IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 95 OF 2015

Dated: 15th May, 2018

Present: HON'BLE MR. N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF

NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003 …… Appellant

VERSUS

1. **Uttar Pradesh Power Corporation Ltd.**
   Shakti Bhawan, 14, Ashok Marg,
   Lucknow-226001
   Uttar Pradesh

2. **Jaipur VidyutVitaran Nigam Ltd.**
   VidyutBhawan, Janpath,
   Jaipur 302005

3. **Ajmer VidyutVitaran Nigam Ltd.**
   VidyutBhawan, Panchsheel Nagar,
   Makarwali Road, Ajmer -305004
   Rajasthan

4. **Jodhpur VidyutVitaran Nigam Ltd.**
   New Power House, Industrial Area,
   Jodhpur-342003

5. **Tata Power Delhi Distribution Ltd.**
   Grid Substation, Hudson Road,
   Kingsway Camp,
   Delhi-110009

6. **BSES Rajdhani Power Ltd.**
   BSES Bhawan, Nehru Place,
   New Delhi-110019

7. **BSES Yamuna Power Ltd.**
   Shakti Kiran Building,
   Karkardooma,
   Delhi-110092

8. **Haryana Power Purchase Centre.**
   Shakti Bhawan, Sector-VI,
   Panchkula,
   Haryana-134109

9. **Punjab State Power Corporation Ltd,**
   The Mall,
   Patiala-147001

10. **Himachal Pradesh State Electricity Board Ltd.**
    Kumar Housing Complex Building-II,
    Vidyut Bhawan,
    Shimla- 171004

11. **Power Development Department,**
    Govt. of Jammu & Kashmir,
    Secretariat,
    Jammu-180 001

12. **Power Department (Chandigarh)**
    Union Territory of Chandigarh,
    Addl. Office Building,
    Sector-9 D, Chandigarh-160 009

13. **Uttarakhand Power Corporation Ltd.**
    UrjaBhawan, Kanwali Road,
    Dehradun-248001

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

Counsel for the Appellant ... Mr. M.G. Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya

Counsel for the Respondent(s)… Mr. Pradeep Misra
Mr. Manoj Kr. Sharma
for R-1 to R-4 & R-9

Mr. R.B. Sharma
for R-6

Mr. Sethu Ramalingam
for R-14

J U D G M E N T

PER HON'BLE JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. NTPC Limited (hereinafter referred to as ***'the Appellant'***) presented this appeal under Section 111 of the Electricity Act, 2003, being aggrieved by the Order dated 15.05.2014 read with the Order dated 22.12.2014 passed by the Central Electricity Regulatory Commission (hereinafter referred to as ***'Central Regulatory Commission'***) in Petition No. 139/GT/2013 and Review Petition No. 20/RP/2014 whereby the Central Commission has revised the tariff for the Anta Gas Power Station (419.33 MW) of the Appellant for the period from 01.04.2009 to 31.03.2014.

2. The Appellant, being aggrieved of the disallowance of Rs. 131.18 lakhs (Rs. 75.96 lakhs on actual basis during 2011-12 and Rs.55.22 lakhs on projected basis during 2012-13) claimed for the Gas Turbine Inlet Air Cooling System on the ground that the benefit of improvement in efficiency is not being passed on to the beneficiaries, has further

sought to pass such other Order(s) as this Hon'ble Tribunal may deem just and proper in the interest of justice and equity.

3. The Appellant has presented this Appeal for considering the following substantive questions of law:

A. *Whether in the facts and circumstances of the case the Central Commission has rightly disallowed the capital and other expenditure claimed by NTPC on the basis that gains of improved efficiency are not being passed on to the beneficiaries?*

B. *Whether in the facts and circumstances of the case, the Central Commission is right in disallowing the expenditure towards GT Inlet Air Cooling System under Regulation 9 (2) (vi) which deals with the expenditure for successful and efficient operation of the station?*

BRIEF FACTS OF THE CASE:

4. The Appellant is a Government of India Undertaking and a Company incorporated under the Companies Act, 1956 and is engaged in the business of generation and sale of electricity to various purchasers/beneficiaries in India. The Appellant, being a generating company owned and controlled by the Central Government, is covered by clause (a) of sub-section (1) of Section 79 of the Electricity Act, 2003 (hereinafter referred to as ***'the Act'***). The generation and sale of power by the Appellant to the Respondents No. 1 to 13 is regulated under

the provisions of the Act by the Central Commission, the Respondent No. 14 herein.

5. One of the generating stations of the Appellant is the Anta Gas Power Station (419.33 MW) (hereinafter called the ***'Anta Station'***). The electricity generated from the Anta Station is supplied to Respondents No. 1 to 13 herein.

6. The Anta Station with the total capacity of 419.33 MW comprises of three Gas Turbine units of 88.71 MW each and one Steam Turbine unit of 153.20 MW. The Commercial Operation Date (COD) of different units of the Anta Power Station are as under:

Units	**COD**
Unit-I (GT)	01.04.1989
Unit-II (GT)	01.05.1989
Unit-III (GT)	01.07.1989
Unit-IV (ST)	01.08.1990

7. For the tariff period from 01.04.2009 to 31.03.2014, the Central Commission notified the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 (in short, *'**Tariff Regulations, 2009'***), *inter-alia,* providing for the norms and parameters applicable for the generating stations for which tariff was to be determined by the Central Commission under Section 62(1)(a)

read with Section 79 (1) (a) and (b) of the Electricity Act. Regulations 9 (2) of the Tariff Regulations, 2009.

8. In terms of the Tariff Regulations, 2009, on 28.10.2009, the Appellant filed Petition No. 239 of 2009 before the Central Commission for determination of tariff of the Anta Station for the period 2009-14. Thereafter, in terms of the directions of the Central Commission in the Order dated 29.06.2010 in Petition No. 245 of 2009, the Appellant filed an amended petition on 22.03.2011 taking into consideration the revised financials.

9. By Order dated 20.04.2012, the Central Commission decided Petition No. 239 of 2009 and determined the tariff of the Anta Power Station for the period of 01.04.2009 to 31.03.2014.

10. As there were errors apparent on the face of record, on 12.06.2012; the Appellant filed Review Petition No. 12 of 2012 before the Central Commission for review of the Order dated 20.04.2012 on the aspects, namely; (a) adjustment of cumulative repayment of loan consequent to truing up of un-discharged liability as on 31.03.2009 (b) calculation of average loan for KFW (D7) in Form-13 and (c) disallowance of expenditure on account of GT # 1 Compressor vanes in 2009.

11. The Central Commission vide Order dated 02.04.2013 decided the review petition by allowing the additional capital expenditure on account of GT-1 compressor vane and computed the interest on loan after correcting the arithmetical errors in the calculation of average loan for KFW (D7) during 2009-10.

12. In the Order dated 20.04.2012, the Central Commission, amongst others, did not fully allow the capitalization claimed by the Appellant. Aggrieved by the Order dated 20.04.2012, read with the Order dated 02.04.2013, the Appellant on 27.05.2013 filed an Appeal, being No.122 of 2013, before the Hon'ble Tribunal. The said Appeal No. 122 of 2013 is pending before this Hon'ble Tribunal. The Appellant craves leave to refer to the pleadings in the above appeal at the time of hearing.

13. On 14.06.2012, the Appellant filed Petition No. 139/GT/2013 for revision of the fixed charges for Anta Station on the basis of actual capital expenditure incurred for the years 2009-10, 2010-11 and 2011-12 and the projected expenditure for the years 2012-13 and 2013-14, in accordance with Regulation 6(1) of the Tariff Regulations, 2009.

14. In the Petition No. 139/GT/2013 filed by the Appellant for the Anta Station, the Central Commission sought for information, details,

clarifications etc. from the Appellant. In response to the above, the Appellant submitted the requisite details vide its Affidavit dated 01.03.2013 including on the aspects of capitalization towards GT Inlet Air Cooling System which is the subject matter of the present appeal.

15. On 25.10.2013, Hon'ble Tribunal in Appeal No. 71 of 2012 relating to disallowance of capital expenditure incurred by the Appellant at Gandhar Station for installation of GT Inlet Air Cooling System remanded the matter to the Central Regulatory Commission.

16. The Central Commission issued Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014. The auxiliary power consumption for Anta Gas power station has been reduced from 3% during 2009-14 period to 2.5% w.e.f.01.04.2014 onwards. The Tariff Regulations, 2014 also provide that the gains arising out of operating parameters being better than the norms shall be shared with the beneficiaries in the ratio of 60:40.

17. The Central Commission, by its Order dated 15.05.2014 decided Petition No 139/GT/2013 and revised the tariff for Anta Station for the period from 01.04.2009 to 31.03.2014. In the said Order, the Central Commission has disallowed the claim of the Appellant in regard to the expenditure incurred on the Gas Turbine Inlet Air Cooling System on

the ground that the benefits due to the improvement in efficiency are not being passed on to the beneficiaries.

18. On 07.07.2014, the Appellant filed a Review Petition No. 20/RP/2014 for review of the Order dated 15.05.2014 and after filing the Review Petition on 07.07.2014, the Appellant filed an Appeal on 08.07.2014, being Appeal No. 184 of 2014, before the Hon'ble Tribunal challenging the Order dated 15.05.2014 passed by the Central Commission. The said Appeal was admitted by the Hon'ble Tribunal on 21.08.2014.

19. Subsequently, the Hon'ble Tribunal, vide Order dated 11.09.2014 in the matter of Steel Authority of India Limited v Central Electricity Regulatory Commission & Ors Appeal No. 41 of 2014, held that an Appeal under Section 111 of the Electricity Act, 2003 would not be maintainable when a Review Petition raising the same issues is pending for adjudication before the Central Commission. Following the said Order dated 11.09.2014, the Hon'ble Tribunal, on 17.09.2014, dismissed the Appeal No. 184 of 2014 as the Review Petition was pending for adjudication before the Central Commission. The Hon'ble Tribunal, however, granted liberty to the Appellant to file an Appeal, subject to the outcome of the pending Review Petition. Further, vide Interim Order dated 04.08.2014, in the Review Petition No. 20/RP/2014, the Central Commission directed the Appellant to submit

the details of the improvement in performance of the Station on account of installation of GT Inlet Air Cooling System.

20. The Appellant, vide Affidavit dated 04.09.2014, submitted the information required in the Interim order dated 04.08.2014 by the Central Commission. Subsequently, vide order dated 22.12.2014, the Central Commission decided the Review Petition No. 20/RP/2014, partly allowing the review petition and rejecting the review on other aspects.

