission, suo-motu revised in respect of issues 1 to 3 and allowed one more issue namely the 5th issue and disallowed the 4th issue through the Review Order.
- j) The Appellant has filed the present Appeal against the Review Order dated 5.9.20112 with reference to 4th issue namely Error in the Computation of Weighted Average Rate of Interest on loan capital for the period 2008-09.

6. After admitting this Appeal, notice was issued to the Respondent. The learned Counsel for the contesting Respondent(2) namely Madhya Pradesh Power Management Committee Limited raised preliminary objection to the maintainability of the Appeal contending that this Appeal as against the rejection of the review in respect of Issue No.4 is not maintainable as per Order 47 Rule 7 of the Civil Procedure Code.

7. Since, the maintainability question was raised by R-2, we asked the parties to argue the maintainability question first before considering the merits of the Appeal.

8. Accordingly, the learned Counsel for both the parties argued at length with reference to the maintainability of the Appeal and filed their written submissions.
9. Though initially, we thought of rendering the judgment on the issue of maintainability question alone but after hearing the arguments on the question of maintainability of the Appeal, we felt that it would be better to decide the maintainability question along with the other issues raised in the Appeal with reference to the merits of the Appeal.
10. Accordingly, we asked the parties to argue the matter on merits also and to file their written submissions.
11. In pursuance to our directions, the learned Counsel for both the parties argued the merits of the Appeal also and filed their respective written submissions.
12. Therefore, in this Appeal, we have to consider two questions:
 - (a) Whether the Appeal as against the Review Order rejecting the review by confirming the Original order in respect of one issue is maintainable or not?
 - (b) Even assuming that the Appeal against the Review Order is maintainable, whether the Impugned Order would suffer from any infirmity so as to warrant the interference in the Impugned Order?

13. Let us first deal with the question of maintainability of the Appeal.
14. The arguments on the question of maintainability by the learned Counsel for the parties are as follows.
15. The learned Counsel for the R-2 raising the preliminary question has made the following submissions:

“Section 94 of the Electricity Act, 2003 provides that the Appropriate Commission may entertain Review Petition and the powers of the Civil Court under Civil Procedure Code with reference to the Review jurisdiction would be applicable in respect of those matters. The power of review as per the Civil Procedure Code is circumscribed by Order 47 Rule 7 of the CPC. This provision specifically provides that the Appeal against the order rejecting the Review Petition shall not lie and the Review Order allowing the Review Petition alone is appealable. The present is a case where the Review Petition has been dismissed in respect of the one issue though the said petition was allowed in respect of the other issues. The issue which has been raised in this Appeal is relating to the claim made by the Appellant in the Review Petition which was disallowed. Therefore, the Appeal is not maintainable”.

16. In reply to the arguments regarding the question of maintainability advanced by the learned Counsel for R-2, the learned Counsel for the Appellant has made the following submissions:

“The Appellant filed a Review Petition pointing about the error on the five issues in the Order dated 16.1.2012 in the Review Petition filed on 5.3.2012. During the pendency of the Review Petition, the Central commission suo-motu rectified the errors mentioned in the issue No.1 to 3 by the Order dated 14.3.2012. Hence, the Appellant restricted itself to rectification of the errors mentioned in issues No.4 and 5. The Central Commission ultimately revised the tariff order in respect of the 5th issue namely Computation of Maintenance Spares for Working Capital for the year 2008-09 but, disallowed the other issue i.e. issue No.4 regarding Error in Computation of Weighted Average Rate of Interest on Loan Capital for the period 2008-09 by the Impugned Order dated 5.9.2012. Each revision i.e. suo-motu revision and the revision through Review Petition would make the main order getting merged with the Review Order. The present Appeal has been filed as against the Review Order dated 5.9.2012 as the Original order dated

16.1.2012 stands merged with the Review Order dated 5.9.2012. Hence, this Appeal is maintainable”.

