Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.189 of 2011

Dated: 20th Sept, 2012

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

In the matter of:

The Tata Power Company Limited
Regulation Department
Jojobera Power Plant,
Jamshedpur-831 016
Having its registered Office at:
Bombay House,
24, Homi Modi Street,
Mumbai-400 001

Appellant

Versus

1. **Jharkhand State Electricity Regulatory Commission**
   2nd Floor, Rajendra Jawan Bhawan,
   Cum-Sainik Bazar,
   Main Road, Ranchi-834 001

2. **M/s.Tata Steel Ltd.**
   Bombay House,
   24, Homi Modi Street,
   Mumbai-400 001

Respondents

Counsel for the Appellant (s): **Mr. Amit Kapur**
Mr. Apoorva Misra
Ms. Divya Chaturvedi
Mr. Vishal Anand

Counsel for the Respondents (s): **Mr. C K Rai for R-1**
Mr. M Tripathi

J U D G M E N T

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

1. The Tata Power Company Limited (the Appellant) challenging the Tariff Order for the Financial Year 2011-12 passed by the Jharkhand State Electricity Regulatory Commission ('State Commission') has filed the present Appeal.

2. The short facts are as follows:-

   (a) The Tata Power Company Limited filed the petition for determination of tariff for the Financial Year 2011-12 for 60 MW capacity each of the Unit-2 and Unit-3 at Jojobera as per Jharkhand State Electricity Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2010.

(b) After observing the formalities and hearing the parties, the State Commission passed the impugned order dated 20.8.2011 determining the tariff after considering the relevant materials placed before it.

(c) The Appellant is aggrieved by the denial of its following claims:

(i) The State Commission did not allow deviation sought by the Appellant and disallowed the Station Heat Rate of 2652 Kcal/Kwh which was proposed by the Appellant on the basis of the Energy Audit Report of Unit-3 by the Central Power Research Institute. While disallowing the proposed Station Heat Rate, it has ignored the principles laid down by this Tribunal earlier in the various judgments regarding the principles of relaxation of the norms.

(ii) The State Commission did not allow the claim of the depreciation of Rs.46 Crores for both Units 2 and 3 while misinterpreting and wrongly applying the Generation Tariff Regulations, 2010.

3. Though the Appeal has been originally filed raising three issues including the disallowance of the recovery of the availability based incentive through the monthly billing, ultimately, the learned Counsel for the Appellant confined himself with only two points as referred to above as his grievance with reference to monthly recovery of availability based incentive, has been resolved by the State Commission through the MYT Tariff Order which was subsequently passed on 31.5.2012.

4. In view of the above, we are only concerned with the above two issues. The relevant question which may arise for consideration is as follows:

    (a) Whether the finding of the State Commission on Station Heat Rate is sustainable in law?

    (b) Whether the State Commission misinterpreted and misapplied the Generation Tariff Regulations relating to Depreciation while disallowing the claim of Depreciation.

5. On these questions, elaborate arguments were advanced by both the Learned Counsel for the Appellant assailing the impugned order and the learned Counsel for the State Commission justifying the impugned order.

6. In support of their respective submissions, both the parties have cited a number of authorities of this Tribunal as well as the Hon'ble Supreme Court.

7. Let us now discuss these issues **one by one**.

8. The **First Issue** is relating to Station Heat Rate and the refusal over the relaxation of the norms.

9. The Learned Counsel for the Appellant has made the following submissions on this issue:

   (a) The State Commission has refused to relax the norms and disallowed the proposed Heat Rate at 2652 Kcal/Kwh which was sought based upon the Energy Audit Report of Unit-3 given by CPRI. The State Commission has merely allowed Station Heat Rate of 2567 and 2577 Kcal/Kwh for Unit-2 and Unit-3 respectively on the basis of Generation Tariff Regulations.

   (b) The Energy Audit was conducted only for Unit-3 and reliance was placed on the same by the Appellant seeking relaxation from the normative Heat Rate for both Unit-2 and Unit-3 for the Year 2011-12. However, the State Commission refused to grant the relaxation by ignoring the fact that it

has decided higher Heat Rate for both the Units for Financial Year 2009-10 and 2010-11.

(c) The State Commission has got the powers for relaxing the Heat Rate under Regulation 17.4. Without exercising the powers, the State Commission has simply refused to relax the Heat Rate causing two fold impacts on the Appellant (1) Commercial Impact due to non recovery of cost and (2) Lack of sufficient gestation period not provided for taking long term and minimum term measures to achieve the Heat Rate prescribed under the Generation Tariff Regulations. Hence, the impugned order is liable to be set-aside.

10. In reply to the above submissions, the learned Counsel for the State Commission has stated as follows:

(a) The State Commission issued the impugned order as per Generation Tariff Regulations, 2010. As per Regulation 8.4, the value for operational norms for the existing generating stations have been decided based upon the past operational data of these plants and as such the norms for the Station Heat Rate for the Unit No.2 and Unit No.3 were correctly fixed at 2567 kCal/KWh and 2577 Kcal/Kwh respectively. These norms of

operations were fixed by the State Commission after studying the past performance of each of the plant of the State and as per the data made available by the Appellant for these two units. The State Commission has given detailed reasonings in the impugned order for not relaxing the Station Heat Rate.