21. The Appellant, further submitted that, the following aspects are also relevant:

i. By its Order dated 25.10.2013 in Appeal No. 71 of 2012 relating to disallowance of capital expenditure incurred by NTPC at Gandhar Station for installation of GT Inlet Air Cooling System, the Hon'ble Tribunal remanded the matter to the Central Commission

ii. The Tariff Regulations, 2014 provide for sharing of gains achieved through improved performance over the norms in the ratio 60:40 with the beneficiaries.

The above aspects were not considered by the Central Commission while passing the impugned Order

22. The Appellant, questioning the legality and validity of the impugned Order dated 15.05.2014 read with the Order dated 22.12.2014 passed by the Central Regulatory Commission disallowing the claim of the Appellant towards GT Inlet Air Cooling System, presented this Appeal.

SUBMISSIONS OF THE LEARNED COUNSEL, MR. M.G. RAMACHANDRAN FOR THE APPELLANT:

23. The learned counsel for the Appellant submitted that, the Central Regulatory Commission erred in disallowing the claim of Rs.131.18 lakh towards installation of the Air Inlet Cooling system for the Gas Turbine of the Anta Station on the ground that there is no justification to allow such capitalization unless the benefit of improved efficiency is passed on to the beneficiaries. The Central Regulatory Commission has also failed to consider that the Air Inlet Cooling System is an expenditure that is necessary for successful and efficient operation of the station and, therefore, the expenditure falls under the scope of Regulation 9 (2) (vi) of Tariff Regulations, 2009. Therefore, the impugned Order passed by the Central Regulatory Commission is liable to be vitiated.

24. The learned counsel for the Appellant vehemently submitted that, it is a settled principle of law that the Commission is bound by the Regulations. To substantiate his submission, he placed reliance

on the judgment of the Hon'ble Supreme Court (2010) 4 SCC 603 (PTC India Limited v Central Electricity Regulatory Commission) and the decision of this Appellate Tribunal in Appeal No. 131 of 2011 dated 01.03.2012 (Haryana Power Generation Corporation Ltd. v Haryana Electricity Regulatory Commission). There is no condition in Regulation 9(2)(vi) that the capitalization of assets will be allowed only if some additional benefit is accruing to the beneficiaries. The Central Regulatory Commission has not considered that the claim of the Appellant being under Regulations 9 (2) (vi) of Tariff Regulations, 2009, it is not permissible to consider any extraneous aspects such as gain being passed on to the beneficiaries as a ground for disallowing the claim.

25. Further, the learned counsel for the Appellant submitted that, this Hon'ble Tribunal, in the case of Gandhar Gas Power Station, vide its judgment dated 25.10.2013 in Appeal No. 71 of 2012, remanded the determination of tariff for the financial years 2009 to 2014. In the remand proceedings, vide Record of Proceedings dated 06.03.2014, the Central Regulatory Commission has considered the issue relating to capitalization of Air Inlet Cooling System. He quickly taken through the reasoning given in paragraph nos. 32 to 37 of the said judgment and vehemently submitted that the Central Regulatory Commission should have decided this issue on strictly on the basis of its Regulations. This aspect of the matter has not been looked into and,

therefore, he submitted that, on this ground also the Order impugned passed by the Central Regulatory Commission is liable to be quashed.

26. The learned counsel for the Appellant submitted that, the Central Regulatory Commission has not taken into consideration that the Gas Turbines were unable to generate up to the rated capacity during the summer months due to increase in ambient temperature of air. This leads to a reduction in the mass flow of air handled by the gas turbine compressor. Use of the inlet air cooling system helps in offsetting this loss by cooling the inlet air. This way the gas turbine would be able to generate near to rated capacity as the mass flow of air is increased by reducing the temperature of inlet air. This cannot be considered as any gain to the Appellant to be passed on to the beneficiaries as additional benefit.

27. Any restoration of capacity otherwise lost due to high ambient temperature during summer would ultimately benefit the beneficiaries by providing increased power supply. In fact, not allowing the capitalization of the expenditure towards Air inlet cooling system may have an adverse impact on the performance of the station and the intended benefit of gas turbine may not be available. Accordingly, disallowing the expenditure is not in the interest of the station and the ultimate beneficiaries to whom the reliable power would be available in a cheaper rate compared to other Discoms.

28. Further, the learned counsel for the Appellant in the additional submissions on behalf of the Appellant submitted that, the learned counsel appearing for the Respondent Nos. 1 to 4 & 9, learned counsel appearing for the Respondent No.6 and the learned counsel appearing for the Respondent No.14/Central Regulatory Commission contended that the Appellant is required to show that the benefit of the improvement on installation of GT Air Inlet cooling System is passed on/shared with the procurer beneficiaries, the absence of which disentitles the Appellant to the capital expenditure. The decision of this Hon'ble Tribunal in Appeal No. 173 of 2013 in the case of NTPC v Central Electricity Regulatory Commission decided on 08.05.2014 covers the present claim of the Appellant in regard to sharing of benefits.

29. The Appellant is seeking a double benefit, namely the benefit of additional capitalization being allowed and also the benefits of improved performance in the Plant Load Factor. In this regard, reference has been made to Appeal No. 173 of 2013, as stated supra. With reference to the Affidavit dated 04.09.2014, it has been claimed that NTPC is already operating at the Plant Load Factor above the normative 85% and, therefore, should not get the benefit of capital expenditure.

30. The Appellant had failed to furnish the information called for in the Interim Order dated 04.08.2014. The information submitted by the Appellant vide Affidavit dated 04.09.2014 does not give the improvement in the heat rate/efficiency of the Gas Station, besides increase in generating capacity.

31. The learned counsel for the Appellant vehemently submitted that, the increase in capacity required to be shown is the increase of the rated capacity above 88.71 MW and not the increase in capacity from 79.13 MW to 85.36 MW. As per Regulation 9(2)(vi) of the Tariff Regulations, 2009 provides for the capital expenditure to be considered only if the expenditure is necessitated due to obsolescence or non-availability of spares. Since Air Inlet Cooling System was not in existence before and is a new asset to be installed, there is no question of any obsolescence. Therefore, the stand taken by the learned counsel for the Respondents in reply statements has no substance and liable to be rejected.

32. It is submitted that, in terms of Regulation 9(2) opening part of the Tariff Regulations, 2009, the Central Regulatory Commission has the discretion to allow the expenditure. The Central Regulatory Commission is right in not exercising the discretion to allow the expenditure considering the interest of consumers, in terms of Section 61(d) of the Electricity Act, 2003. The claim for installation of the Air

Inlet Cooling System has been made by the Appellant in the FY 2011-12, after the Gas Station has functioned for sufficiently long time.

33. Besides the above, some general, sweeping and extraneous claim were made on grounds of interest of consumer was made, which are not germane to the facts of the case. Therefore, submissions and the stand taken in the reply cannot be made applicable to the facts and circumstances of the case in hand and this matter is directly covered by the decision of this Hon'ble Tribunal in case of Gandhar Gas Power, as stated above.

34. The Appellant's rejoinder on the specific aspects raised by the learned counsel for the Respondents are:

A. SHARING/PASSING OF BENEFITS:

35. The issue of sharing/passing of benefits to the Respondent-procurers, in the context of Regulation 9(2)(vi) of the Tariff Regulations, 2009, with reference to the GT Air Inlet Cooling System was specifically decided by this Hon'ble Tribunal in the judgment and order dated 28.10.2013 in Appeal No. 70 and 71 of 2012 (NTPC Limited v Central Electricity Regulatory Commission)**.** This Hon'ble Tribunal had taken note of the findings of the Central Regulatory Commission in the case of Gandhar Station, at **Para 35** to the effect -"*in the absence of any commitment on the part of the Petitioner to pass on the benefit of*

improvement in efficiency" and in **Para 36**, rejected the same by holding that the Central Commission has not dealt with the issue in accordance with the Regulations.

36. It is therefore, clear that the plea of parting with the benefit to the procurers, cannot be a condition for considering the admissibility of capital expenditure under Regulation 9(2)(vi) of the Tariff Regulations, 2009.

37. It is in the above context, that while considering the review petition filed by the Appellant, in the Order dated 22.12.2014, the Central Regulatory Commission, after referring first to the contents of Para 31 of the Order dated 15.05.2014 (in Para 5) and the decision of the Hon'ble Tribunal in Appeal No. 70 and 71 of 2012 (in Paras 6, 8 and 9), proceeded to consider the matter in accordance with the decision of the Hon'ble Tribunal (in Para 11). It may be seen in Para 11 that the Central Regulatory Commission has not considered the requirement of passing the benefit to the Procurers. The two grounds considered are (i) alleged non furnishing of information and; (ii) issue of obsolescence or non availability of spares being not applicable.

38. It is in the above context, that while considering the review petition filed by NTPC, in the Order dated 22.12.2014, the Central Commission, after referring first to the contents of Para 31 of the Order

dated 15.05.2014 (in Para 5) and the decision of the Hon'ble Tribunal in Appeal No. 70 and 71 of 2012 (in Paras 6, 8 and 9), proceeded to consider the matter in accordance with the decision of the Hon'ble Tribunal (in Para 11). It may be seen in Para 11 that the Central Commission has not considered the requirement of passing the benefit to the Procurers. The two grounds considered are (i) alleged non furnishing of information and; (ii) issue of obsolescence or non availability of spares being not applicable. Therefore, the Order dated 22.12.2014 is clear. The rejection is on the two aforementioned grounds. It is not on account of there being no benefit to the procurers.

39. In the above circumstances, it is rather surprising that the Respondent Procurers and the Central Regulatory Commission are raising the issue of the benefit not being derived by the beneficiaries, as the primary ground to plead that the Appellant should not get the capital expenditure. The reliance placed on the judgment dated 08.05.2014 passed by this Hon'ble Tribunal in Appeal No. 173 of 2013 (supra) is misplaced for more than one reasons.

40. There is an authoritative decision of the Hon'ble Tribunal dated 28.10.2013 in Appeal 70 and 71 of 2012 with reference to the GT Air Inlet cooling system and Regulation 9(2)(vi) i.e. the subject matter in the present case. The decision in Appeal No. 173 of 2013 is regarding the Energy monitoring System and not on an actual plant/operating

equipment used for generation of electricity in a successful and efficient manner.