17. The learned Counsel for the Appellant in order to substantiate the plea that the Appeal is maintainable, has cited the following decisions:

(a) U.J.S Chopra Vs State of Bombay: AIR 1955 SC 633;

(b) Commissioner of Income Tax, Bombay Vs. M/s. Amritlal Bhogilal & Co: AIR 1958 SC 868;

(c) Madan Gopal Rungta Vs Secretary to the Government of Orissa: AIR 1962 SC 1513;

(d) State of Madras Vs Madurai Mills CO: AIR 1967 681;

(e) M/s. Gojer Bros (Pvt) Ltd Vs. Shri Ratan Lal Singh: 1974 (2) SCC 453;

(f) Sushil Kumar Sen Vs State of Bihar: AIR 1975 SC 1185;

(g) Kothari Industrial Corpn Ltd., Vs Agricultural Income Tax Officer: (1998) 230 ITR 306;

(h) Hindustan Aeronautics Ltd., Bangalore Vs Commissioner of Income Tax, Karnataka: (2000) 5 SCC 365;

18. The learned Counsel for the contesting Respondent after distinguishing all these judgments referred to by the Appellant, has cited the judgment of this Tribunal in Appeal No.88/2013 and Appeal No.50 of 2010 dated 24.5.2010 and the Hon'ble Supreme Court in the case of M N Haider and Others Vs Kendriya Vidyalaya Sanghahan reported in (2004) 13 SCC 677 in which it was held that the Appeal as against the Review Order rejecting the Review is not maintainable.
19. We find that in this case the Central Commission in the suo-motu review order dated 14.3.2012 corrected the inadvertent clerical/arithmetical errors in respect of un-discharged liability and the linkage errors in respect of the calculation of Advance Against Depreciation and Depreciation which had occurred in the main order dated 16.1.2012. Consequently, the capital cost, Return on Equity, Interest on loan, depreciation, etc were modified and revised Annual Fixed Charges for FY 2004-09 were re-determined. Thus, the suo-motu order resulted in re-determination of the various components of the tariff and consequently, the Annual Fixed Charges for the project to be recovered from the beneficiaries.
20. In the Review Petition, the Appellant had raised five items of error in the Main Order including three grounds of errors which were corrected in the suo-motu order dated

14.3.2012 by the State Commission. Accordingly, the Central Commission considered remaining two grounds viz., Error in computation of Weighted Average Rate of interest on loan and Error in computation of maintenance spares for working capital for FY 2008-09. The Central Commission did not accept the error in computing Weighted Average Rate of interest on loan but rectified the error in computation of maintenance spares for Working Capital for the FY 2008-09. Accordingly, the Central Commission re-determined and revised the annual fixed charges for the project for the period 2007-09 in the Review Order dated 5.9.2012. Thus, the original order dated 16.1.2012 was changed by the earlier review order dated 14.3.2012 got further changed in the Review Order dated 5.9.2012. Therefore the main order got merged with the Review Order. It is noticed that the interest on loan for the FY 2008-09 allowed in the Main Order was Rs.13326.99 lacs but in the Review Order, the interest on loan allowed is only Rs.12865.76 lacs. Similarly, the annual fixed charges for the project for the FY 2008-09 allowed for the project was Rs.29978.18 lacs which has been rectified as Rs.31961.36 lacs in the Impugned Review Order dated 5.9.2012.

21. We also find that in the Original Order dated 16.1.2012, the Central Commission has only indicated that on the basis of

actual rate of interest applied on the yearly average loan, the weighted average rate of interest has been worked out as 9.38% for FY 2008-09 and the same has been applied on the normative average loan during the year to arrive at the interest on loan. However, in the Review Order dated 5.9.2012, the Central Commission has explained the reason for not accepting the weighted average rate of interest of 10.71% claimed by the Appellant and allowing interest rate at 9.38%.

22. The facts of present case are totally different from the facts of the Appeal No.88 of 2013. In Appeal No.88 of 2013 the issues which were rejected in review against which the Appeal was filed, were not modified as a result of review allowed in other issues. In the present case in the suo-motu Review Order dated 14.3.2012, the Central Commission corrected the inadvertent clerical and arithmetical errors resulting in modification in various components of tariff including interest on loan and the Annual Fixed Charges of the project. The Central Commission in the Impugned Review Order dated 5.9.2012 again changed the computation of Maintenance Spares for Working Capital for FY 2008-09 and re-determined the Annual Fixed Charges for FY 2008-09 and directed the Appellant to claim the difference in the tariff determined by Order dated 16.1.2012 and the tariff determined by the Review Order dated 5.9.2012. The interest on loan and Annual Fixed charges for FY 2008-09 have also been modified in the Review order dated 5.9.2012 with respect

to the Main order dated 16.1.2012. Thus, in the present case, the Doctrine of Merger will be applicable and main order dated 16.1.2012 and suo-motu Review order dated 14.3.2012 will merge with the Review order dated 5.9.2012. Therefore, the Appellant has correctly challenged the Review Order dated 5.9.2012 in respect of the issue of interest on loan in this Appeal. Hence, the Appeal filed against the Review order is maintainable in this case.