(b) Regulation 17.4 gives the power of relaxation to the Commission but these powers could be exercised only in public interest and for the reasons to be recorded in writing. The Appellant did not furnish any material to show the element of any public interest involved to enable the State Commission for granting relaxation in the Station Heat Rate norms.

(c) Further, valid reasons have not been adduced by the Appellant to invoke the powers of Regulation 17.4 to relax the provisions of Regulations. Power of relaxation of the provisions of the Regulations must be exercised sparingly. In this matter, no case is made out by the Appellant for exercising discretion to relax the provisions of the Regulations in favour of the Appellant. Hence, the impugned order is perfectly justified.

11. We have carefully considered the contentions urged by both the learned Counsel for the parties on this issue.

12. Before dealing with this 1st issue, let us refer to and quote the relevant paragraphs of the impugned order dated 20.8.2011 which contains the reasons for refusing to allow the norms for Station Heat Rate: They are as follows:

Commission's analysis

9.15 The Commission specified the norms of operation for the two Units of Jojobera Plant in the Clause 8.4 of the Generation Tariff Regulations, 2010. It is pertinent to mention that the norms of operation were fixed by the Commission after study of the past performance for each plant in the state and as per the data made available by the Generation companies including TPCL for the two units - Unit 2 and Unit 3 of Jojobera Plant. Before finalization of the norms, the Commission had also conducted a public hearing in which all the stakeholders, including TPCL, participated. The Commission after due deliberation finalized the Regulations.

9.16 The Regulations have been notified accordingly and the norms of operation are applicable and binding on each of the generation plants covered under the Regulations. As per the said Regulations, the Station Heat Rate for the two units has been fixed at 2567kCal/kWh and 2577 kCal/kWh respectively.

9.17 Meanwhile, in view of the submission made by the Petitioner to consider the proposed SHR for the two units as per the recommendations of the CPRI Report, the Commission decided to scrutinize the

report and following are the key observations regarding the same:

(a) The CPRI Report indicates that the key deviation factors between the Design Heat Rate of 2253 kCal/kWh and Test Heat Rate of 2577 kCal/kWh are:

(i) Difference in Boiler Efficiency (deviation caused - 48.10 kCal/kWh)

(ii) Difference in Turbine Efficiency (deviation caused - 275.01 kCal/kWh)

(iii) Difference in Generator Efficiency (deviation caused – 0.49 kCal/kWh)

(iv) Steam consumption in boiler, turbine and auxiliary steam requirements such as blow down, gland steam, vent steam etc.

The Commission notes that even with the Test Coal Performance test, the boiler accounts for only 15% of the variance. The Turbine being the automated portion of the cycle is mostly amenable for Heat Rate deficiency rectifications easily. The CPRI report does not provide any break-up of the TG Cycle Heat rate deviations. The Generator efficiency variation is negligible.

(b) The CPRI Report mentions deviation of Test Heat Rate (of 2577 kCal/kWh for FY 2010-11) to the annual Heat Rate of Unit 3 (of 2643 kCal/kWh) on account of the following reasons:

(i) HR Deviation DM due to DM Water consumption – This is for DM water consumption for non-motive purposes.

The Commission views that in any normal operating plant in the closed cycle steam losses via vents, gland seals, steam traps, HFO heating, boiler blow down takes place which necessitates DM water make up. However, when the Station Heat Rate is considered, the entire plant is considered as a boundary with Heat Rate being determined as input into Boiler vis-à-vis the electrical output. All the Heat losses in the system are duly factored in the Station Heat Rate. The Commission notes from the CPRI Report that reference is made to Make-up being 1% of MS Flow and hence no optimization is possible. Considering that the Plant was operating on similar parameters of Make up, the Station Heat Rate of 2577 kCal/kWh was being achieved and hence there is no reason why deviation should be allowed. Moreover, the Petitioner has not indicated any specific non-motive applications.

(ii) HR Deviation Reject due to Mill Rejects – This is for the energy content of the rejects in the milling system.

While in principle this may be admissible as the input into the Boiler is the net of the input into the Bunker and output from the reject system, the Commission also notes that the CPRI report indicates the need for improvements in milling systems as a medium term intervention (over 2-3 Years). The deviation due to HR Rejects is 8.04 kCal/kWh but total recovery across various medium term interventions is 10 kCal/kWh

indicating that there will be partial recovery against the rejects loss. It is also noted that mill fineness optimization, coal flow equalization has been recommended as some of the intervention measures at the Unit 3 of the PowerStation. Medium term measures in the CPRI Report indicate coal mill performance improvement measures.