41. Further, he vehemently submitted that, the claim for Energy monitoring system (under Regulation 9(2)(ii) of the Tariff Regulations, 2009 – change in law) was considered in the context of reduction in the auxiliary consumption, less than what was allowed on normative basis and also, that the civil and other works were required to be done by the Cut Off date (Ref: Para 24 (i) of the Judgment dated 8.05.2014). Therefore, the decision in Appeal No. 173 of 2013 cannot be considered as a precedent in the context of the categorical decision in Appeal No. 70 and 71 of 2012, against which no appeal has been filed.

42. The Appellant has challenged the Order dated 08.05.2014 in Civil Appeal No 6488 of 2014 and notice has been issued on the same. Therefore, in any event, the benefit of increased generation in the Anta Gas Power Plant is to the advantage of the procurers.

B. ALLEGED DOUBLE BENEFIT:

43. There is no merit in the contentions of the Respondents that the Appellant is getting double benefit. The Appellant gets its annual revenue requirements, based on the capital expenditure including the additional capital expenditure at the normative PLF and, thereafter,

incentive. The Appellant does not get anything more than that on account of installing the Inlet Air Cooling System.

44. The Double benefit which the Hon'ble Tribunal considered in Appeal No. 173 of 2011 (supra) decided on 08.05.2014 at Para 24 (iii) – Last Part is a reduction in the total quantum of auxiliary consumption. This is completely different from the performance of the generating station, as per the normal condition without being affected by the high ambient temperature during high summer months, prevalent in Rajasthan where Anta Gas Power Station is located. For example, if the same Gas Power Station is situated in a place which may not have high ambient temperature (as in Rajasthan), the Appellant would have got the same amount of generation without installing the air inlet cooling system. Thus, installation of air inlet cooling system confers no higher benefit than what is normally expected from a Gas Power Station. The necessity to install the GT Air Inlet cooling system was for reasons beyond the control of the Appellant and for factors not attributable to the Appellant in any manner. Therefore, the submissions of the learned counsel for the Respondents may not be applicable to the facts and circumstances of this case.

C. NTPC OPERATING AT HIGHER PLF:

45. This contention is being made for the first time in the present proceedings. In the impugned Orders, the Central Regulatory

Commission has not proceeded on the basis of any such plea. Such a plea is totally misconceived and shows the lack of understanding of PLF, which is to be decided on annual basis and the requirement to achieve maximum output during peak months (summer months). Therefore, the PLF on the normative basis of 85% and incentive are computed on an annual basis and not on monthly/daily basis. The achievement of PLF on an annual basis will not be to the extent of rated capacity, in the present case – 88.71 MW. This is on account of various reasons including planned shutdown, Forced Shutdown, unavailability of fuel to the full extent etc. However, with the available fuel, the Gas Turbine was functional to the maximum extent, as in the present case on certain dates to 85.36 MW. It does not mean that the PLF achieved during the year is 85.36 MW against a rated capacity of 88.71 MW. Therefore, there is no basis that the Appellant is taking advantage of higher PLF. The said contention raised by the learned counsel for the Respondent for the first time should not be entertained as the same is not applicable to the facts and circumstances of the case in hand. Hence, it may be rejected.

D. NON FURNISHING OF INFORMATION:

46. In the Impugned Order, at Page 205, the decision of the Central Regulatory Commission is that the Appellant has failed to furnish the required information. The impugned Order does not even refer to the Affidavit filed by the Appellant along with the Information on

04.09.2014 in the context of the Air Inlet cooling System. The impugned Order is also not to the effect that inadequate information or all the information required, has not been furnished. The impugned Order does not say that increase in capacity is given, but heat rate/efficiency has not been given. The impugned Order dated 22.12.2014 does not even refer to the Interim Order dated 4.08.2014 in the context of information sought for GT Air Inlet Cooling System, while referring to it in another context.

47. The only and obvious inference is that the Central Regulatory Commission overlooked the Affidavit dated 04.09.2014 filed by the Appellant and the information provided therein in regard to increase in capacity.

48. Despite the above, the Central Regulatory Commission as well as the other Respondents (in the written submissions and the arguments) are seeking to add their own version by stating that all the information required was not furnished. The Affidavit dated 04.09.2014 clearly and unambiguously talks about an increase in generation capacity from 79.13 MW to 85.36%, namely; by 6.23 MW which is a significant improvement in the available quantum of electricity to the Respondent - Procurers. As regards, heat value/efficiency, it is important to again refer to the decision of this Hon'ble Tribunal In Appeal No. 70 and 71 of 2012 wherein it was stated that – ***"the norms of heat rate are***

***decided by the Central Commission in its Regulations and the same could not be decided by the Appellant*".**

49. After noting the above, this Hon'ble Tribunal directed the Central Commission to decide the matter in accordance with Regulation 9(2)(vi) of the Tariff Regulations, 2009. Accordingly, heat rate/efficiency was not to be a subject matter of consideration. The increase in capacity was the relevant factor which was provided. In the Impugned Order, the Central Regulatory Commission has not referred to non furnishing of heat rate/efficiency as a ground for rejecting the claim. Therefore, allegations made in this regard by the Respondents are an afterthought and without any merit and, hence, are liable to be rejected.

E. INCREASE IN CAPACITY TO BE SHOWN IS NOT INCREASE IN RATED CAPACITY

50. It is the case of the Appellant that it is patently erroneous to contend that by installing air inlet cooling system, the rated/installed capacity should increase beyond 88.71 MW. The rated/installed capacity is based on the entire generating unit consisting of number of equipment. Mere installation of air inlet cooling system, with all other plant/equipment remaining the same cannot possibly increase the rated capacity. Therefore, the obvious reference is to the increase in

the generation capacity and not by any means to the increase in the rated capacity.

F. RE: OBSOLESCENCE

51. It is the case of the Appellant that in view of the external factor of high ambient temperature, the Gas Turbine with rated capacity of 88.71 MW, was not in a position to generate upto the desired quantum and to that extent, it should be considered to be affected by obsolescence which gets rectified with installation of air inlet cooling system. The dominant purpose of the Regulation 9(2)(vi) is the successful and efficient operation and the issue of obsolescence or non availability of spares on the above touchstone. The obsolescence issue was not raised by the Central Regulatory Commission in the Order dated 15.05.2014 and was only raised in the Order dated 22.12.2014.

G. DISCRETIONARY POWER

52. The discretion under Regulation 9(2) of the Tariff Regulations, 2009 is a judicial discretion to be exercised in circumstances where it is required to be exercised. To substantiate the submission regarding discretionary power, the learned counsel for the Appellant placed reliance on the judgment of the Hon'ble Supreme Court in Aero Traders (P) Ltd. v. Ravinder Kumar Suri, (2004) 8 SCC 307 (ref.: para

6) and also in the case of PTC India Limited-v-Central Electricity Regulatory Commission (2010) 4 SCC 603 (ref: paras 56 & 57).

H. ALLEGED DELAY IN INSTALLATION OF AIR INLET COOLING SYSTEM

53. It is correct that the Air Inlet Cooling System was being established in the financial year 2011-12 and not at the time when the Gas Power Station was established. The said issue was not raised by the Central Regulatory Commission in the impugned Order. The need for installation of the Air Inlet Cooling System in the year 2011-12,was for the following reasons:

(a) The Tariff Regulations, 2009, for the first time increased the useful life of the Gas Power Station from 15 to 25 years;

(b) By the Second Amendment to the Tariff Regulations, 2009 which came into force on 21.6.2011, for the first time, sub clause (vi) was added to Regulation 9 (2), which was incorporated and thereby, enabled the consideration of the additional capitalisation in the case of Gas Power Station for successful and efficient operation as stated in the said Regulation;

54. Up to 31.03.2009, the pre-existing Tariff Regulations, 2004 allowed all types of additional capitalisation to be considered. The Tariff Regulations, 2009, when it came into force w.e.f. 01.04.2009

restricted the consideration of additional capitalisation only to sub clauses (i) to (iv). Accordingly, on grounds which are specified in Regulation 9 (2) (vi), the Appellant could not have claimed the allowance of the capital expenditure prior to June 2011.

55. If these aspects of the matter are being taken into consideration, the impugned Order passed by the Central Regulatory Commission is liable to be set-aside.

56. The aforesaid justification of the Central Regulatory Commission is devoid of any merit as this Hon'ble Tribunal has in a similar case of Gandhar Gas Power Station allowed GT Inlet Air Cooling System being installed for the first time at Gandhar Gas Power Station. The Central Regulatory Commission should maintain a consistency/uniformity in its approach. Therefore, The Central Regulatory Commission has not taken into consideration that the Tariff Regulations, 2014 applicable for the 5 year period from 01.04.2014 envisage sharing of the gains, arising due to achievement of operating parameters better than the norms with the beneficiaries in the 60:40 ratio. Accordingly, there would be automatic sharing of the improved operating parameters resulting from the GT Inlet Air Cooling System. The Central Regulatory Commission ought to have allowed the capitalization of the above asset instead of disallowing it on the ground that the benefit not being

passed on to the beneficiaries cannot be sustainable and is liable to be set-aside at threshold on this ground also.

PER CONTRA,

SUBMISSIONS OF MR. PRADEEP MISRA, LEARNED COUNSEL FOR THE RESPONDENT NOS. 1 TO 4 & 9:

57. The Appellant has filed the instant appeal against the Order dated 15.05.2014 passed in Petition No. 139/GT/2013 on the file of the Central Electricity Regulatory Commission, New Delhi read with Order dated 12.12.2014 passed in Review Petition No. 20/RP/2014 in respect of tariff for Anta Gas Power Station for the period from 01.04.2009 to 31.03.2014.

58. Some of the relevant dates are as follows:

Units	**COD**
Unit-I (GT)	01.04.1989
Unit-II (GT)	01.05.1989
Unit-III (GT)	01.07.1989
Unit-IV (ST)	01.08.1990

Unit-I , II and III are gas turbine unit having capacity of 88.71 MW each and Unit-IV is steam turbine unit having capacity of 153.20 MW. Thus, total capacity of Anta GPS

59. The learned counsel for the Respondent Nos. 1 to 4 & 9 submitted that, the Electricity Act, 2003 has come into force on 10.06.2003. **The aim and object as enshrined in the preamble of**

the Act and, further, he placed reliance as envisaged under Section 61(d) of the Electricity Act, 2003 which provides guiding principle for determination of tariff. He submitted that, as per the Order dated 19.01.2009, the Central Regulatory Commission has framed CERC (Terms and Condition of Tariff) Regulations, 2009 which became applicable from 01.04.2009 and were to remain in force for five years from date of commencement. Regulation 2 is a definition Clause and relevant sub clauses are "(4) 'auxiliary energy consumption' or 'AUX'; (18) 'gross calorific value' or 'GCV'; (19) 'gross station heat rate' or 'GHR' (21) ' installed capacity' or 'IC'; 9. 'Additional Capitalization' and 9(2)(vi)".

