

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 148 OF 2015

Dated : 4th May, 2016

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

In The Matter Of:

NTPC Limited

NTPC Bhavan, Scope Complex,
Core-7, Institutional Area, Lodhi Road
New Delhi-110003

.....Appellant

VERSUS

- 1. Uttar Pradesh Power Corporation Ltd.**
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226 007
- 2. Jaipur VidyutVitrان Nigam Ltd.**
Vidyut Bhawan, Janpath,
Jaipur- 302 005
- 3. Ajmer VidyutVitrان Nigam Ltd.**
Old Power House, HathiBhata,
Jaipur Road, Ajmer, Rajasthan - 305 001
- 4. Jodhpur VidyutVitrان Nigam Ltd.**
400 kV GSS Building Ajmer Road, Heerapaura,
Jaipur, Rajasthan - 342003
- 5. Tata Power Delhi Distribution Limited**
Power Trading & Load Despatch Group,
Cennet Building, Adjacent to 66/11 kV
Pitampura-3, Grid Building,
Pitampura, New Delhi-110034

- 6. BSES Rajdhani Power Ltd.**
BSES Bhawan, 2nd Floor, B-Block,
Behind Nehru Place Bus Terminal,
Nehru Place, New Delhi - 110019
- 7. BSES Yamuna Power Ltd.**
2nd Floor, B Block, Shakti Kiran Building,
Near Karkardooma Court,
New Delhi - 110092
- 8. Haryana Power Purchase Centre**
Shakti Bhawan, Energy Exchange, Room No. 446,
Top Floor, Sector-6, Panchkula- 134 109
- 9. Punjab State Power Corporation Ltd.**
The Mall, Patiala-147001
- 10. Himachal Pradesh State Electricity Board**
VidyutBhawan, Kumar House Complex
Building II, Shimla - 171004
- 11. Power Development Dept.**
Govt. of Jammu & Kashmir,
SLDC Building, Ist Floor,
Gladani Power House,
Narwal, Jammu -190 009
- 12. Power Development UT Chandigarh,**
Sector 9-D, UT,
Chandigarh-160019
- 13. Uttarakhand Power Corporation Ltd.**
Urja Bhawan, Kanwali Road,
Near BalliWalaChowk, Dehradun -248001
- 14. Madhya Pradesh Power Transmission Company Ltd.**
Nayagaon, Jabalpur-482008
(Madhya Pradesh)
- 15. Maharashtra State Electricity Distribution Co. Ltd.**
Prakashgad, Bandra (East),
Mumbai-400051
- 16. Gujarat Energy Transmission Corporation Ltd.**
Sardar Patel VidyutBhawan, Race Course,
Vadodara-390007

17. **Chhattisgarh State Power Transmission Co. Ltd.**
Danganiya, Raipur-492013
18. **Goa Electricity Department Government of Goa,**
VidyutBhawan, 3rd Floor,
Panaji, Goa - 403001
19. **Electricity Department Administration of Daman & Diu**
Moti Daman, Daman & Diu - 396210
20. **Electricity Department Administration of**
Dadra Nagar Haveli,
Silvassa-396210
21. **West Bengal State Electricity Board**
VidyutBhawan, Bidhan Hagar, Block DJ,
Sector-II, Salt Lake City,
Kolkata-700 091
22. **Bihar State Electricity Board,**
VidyutBhawan, Bailey Road,
Patna-800021
23. **Jharkhand State Electricity Board**
In front of Main Secretariat,
Doranda, Ranchi-834002
24. **GRIDCO Ltd,**
Janpath, Bhubaneswar-751 022
25. **Power Department, Govt. of Sikkim,**
Kaji Road, Gangtok-737101
26. **Eastern Power Distribution Company Ltd.**
P&T Colony, Seethmmadhara,
Vishakapatnam, Andhra Pradesh - 530013
27. **Southern Power Distribution Company Ltd.**
SrinivassaKalyanaMandapam Backside,
Tiruchanoor Road, KesavayanaGunta,
Tirupati- 517501
28. **Northern Power Distribution Company Ltd.**
Opp. NIT Petrol Pump, Chaitanapuri,
Kaize Warangal-506004