In view of the above, the deviation as requested is not allowed by the Commission and instead the Commission directs the Petitioner to put in place the intervention mechanisms in the milling system towards ensuring mill optimization and minimal rejects.

(iii) HR Deviation – MS & RH Pipe – This is on account of heat loss from the insulation of the piping between the Boiler and Turbine.

In any power plant, even with insulation, certain degree of heat loss is expected from the insulation of the pipelines. In case insulation deteriorates, the same is duly addressed in the annual maintenance plan of the Units. While ensuring that the MS and RH inlet temperatures are maintained at HP Turbine inlet (Main Steam Inlet Temperature) and IP Turbine inlet (Hot Reheat Inlet Temperature), the heat input into the Boiler increases concomitantly and so the Heat Rate achieved by the Station earlier and the Performance Test would have already accounted this in the Heat Rate assessment. Therefore, a separate factor for this is not admissible. Instead the Commission directs the Petitioner to conduct an energy audit and insulation checking and rectify the same by incorporating insulation repair

in the Annual Maintenance Plan. This is mentioned in the Directives Section of this Order.

9.18 *The Commission notes with concern that the CPRI Report clearly indicates that principal deviation (274.8 kCal/kWh) is a controllable loss and better SHR than the 2577 kCal/kWh currently allowed is achievable. The Commission directs the Petitioner to provide a detailed break-up of the TG cycle related deviation. The CPRI report indicates that with various measures only 45 kCal/kWh is recoverable across various plant components. The Commission also notes with concern that certain intervention measures are indicated like cleaning of internal parts of condenser, heaters which have a serious impact on the TG Cycle Heat Rate. Accordingly, the Commission directs the Petitioner to provide actual operational Heat Balance Diagrams of the units at 100% load, 80%, 75% & 50% and a month-wise loading profile of the Units. The Petitioner is also directed to provide the design Heat Balance Diagram at the above load conditions along with an explanation of the variances in the various TG cycle equipment performances from the design conditions. The same is mentioned in the Directives Section of this Order.*

9.19 *In view of the above observations, the Commission does not find any merit in allowing deviation in the norms fixed for SHR, for Unit 2 at 2567 kCal/kWh and Unit 3 at 2577 kCal/kWh, as per the Generation Tariff Regulations, 2010.*

13. In the light of the reasonings and the findings given by the State Commission, let us now discuss the issue.

14. According to the State Commission, the ARR and Tariff Order for the Financial Year 2011-12 was issued by the State Commission as per the Generation Tariff Regulations, 2010. It is further stated by the learned Counsel for the State Commission that in the Regulations 8.4, the State Commission has specified the norms of operation for the two units of Jojobera Plant of the Appellant.

15. Let us refer to the relevant portion of the said Regulation:

*"**Norms of operation***

8.4 The value for operational norms for the existing generating stations have been decided, based on the past operational data of these plants .The norms of operation as given hereunder shall apply for existing thermal power stations in the state:

.....

Tata Power Company Limited (TPCL)
Jojobera Thermal Power Station

Unit-II

Parameters	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**2015-16**
Normative Annual Plant Availability Factor (%)	85%	85%	85%	85%	85%
Gross Station Heat Rate (kCal/kWh)	**2567**	**2567**	**2567**	**2567**	**2567**
Auxiliary Consumption (%)	10.00%	10.00%	10.00%	10.00%	10.00%
Secondary Fuel Oil Consumption (ml/kWh)	1.00	1.00	1.00	1.00	1.00

Unit-III

Parameters	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**2015-16**
Normative Annual Plant Availability Factor (%)	85%	85%	85%	85%	85%
Gross Station Heat Rate (kCal/kWh)	**2577**	**2577**	**2577**	**2577**	**2577**
Auxiliary Consumption (%)	10.00%	10.00%	10.00%	10.00%	10.00%
Secondary Fuel Oil Consumption (ml/kWh)	1.00	1.00	1.00	1.00	1.00

16. Quoting the above tables, it is submitted by the State Commission that on the basis of this Regulation, the norms for the Station Heat Rate for the year 2011-12 for the Unit No.2 and 3 were fixed at 2567 kCal/kWh and 2577 kCal/kWh respectively as quoted in the above table.

17. It is not disputed that the norms of operation were fixed by the State Commission only after conducting the public hearing. In the said hearing, all the stake holders including the representative of the Appellant participated and gave suggestions which were considered by the State Commission while framing Tariff Regulations and Generation Tariff Regulations, 2010. It is the specific stand taken by the State Commission that the above norms of operation were fixed by the State Commission only after

studying the past performance of each plant in the State and as per the data made available by the generating companies including the Appellant for the two units i.e. Unit No.2 and Unit No.3 of the Jojobera plant. Therefore, there is nothing wrong in the findings with regard to norms fixed by the State Commission as no material has been placed by the Appellant to show that the relevant procedure had not been followed before finalisation of the said norms of operation.