60. He submitted that, after remand, it was decided that the Appellant will claim this Additional Capitalization in the True up Petition. But, noting was claimed.

61. The Central Regulatory Commission has passed an Order dated 15.05.2014 in the said petition wherein, regarding claim for capitalization for GT Inlet Air Cooling system was rejected in para 31 of the Order. Thereafter, the Appellant has filed Review petition No. 20/RP/2014 for review of the Order dated 15.05.2014. The Appellant, on asking of the certain information by the Central Regulatory Commission, have submitted some information to the Commission on 04.09.2014 which is produced at pages 194 to 198 of the Appeal Paper

Book at "2. Para 8(a)". The Central Regulatory Commission, vide its Order dated 22.12.2014, has decided the Review Petition wherein the claim of the Appellant was rejected on the ground that it has failed to provide the necessary information as has held in para 11 of the Order dated 22.12.2014.

62. The principal submission of the learned counsel appearing for the Respondent Nos. 1 to 4 & 9 is that, considering the aim and object of the Act and Section 61(d) of the Electricity Act, 2003, the tariff should be cheaper in the hands of end consumer. From this additional capitalization the beneficiaries are not getting any benefit. Hence, the Regulations cannot be interpreted to mean that without any benefit the amount spent by Appellant can be capitalized for the purpose of tariff.

63. From the perusal of Regulation 21, it is clear that, if Gross Station Heat Rate is higher, the rate would be more and in case Gross Station Heat Rate is less, the rate would be cheaper. The Appellant has not given the information about Gross Station Heat Rate. Hence, the Central Regulatory Commission has rightly rejected the claim of the Appellant by assigning the cogent reasons in the Order impugned.

64. Further, he submitted that, any amount cannot be capitalized in the capital base for the purpose of tariff unless and until some benefit is given to the beneficiaries.

65. He submitted that, the Central Regulatory Commission in the main Order dated 15.05.2014 has recorded its finding that due to shortage of APM Gas the generation capacity of this station is not being fully utilized. If the capacity is not being utilized fully, the question of further increase in generation of electricity is not required for smooth functioning of the plan hence, the amount cannot be capitalized. In view of the aforesaid facts and circumstances, the instant Appeal filed by the Appellant is liable to be rejected.

FOLLOWING ARE THE SUBMISSIONS OF MR. R.B. SHARMA, LEARNED COUNSEL FOR RESPONDENT NO.6/BSES RAJDHANI POWER LIMITED (BRPL):

66. The learned counsel for the sixth Respondent, at the outset, submitted that, each and every statements, allegations, submissions, made by the Appellant in the Appeal are being denied that is contrary to and/or inconsistent with that is stated herein. It is respectfully submitted that, nothing herein should be deemed to have been admitted unless the same is expressly admitted herein.

67. In the instant case, the core issue is that the Appellant has prayed for setting aside the Order dated 15.05.2014 read with the

Order dated 22.12.2014 passed by the Central Regulatory Commission in Petition No. 139/GT/2013 and Review Petition No. 20/RP/2014 respectively to the extent challenged in the this Appeal. It is alleged that the Central Regulatory Commission had disallowed an amount of Rs. 131.18 lakh claimed for the GT Inlet Air Cooling System.

68. It is the case of the Appellant regarding GT Inlet Air Cooling System that, the Appellant has claimed that there is no provision in the Regulation 9(2)(vi) of Tariff Regulations, 2009 to impose condition that the claim amounting to Rs. 131.18 Lakh (Rs. 75.96 lakh during 2011-12 and Rs. 55.22 lakh during 2012-13 on projected basis) will be admissible only if the gain arising out of **'Gas Turbine Inlet Cooling System'** is passed on to the beneficiaries. The alleged claim of the Appellant was rejected by the Central Regulatory Commission as the Appellant refuses to pass on the benefits of the efficiency improvements to the beneficiaries as held in paragraph 31 of the impugned Order dated 15.05.2014. The impugned Order would show that there is no justification for installation of inlet air cooling system. It would further show that the Appellant refuses to pass on the benefits of the efficiency improvements to the beneficiaries. By refusing to pass on the benefits of the efficiency improvements to the beneficiaries, the Appellant is seeking double benefits for himself which means enjoying the fruits of additional capitalization in the tariff

and also the benefits of the efficiency improvements as the same are norm based.

69. Further, the Appellant has contended that passing the benefits to the beneficiaries is not a condition stipulated in Regulation 9(2)(vi) of the Tariff Regulations, 2009. Such a contention, if accepted, would allow double benefits to the Appellant. To avoid this, the following options are open to the Central Regulatory Commission:

i. Allow the benefits to be shared between the Appellant and the beneficiaries or

ii. If benefits outweigh the capital expenditure on such ventures and the Appellant not prepared to share such benefits then he must bear the capital expenditure.

70. The approach adopted by the Central Regulatory Commission is in accordance with the provisions of Regulation 9(2) as the powers under Regulation 9(2) are discretionary powers vested in the Central Regulatory Commission. The Central Regulatory Commission in its discretion while allowing the additional capitalization may order that the benefits of the additional capitalization be passed on to the beneficiaries and in the event of such denial by the Appellant, the additional capitalization can be refused at the discretion of the Central

Regulatory Commission. Such approach is based on equity and justice which is also applied in the instant issue.

71. The learned counsel appearing for the sixth Respondent further submitted that, the Appellant sought the review of impugned Order on the ground of error apparent on the face of Order and raised the issue that there is no provision that the gain arising out of the installation of the equipment is passed on to the beneficiaries besides raising the issue relating to the capitalization of Air Inlet Cooling system in respect of determination of tariff of Gandhar GPS of the Appellant which has been remanded to the Central Regulatory Commission by this Tribunal vide its judgment dated 25.10.2013 in Appeal No. 71 of 2012. The Central Regulatory Commission after hearing the parties clarified that the installation of Air Inlet Cooling system is neither necessary due to renovation of Gas Turbine nor due to obsolescence or non availability of spares for successful and efficient operation of Gas Turbines in case of Anta GPS and dismissed the review petition by assigning the valid and cogent reasons in paras 8, 9, 10 & 11 of the Order.

72. In the circumstances, as stated supra, it is respectfully submitted that, the instant Appeal filed by the Appellant, is absolutely devoid of merits and liable to be dismissed with costs.

73. To substantiate his submission, the learned counsel for the sixth Respondent, has placed reliance on the judgment of this Appellate Tribunal dated 08.05.2014 passed in Appeal No. 173 of 2013 in the case of NTPC Limited v Central Electricity Regulatory Commission & Ors and taken through the judgment so far it relates to the facts and circumstance applicable to this case only i.e. para 2(c), 7(ii), 15 – Regulation 9(ii)(vi) of Tariff Regulations, 2009, para 24:Issue no.(II) (i)(ii).

74. Therefore, the learned counsel for the sixth Respondent submitted that the reasoning given by this Appellate Tribunal, as stated supra, is directly applicable to the facts and circumstances of the case and in the light of the aforementioned submissions, the instant Appeal filed by the Appellant is liable to be dismissed with costs.

MR. SETHU RAMALINGAM, LEARNED COUNSEL FOR THE RESPONDENT NO. 14/CERC SUBMITTED THAT:

75. The learned counsel for the Respondent No.14 submitted that, the Appellant has challenged the Order dated 15.05.2014 in Petition No. 139/GT/2013 and Order dated 22.12.2014 in Petition No. 20/RP/2014 passed by the Central Regulatory Commission wherein the Appellant has questioned the disallowance of Rs.131.18 lakh claimed for Gas Turbine Air inlet cooling system while computing tariff

for Anta Gas Power Station for the period 2009-14. The Central Regulatory Commission, in para 31 of its Order dated 15.05.2014, has disallowed the claim of the Appellant for Air Inlet System.

76. Thereafter, the Appellant has filed a Review Petition No. 20/RP/2014 on various issues including the disallowance of Capitalization of Gas Turbine Inlet Air Cooling System. In this regard, the Central Regulatory Commission, in para 8 of its Interim Order dated 04.08.2014, has directed the Appellant to submit on affidavit, the details of the increase in capacity and the improvement in Heat Rate/efficiency of the gas station on account of installation of GT Air Inlet Cooling System. In compliance of the direction of the Central Regulatory Commission, the Appellant, vide its affidavit dated 04.09.2014, has submitted some information which is produced at pages 194 to 198 of the Appeal Paper Book at "2. Para 8(a) & (b)".

77. The learned counsel for the Respondent No.14 submitted that, the details called for by the Central Regulatory Commission were essential to establish that the expenditure incurred was 'necessary for successful and efficient operation of the station'. It is apparent from the aforementioned affidavit of the Appellant that the Appellant had failed to provide any data details despite the specific directions of the Central Regulatory Commission.

78. Further, he submitted that, in case of an appeal in respect of another Gas-based Station (Gandhar GPS), this Appellate Tribunal by its judgment dated 25.10.2013 in Appeal No. 71 of 2012, has remanded the matter to the Central Regulatory Commission with the observation that *"the Central Commission should have decided this issue strictly on the basis of its Regulations. The norms for heat rate are decided by the Central Commission in its Regulations and the same could not be decided by the Appellant. Therefore, we direct the Central Commission to decide the issue according to its Regulations after considering whether the expenditure on Air Inlet cooling system is required for renovation of gas turbine or necessary due to obsolescence or non-availability of spares for successful and efficient operation of the gas station, after hearing the concerned parties*."

79. The Central Regulatory Commission, after considering the submissions of the Appellant, in the light of the judgment of this Appellate Tribunal passed in Appeal No. 71 of 2012, disposed of the claim of the Appellant.

80. The learned counsel for the Respondent No.14 submitted that, it is evident from the above that the Central Regulatory Commission had tested the admissibility of the expenditure purely based on the provisions of the Tariff Regulations, 2009. Having consented to the directions of the Central Regulatory Commission to furnish details

regarding the capacity increase and improvement in Heat Rate/Efficiency, the Appellant is stopped from questioning this approach after submission of the details.