- 29. Central Power Distribution Company Ltd.**
Mint Compound,
Hyderabad-500063
- 30. Electricity Department, Govt. of Pondicherry,**
137, Nethaji Subhash Chandra Bose Salai,
Pondicherry – 605 001.
- 31. Tamil Nadu Generation and Distribution Corporation Ltd.**
NPKRR Maaligai, 144,AnnaSalai,
Chennai-600 002
- 32. Kerala State Electricity Board**
VaidyuthiBhavanam,
Pattom, Trivandrum – 695 004,
Kerala.
- 33. Bangalore Electricity Supply Company**
K.R. Circle, Bangalore-506001
Karnataka
- 34. Mangalore Electricity Supply Company**
Paradigm Plaza, AB Shetty Circle,
Mangalore-575001
- 35. Chamundeshwari Electricity Supply Corporation**
#927, L J Avenue, GF,
New KantharajUrs Road,
Saraswatipuram, Mysore-570009
- 36. Gulbarga Electricity Supply Corporation**
Station Road, Gulbarga, Karnataka-585 102
- 37. Hubli Electricity Supply Company**
Navanagar, PB Road, Hubli, Karnataka- 580 025
- 38. Assam State Electricity Board**
BijuleeBhawan, Paltan Bazar,
Guwahati- 781 001
- 39. Central Electricity Regulatory Commission,**
3rd& 4th Floor Chandralok Building,
36, Janapath, New Delhi – 110 001

.....Respondents

APPEAL UNDER SECTION 111(1) OF THE ELECTRICITY ACT, 2003

- Counsel for the Appellant(s) : Mr. M.G.Ramachandran,
Ms. Poorva Saigal &
Mr. Shubham Arya
- Counsel for the Respondent(s) : Mr. Pradeep Misra &
Mr. Suraj Singh for R-1 to R-4
Mr. R.B. Sharma for R-2, R-6,
R-22 & R-24
Mr. Rishabh D. Singh for R-14
Mr. S.Vallinayagam for R-31
Mr. Dhananjay Baijal &
Mr. Nikhil Nayyar for R-39

J U D G M E N T

PER HON'BLE T. MUNIKRISHNAIAH, TECHNICAL MEMBER

1. The Appellant, NTPC has filed this appeal being Appeal No. 148 of 2015 against the Order dated 10.04.2015 passed by Central Electricity Regulatory Commission in Petition No.121/MP/2011 relating to recovery of additional cost incurred by NTPC stations on account of abnormal increase in water charges.
2. The Appellant, NTPC is a Central Government Enterprise and being incorporated under the Companies Act, 1956. Further, NPTC is engaged in the business of generation and sale of electricity to various purchasers/beneficiaries in India.
3. The Respondent No. 39, The Central Electricity Regulatory Commission, by its Notification dated 19.01.2009, the Central Commission notified the Central Electricity Regulatory Commissions (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as '**Tariff Regulations, 2009**') with regard to the tariff for the period 1.04.2009 to 31.03.2014.
4. The Respondent No.1 to 38, are beneficiaries/Distribution Companies to various States of the Country.

5. FACTS OF THE CASE

- 5.1 On 19.01.2009, the Central Electricity Regulatory Commissions (Terms and Conditions of Tariff) Regulations, 2009 notified by the Central Commission to be effective from 01.04.2009 and covering the tariff period for the Financial Year 2009 to 2014.
- 5.2 The State Governments issued the respective Notifications on 01.05.2010 and 01.02.2012 substantially revising the existing water charges with an increase ranging from 94% for Korba & Sipat Generating Stations to 2944% for the Farakka Generating Station.
- 5.3 On 26.04.2011, the Petitioner, NTPC filed the Petition, before the Central Commission being Petition No.121/MP/2011 praying for a relaxation of norms set by the Central Commission for the period 1.4.2009 to 31.03.2014 under Regulation 44 – ‘Power to Relax’ of the Tariff Regulations, 2009 in order to recover the additional cost incurred by the various Stations of NTPC on account of the substantial increase in water charges.
- 5.4 Consequent to the above hike in water charges, NTPC, on 26.04.2011, filed a Petition before the Central Commission being Petition No.121/MP/2011 praying for a relaxation of norms set up by the Central Commission for the period 01.04.2009 to 31.03.2014 under regulations 44 and – ‘Power to Relax’ of the Tariff Regulations, 2009 in order to recover the additional cost incurred by the various Stations of NTPC on account of the substantial increase in water charges.
- 5.5 During the course of the Proceedings in Petition No.121/MP/2011, the Central Commission sought for information, details, clarifications etc. from NTPC with regard to the working of water charges. In response to the above, NTPC submitted the requisite details vide its Affidavits dated 27.06.2011, 26.08.2011, 30.07.2013, 10.03.2014 & 5.05.2014 respectively.
- 5.6 In addition to the above, the Appellant, NTPC made Additional Submissions vide its Affidavits dated 20.12.2011 and 6.03.2012 before the Central Commission placing on record subsequent events such as the increase in Water Charges in Uttar Pradesh and the Farakka Station.
- 5.7 On 31.12.2012, the Central Commission notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff)

(Third Amendment) Regulations, 2012 allowing for the payment of water charges, in respect of NHPC Limited in the State of Jammu and Kashmir.