18. According to the Appellant, the State Commission has refused to exercise its power to relax the norms and disallowed the proposed Heat Rate at 2652 kCl/kWh which was sought for, based upon the Energy Audit Report of Unit-3 by CPRI, a Society under Ministry of Power, Government of India. It is also contended by the Appellant that the State Commission while refusing to relax the norms of the Station Heat Rate, has ignored the fact that it has approved higher Heat Rate for both the units for Financial Year 2009-10 and Financial Year 2010-11. This contention in our view, is misconceived.

19. It is noticed that the CPRI's report was only pertaining to Jojobera Unit-3 plant considering the past operational norms and design of the plant which has its own variations. The norms for Unit No.3 cannot be accepted as the same for Unit No.2 or vice-versa. The relevant portion of the tariff

order for the Financial year 2009-10 dated 20.1.2010 is reproduced below:

> *"10.5 The Commission has observed that the performance of the two Units of Jojobera plant with respect to some of the operational parameters is lower than other similarly placed plants in the country considering the age profile of the TPCL Units. In particular, the SHR, PLF, normative annual plant availability factor (as per CERC Tariff Regulations, 2009) and the auxiliary consumption can be improved further to the extent of CERC approved operational norms for thermal stations of such nature. The Commission directs the petitioner to submit an improvement plan for the two Units within three months of the issue of this order".*

20. Similar directions were issued by the State Commission in the Tariff order for the Financial Year 2010-11. The same is reproduced below:

> "A 9: *NEW DIRECTIVES*
>
> ***Performance of generating Units***
>
> *9.2 The Commission has observed that the performance of the two Units of Jojobera plant with respect to some of the operational parameters is lower than those of the other similarly placed plants in the country. In particular, the SHR, the PLF, normative annual plant availability factor (as per CERC Tariff Regulations, 2009) and the auxiliary consumption can be improved further to the extent of CERC approved operational norms for thermal stations of such nature.*

The Commission directs the TPCL to take note from similar comparison of 110/120 MW, as stated below, and take appropriate measures to improve the operational parameters for both the units".

21. The relevant particulars as stated in the paragraphs quoted above are given below:

Unit –II

Particulars	**Submitted by TPCL**	**Approved by Commission**
Station Heat Rate (kCal/kWh) for the year 2009-2010	2632	2632
Station Heat Rate (kCal/kWh) for the year 2010-2011	2644	2644

Unit –III

Particulars	**Submitted by TPCL**	**Approved by Commission**
Station Heat Rate (kCal/kWh) for the year 2009-2010	2648	2648
Station Heat Rate (kCal/kWh) for the year 2010-2011	2621	2621

22. In view of the above, the submission of the Appellant that the State Commission has earlier approved higher Heat Rate for both the units for the Financial Year 2009-10 and

Financial Year 2010-11, is not tenable because the tariff orders for both the years were passed following the Power Purchase Agreement signed by the Appellant with Tata Steel Limited. In these tariff orders, the State Commission has specifically observed that the performance of these two units is lower than those of the other similarly placed plants in the country. Another factor is notification of Tariff Regulation 2010 on 27.10.2010 after consideration of data of various power plants including Appellant's power plant, wherein the Station Heat Rate for Units 2&3 at Jojobera was specified. The tariff for Financial Year 2011-12 has to be determined as per the Tariff Regulation,2010 and not on the basis of determination in the previous tariff orders.

23. In fact, the Appellant itself wanted to have independent Energy Audit performance Test for Unit No.2. The Appellant in the Tariff Petition before the State Commission while asking the same Station Heat Rate for both the Unit No.2 and Unit No.3 has stated as follows:

> ".....*It is submitted that, Tata Power is in the process of planning similar Energy Audit & Peformance Test done for Unit-2 at Jojobera shortly. Since Unit 2 has identical technical specification/configuration performance trend as that of Unit 3 and Energy Audit & Performance Test was a part of the Operational improvement Plan submitted by Tata Power as directed by the Hon'ble Commission, Tata Power therefore, submits that the recommendation or*

observation arrived at in such Energy Audit needs to be complied with. Accordingly, for the purpose of the present petition, Tata Power therefore, finds it appropriate to consider the Operative Heat Rate as recommended by CPRI for FY 2011-12 at 2652 Kcal/Kwh for both the units. This would impact the GenerationTariff marginally by about 5 paisa/Kwh with respect to Heat approval in the Generation Tariff Regulation, 2010. Tata Power therefore, humbly requests the Hon'ble Commission to accept the same and also the Trajectory of Heat Rate proposed in Table – 49."

24. As indicated above, the State Commission, after in depth analysis of the Energy Audit Report, declined to deviate from the norms fixed for the Station Heat Rate for the Unit No.2 at 2567 kCal/kWh and Unit No.3 at 2577 kCal/kWh as per the Generation Tariff Regulations, 2010.

25. As quoted above, the State Commission has given detailed reasonings from Para 9.15 to 9.19 of the impugned order for not relaxing the Station Heat Rate norms for the Financial year 2011-12.