81. It is, further, submitted that, the Central Regulatory Commission while determining the claim for tariff is required under sub-section 61(d) of the Electricity Act, 2003 to be guided by the principles of "safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner". It is submitted that, while allowing expenditure, the Central Regulatory Commission is required to be satisfied that the gains of such expenditure is passed on to the beneficiaries. Since, the Appellant has failed to provide the information with respect to improvement of Heat rate/performance of the machines due to installation of inlet air cooling system, the claim of the Appellant was not allowed. Therefore, in view of the foregoing submissions, the instant Appeal filed by the Appellant is liable to be dismissed.

OUR CONSIDERATION & CONCLUSION:

82. We have heard the learned counsel, Mr. M.G. Ramachandran, appearing for the Appellant, learned counsel, Mr. Pradeep Misra, appearing for the Respondent Nos. 1 to 4 & 9, learned counsel, Mr. R.B. Sharma, appearing for the Respondent No. 6 and learned counsel, Mr. Sethu Ramalingam, appearing for

the Respondent No.14 at considerable length of time. We have also perused the grounds urged in the memorandum of appeal and also gone through the written submissions and rejoinder filed by the learned counsel appearing for the Appellant and reply filed by the learned counsel for the Respondents. We have also carefully gone through the entire records available in the file.

83. The only issue that arise for our consideration is:

> *Whether the revised tariff for the Anta Gas Power Station of the Appellant for the period from 01.04.2009 to 31.03.2014, the Central Commission has disallowed the claim of the Appellant in regard to the expenditure incurred on the Gas Turbine Inlet Air Cooling System on the ground that the benefits due to the improvement in efficiency are not being passed on to the beneficiaries is sustainable in law?*

84. The principal submission of the learned counsel appearing for the Appellant is that the Central Regulatory Commission erred in disallowing the claim of Rs.131.18 lakh towards installation of the Air Inlet Cooling system for the Gas Turbine of the Anta Station on the ground that there is no justification to allow such capitalization unless the benefit of improved efficiency is passed on to the beneficiaries. Therefore, the Central Regulatory Commission has failed to consider that the Air Inlet Cooling System is an expenditure that is necessary for successful and efficient operation of the station and, therefore, the expenditure falls under the scope of Regulation 9 (2) (vi) of Tariff

Regulations, 2009. Therefore, the impugned Order passed by the Central Regulatory Commission is liable to be set-aside.

85. The learned counsel appearing for the Appellant vehemently submitted that, it is a settled principle of law that the Commission is bound by the Regulations. To substantiate his submission, he placed reliance on the judgment of the Hon'ble Supreme Court (2010) 4 SCC 603 (PTC India Limited v Central Electricity Regulatory Commission) and the decision of this Appellate Tribunal in Appeal No. 131 of 2011 dated 01.03.2012 (Haryana Power Generation Corporation Ltd. v Haryana Electricity Regulatory Commission). There is no condition in Regulation 9(2)(vi) that the capitalization of assets will be allowed only if some additional benefit is accruing to the beneficiaries. The Central Regulatory Commission has not considered that the claim of the Appellant being under Regulations 9 (2) (vi) of Tariff Regulations, 2009, it is not permissible to consider any extraneous aspects such as gain being passed on to the beneficiaries as a ground for disallowing the claim.

86. The learned counsel for the Appellant placed reliance on the judgment of this Appellate Tribunal, in the case of Gandhar Gas Power Station, dated 25.10.2013 in Appeal No. 71 of 2012 wherein, the Central Regulatory Commission has considered the issue relating to capitalization of Air Inlet Cooling System and placed the reliance on

reasoning assigned in paragraph nos. 32 to 37 of the said judgment and submitted that, the Central Regulatory Commission should have decided this issue strictly on the basis of its Regulations. If the ratio of the judgment of this Appellate Tribunal, as referred above, is considered, the impugned Order passed by the Central Regulatory Commission is liable to be quashed.

87. The learned counsel for the Appellant submitted that, the Central Regulatory Commission has not taken into consideration that the Gas Turbines were unable to generate up to the rated capacity during the summer months due to increase in ambient temperature of air. This leads to a reduction in the mass flow of air handled by the gas turbine compressor. Use of the inlet air cooling system helps in offsetting this loss by cooling the inlet air. This way the gas turbine would be able to generate near to rated capacity as the mass flow of air is increased by reducing the temperature of inlet air. This cannot be considered as any gain to the Appellant to be passed on to the beneficiaries as additional benefit.

88. Further, learned counsel for the Appellant submitted that, any restoration of capacity otherwise lost due to high ambient temperature during summer would ultimately benefit the beneficiaries by providing increased power supply. In fact, not allowing the capitalization of the expenditure towards Air inlet cooling system may have an adverse

impact on the performance of the station and the intended benefit of gas turbine may not be available. Accordingly, disallowing the expenditure is not in the interest of the station and the ultimate beneficiaries to whom the reliable power would be available at a cheaper rate as compared to other Discoms. This aspect of the matter has not been considered by the Central Regulatory Commission.

89. The learned counsel for the Appellant, in additional submissions, submitted that, the learned counsel appearing for the Respondent Nos. 1 to 4 & 9, 6 and 14 contended that the Appellant is required to show that the benefit of the improvement on installation of GT Air Inlet cooling System is passed on/shared with the procurer beneficiaries, the absence of which disentitles the Appellant to the capital expenditure. To substantiate this submission, the learned counsel for the Respondent No.14 placed reliance on the judgment of this Appellate Tribunal in Appeal No. 173 of 2013 in the case of NTPC v Central Electricity Regulatory Commission decided on 08.05.2014 covers the present claim of the Appellant in regard to sharing of benefits. The Appellant is seeking a double benefit, namely the benefit of additional capitalization being allowed and also the benefits of improved performance in the Plant Load Factor and, therefore, he should not get the benefit of capital expenditure.

90. The learned counsel for the Appellant submitted that, the learned counsel for the Respondent has specifically contended that the Appellant has failed to furnish the information called for in the Interim Order dated 04.08.2014. The information submitted by the Appellant vide Affidavit dated 04.09.2014 does not give the heat rate/efficiency of the Gas Station, besides increase in capacity. The learned counsel for the appellant submitted that, the increase in capacity required to be shown is the increase of the rated capacity above 88.71 MW and not the increase in capacity from 79.13 MW to 85.36 MW. The Regulation 9(2)(vi) of the Tariff Regulations, 2009 provides for the capital expenditure to be considered only if the expenditure is necessitated due to obsolescence or non-availability of spares. Since Air Inlet Cooling System was not in existence before and is a new asset to be installed, there is no question of any obsolescence. Therefore, the stand taken by the learned counsel for the Respondents in reply statements has no substance and is liable to be rejected at threshold.

91. Besides the above, some general, sweeping and extraneous claims on grounds of interest of consumer were made, which are not germane to the facts of the case. Therefore, submissions and the stand taken in the reply by the learned counsel for the Respondents cannot be made applicable to the facts and circumstances of the case in hand and this matter is directly covered by the decision of this Appellate Tribunal in case of Gandhar Gas Power, as stated above.

92. Lastly, in the rejoinder filed on behalf of the Appellant, on the specific aspect raised by the learned counsel for the Respondents that:

(A) Sharing /Passing of benefits;

(B) Alleged double benefit;

(C) NTPC operating at higher PLF;

(D) Non-furnishing of information;

(E) Increase in capacity to be shown is not increase in rated capacity;

(F) Re: obsolescence;

(G) Discretionary power; and

(H) Alleged delay in installation of air inlet cooling system.

93. The learned counsel for the Appellant, at the outset, submitted that, sharing/passing of benefits to the Respondent-procurers, in the context of Regulation 9(2)(vi) of the Tariff Regulations, 2009, with reference to the GT Air Inlet Cooling System was specifically decided by this Appellate Tribunal in the judgment and order dated 28.10.2013 in Appeal No. 70 and 71 of 2012 (NTPC Limited v Central Electricity Regulatory Commission)**.** This Appellate Tribunal had taken note of the findings of the Central Regulatory Commission in the case of Gandhar Station, at **Para 35** to the effect -"*in the absence of any commitment on the part of the Petitioner to pass on the benefit of improvement in efficiency*" and in **Para 36**, rejected the same by holding that the Central Commission has not dealt with the issue in accordance with the Regulations. Therefore, it is ample clear that the plea of parting

with the benefit to the procurers, cannot be a condition for considering the admissibility of capital expenditure under Regulation 9(2)(vi) of the Tariff Regulations, 2009.

94. In the above context, that while considering the review petition filed by the Appellant, in the Order dated 22.12.2014, the Central Regulatory Commission, after referring first to the contents of Para 31 of the Order dated 15.05.2014 (in Para 5) and the decision of the Appellate Tribunal in Appeal No. 70 and 71 of 2012 (in Paras 6, 8 and 9), proceeded to consider the matter in accordance with the decision of this Appellate Tribunal (in Para 11). It may be seen in Para 11 that the Central Regulatory Commission has not considered the requirement of passing the benefit to the Procurers. The two grounds considered are (i) alleged non furnishing of information and; (ii) issue of obsolescence or non availability of spares being not applicable.

95. Further, the learned counsel for the Appellant submitted that, it is rather surprising that the Respondent Procurers and the Central Regulatory Commission are raising the issue of the benefit not being derived by the beneficiaries, as the primary ground to plead that the Appellant should not get the capital expenditure. The reliance placed on the judgment dated 08.05.2014 passed by this Appellate Tribunal in Appeal No. 173 of 2013 (supra) is misplaced for more than one reason. There is an authoritative decision of this Appellate Tribunal

dated 28.10.2013 in Appeal 70 and 71 of 2012 with reference to the GT Air Inlet cooling system and Regulation 9(2)(vi) i.e. the subject matter in the present case. The decision in Appeal No. 173 of 2013 is regarding the Energy monitoring System and not on an actual plant/operating equipment used for generation of electricity in a successful and efficient manner. There is no merit in the contention of the learned counsel for the Respondents that the Appellant is getting double benefit. The Appellant gets its annual revenue requirements, based on the capital expenditure including the additional capital expenditure at the normative PLF and, thereafter, incentive. The Appellant does not get anything more than that on account of installing the Inlet Air Cooling System.