23. Accordingly, the first issue is decided in favour of the Appellant.
24. We would now deal with the 2nd question framed above.
25. The issue which involves the claim which has been disallowed by the Central Commission on which the Appellant has preferred this Appeal is as follows:

“Error in the Computation of Weighted Average Rate of Interest on loan capital for the period 1.4.2008 to 31.3.2009”.

26. The learned Counsel for the Appellant, on this issue has made the following submissions:
 - (a) The interest on loan is to be calculated on the basis of the weighted average rate of interest. The relevant Regulation is 38 (1) (a) of the CERC (Terms and Conditions of Tariff) Regulations, 2004. As per

this Regulation, the interest on loan capital shall be computed loan wise on the loans arrived at. Thus, the 2004 Regulations require that the rate of interest on loan capital is to be calculated as weighted average as opposed to simple average. However, while passing the Tariff Order dated 16.1.2012, the Central Commission has omitted to consider the variable of time dimension for the loans. The Central Commission despite its own Regulations has insisted on simple average gross loans instead of weighted average.

(b) The weighted average rate of interest on loan was allowed at 9.38% per annum instead of 10.71% per annum as claimed in the Tariff Petition by using this methodology. This methodology of weighted average rate calculations was contrary to the Central Commission's own Regulations. As per Regulations 38 (1) (a) of 2004 Regulations, the interest on loan was computed loan wise. As such, the time for which the each loan had been serviced could not be ignored. This had to be taken into consideration while computing the weighted average rate of interest on loan for given period.

(c) The Appellant, therefore, filed a Review of the Order dated 16.1.2012 before the Central Commission

so as to allow the interest rate on loan capital at the rate of Rs.10.71% instead of Rs.9.38%. In fact, this aspect of time dimension was adopted by the Central Commission in yet another case is the Order dated 19.4.2011 for the Indira Sagar project. However, the Central Commission did not accede to the Appellant's prayer for considering the impact of time dimension on the basis of the earlier order dated 19.4.2011. On the other hand, the prayer was rejected merely on the ground that the Central Commission had been adopting throughout the methodology of calculating the rate of interest on loan capital as a simple average rate. Therefore, the Central Commission be directed to calculate on the basis of the weighted average by considering the time dimension with respect to the loan.

27. Refuting these contentions, the learned Counsel appearing for the contesting R-2, has submitted the following:

(a) There is no error in the methodology adopted by the Central Commission in working out the rate of interest on loan on the basis of the actual rate of interest applied on yearly average loan. The only ground raised by the Appellant is a parity sought to be claimed on the basis of the earlier Order dated 19.4.2012 passed in yet another case where the

weighted average rate of interest was adopted while considering the loan wise time dimension. This submission is devoid of merits.

(b) The Appellant has totally violated all the provisions of the Regulations 38 (1) (c) (interest on loan capital) and re-financed the loan on exorbitantly high rate of interest. This could not be fastened on the procurers but has to be absorbed by the Generators like the Appellant.

(c) As per Section 79 (4) of the Electricity Act, 2003 the Central Commission can regulate tariff only in accordance with the policy guidelines provided under the National Electricity Policy and Tariff Policy. As per the Tariff Policy, the Central Commission has to ensure availability of electricity to consumers at reasonable and competitive rates. Therefore, the abnormal increase in the rate of interest from 7% to 11.89% on account of re-financing is totally unreasonable.

28. Having regard to the above rival contentions, let us discuss the issue now.
29. Before deliberating this issue, it would be appropriate to refer to the discussion and findings of the Central

Commission on this issue in the Original Order dated 16.1.2012 as well as Review Order dated 5.9.2012.