26. Even though, the power of relaxation has been conferred on the State Commission under Regulation 17.4 of the Generation Tariff Regulations, 2010, the said power cannot be exercised just like that but it can be exercised only when there is a public interest involved and when there are acceptable reasons for such relaxation.

27. The Appellant has failed to establish before the State Commission the element of any public interest involved in favour of granting of relaxation in the Station Heat Rate norms. In fact, the Appellant did not make out the ground for relaxation. It is settled law that the power of relaxation of Regulations must be exercised very sparingly and with circumspection. The relaxation to be exercised only after exceptional circumstances which is exception to the general rule. This implies that there has to be sufficient reason to justify relaxation. In the instant case, no such sufficient reason was given to the State Commission warranting for the invocation of Regulation 17.4 for relaxation of the norms.

28. The learned Counsel for the State Commission has cited the following authorities in order to show that the power of relaxation must be exercised sparingly. The decisions are as follows:

    (a) Pragati Power Corporation Limited (PPCL), New Delhi V. Delhi Electricity Regulatory Commission (DERC) and Ors reported in 2011 ELR (APTEL) 0679

    (b) R K Khandelwal Vs State of Uttar Pradesh and Ors reported in (1981) 3 SCC 592.

    (c) Indraprastha Power Generation Co Ltd. V Delhi Electricity Regulatory Commissions and Ors reported in 2011 ELR (APTEL) 0669

(d) Damodar Valley Corporation Vs Central Electricity Regulatory Commissions & Ors in 2010 ELR (APTEL) 0668.

29. The principles relating to the exercise of power of relaxation laid down in the above decisions referred to above are as follows:

(a) The Regulation gives judicial discretion to the Commissions to relax norms based on the circumstances of the case. Such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation which has to be exercised only in the exceptional case where non-exercise of the discretion would cause hardship and injustice to a party.

(b) If there is a power to relax the regulation, the power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some party and to disfavour some other party.

(c) The party who claims relaxation of the norms shall adduce valid reasons to establish to the State Commission that it is a fit case to exercise its power to relax such Regulation. In the absence of valid reasons, the State Commission cannot relax the norms for mere asking. When the State Commission has given

reasoned order as to why the power for relaxation cannot be exercised, the said order cannot be interfered with by the Appellate Forum.

(d) The power of the Appellate Authority cannot be exercised normally for the purpose of substituting one subjective satisfaction with another without there being any specific and valid reasoning for such a substitution.

30. The learned Counsel for the Appellant has cited the following decisions in support of its plea:

(a) Maharashtra State Power Generation Co. Ltd Vs. Maharashtra Electricity Regulatory Commission & Ors reported as 2010 ELR (APTEL) 0189

(b) Haryana Power Generation Corporation Limtied vs Haryana Electricity Regulatory Commission & Ors dated 31.7.2009 passed by this Tribunal in Appeal No.42 and 43 of 2008

(c) Maharashtra State Power Generation Company Ltd vs Maharashtra Electricity Regulatory Commission reported as 2011 ELR (APTEL) 1404

(d) Judgment of this Tribunal reported in: Tariff Revision (Suo Motu Action on the Letter Received from Ministry of Power) reported as 2011 ELR (APTEL) 1742

(e) Essar Power Limited Vs Uttar Pradesh Electricity Regulatory Commission reported as 2011 ELR (APTEL)

31. The principles laid down in these authorities cited by the Appellant are as follows:

(a) If the Station Heat Rate allowed by the Commission is not achievable, then the same would not be in anybody's interest. The entity would suffer by no recovering its reasonable cost of supply of electricity and consumers would not get right signal about the pricing of the product, they would be using.

(b) The Station Heat Rate is one of the most important factors for the purpose of determination of the cost of generation. If the targets given to the generating company are not achievable, no purpose would be served by setting such targets, because such approach would adversely impact the financial position of the generator.

(c) The reasonable time has to be given for completion of the medium term measures required for the improvement of the Station Heat Rate.

(d) In case any Regulation causes hardship to a party or works injustice to him, the Regulation can be relaxed.

(e) The tariff determination shall be consistent with Section 61 of the Act as well as the Government of

India guidelines which shall strike a balance between the transparency, fairness, consumer interest and viability.

32. On going through all the decisions, we are of the view that the principles which have been laid down by this Tribunal as well as Hon'ble Supreme Court as cited by the State Commission would squarely apply to the present case especially, when impugned order has given proper reasonings for not relaxing the norms. On the other hand, the reliance placed by the Appellant on 2010 DELR (APTEL) 0189 cited by him has no application to the present case. In that case, the Station Heat Rate was found to be unachievable and in that context the State Commission was not in a position to take a considered view on the subject. In the present case, the State Commission has fixed the norms of Station Heat Rate after studying in details the past performance for each plant in the State and after considering the data furnished by the Appellant for 2 units i.e. Unit No.2 and Unit No.3 of the Plant.