96. Regarding NTPC operating at higher PLF, this contention is being made for the first time in the present proceedings. In the impugned Orders, the Central Regulatory Commission has not proceeded on the basis of any such plea. Such a plea is totally misconceived and shows the lack of understanding of PLF, which is to be decided on annual basis and the requirement to achieve maximum output during peak months (summer months). Therefore, the PLF on the normative basis of 85% and incentive are computed on an annual basis and not on monthly/daily basis. The achievement of PLF on an annual basis will not be to the extent of rated capacity, in the present case – 88.71 MW. This is on account of various reasons including planned shutdown,

forced shutdown, unavailability of fuel to the full extent etc. However, with the available fuel, the Gas Turbine was functional to the maximum extent, as in the present case on certain dates to 85.36 MW. It does not mean that the PLF achieved during the year is 85.36 MW against a rated capacity of 88.71 MW. Therefore, there is no basis that the Appellant is taking advantage of higher PLF. The said contention raised by the learned counsel for the Respondent for the first time should not be entertained as the same is not applicable to the facts and circumstances of the case in hand. Hence, their stand may be rejected.

97. Further, he vehemently submitted that, regarding non-furnishing of information, in the Impugned Order, at Page 205, the decision of the Central Regulatory Commission is that the Appellant has failed to furnish the required information. The impugned Order does not even refer to the Affidavit filed by the Appellant along with the Information on 04.09.2014 in the context of the Air Inlet cooling System. The impugned Order is also not to the effect that inadequate information or all the information required, has not been furnished. The impugned Order does not say that increase in capacity is given, but heat rate/efficiency has not been given. The impugned Order dated 22.12.2014 does not even refer to the Interim Order dated 4.08.2014 in the context of information sought for GT Air Inlet Cooling System, while referring to it in another context. The only and obvious inference

is that the Central Regulatory Commission overlooked the Affidavit dated 04.09.2014 filed by the Appellant and the information provided therein in regard to increase in capacity.

98. Despite the above, the Central Regulatory Commission as well as the other Respondents (in the written submissions and the arguments) are seeking to add their own version by stating that all the information required was not furnished. The Affidavit dated 04.09.2014 clearly and unambiguously talks about an increase in generation capacity from 79.13 MW to 85.36%, namely; by 6.23 MW which is a significant improvement in the available quantum of electricity to the Respondent - Procurers. As regards, heat value/efficiency, it is important to again refer to the decision of this Appellate Tribunal in Appeal No. 70 and 71 of 2012 wherein it was stated that – **"*the norms of heat rate are decided by the Central Commission in its Regulations and the same could not be decided by the Appellant*"**. Therefore, this Appellate Tribunal directed the Central Commission to decide the matter in accordance with Regulation 9(2)(vi) of the Tariff Regulations, 2009. Accordingly, heat rate/efficiency was not to be a subject matter of consideration. The increase in capacity was the relevant factor which was provided. In the Impugned Order, the Central Regulatory Commission has not referred to non furnishing of heat rate/efficiency as a ground for rejecting the claim. Therefore, allegations made in this

regard by the Respondents are an afterthought and without any merit and, hence, are liable to be rejected.

99. Regarding obsolescence, the learned counsel for the Appellant submitted that, in view of the external factor of high ambient temperature, the Gas Turbine with rated capacity of 88.71 MW, was not in a position to generate upto the desired quantum and to that extent, it should be considered to be affected by obsolescence which gets rectified with installation of air inlet cooling system. The dominant purpose of the Regulation 9(2)(vi) is the successful and efficient operation and the issue of obsolescence or non availability of spares on the above touchstone. The obsolescence issue was not raised by the Central Regulatory Commission in the Order dated 15.05.2014 and was only raised in the Order dated 22.12.2014. Further, he submitted that, discretion under Regulation 9(2) of the Tariff Regulations, 2009 is a judicial discretion to be exercised in circumstances where it is required to be exercised. It is not discretion to reject the claim at the volition of the Central Regulatory Commission. To substantiate the submission regarding discretionary power, the learned counsel for the Appellant placed reliance on the judgment of the Hon'ble Supreme Court in Aero Traders (P) Ltd. v. Ravinder Kumar Suri, (2004) 8 SCC 307 (ref.: para 6) and also in the case of PTC India Limited v Central Electricity Regulatory Commission (2010) 4 SCC 603 (ref: paras 56 & 57) of the said judgment.

100. The learned counsel for the Appellant submitted that, while disallowing the Inlet Air Cooling System in the Review Order dated 22.12.2014, the Central Regulatory Commission has erred in reasoning assigned in para 11 contrary to the case made out by the Appellant, therefore, it is liable to be rejected.

101. Further, he submitted that, the Central Commission ought to have considered the judgment of this Appellate Tribunal in a similar case of Gandhar Gas Power Station allowed GT Inlet Air Cooling System being installed for the first time at Gandhar Gas Power Station. The Central Regulatory Commission should maintain a consistency/uniformity in its approach. Therefore, The Central Regulatory Commission has not taken into consideration that the Tariff Regulations, 2014 applicable for the 5 year period from 01.04.2014 envisage sharing of the gains, arising due to achievement of operating parameters better than the norms with the beneficiaries in the 60:40 ratio. Accordingly, there would be automatic sharing of the improved operating parameters resulting from the GT Inlet Air Cooling System. The Central Regulatory Commission ought to have allowed the capitalization of the above asset instead of disallowing it on the ground that the benefit is not being passed on to the beneficiaries cannot be sustainable and is liable to be set-aside at threshold on this ground also.

102. The submission of the learned counsel appearing for the Respondent Nos. 1 to 4 & 9 is that, considering the aim and object of the Act and Section 61(d) of the Electricity Act, 2003, the tariff should be cheaper in the hands of end consumer. From this additional capitalization the beneficiaries are not getting any benefit. Hence, the Regulations cannot be interpreted to mean that without any benefit the amount spent by Appellant can be capitalized for the purpose of tariff. The Central Regulatory Commission has rightly justified by assigning valid and cogent reasons rejected the claim of capitalization towards GT Inlet Air Cooling System of the Appellant. Thereafter, the Appellant has filed Review petition No. 20/RP/2014 for review of the Order dated 15.05.2014. The Appellant, on asking of the certain information by the Central Regulatory Commission, have submitted some information to the Commission on 04.09.2014 which is produced at pages 194 to 198 of the Appeal Paper Book at "2. Para 8(a)". The Central Regulatory Commission, vide its Order dated 22.12.2014, has decided the Review Petition wherein the claim of the Appellant was rejected on the ground that it has failed to provide necessary information as held in para 11 of the Order dated 22.12.2014. Further, he submitted that, as per Regulation 21, it is clear that, if Gross Station Heat Rate is higher, the rate would be more and in case Gross Station Heat Rate is less, the rate would be cheaper. The Appellant has not given the information about Gross Station Heat Rate. Hence, the Central Regulatory

Commission has rightly justified in rejecting the claim of the Appellant by assigning the cogent reasons in the Order impugned. Any amount cannot be capitalized in the capital base for the purpose of tariff unless and until some benefit is given to the beneficiaries. The Central Regulatory Commission in the main Order dated 15.05.2014 has recorded a finding that due to shortage of APM Gas the generation capacity of this station is not being fully utilized. If the capacity is not being utilized fully, the question of further efficiency in generation of electricity is not required for smooth functioning of the plan hence, the amount cannot be capitalized. Therefore, the instant Appeal filed by the Appellant is liable to be rejected.

103. The learned counsel for the sixth Respondent submitted that, regarding GT Inlet Air Cooling System the Appellant has claimed that there is no provision in the Regulation 9(2)(vi) of Tariff Regulations, 2009 to impose condition that the claim amounting to Rs. 131.18 Lakh (Rs. 75.96 lakh during 2011-12 and Rs. 55.22 lakh during 2012-13 on projected basis) will be admissible only if the gain arising out of 'Gas Turbine Inlet Cooling System' is passed on to the beneficiaries. The alleged claim of the Appellant was rejected by the Central Regulatory Commission as the Appellant refused to pass on the benefits of the efficiency improvements to the beneficiaries as held in paragraph 31 of the impugned Order dated 15.05.2014. The impugned Order would show that there is no justification for installation of inlet air cooling

system. It would further show that the Appellant refused to pass on the benefits of the efficiency improvements to the beneficiaries. By refusing to pass on the benefits of the efficiency improvements to the beneficiaries, the Appellant is seeking double benefits for himself which means enjoying the fruits of additional capitalization in the tariff and also the benefits of the efficiency improvements as the same are norm based.

104. The Appellant has, further, contended that passing the benefits to the beneficiaries which is not a condition stipulated in Regulation 9(2)(vi) of the Tariff Regulations, 2009. Such a contention, if accepted, would allow double benefits to the Appellant. To avoid this, the following options are open to the Central Regulatory Commission:

i. Allow the benefits to be shared between the Appellant and the beneficiaries or

ii. If benefits outweigh the capital expenditure on such ventures and the Appellant not prepared to share such benefits then he must bear the capital expenditure.

105. The approach adopted by the Central Regulatory Commission is in accordance with the provisions of Regulation 9(2) as the powers under Regulation 9(2) are discretionary powers vested in the Central Regulatory Commission. The Central Regulatory Commission in its discretion while allowing the additional capitalization may order that the benefits of the additional capitalization be passed on to the

beneficiaries and in the event of such denial by the Appellant, the additional capitalization can be refused at the discretion of the Central Regulatory Commission. Such approach is based on equity and justice which is also applied in the instant issue rightly by the Central Regulatory Commission.

106. The Appellant sought the review of impugned Order on the ground of error apparent on the countenance of Order and raised the issue that there is no provision that the gain arising out of the installation of the equipment is passed on to the beneficiaries besides raising the issue relating to the capitalization of Air Inlet Cooling system in respect of determination of tariff of Gandhar GPS of the Appellant which has been remanded to the Central Regulatory Commission by this Appellate Tribunal vide its judgment dated 25.10.2013 in Appeal No. 71 of 2012. The Central Regulatory Commission after hearing the parties clarified that the installation of Air Inlet Cooling system is neither necessary due to renovation of Gas Turbine nor due to obsolescence or non availability of spares for successful and efficient operation of Gas Turbines in case of Anta GPS and dismissed the review petition by assigning the valid and cogent reasons in paras 8, 9, 10 & 11 of the Order.