5.8 The Central Commission, by Order dated 10.04.2015 (Impugned Order) decided Petition No. 121/MP/2011 and disallowed the additional expenditure being sought by NTPC on account of increase in water charges.

5.9 Aggrieved by the decision of the Central Commission in its Order dated 10.04.2015, the Appellant, NTPC filed the present Appeal and prayed for following reliefs:

(a) Allow the petitioner to bill and recover the additional cost incurred in respect of the increase in water charges over and above as allowed for O & M expenditure from the respondents as an additional component under O&M expenses, and

(b) Pass any other order in the regard as the Hon'ble Commission may find appropriate in the circumstances mentioned above".

6. We have heard Mr. M.G.Ramachandran, the Learned Counsel for the Appellant and Mr. Pradeep Misra, Learned Counsel for Respondent Nos. 1 to 4, Mr. S.Vallinayagam for the Respondent No.31 and Mr. R.B.Sharma, learned counsel for the Respondent No. 24, GRIDCO and gone through the written submissions filed by the rival parties. We have gone through the evidence and other materials available on record including the Impugned Order passed by Central Commission.

7. The following issues arise for our consideration in the instant Appeal.

(i) Whether the Central Commission is justified in disallowing the additional expenditure incurred by NTPC on account of the substantial increase in water charges?

(ii) Whether the Appellant/Petitioner is entitled for grant of relief invoking power under Regulation 44 - 'Power to Relax' of the Tariff Regulations, 2009?

8. Since, the issue No. (i) & (ii) are inter-related; we are taking up and deciding them together.

9. **The following are the submissions made by the Counsel of the Appellant/Petitioner, NPTC on these issues:**

- 9.1 That the Central Commission failed to appreciate the additional cost and expenses incurred by NTPC at its generating stations was on account of the unprecedented increase in water charges, consequent to the Notifications/Orders issued by the State Governments providing for an increase in the water charges payable. The Central Commission failed to appreciate that the increase was not on account of any reason attributable to NTPC. NTPC had no option but to comply with the mandatory direction to pay such increased water charges to operate the generating stations.
- 9.2 That the Central Commission failed to appreciate that the Notifications were issued by the State Government after the Central Commission had determined the Operation and Maintenance norms for the generating stations under the Tariff Regulations, 2009 for the period from 1.4.2009 to 31.3.2014 based on actual water charges during the period 2004-05 to 2007-08. Accordingly, while framing the Tariff Regulations, 2009, the Central Commission had no occasion to deal with the substantial increase in the water charges affected by the State Government by subsequent Notifications which came into effect in the years 2010, 2011, 2012 etc.
- 9.3 That the Central Commission failed to appreciate the O&M expense norms for 2009-14 are based on the actual O&M expenditure of 2004-05 to 2007-08. In this regard, the relevant extracts of the Statement of Reasons issued by the Central Commission along with the Tariff Regulations, 2009 read as under:

"19.7 As regards escalation rate, Commission at the draft stage considered the average annual escalation rate of 5.17% based on The Commission is of the view that the escalation rate should be average of the period for which O&M expenses are being considered for arriving at base O&M expenses in 2008-09 where as for future, trend up to 2008-09 should also be captured."

However, for the transmission system, Commission is considering O&M expenses for the five year period from 2003-04 to 2007-08 in order to capture rationalization of manpower. Hence the annual escalation rate for arriving at base O&M cost in 2007-08 has been

worked out as 5.17% based on escalation rates for the year 2003-04 to 2007-08. The escalation rate for the tariff period has been arrived at 5.72% after considering the inflation data up to October 2008."

.....

"20.4 The above norms were based on actual of stations having either 200/210/250 MW sets, 500 MW sets and sets having combination of the 200/210/250 MW and 500 MW sets. The average O&M expenses for the year 2004-05 to 2006-07 were escalated at 5.17% up to 2008-09 and provided with 45% increase in employee cost to arrive at average of 13.77 Lakh/MW in 2009-10. This was divided into two sets of norms, one for 200/210/250 MW set and another for the 500 MW set as 15.70 Lakh/MW and 12.50 Lakh/MW. The beneficiaries have pointed out that the O&M norms for 500 MW sets are higher as compared to actual. As such, we have again reviewed the O&M norms considering actuals of 2004-05 to 2007-08 in each class."

(emphasis supplied)

Therefore, it is clear from the above, had the increase in the water charges be known at the time when the Tariff Regulations, 2009 were being finalized, the same would have been duly factored in the norms determined under Regulation 19.