33. The decision cited by the Appellant in Appeal No.42 & 43 of 2008 by this Tribunal dated 31.7.2007 would not apply to the present case since in that case most of the power Stations, completed their normal useful life i.e. 25 years whereas in the present case, the plants have commenced their

operation only in the year 2001 and 2002 i.e. 10 years and 09 years respectively. Similarly, the judgment of this Tribunal reported in 2011 ELR (APTEL) 1404 also would not apply since in that case, it was held that the approach of the State Commission was not consistent. In the present case, the State Commission has considered the CPRI report in detail and studied that the major deviation between the design Heat Rate and the Test Heat Rate due to turbine deficiency. Similarly, in other cases also reported in 2011 ELR (APTEL) 1742, i.e. suo-moto action taken by this Tribunal and Essar Power Limited case reported in 2011 Energy Law Journal would not apply to this case since the issue in question has not been decided in those cases. In the present case, Station Heat Rate norms have been framed under the Regulation after studying the past performance of the Plants. That apart, the State Commission has given a detailed reasonings in the impugned order for not relaxing the norms laid down in the Regulation. Hence, we do not find any infirmity in the finding of the State Commission on this issue.

34. Therefore, the **First issue is answered** as against the Appellant.

35. Let us discuss the **Second issue**. This issue relates to Disallowance of the Appellant's claim for depreciation.

36. According to the Appellant, the claim of the Appellant before the State Commission with regard to the depreciation was under clause 7.31 of the Tariff Regulations, 2010 but, instead of allowing the depreciation under the said clause, the State Commission has allowed the depreciation as per Clause 7.32 of the Tariff Regulations, 2010.

37. According to the Appellant, he is aggrieved over the impugned findings on this issue for the following reasons:

    (a) The State Commission allowed a Depreciation of about Res.11.21 Crores for the Financial Year 2011-12 as against the proposed depreciation of about Rs.46.35 Crores for the unit No.2 and 3.

    (b) The State Commission wrongly computed the depreciation in the impugned order on the basis of the Regulation 7.32 instead of Regulation 7.31 of the Generation Tariff Regulations, 2010.

38. It is stated by the Appellant that the purpose of depreciation is to create corpus for financing the replacement/repair of the parts/assets of the Generation Stations. It is also pointed out that the Ministry of Power has provided for accelerated depreciation in the tariff policy and that while clause 7.31 provides the scheme of calculation of depreciation, the clause 7.32 provides for the existing

generating stations and Regulation 7.32 does not deal with the provisions of the depreciation recovery as provided in the Central Commission's Tariff Regulations.

39. Refuting these contentions, the learned Counsel for the State Commission has submitted that Clause 7.32 is only the applicable Regulation for the Appellant and not Clause 7.31 of the Generation Tariff Regulations, 2010 as claimed by the Appellant in view of the fact that both the Unit No.2 and 3 have been commissioned in February, 2001 and February, 2002 respectively and as such they are the existing projects.

40. Before discussing this issue, we will quote the discussion and finding rendered by the State Commission in the impugned order on this issue which is quoted as below:

"Commission's Analysis"

"9.81 The Generation Tariff Regulation, 2010 have specified the following methodology for the calculation of depreciation expense for existing generating stations:

a) Depreciation shall be allowed upto a maximum of 90% of the capital cost of the asset and the salvage value of the asset shall be considered as 10%.

b) Depreciation shall be calculated annually as per the straight line method and at the rates

specified in the Appendix-I of the said Regulations.

c) In case of existing generating stations, during the transition period, the balance depreciable value as on April 1, 2011 shall be worked out by deducting the cumulative depreciation including AAD as admitted by the Commission upto March 31, 2011 from the gross depreciable value of the assets.

d) The rate of depreciation shall be continued to be charged at the rate specified in Annexure-I till the cumulative depreciation reaches 70%. Thereafter, the remaining depreciable value shall be spread over the remaining life of the asset such that the maximum depreciation does not exceed 90%.

9.82 The Commission has observed that both for Unit 2 and Unit 3, the cumulative depreciation on the Original Project Cost for some assets has exceeded 70%. For these assets, the Commission has spread the balance depreciable value of the assets (as on March 31, 2011) over the balance useful life of the assets.

(Note: For purpose of calculation of depreciation, the useful life of assets has been considered as 25 years. Since depreciation has been charged for Unit 2 from 2002 onwards, the balance useful life of assets for Unit 2 has been taken equal to 15 years. For Unit 3, depreciation has been charged from 2003 onwards, the balance useful life of assets for Unit 3 has been taken equal to 16 years.)

9.83 In case of assets where cumulative depreciation has not reached 70%, the Commission has considered the depreciation on assets as per the rates specified in the Generation Tariff Regulation, 2010.

9.84 The Petitioner has submitted that since both the Units have not yet completed 12 years of operation, as per Regulation 7.31 of the Generation Tariff Regulation, 2010, the depreciation rates for various classes of assets as prescribed in the Generation Tariff Regulation, 2010 is applicable for both the Units.