107. The learned counsel for the sixth Respondent has placed reliance on the judgment of this Appellate Tribunal dated 08.05.2014 passed in

Appeal No. 173 of 2013 in the case of NTPC Limited v Central Electricity Regulatory Commission & Ors. In view of the reasoning assigned in paragraphs 24 & 25 of the judgment of this Appellate Tribunal, the instant Appeal filed by the Appellant is liable to be dismissed on this ground also.

108. The learned counsel for the Respondent No.14 submitted that, the Appellant has challenged the Order dated 15.05.2014 in Petition No. 139/GT/2013 and Order dated 22.12.2014 in Petition No. 20/RP/2014 passed by the Central Regulatory Commission wherein the Appellant has questioned the disallowance of Rs.131.18 lakh claimed for Gas Turbine Air inlet cooling system while computing tariff for Anta Gas Power Station for the period 2009-14. The Central Regulatory Commission, in para 31 of its Order dated 15.05.2014, has disallowed the claim of the Appellant for Air Inlet System which is strictly in accordance with the relevant regulations. Thereafter, the Appellant has filed a Review Petition on various issues including the disallowance of Capitalization of Gas Turbine Inlet Air Cooling System. The Central Regulatory Commission, in para 8 of its Interim Order dated 04.08.2014, has directed the Appellant to submit on affidavit, the details of the increase in capacity and the improvement in Heat Rate/efficiency of the gas station on account of installation of GT Air Inlet Cooling System. In compliance of the direction of the Central Regulatory Commission, the Appellant, vide its affidavit dated

04.09.2014, has submitted some information which is produced at pages 194 to 198 of the Appeal Paper Book at "2. Para 8(a) & (b)". The Appellant has failed to provide any data details despite the specific directions of the Central Regulatory Commission.

109. Regarding the reliance placed by the learned counsel for the Appellant in the case of Gandhar Gas Power Station wherein the matter was remanded to the Central Regulatory Commission with observation that the Central Regulatory Commission should have decided this issue strictly on the basis of its Regulations. The norms for heat rate are decided by the Central Commission in its Regulations and the same could not be decided by the Appellant. Therefore, they have decided the issue according to its Regulations after considering whether the expenditure on Air Inlet cooling system is required for renovation of gas turbine or necessary due to obsolescence or non-availability of spares for successful and efficient operation of the gas station. The Central Regulatory Commission has rightly considered the directions issued by this Appellate Tribunal in Appeal No. 71 of 2012 in the case of Gandhar GPS and, by assigning the valid and cogent reasons in its Order, the review petition filed by the Appellant has been dismissed holding that we do not find any error in the impugned Order dated 15.05.2014 on this ground. The said reasoning assigned is strictly in consonance with relevant material available on record and, therefore, rightly justified in rejecting the review petition.

110. Further, he submitted that, it is evident from the above that the Central Regulatory Commission had tested the admissibility of the expenditure purely based on the provisions of the Tariff Regulations, 2009. Having consented to the directions of the Central Regulatory Commission to furnish details regarding the capacity increase and improvement in Heat Rate/Efficiency, the Appellant is stopped from questioning this approach after submission of the details. The Central Regulatory Commission while determining the claim for tariff is required under sub-section 61(d) of the Electricity Act, 2003 to be guided by the principles of "safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner". While allowing expenditure, the Central Regulatory Commission is required to be satisfied that the gain of such expenditure is passed on to the beneficiaries. Since, the Appellant has failed to provide the information with respect to improvement of Heat rate/performance of the machines due to installation of inlet air cooling system, the claim of the Appellant was not allowed. Therefore, in view of the foregoing submissions, the instant Appeal filed by the Appellant is liable to be dismissed.

OUR FINDINGS:

111. The Electricity Act came into force on 10.06.2003. The aim and object as enshrined in the preamble of the Act reads as follows:

> *"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."*
>
> *(Emphasis supplied)*

Further, under Section 61(d) which provides guiding principle for determination of tariff, it has been provided as under:

> *"Section 61. (Tariff regulations):*
> *The Appropriate Commission shall subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following namely;*
> *"xxxxxx*
> *(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner,*

112. The Appellant filed a Petition, being No. 139/GT/2013, for revision of fixed charges for Anta GPS on the basis of actual capitalization incurred for the year 2009-2010, 2010-2011 and 2011-2012 and projected expenditure for the year 2012-2013 and 2013-2014. The Central Commission, by its Order dated 15.05.2014 decided the Petition No 139/GT/2013 and revised the tariff for Anta

Station for the period from 01.04.2009 to 31.03.2014. By this Order, the Central Commission has disallowed the claim of the Appellant in regard to the expenditure incurred on the Gas Turbine Inlet Air Cooling System on the ground that the benefits due to the improvement in efficiency are not being passed on to the beneficiaries as held in paragraph 31 which is read thus:

> ***"GT Inlet Air Cooling System***
>
> *31. The petitioner has claimed expenditure of Rs.131.18 lakh (Rs.75.96 lakh on actual basis during 2011-12 and Rs. 55.22 lakh on projected basis during 2012-13). The petitioner while justifying the expenditure has submitted that GTs are rated at 88.71 MW at 27 ^{0}C and 60% humidity. However, it has been stated that Gas Turbines are not able to generate upto rated capacity during summer due to increase in ambient temperature. The petitioner has clarified that when the Gas Turbines generate to their full rated capacity, the additional power will become available to the beneficiaries during summer. UPPCL has opposed capitalization of the expenditure and has pleaded that the expenditure should be met by the petitioner through its internal resources. It needs to be noted that the generation capacity of the generating station is not being fully utilized because of shortage of APM gas. As such, the plea of additional generation by the petitioner is purely theoretical and without any gain in actual terms. It is further observed that the benefit of improvement in efficiency is to be retained by the petitioner. Hence, there is no justification to allow capitalization of the expenditure unless the benefit of improved efficiency is passed on to the beneficiaries. As such, there is no justification for installation of inlet air cooling system and the capitalization of the said expenditure is not allowed."* *(Emphasis supplied)*

113. After going through the reasoning given in paragraph 31 of the Order dated 15.05.2014 passed by the Central Commission, the Appellant has filed a Review Petition No. 20/RP/2014 on 07.07.2014 to review the Order dated 15.05.2014. The said Review Petition filed

by the Appellant had come up for consideration and after hearing the learned counsel appearing for the parties and after evaluation of the relevant material on record and going through the Order dated 15.05.2014, the Central Regulatory Commission has decided the said review petition vide its Order dated 22.12.2014 against the Appellant on the ground that it has failed to file required necessary information as held in paragraph 11 of the Order which read thus:

> *"11. In the light of the judgment of the Tribunal and the direction in the record of proceedings in Petition No. 226/2009, the Commission had directed the petitioner in the present case to submit the details regarding the increase in capacity of the palnt after installation of Air Inlet cooling system and the improvement in Heat Rate/Efficiency on account of the installation of Air Inlet Cooling system for this generating station. However, the petitioner has failed to furnish the said information, while reiterating that its claim should be considered in terms of the Regulation 9(2)(vi) of the 2009 Tariff Regulations. In the absence of the required information, the Commission has considered the claim of the petitioner in accordance with the provisions of Regulation 9(2)(vi) in the light of the observations of the Tribunal in its judgment dated 25.10.2013 in Appeal No. 71/2012 and has come to the conclusion that the expenditure is not necessary as the Gas Turbine is working satisfactorily even without renovation since the date of commercial operation of the generating station. Moreover, for the purpose of obsolescence or non availability of spares, there should be an Air Inlet Cooling system in place. Since the asset is being installed for the first time, the question of obsolescence or non-availability of spares is not a relevant consideration. In the light of the above discussions, we are of the considered view that the installation of Air Inlet Cooling system is neither necessary due to renovation of Gas Turbine nor due to obsolescence or non availability of spares*

for successful and efficient operation of Gas Turbines in case of Anta GPS. Hence, we find no error in the impugned order dated 15.5.2014 on this ground." *(Emphasis supplied)*

114. It is the case of the Appellant that there is no provision in the Regulation 9(2)(vi) of Tariff Regulations, 2009 to impose condition that the claim amounting to Rs. 131.18 Lakh (Rs. 75.96 lakh during 2011-12 and Rs. 55.22 lakh during 2012-13 on projected basis) will be admissible only if the gain arising out of 'Gas Turbine Inlet Cooling System' is passed on to the beneficiaries. The claim of the Appellant was rejected by the Central Regulatory Commission as the Appellant refuses to pass on the benefits of the efficiency improvements to the beneficiaries as held in paragraph 31 of the impugned Order dated 15.05.2014. Further, the impugned Order would show that there is no justification for installation of inlet air cooling system. It would further show that the Appellant refuses to pass on the benefits of the efficiency improvements to the beneficiaries. By refusing to pass on the benefits of the efficiency improvements to the beneficiaries, the Appellant is seeking double benefits for himself which means enjoying the fruits of additional capitalization in the tariff and also the benefits of the efficiency improvements as the same are norm based as vehemently contended by the learned counsel, Mr. R.B. Sharma, appearing for the sixth Respondent. Further, the Appellant has contended that passing the benefits to the beneficiaries which is not a condition stipulated in Regulation 9(2)(vi) of the Tariff Regulations, 2009. Such a contention, if

accepted, would allow double benefits to the Appellant as pointed out by the learned counsel for the sixth Respondent. To avoid this, the following options are open to the Central Regulatory Commission; (i) Allow the benefits to be shared between the Appellant and the beneficiaries or (ii) If benefits outweigh the capital expenditure on such ventures and the Appellant not prepared to share such benefits then he must bear the capital expenditure. Therefore, the approach adopted by the Central Regulatory Commission is in accordance with the provisions of Regulation 9(2) as the powers under Regulation 9(2) are discretionary powers vested in the Central Regulatory Commission. The Central Regulatory Commission in its discretion while allowing the additional capitalization may order that the benefits of the additional capitalization be passed on to the beneficiaries and in the event of such denial by the Appellant, the additional capitalization can be refused at the discretion of the Central Regulatory Commission. Such approach is based on equity and justice which is also applied in the instant issue and by assigning the valid and cogent reasons in its Order, the Central Regulatory Commission has disallowed the claim of the Appellant, which is justifiable.