30. The findings rendered by the Central Commission in the **Original Order dated 16.1.2012** on the issue of interest on loan is as follows:

“Interest on Loan

41. Regulation 38(i) of the 2004 regulations provides as under:

(a) Interest on loan capital shall be computed loan wise on the loans arrived at in the manner indicated in Regulation 36;

(b) The loan outstanding as on 1.4.2004 shall be worked out as the gross loan in accordance with Regulation 36 minus cumulative repayment as admitted by the Commission or any other authority having power to do so, up to 31.3.2004. The repayment for the period 2004-09 shall be worked out on a normative basis;

(c) The generating company shall make every effort to re-finance the loan as long as it results in net benefit to the beneficiaries. The costs associated with such re-financing shall be borne by the beneficiaries;

(d) The changes to the loan terms and conditions shall be reflected from the date of such re-financing and benefit passed on to the beneficiaries;

(e) In case of dispute, any of the parties may approach the Commission with proper application. However, the beneficiaries shall not withhold any payment ordered by the Commission to the generating company during pendency of any dispute relating to re-financing of loan;

(f) In case any moratorium period is availed of by the generating company, depreciation provided for in the tariff during the years of moratorium shall be treated as repayment during those years and interest on loan capital shall be calculated accordingly;

(g) The generating company shall not make any profit on account of re-financing of loan and interest on loan;

(h) The generating company may, at its discretion, swap loans having floating rate of interest with loans having fixed rate of interest, or vice-versa, at its own cost, and gains or losses as a result of such swapping shall accrue to the generating company:

Provided that the beneficiaries shall be liable to pay interest for the loans initially contracted, whether on floating or fixed rate of interest.

42. The calculation for Interest on loan for the purpose of tariff is as under:

(a) The opening gross normative loan as on the date of commercial operation of each machine has been arrived at in accordance with Regulation 36 of the 2004 regulations.

(b) On the basis of actual rate of interest applied on the yearly average loan, the weighted average rate of interest has been worked out 7.00% and 9.38% for the years 2007-08 and 2008-09 respectively and the same has been applied on the normative average loan during the year to arrive at the interest on loan.

43. The computations of interest on notional loan by applying weighted average interest rate are appended herein below:

	20.08.07 to 24.08.07 (for 1 Machine)	25.08.07 to 10.09.07 (for 2 Machine)	11.09.07 to 25.09.07 (for 3 Machine)	26.09.07 to 18.10.07 (for 4 Machine)	19.10.07 to 29.10.07 (for 5 Machine)	30.10.07 to 09.11.07 (for 6 Machine)	10.11.07 to 14.11.07 (for 7 Machine)	15.11.07 to 31.03.08 (for 8 Machine)	2008-09
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Gross Opening Loan	11668.66	25111.38	40178.89	57112.43	75798.60	96240.14	118432.07	141140.48	141401.66
Cumulative Repayment up to Previous Year	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Net Loan Opening	11668.66	25111.38	40178.89	57112.43	75798.60	96240.14	118432.07	141140.48	141401.66
Repayment during the year	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Add: Additional Capitalization/ drawal	0.00	0.00	0.00	0.00	0.00	0.00	0.00	261.18	1284.35
Net Loan Closing	11668.66	25111.38	40178.89	57112.43	75798.60	96240.14	118432.07	141401.66	142686.01
Average Loan	11668.66	25111.38	40178.89	57112.43	75798.60	96240.14	118432.07	141271.07	142043.83
Weighted Average Rate Of Interest on Loan	7.00%	7.00%	7.00%	7.00%	7.00%	7.00%	7.00%	7.00%	9.38%
Interest	11.16	81.65	115.27	251.23	159.47	202.47	113.25	3728.63	13326.99

31. So, in this Order, the State Commission, on the basis of the Regulation 38 (i) of the 2004 Regulations, fixed the rate of interest as Rs.9.38%.
32. Let us see the findings on this Issue in the **Review Order dated 5.9.2012** which is as under:

“6. Heard the parties and examined the documents on record. In order dated 16.1.2012 in Petition No.265/2010 the Commission had worked out the weighted average rate of interest of loan as 7.00% and 9.38% for the years 2007-08 (20.8.2007 to 31.3.2008) and 2008-09, on the basis of actual rate of interest applied on the yearly average loan, applied on the normative average loan during the Regulations. The Petitioner has submitted that the interest on loan may be worked out on the weighted average rate of interest of 10.71% from 1.4.2008 to 31.3.2009 based on actual loan portfolio throughout the year and taking into consideration the time factor for which a particular loan was served. According to the Petitioner, the above said methodology considered in order dated 19.4.2011 in Petition No.207/2010, pertaining to another generating Station of the Petitioner, is required to be adopted in this case also. The

submission of the Petitioner is not acceptable. The Commission in all its orders determining the tariff of central generating stations for the period 2004-09, has consistently adopted the weighted average rate of interest on loan computed on the basis of average of interest on loans, taking into account the simple average gross loans (i.e. opening + closing)/² in accordance with Form 13 of the 2004 Tariff Regulations. We are of the view that the methodology adopted consistently to all other tariff orders of the Central Generating Stations for calculation of interest on loan, in terms of Form-13 under the 2004 Tariff Regulations, as stated, should be applicable in the instant case also. Moreover, the methodology considered in Commission's order dated 19.4.2011 in Petition No.207/2010, being a one off case, there is no reason to adopt the same in the present case. In view of this, the prayer of the Petitioner is rejected and accordingly, review on this count fails".

33. Thus, the Central Commission in this Review Order dated 5.9.2012, has confirmed the Original Order holding that the methodology adopted consistently to all other tariff orders of the Central Commission's Generating Stations for calculations of interest on loan including in the Original order should be applicable to this case also. The Central Commission has also held that the finding in its order dated 19.4.2011 in Petition No.207 of 2010 being a one off case could not be adopted in the present case.
34. The Appellant has prayed that there was error in the consideration of the weighted average rate of interest on

the loan and that therefore, the weighted average rate of interest be revised to 10.71% instead of 9.38%.

35. Regulation 38(i) (a) of 2004 Tariff Regulations stipulates that the loan shall be computed loan-wise. Form 13 which forms part of the 2004 Tariff Regulations for furnishing information relating to interest on loan indicates that the Generating Company has to furnish information relating to opening and closing value of each loan on the basis of which average loan has to be worked out. The Appellant has also to indicate the rate of interest on each loan. The cumulative opening and closing balance has to be worked out by adding respective opening and closing value of each loan and the cumulative average loan is worked out by taking the average of cumulative opening and closing values of the loan. However, form 13 does not indicate the same procedure for the rate of interest on a loan, if the rate varies during a Financial Year.
36. In the present case there is only one loan. According to the Appellant interest rate on loan for first 88 days of the Financial Year 2008-09 was 7% per annum and thereafter the interest rate was 11.89% p.a. for the remaining 277 days of the said Financial Year. As per the Appellant, the above change in rate of interest during the Financial Year 2008-09 did not take place at the Appellant's own volition. It has been submitted by the Appellant that in order to meet

the requirement of loan capital for construction of Omkareshwar Hydroelectric Project, the Appellant had taken loan for an amount of Rs. 1350 crores in June, 2005 at the interest rate of 7% per annum by entering into Long Term Loan Agreement with consortium of Banks. As per the terms and conditions of these loan agreements, the parties were free to exercise put/call option after a period of three years from the date of first disbursement by the respective Banks. These banks opted for the call option on the lapse of the prescribed period of three years and in order to honour the said call option, the Appellant had to resort for re-financing of Rs. 1350 crores at interest rate of 11.89% p.a. by entering into Long Term Loan Agreement dated 26.6.2008 with M/s. Power Finance Corporation w.e.f. 28.06.2008.

37. The Appellant in Form 13 furnished along with its Petition before the Central Commission, had clearly indicated that the interest rate on loan 1 was 7% per annum upto 27.6.2008 and 11.89% per annum from 28.6.2008.
38. In view of the above, we feel that the Central Commission should have taken the weighted average of interest on loan taking into account 7% rate of interest from 1.4.2008 to 27.6.2009 and 11.89% from 28.6.2008 to 31.3.2009 while calculating the weighted average rate of interest for the Financial Year 2008-09. While for working out the average

net loan of various loans taken for a project, the State Commission has been adopting the procedure of taking the opening value of total loan and closing value of total loan and the average rate of interest on various loans. However, the same approach cannot be adopted for one loan in which the rate of interest has changed during the Financial Year.