- 9.4 That the Central Commission failed to appreciate the escalation rate of 5.72% provided in the Tariff Regulations, 2009 is expected to cover the normal escalation in prices/ costs of various components of the O&M expenses including water charges. Any abnormal / unnatural increase, as in the present case, in any cost component which is beyond the reasonable control of the utility cannot be covered by the normal escalation factors.
- 9.5 That the Central Commission erred in holding that the decision of the Central Commission dated 12.10.2012 in Petition No. 35/MP/2011 in the case of NTPC Limited v. West Bengal State Electricity Distribution Co. Ltd and Ors wherein a similar issue arose in regard to the increase in wages and salaries of the employees, is distinguishable from the present case regarding water charges. As in the present case, the said expenditure could not be factored at the time of determination of the norms under the Tariff Regulations, 2004 since the pay revision came into force later. In the Order dated 12.10.2012, the Central Commission held that a clear case has been made out to

remove the difficulty arising out of non-consideration of the impact of wage revision in the O&M norms for the period 2004-09.

- 9.6 That the Order of the Central Commission dated 12.10.2012 has been upheld by this Hon'ble Tribunal by its judgement dated 24.3.2015 in Appeal No. 55 of 2013 and Batch and the same principle ought to have been accepted.
- 9.7 That the Central Commission erred in holding that the Tariff is a complete package and under-recovery of one element may be offset against over-recovery of another tariff element. The said principle would be contrary to the basic feature of the Tariff Regulations, 2009, namely, that the normative parameters are set, based on the specific tariff elements and the savings/losses on account of one element cannot be offset against another tariff element.
- 9.8 That the Central Commission failed to appreciate the subsequent developments i.e. the increase in water charges may change the basis on which the norms had been fixed with reference to a particular tariff element and if such subsequent developments are not on account of any imprudence or failure or default on the part of the utility, the same can be revised to adjust for the impact of the subsequent developments.
- 9.9 That the Central Commission failed to appreciate, when a similar situation arose with regard to NHPC, the Central Commission had allowed for the increase in water charges and granted the necessary relief to NHPC Limited by notifying the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Third Amendment) Regulations, 2012. In parity with the reasons given for amending the tariff Regulations, 2009 for NHPC, the Central Commission ought to have exercised the power to relax in the present case.
- 9.10 That the Central Commission has failed to appreciate that the increase in the water charges ought to have been allowed as an effect of a change in law on account of the mandatory direction of the State Government. These notification increases the revenue expenditure and need to be allowed as pass through in tariff.
10. **Percontra, the following are the submissions made by Mr. Pradeep Misra on behalf of Respondent No. 1 to 4.**

- 10.1 That the O&M Expenses are normative and any increase or decrease in the same is to the account of Appellant, hence CERC was perfectly justified in not accepting the claim of Appellant.
- 10.2 That the O&M Expenses are normative. The Appellant cannot choose that in case one element of O&M Expenses is increased, it is entitled to claim the same and on the other hand if any element is decreased, the benefit of the same will be kept by Appellant. The tariff could be determined either on actuals or on normative basis. Once the Commission by 2009 Regulations has directed that O&M Expenses will be normative, the Appellant is not entitled to claim actuals. The observation of the Commission in Paras 26 and 28 of the impugned order are thus perfectly justified.
- 10.3 That in case of O&M expenses, all factors including the water charges have been taken into consideration while fixing the norms for the period 2009-14, O&M expenses allowed under the 2009 Tariff Regulations are a complete package and water charges are just one element of the package. It is possible that under recovery of one element may be offset against over-recovery of another element. Therefore, any one element of O&M charges cannot be considered in isolation.
- 10.4 That unless and until it is provided in the regulation that a claim would be admissible in the Regulation, such claim cannot be allowed as a pass through in the tariff. Since the O&M Expenses provided under the Regulations 2009 are normative in nature, hence the Appellant is not entitled to claim actual O&M Expenses even if the same are enhanced.
11. **The following are submission made by the counsel of the Respondent No. 24, GRIDO.**
- 11.1 The Appellant has contended that the increase in water charges was subsequent to the notification of Tariff Regulations, 2009 and consequent to the directions of the State Government, the same be attributed as 'change in law' which is also not on account of any reason attributable to NTPC. The contention of the Appellant is flawed and misconceived as the applicability of 'change in law' under the Tariff Regulations, 2009 is only in respect of additional capitalization which results owing to 'change in law'. The 'Change in Law' is not

applicable in O&M expenses as any increase in O&M expenses is governed by the escalation norm of 5.72% provided under the O&M expenses wherein water charges have been included.