115. Further, it is the case of the Appellant that he sought the review of impugned Order on the ground of error apparent on the face of the Order and raised the issue that there is no provision that the gain arising out of the installation of the equipment is passed on to the

beneficiaries besides raising the issue relating to the capitalization of Air Inlet Cooling system in respect of determination of tariff of Gandhar GPS of the Appellant which has been remanded to the Central Regulatory Commission by this Appellate Tribunal vide its judgment dated 25.10.2013 in Appeal No. 71 of 2012. The Central Regulatory Commission after hearing the parties clarified that the installation of Air Inlet Cooling system is neither necessary due to renovation of Gas Turbine nor due to obsolescence or non availability of spares for successful and efficient operation of Gas Turbines in case of Anta GPS and dismissed the review petition by assigning the valid and cogent reasons in paragraph 11 of the Order dated 22.12.2014. In the light of the observations of this Appellate Tribunal in its judgment dated 25.10.2013 in Appeal No. 71 of 2012 and has come to the conclusion that the expenditure is not necessary as the Gas Turbine is working satisfactorily even without renovation since the date of commercial operation of the generating station. Moreover, for the purpose of obsolescence or non availability of spares, there should be an Air Inlet Cooling system in place. Since the asset is being installed for the first time, the question of obsolescence or non-availability of spares is not a relevant consideration. In the light of the above discussions, we are of the considered view that the installation of Air Inlet Cooling system is neither necessary due to renovation of Gas Turbine nor due to obsolescence or non availability of spares for successful and efficient operation of Gas Turbines in case of Anta GPS. Hence, we find no

error in the impugned order dated 15.5.2014 and, hence, the review petition filed by the Appellant was rejected. The said reasoning given by the Central Regulatory Commission after thorough evaluation of the entire records available in the file, therefore, we do not find any error or perversity in the impugned order. Hence, interference by this Appellate Tribunal does not call for.

116. It is the specific case of the Appellant as regards Gas Turbine Inlet Air Cooling System, the Commission by its interim Order dated 04.08.2014 directed the Appellant to submit on affidavit, the details of the increase in capacity and the improvement in Heat Rate/efficiency of the gas station on account of installation of GT Air Inlet Cooling System by 05.09.2014. No further extension of time shall be granted for filing of additional information/replies and/or rejoinder. The matter shall be listed for final hearing on 11.09.2014. In compliance of the Order, the Appellant vide affidavit dated 04.09.2014 had submitted as under:

> *"2. Para 8.*
>
> *a. It is submitted that, the Anta GPS, had carried out a study on 23.08.2014 to assess the impact of Inlet Air Cooling System in one of the GTs. During the study, it has been found that the machine was generated 79.13 MW against a rated capacity output of 88.71 MW at terminal conditions of 1005 degree Celsius of turbine inlet temperature of flue gas while inlet air cooling system was kept out of service. This clearly establishes that machine is unable to achieve the rated load due to high inlet air temperature. The performance of the machine improved as*

soon as the inlet air cooling system was taken into service and the generation was improved by 6.23 MW i.e. from 79.13 MW to 85.36 MW at the same ambient /terminal conditions with improved inlet air temperature. It may therefore be summarized that installation of the inlet air cooling system has been successful in arresting the generation loss due to high ambient temperature. The installation of inlet air cooling system has been envisaged with view to achieve the design output during the period of high ambient temperature.

b. It is therefore submitted that the claim for capitalization of GT Inlet Air Cooling System may be allowed under the Regulation 9(2)(vi) of the Tariff Regulations, 2009. The said regulations relates with the capital expenditure that is necessary for the successful and efficient operation of the Gas Power Station."

(Emphasis supplied)

117. The said details called for by the Central Regulatory Commission were essential to establish that the expenditure incurred was "necessary for successful and efficient operation of the station". It is manifest from the affidavit of the Appellant that the Appellant had failed to provide any data details despite the specific directions of the Central Regulatory Commission. In view of non-furnishing of data details despite specific direction and taking into consideration the direction issued by the Appellate Tribunal by its judgment dated 25.10.2013 in the case of Gandhar GPS in Appeal No. 71 of 2012 wherein the Appellate Tribunal remanded the matter to the Commission with the following observations:

> *"37. The Central Commission should have decided this issue strictly on the basis of its Regulations. The norms for heat rate are decided by the Central Commission in its Regulations and the same could not be decided by NTPC. Therefore, we direct the Central Commission to decide the issue according to its Regulations after considering whether the expenditure on Air Inlet cooling system is required for renovation of gas turbine or necessary due to obsolescence or non-availability of spares for successful and efficient operation of the gas station, after hearing the concerned parties."*
>
> *(Emphasis supplied)*

118. The Central Regulatory Commission, after considering the case made out by the Appellant and in the light of the judgment of this Appellate Tribunal in Appeal No. 71 of 2012 dated 25.10.2013 by assigning the valid and cogent reasons in paragraph 11 of the Review Order, has specifically opined that we are of the considered view that the installation of Air Inlet Cooling system is neither necessary due to renovation of Gas Turbine nor due to obsolescence or non availability of spares for successful and efficient operation of Gas Turbines in case of Anta GPS. The said reasoning given by the Central Regulatory Commission is well founded and well reasoned and has rightly justified denying the relief sought by the Appellant nor they find any error on the face of the order and rightly rejected the review petition. Therefore, interference by this Appellate Tribunal on this ground also does not call for.

119. The learned counsel submitted that, the Central Regulatory Commission, vide its Order dated 20.04.2012, did not fully allow the capitalization claimed by the Appellant. Aggrieved by the Order dated 20.04.2012, read with the Order dated 02.04.2013, the Appellant filed an Appeal, being No.122 of 2013, on the file of the Appellate Tribunal for Electricity, New Delhi. The same is pending before this Appellate Tribunal. The Appellant craves leave to refer to the pleadings in the above appeal at the time of hearing. The said statement may not be germane to the facts and circumstances of the case in hand. The said matter had come up for hearing on 07.12.2015 in Appeal Nos. 122, 136 and 146 of 2013 and the issues raised in said appeals were decided against the Appellant. Therefore, the said contention of the Appellant does not call for consideration.

120. If we take the entire Order into consideration, what has emerged is that the Central Regulatory Commission has considered all the aspects including that contained in the affidavit filed by the Appellant, and recorded the finding of facts in the main order in paragraph 31 and also in paragraph 11 of the order in review petition. In the said reasoning assigned by the Central Regulatory Commission, we do not find any error or any material irregularity. The reasoning assigned is sound and proper; therefore, we are of the

considered view on this ground also that the instant Appeal filed by the Appellant is liable to be dismissed.

121. The learned counsel for the Appellant quick to point out and took us through the additional submissions filed on behalf of the Appellant dated 03.02.2018 to the reply arguments on 02.05.2018 and the Appellant's rejoinder submissions on the above specific aspects raised by the Respondents i.e. (a) Sharing /Passing of benefits; (b) Alleged double benefit; (c) NTPC operating at higher PLF; (d) Non-furnishing of information; (e) Increase in capacity to be shown is not increase in rated capacity; (f) Re: obsolescence; (g) Discretionary power; (h) Alleged delay in installation of air inlet cooling system; and has assigned the reasons and this fact was also contended before the Central Regulatory Commission by providing relevant materials and giving detailed explanation in respect of these heads. This aspect has neither been looked into nor considered. The discretion under Regulation 9(2) of the Tariff Regulations, 2009 is a judicial discretion to be exercised in circumstances where it is required to be exercised. It is not discretion to reject the claim at the volition of the Central Commission. The reasoning assigned in the main order and also in the review order in paragraphs 31 and 11 of the Orders respectively is contrary to the case made out by the Appellant. The Central Regulatory Commission ought to have accepted the same and extended the reliefs sought for by the

Appellant by exercising their discretionary powers under Regulation 9(2)(vi) of the Tariff Regulations, 2009.

122. It is significant to note that the impugned Order would show that there is no justification for installation of inlet air cooling system. It would, further, show that the Appellant refuses to pass on the benefits of the efficiency improvements to the beneficiaries. By refusing to pass on the benefits of the efficiency improvements to the beneficiaries, the Appellant cannot redress his grievance when they failed to furnish necessary information called for. It is the specific case of the Appellant, as stated supra, that passing the benefit to the beneficiaries is not a condition envisaged in Regulation 9(2)(vi) of the Tariff Regulations, 2009. It is pertinent to note that such a contention, if accepted, would allow double benefits to the Appellant. The judgment of this Tribunal dated 08.05.2014 passed in Appeal No. 173 of 2013 is squarely applicable to this case, too. We are of the considered view that the reasoning given is in accordance with the provisions of Regulation 9(2) as the powers under Regulation 9(2) are discretionary powers vested in the Commission. The Central Regulatory Commission, in its wisdom/discretion while allowing the additional capitalization, may order that the benefits of the additional capitalization be passed on to the beneficiaries and in the event of such denial by the Appellant, the additional capitalization can be refused at the discretion of the Commission. Such approach

is based on equity and justice which is also applied in the instant issue by assigning the valid and cogent reasons. Therefore, we do not find any error or legal infirmity in the Impugned Order. The Central Regulatory Commission, after thorough evaluation of the oral and documentary evidence and material available on record, has denied the benefit to the Appellant for exercising his discretionary powers, which is just and reasonable. We do not find any arbitrariness and perversity in the impugned order. Therefore, on this ground also the instant appeal filed by the Appellant is liable to be dismissed as devoid of merits.

123. After thorough evaluation of the entire relevant material available on record at threadbare and after re-appreciation of oral and documentary evidence available on the file, what has emerged is that we do not find any error of law, much less material irregularity, in the impugned order passed by the Central Regulatory Commission. The Central Regulatory Commission has assigned valid and cogent reasons in its main order and in the review order. Therefore, we do not find any illegality or perversity in the main order and in the review order passed by the Central Regulatory Commission. Accordingly, we decide the issue in question against the Appellant and uphold the Orders passed by the Central Regulatory Commission.

O R D E R

Having regard to the factual and legal aspects of the matter, as stated supra, the issue raised in this appeal is answered against the Appellant and the instant appeal, being Appeal No. 95 of 2015, filed by the Appellant on the file of the Appellate Tribunal for Electricity, New Delhi is dismissed as devoid of merits. Consequently, we uphold the impugned Order dated 15.05.2014 passed in Petition No. 139/GT/2013 and the Order dated 22.12.2014 passed in the Review Petition No. 20/RP/2014 on the file of the Central Electricity Regulatory Commission, New Delhi.

No order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 15TH DAY OF MAY, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

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

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