9.85 However, the Petitioner has misinterpreted the provisions regarding depreciation as stated in the Generation Tariff Regulation, 2010. Regulation 7.31 (as quoted below) of the said Regulations pertains to norms for calculation of depreciation for the new generating stations.

"Method' and at rates specified in Appendix-I to these Regulations for the assets of the generating station:

Provided that, the remaining depreciable value as on 31st March of the Year closing after a period of 12 Years from the Date of Commercial operation shall be spread over the balance Useful life of the assets."

9.86 The said norm has been specified in accordance with the norm specified by the Central Electricity Regulatory Commission (CERC) for calculation of depreciation in CERC (Terms and Conditions of Tariff) Regulations, 2009……..
……

9.88. It may be noted that the repayment of long term debt of the Unit 2 and Unit 3 (on the Original Project Cost) has been completed in the years FY 2009-10 and FY 2010-11 respectively and the cumulative depreciation for certain assets has reached 70%. Therefore, even though the Units have not yet completed 12 years of operation, the remaining depreciable value for such assets should be spread over the balance useful life of the assets (in accordance with Regulation 7.32 of the Generation Tariff Regulation, 2010).

9.89 The Commission has also allowed depreciation on the approved additional capitalization considering the depreciation rates specified in Generation Tariff Regulation, 2010. Depreciation has been provided for twelve months on the approved additional capitalization for FY 2007-08 to FY 2010-11; and for six months on the approved additional capitalization for FY 2011-12, considering that asset addition will be spread over the course of the entire year.

9.90 The depreciation approved for FY 2011-12 on Original Project Cost and additional capitalization is given in the Table below".

41. On the basis of these findings, the State Commission has approved the depreciation of Rs.4.73 for Unit No.2 and Rs.6.48 Crores for Unit No.3.

42. Let us now refer to both the Regulations namely Clause 7.31 and Clause 7.32 of the Generation Tariff Regulations, 2010:

"7.31 Depreciation shall be calculated annually based on 'Straight Line Method' and at rates specified in Appendix-I to these Regulations for the assets of the generating station:

Provided that, the remaining depreciable value as on 31st March of the Year closing after a period of 12 Years from the Date of Commercial operation shall be spread over the balance Useful life of the assets.

7.32 In case of the existing Projects, during Transition period the balance depreciable value as on 1.4.2011 shall be worked out by deducting the cumulative depreciation including Advance Against Depreciation as admitted by the Commission upto 31.3.2011 from the gross depreciable value of the assets.

During Control period the balance depreciable value as on 1.4.2012 shall be worked out by deducting the cumulative depreciation as admitted by the Commission upto 31.3.2012 from the gross depreciable value of the assets.

The rate of depreciation shall be continued to be charged at the rate specified in Appendix-I till cumulative depreciation reaches 70%. Thereafter the remaining depreciable value shall be spread over the remaining life of the asset such that the maximum depreciation does not exceed 90%.

43. The reading of the above Regulations would indicate that Regulation 7.31 provides for spread over after a period of 12 years from the date of commercial operation and Regulation 7.32 deals with the existing projects and in respect of the

existing projects the rate of depreciation shall be charged at the rates specified in Appendix-1 till cumulative depreciation reaches 70%. This Regulation uses the terms, existing projects, Transition Period and Control Period.

44. Let us now refer to the definition of these terms in the relevant clauses:

> *"Clause 2 (22) of the Generation Tariff Regulation, 2010 define the term **"Existing Project**" as:-*
>
> > *"**Existing Project**" means the project declared under commercial operation from a date prior to 01.04.2011;*
>
> *Clause 2 (43) of the Generation Tariff Regulation, 2010 define the term "**Transition Period"** as:*
>
> > *"**Transition Period"** means the period of determination of tariff on annual basis which shall be from 1st April, 2011 and up to 31st March, 2012;*
>
> *Clause 2 (15) of the Generation Tariff Regulation 2010 define the term **"Control Period"** as:*
>
> > ***"Control Period"** means a multi-year period fixed by the Commission from 1st April, 2012 and upto 31st March, 2016.*

45. The Control Period of the Generation Tariff Regulation, 2010 is between April, 2010 and March, 2016. Therefore, all the projects which commenced their Commercial Operation

after the date of commencement of the Generation Tariff Regulations shall be governed under Regulation 7.31. For the existing projects, Regulation 7.32 shall be governed..