- 11.2 The Appellant under the pretext of increase in water charges is in fact questioning the norms prescribed for the O&M expenses and the norms of escalation for which the Hon'ble Tribunal is not the appropriate forum. Similarly, claiming discrimination in the matter of allowing relief to NHPC by framing regulation yet at the same time denying the similar relief to the Appellant is nothing but again questioning the regulation.
- 11.3 The Appellant has relied on the judgment dated 24.5.2011 in Appeal Nos. 100 & 103 of 2009 and its applicability in the present case. On this point, it is submitted that this contention of the Appellant is wholly misplaced as the judgment dated 24.5.2011 in Appeal Nos. 100 & 103 of 2009 have distinguishable features. Hon'ble Tribunal in its aforesaid judgment has decided that the single component of tariff can be revised without considering the 14% ROE available to the generating companies. The Commission, however, in the impugned order has decided that the O&M expense which is one component of tariff is a complete package and thus, the above judgment of the Hon'ble Tribunal is not applicable in the present Appeal.
- 11.4 The Appellant has also relied on the Order dated 12.10.2012 in Petition No. 35/MP/2011 in the matter of NTPC Limited Vs. West Bengal State Electricity Distribution Co. Ltd. & others in regard to the increase in wages and salaries of employees. This Order of the Commission was also upheld by the Hon'ble Tribunal in its judgment dated 24.03.2015 in Appeal No. 55 of 2013 & Batch in the case of BSES Yamuna Power Limited Vs. Central Electricity Regulatory Commission and others. The judgment in the above case is also not applicable to the present case as the facts and circumstances in the present Appeal are distinguishable. In Petition No. 35/MP/2011, liberty was granted to the Appellant-NTPC by the Commission to approach and raise the same issue at an appropriate stage of increase in the employees cost on account of wage revision in the salaries of the employees. However, in the present Appeal no such liberty was granted to the Appellant. Further, the Commission while finalizing the tariff regulations took a conscious decision to include the water charges as part of the O&M expenses on the basis of variation of

historical data. In the 'Statement of Reasons' to the tariff regulations, Commission clarified that the utilities should manage their expenses on O&M as admissible on normative basis in accordance with the Tariff Regulations, 2009.

The Appellant and other generating companies like NLC were expected to manage their O&M expenses within the normative level as specified in the Tariff Regulations, 2009. It may also be stated here that the O&M expenses are controllable in nature and thus the Appellant is in a better position to limit O&M expenses.

12. The following are the submission of the learned counsel for the Respondent No. 31

12.1 That the power of relaxation under the Tariff Regulations, is general in nature and its exercise is discretionary. It is settled law that exercise of discretion must not be arbitrary. It is to be exercised reasonably and with circumspection consistent with justice, equity and good conscience, always in keeping with the given facts and circumstances of a case.

12.2 That the Commission in its analysis and decision given in Regulation 27(a) has clearly exhibited the difference in water consumption between the thermal and hydro generating stations. The appellant without getting into proper interpretation of the decision given by the commission, has come to the conclusion that the Commission on the one hand has acknowledged the fact that the generator has no control on water charges which are determined by state agencies but on the other hand, it has disallowed the expenditure incurred by NTPC due to abnormal hike in water charges.

12.3 That the Commission is correct in holding that tariff is a complete package and water charges cannot be considered in isolation. The O & M is norm based and not at actual. Any additional expense in one component cannot be allowed and the whole spectrum of cost should be looked into, while considering the comparison of actual cost and the recovery based on norms.

13. Our Consideration and Conclusion on the above issues:

13.1 The main contention the Appellant is that the additional cost and expenses incurred on account of the unprecedented increase in water charges, subsequent to the notification/orders issued by the by the State Governments leads to an increase in the water charges payable due to hike in water charges. The Appellant-NTPC filed a Petition before the Central Commission being Petition No. 121/MP/2011 and prayed for relaxations of norms set by the Central Commission for the period 01.04.2009 to 31.03.2014 under Regulations 44, “Power to Relax” of the Tariff Regulations, 2009 in order to recover the additional cost incurred by various stations of NPTC on account of increase in water charges. The Central Commission rejected the plea of the Appellant-NTPC and has not considered the increase in water charges for the period 2009-14.

Further, the Appellant has submitted that subsequent to the 2009 Tariff Regulations and effective from 01.04.2009, the State Governments of Odisha, Chhattisgarh and Madhya Pradesh have increased water charges, ranging from 94% for Korba & Sipat Generating Stations and 2944% for the Farakka Generating Stations.