39. The Central Commission in the original order dated 16.1.2010 has clearly indicated that the weighted average rate of interest has been worked out as 9.38% for the Financial Year 2008-09 which has been applied on the normative average loan during the year to arrive at the interest on loan. However, the Central Commission has calculated the weighted average rate of interest on loan for Financial Year 2008-09 as 9.38% which is a simple average of 7% and 11.89%.
40. Thus, the Central Commission has wrongly taken the simple average of interest rate instead of weighted average of interest rate giving weightage to number of days for which the interest rate was applicable. The Central Commission has mixed up the weighted average of interest rate with the average outstanding loan worked out as an average of opening and closing values of loan and has wrongly held in the Review Order dated 5.9.2012 that the interest on loan has to be worked out by taking simple

average of gross loan i.e. summation of opening and closing value of loan divided by two in accordance with Form 13 of the 2004 Regulations. Form 13 of the 2004 Regulations does not specify such stipulation for working out the rate of interest on a loan where the interest rate has undergone variation during a Financial Year. It only indicates the average value of amount of loan and not rate of interest of loan.

41. The Respondent has pointed out that the Appellant has swapped the loan at exorbitantly high rate of interest by re-financing the loan thus increasing the cost to the consumers in violation of the Tariff Policy which provides for ensuring availability of electricity to consumers at reasonable and competitive rates. According to the Respondent, Regulation 38(1)(h) provides that the cost of increase rate of interest due to swapping of loan has to be borne out by the generating company itself.
42. We have examined this matter. Regulation 38(i)(h) is reproduced as under:

“(h) The generating company may, at its discretion, swap loans having floating rate of interest with loans having fixed rate of interest or vice versa, at its own cost, and gains or losses as a result of such swapping shall accrue to the generating company”.

43. Thus, if a generating company at its discretion, swaps the loans with loans having higher rate of interest or vice versa the losses or gains as a result of such swapping has to be borne by the generating company.
44. It has been explained by the Appellant that in the present case there is no swapping of loans at the discretion of the Appellant. The Long Term Loan Agreement with the consortium of Bank who had financed the construction of Omkareshwar Hydroelectric Project of the Appellant provided that the parties were free to exercise put/call option after a period of three years from the date of first disbursement by the respective banks. These banks have opted for the call upon option after the lapse of three years and, therefore, the Appellant was forced to resort to re-financing of the loan at a higher interest rate from Power Finance Corporation. Thus, the increase in rate of interest was not on account of self initiated action of the Appellant but was warranted consequent to the banks resorting to the call option as per the terms of the loan agreement. The Central Commission has considered the increase in interest rate from 7% to 11.89% but has calculated the simple average of interest rates of 7% and 11.89% instead of working out the weighted average.
45. In view of above, the Central Commission is directed to re-compute the weighted average rate of interest taking into

account the duration of loan with respective interest rate and re-determine the interest on loan to be allowed in the tariff of the Appellant's Power Station. Accordingly, this issue is decided in favour of the Appellant.

46. **Summary of our findings**

(a) **This Appeal is maintainable as against the Review Order dated 5.9.2012. In the present case, the Doctrine of Merger is applicable as the Central Commission has reviewed certain parameters which resulted in modification of the interest on loan and other parameters and re-determined the annual fixed charges in the Review Order. Thus, the main order got merged with the Review Order.**

(b) **The Central Commission has wrongly determined the average of the interest rate on loan at the beginning and at the end of the Financial Year instead of working out the weighted average interest rate of loan considering the duration. Accordingly, the Central Commission is directed to re-determine the weighted average interest on loan and consequently the interest on loan and**

**Annual Fixed Charges of the Appellant for the
Financial Year 2008-09.**

47. The Appeal is allowed. The impugned order is set aside. The Central Commission is directed to pass consequential orders within three months from the date of the communication of this Judgment.
48. Pronounced in the open court on this
07th day of March, 2014.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 07th Mar, 2014

√REPORTABLE/~~NON-REPORTABLE~~