The increase in water charges in respect of stations located in these states is tabulated below:

Sl. No.	Station	Increase effective from	Existing Water Charges	Revised Water Charges	% increase
			Rate	Rate	
1	Korba-I&II	01.05.2010	3.60/m ³	7.00/m ³	94%
2	Sipat-II	01.05.2010	3.60/m ³	7.00/m ³	94%
3	Talcher-I*	01.10.2010	0.55/m ³	4.50/m ³	718%
4	Talcher-II*	01.10.2010	0.55/m ³	4.50/m ³	718%
5	TTPS	01.10.2010	0.55/m ³	4.50/m ³	718%
6	Vindhyachal **	01.01.2010 & 01.01.2011	2.00/cusec	4.5/cusec	125%
7.	Farakka	01.02.2012	Rs 5.5/5000 Cft	Rs 5.2/1000 gallon	2944%
8.	Badarpur	15.07.2011	Rs 1.5 Lakh/cusec/year	Rs 6.0 Lakh/cusec/year	400%
9.	Dadri Thermal	15.07.2011	Rs 1.5 Lakh/cusec/year	Rs 6.0 Lakh/cusec/year	400%
10.	Auraiya	15.07.2011	Rs 1.5 Lakh/cusec/year	Rs 6.0 Lakh/cusec/year	400%
11	Dadri Gas	15.07.2011	Rs 1.5 Lakh/cusec/year	Rs 6.0 Lakh/cusec/year	400%

12	Tanda	15.07.2011	Rs 1.5 Lakh/cusec/year	Rs 6.0 Lakh/cusec/year	400%
13	Unchahar	15.07.2011	Rs 1.5 Lakh/cusec/year	Rs 6.0 Lakh/cusec/year	400%

As per the Appellant, the increase in water charges effective during 2010, 2011 and 2012 and as a result of statutory directions issued by the respective State Governments, **the increase is not on account of any reason attributable to NTPC** and the increase is beyond the control of NTPC. Further, the above increase in water charges in different States have occurred and have come to the effect after the Central Commission had determined O&M expenses for generating stations under the Tariff Regulations, 2009 for the period from 01.04.2009 to 31.03.2014.

- 13.2 Contrary to these, the respondents, various distribution companies strongly refuted that the total expenses on account of water charges of 27 generating stations of the Appellant, NTPC have increased from 90.67 Cr in 2008-09 to 477.73 Cr in the year 2012-13.

Further, the respondents TANGEDCO in its submissions stated that the water charges are part of O&M expenses, separate claim for water charges should not be allowed. Similar views are expressed by other Respondents and further submitted that the water charges are escalated every year. The water charges forming part of the normative O&M expenses have been held to be a package. Hence, the Normative O&M fixed by the Central Commission cannot be allowed by utilizing the “*Power to Relax*” as per Regulations 44 of the Tariff Regulations, 2009.

- 13.3 Before we proceed towards our own conclusion, we deem it proper to reproduce the relevant part of the impugned order, which is necessary in order to enable us to examine the correctness and legality of the impugned order on this issue:

“27. The Petitioner has vide its affidavit dated 30.7.2013 has submitted the year-wise under recovery of O&M expenses for all generating stations from 2009-10 to 2012-13. The Petitioner has compared the expenses allowed by the Commission in tariff on normative basis and actual O&M expenses incurred by NTPC. The Petitioner worked out the under-recovery to the extent of Rs. 496 crore, Rs. 1245 crore, Rs. 1187 crore and Rs. 1533 crore for the years 2009-10, 2010-11, 2011-12 and 2012-13

respectively. The actual O&M expenses as per books and account relied upon comprises of various expenses which are not allowable for the purpose of the working out normative O&M in tariff such as PRP expenses, incentives (ex-gratia), donations and loss of stock, etc. The actual O&M expenses also include the additional cost on account of wage revision over and above normative O&M expenses as allowed separately by the Commission. Therefore, stated under recovery of O&M expenses cannot be a ground to grant water charges on actual basis by relaxing the norms."

"If the submission of the Petitioner for reimbursement of the water charges on actual basis is accepted, it will amount to allowing the O&M charges on the basis of normative or the actual whichever is higher. Such a dispensation would evoke similar demands from the beneficiaries for reimbursement of expenditure in tariff not at the normative levels but at the lower of the normative and actual. In our view, once the tariff has been fixed on the basis of normative parameters, the same should not be reopened even if there is any variation between normative and actual. During the 2009-14 period, some of the State Governments have enhanced the water charges. It is pertinent to mention that the Commission in due recognition of the escalation of the water charges by some of the State Governments has excluded water charges as a component of charges have been allowed as a pass through during the tariff period 2014-19. Therefore, the impact of enhancement of water charges by some of the State Governments is confined to the period 2009-14 only. In our view, the Petitioner should absorb the additional expenditure on account of water charges by offsetting the same against the savings made by the Petitioner during the 2009-14 tariff period under other normative parameters including the operating norms."

13.4 Let us examine the Central Commission's Tariff Regulations, which provides for recovery of operation and maintenance expenses on normative basis. The relevant part of the Tariff regulations is as under:

"19. Operation and Maintenance Expenses

Normative operation and maintenance expenses shall be as, namely:

- (a) Coal based and lignite fired (including those based on CFBC technology) generating stations, other than the generating stations referred to in clauses b) and (d):

(Rs. in lakh/MW)

Year	200/210/250 MW sets	300/330/350 MW sets	500 MW sets	600 MW and above sets
2009-10	18.20	16.00	13.00	11.70
2010-11	19.24	16.92	13.74	12.37

2011-12	20.34	17.88	14.53	13.08
2012-13	21.51	18.91	15.36	13.82
2013-14	22.74	19.99	16.24	14.62

Provided that the above norms shall be multiplied by the following factors for additional units in respective unit sizes for the units whose COD occurs on or after 01.04.2009 in the same station:

200/210/250 MW	Additional 5 th & 6 th units	0.9
	Additional 7 th & more units	0.85
300/330/350 MW	Additional 4 th & 5 th units	0.9
	Additional 6 th & more units	0.86
500 MW and above	Additional 3 rd & 4 th units	0.9
	Additional 5 th & above units	0.85

- (b) Talcher Thermal Power Station (TPS), Tanda TPS, Badarpur TPS of NTPC and Bokaro TPS, Chandrapura TPS and Durgapur TPS of DVC
(Rs. In lakh/MW)

Year	Talcher TPS	Tanda and Chandrapura TPS	Badarpur, Bokaro and Durgapur TPS
2009-10	32.75	26.25	31.35
2010-11	34.62	27.75	32.25
2011-12	36.60	29.34	33.17
2012-13	38.70	31.02	34.12
2013-14	40.91	32.79	35.09

- (c) Open Cycle Gas Turbine/Combined Cycle generating stations
(Rs. In lakh/MW)

Year	Gas Turbine/Combined Cycle generating stations other than small gas turbine power generating stations	Small gas turbine power generating stations	Agartala GPS
(1)	(2)	(3)	(4)
2009-10	14.80	22.90	31.75
2010-11	15.65	24.21	33.57
2011-12	16.54	25.59	35.49
2012-13	17.49	27.06	37.52
2013-14	18.49	28.61	39.66

- (d) Lignite-fired generating stations
(Rs. In lakh/MW)

Year	125 MW Sets	TPS-I of NLC
2009-10	24.00	27.00
2010-11	25.37	28.54
2011-12	26.82	30.18
2012-13	28.36	31.90
2013-14	29.98	33.73

The Central Commission while fixing the above normative O&M charges for determination of Tariff for the financial year 2009-14, followed the procedure laid down in Section 61 of Electricity Act, 2003 duly safe guarding of consumers interest and at the same time recovery of cost of electricity in a reasonable manner.

- 13.5 The Central Commission arrived the Normative O&M expenses for the Tariff period 2009-14 as a package considering all the elements/components of operation and maintenance expenses such as employees cost, repair & maintenance cost of generating stations including water charges. Hence, the increase in cost of one element cannot be considered in isolation as the normative O&M cost is arrived duly considering all the factors.

Further, while framing the Tariff Regulations, the Central/State Commissions considers the stakeholders/public opinion and as per National Tariff Policy etc., the Regulations are framed. Further, the Commission has considered an escalation factor of 5.72% as per WPI & CPI index published by Govt. of India.

- 13.6 According to Tariff Policy, the O&M expenses are controllable factor and hence, the Appellant/Petitioner has to take suitable measures to control the O&M expenditures and the Act provides reward for efficiency in performance. Further, the O&M expenditure as per Tariff Regulations, 2009, is norm based and not at actual, hence, any additional expenses in one component cannot be allowed and whole spectrum of cost should be looked into while considering the comparison of actual cost and the recovery based on norms.

- 13.7 The Appellant/Petitioner has relied upon the decision of the Commission dated 12.10.2012 in Petition No. 35/MP/2012 with regard to pay revision and has submitted that the increase in water charges has to be considered in the similar lines with respect to pay revision of employee and submitted that the increase in water charges has to be considered in a similar lines.

We have gone though the Judgments of this Tribunal with respect to pay revision of employees. The Judgment of this Tribunal in Appeal Nos. 184 and 305 of 2013, dated 19th Feb, 2016 is as under:

"15.3 This Tribunal has relied on the judgment of Hon'ble Supreme Court in the case of West Bengal Electricity Regulatory commission Vs CESC Limited while passing the judgment in Appeal No.55 of 2013 dated 24.3.2015. The relevant part of this Tribunal's judgment in Appeal No.55 of 2013 dated 24.3.2015 in the case of BSES Yamuna Power Ltd., vs. Central Electricity Regulatory Commission (CERC), is as under: "18.6. We have gone through the proposition of law settled by the Hon'ble Supreme Court of India in West Bengal Electricity Regulatory Commission Vs.CESC Limited (2002) 8 SCC 715 in which the Hon'ble Apex Court had observed that the employees cost prudently incurred needs to be reimbursed to the Utility. The Hon'ble Supreme Court expressing agreement with the finding of the High Court held that since it is not disputed that the payments made to the employees are governed by the terms of the settlement form which it will not be possible for the Company to wriggle out during the existence of the settlement, therefore, the actual amounts spent by the Company as employees' costs will have to be allowed. In these matters in hand, after careful and deep scrutiny of the rival submissions made by the parties, we do not find any force in the submissions/contentions made on behalf of the appellants. Rather, the submissions of the respondent power generators/corporations have legal force to which we agree".

- 13.8 Further, the Central Commission in the Order dated 12.10.2012 in Petition No. 35/MP/2011 observed as under:

"Accordingly, the petitioner has approached by way of the present petition for allowing the impact of the pay revision and wage revision in tariff. In our view, norms of tariff have been specified in the terms and conditions of tariff after extensive stakeholder's consultation and keeping in view the provision of the Act, National Electricity Policy and tariff Policy and its sanctity should be maintained. Normally a party should not be allowed any charged in deviation of the norms. However, when a particular expenditure has not been factored while deciding the norms, in that case the claim for such expenditure cannot be said to result in reopening of norms. The claim has to be considered in addition to the norms after due prudence check as regards its reasonability. Otherwise this will result in under-recovery of the cost of expenditure of the generating company. In our view, the principle that tariff is a package based on the norms and cannot be reopened on account of additional actual expenses is not applicable in this case since, the impact of wage revision and pay revision was never factored in the norms and hence was never part of the package. Therefore the impact of wage and pay revision need to be considered over and above the norms specified in the 2004 Tariff Regulations".

Thus, the actual cost of O&M expenses also included additional cost on account of wage revision over and above Normative O&M

expenses and this cannot be the ground for considering the increase in water charges. In our view, once, the tariff has been fixed on the basis of normative parameters; the same should not be opened, even if, there is, any variation between normative and actual. The Regulations, 44 of the Tariff Regulations, 2009, i.e. "Power to Relax" cannot be utilized in this case. We feel that the Power to Relax has to be strictly construed and is to be exercised judicially and with caution.

- 13.9 Further, the Central Commission duly followed their Tariff Regulations, 2009 while determining the Tariff by considering the Normative O&M expenses of the Appellant Generating Stations duly taking the stakeholders/public view at the time of approval of the Tariff Regulations.
- 13.10 The Appellant has submitted that the Central Commission through 3rd Amendment of Tariff Regulations, has allowed for payment of water charges in respect of NHPC Ltd. in the State of Jammu & Kashmir. We have gone through the Impugned Order and noticed that the payment of water charges to NHPC has been allowed through and after amendment in Regulations and not under Regulations, 44 of Tariff Regulations, 2009, i.e. "Power to Relax". Hence the contention of the Appellant cannot be accepted.
- 13.11 In our opinion after going through the above submissions, we do not find any infirmity in the decision of the Central Commission regarding disallowance of increase in water charges for the period 2009-14 as the increase in water charges is one of the component of the normative O&M charges in the tariff Regulations, 2009 and further the O&M charges in the Tariff Regulations, 2009 is one package under which water charges is one of the components and hence the increase in one component cannot be considered under Regulation, 44 of the tariff Regulations, i.e. "Power to Relax". However, the Appellant is allowed by the Central Commission for the Tariff period 2014-19 by excluding the water charges from the Normative O&M charges. Thus, this issue is decided against the Appellant.

Thus, we feel that the impact of water charges cannot be considered for the tariff period 2009-14. However, the Commission considered the effect of water charges separately by excluding the water charges from the Normative O&M expenses.

13.12 Thus, we do not find any infirmity in the decision of the Central Commission in the Impugned Order dated 10.04.2015. Accordingly, the Appeal is dismissed.

ORDER

The instant Appeal being Appeal No. 148 of 2015 is hereby dismissed and the Impugned Order dated 10.04.2015 passed by Central Commission is hereby affirmed/upheld.


No order to costs.

Pronounced in the Open Court on this **4th day of May, 2016.**

**(T Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

Dated: 4th May, 2016

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