46. Let us now refer to the other Regulations which are relevant for understanding the applicability of the control period of the Generation Tariff Regulations, 2010:

> *"5.1 The Commission shall continue with the Annual Tariff Framework for approval of ARR and Tariff of the Generating Company during the Transition Period.*
>
> *5.2 Accordingly, the Transition period shall commence from April 1, 2011 and shall extend till March 31, 2012. ARR filing for the Transition Period shall be done in accordance with the Annual Tariff framework contained in these Regulations;*
>
> *5.3 The Commission shall adopt Multi Year Tariff framework for approval of ARR and Tariff during the Control Period.*
>
> *5.4 Accordingly, the Control Period shall commence from 1st April 2012 and shall extend till 31st March 2016. ARR filings for the Control Period shall be done in accordance with the MYT framework contained in these Regulations;*

47. The above Clauses would reveal that the Generation Tariff Regulation, 2010 provides the applicability of the Tariff

Regulations into two time period (1) Transition Period from 01st April, 2011 to 31st March, 2012 and (2) Control Period from 01 April, 2012 to 31st March, 2016.

48. Admittedly, the Unit No.2 commenced its operation on 1.2.2001 and Unit No.3 commenced its operation on 1.2.2002. Therefore, both the units of the Plant of the Appellant are the existing Generating Stations as per the definition in Clause No.2 (22) of the Regulations, 2010.

49. The reading of the above definition Clauses in the Regulation would make it clear that for ascertaining the balance depreciable value of the existing projects during the transition period, the first part of 7.32 is required to be followed.

50. Similarly, for ascertaining the balance depreciable value of the existing project during the control period, the second part of the Clause 7.32 is required to be followed.

51. The third part indicates that the depreciation shall be continued to be charged at the rates specified in the Regulation till cumulative depreciation reaches 70%. Thereafter, the remaining depreciable value shall be spread over the remaining life of the asset such that the maximum depreciation does not exceed 90%.

52. In view of the above, it is Clause 7.32 of the Regulations, 2010 which is the applicable Regulation for the Appellant and not Clause 7.31 of the Generation Tariff Regulations, 2010 as claimed by the Appellant.

53. It is the case of the Appellant that if the Regulation 7.31 applies to new project, it would take about 13 years to reach 70% which is beyond the applicability of the Regulation. It is to be pointed out that the proviso to Regulation 7.31 does not provide for the limit of 70% as stated by the Appellant. In other words, Regulation 7.31 provides for spread over after a period of 12 years from the date of commercial operation without any reference to the limit of 70%.

54. It is submitted by the Appellant that Regulation 7.32 is merely an alternate provision for recovering the depreciation and it cannot be treated as an overriding provision over the Regulation 7.31. This submission is misconceived.

55. Regulation 7.32 is neither an alternate provision nor an overriding provision over Regulation 7.31. If both these Regulations are read together, then it would be clear that both are framed for the application to the different categories of the project. Regulation 7.31 is applicable to new Generating Stations, i.e. the Generating Stations which shall come into commercial operation on or after 1.4.2011. Regulation 7.32 is applicable to the existing generating

stations i.e. the Stations whose commercial operation date was prior to 1.4.2011.

56. The Appellant relied upon the Central Commission's Regulations, 2009 for the 12 years ceiling. Comparison of clause 17.4 of the Central Commissions (Terms and Conditions of Tariff) Regulation, 2009 and Clause 7.32 of the State Commission's Generation of Tariff Regulations, 2010 will show that the Central Commission's Regulations, 2009 and State Commission's Generation Tariff Regulations, 2010 have treated the depreciation differently. As per Central Commission's Tariff Regulations, the spread of remaining depreciable value over the balance useful life of the assets of remaining depreciable value over the balance useful life of the assets is allowed only after 12 years from the date of Commercial Operation. In the State Commission's Regulation for existing plants there is a provision for spread over if the cumulative depreciation of an asset reaches 70%. This provision is not available in Central Commission's Regulation. Thus comparison with Central Commission's Regulation will not be proper.

57. The learned Counsel for the State Commission has relied upon the National Insurance Co Ltd vs Anjana Shyam in 2007 (Vol-7) SCC 445 and Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd in 1987

(Vol.1) SCC 424 giving the principles of interpretation of the provision.

58. The learned Counsel for the Appellant also placed reliance on the issue of interpretation in NTPC Vs. Central Commission reported in 2009 ELR (APTEL) 0337. The principles relating to the interpretation are well settled as laid down by the decisions. The interpretation must depend upon the text and context. They are the basis of the interpretation. One may say if the text is texture, context is what gives the colour. Both are important. No part of the provision or no word of provision can be construed in isolation. The Statute has to be considered so that every word has a place and everything is in its place. Only on the basis of these principles, the interpretation has been given by the State Commission in the impugned order. This interpretation, in our view is correct and justified.

59. Therefore, the submissions, made by the Counsel for the Appellant on this issue has no merit.

60. This question also is answered as against the Appellant.

61. **Summary of Our Findings**

i) **The State Commission has correctly decided the Station Heat Rate for Units 2 & 3 of Appellant's Jojobera Thermal Power Station as per the Tariff**

Regulations. No case has been made out by the Appellant for exercise of powers of relaxation of Station Heat Rate norms by the State Commission.

ii) **The State Commission has correctly determined the depreciation as per Regulation 7.32.**

62. In view of our above findings, we do not find any merit in the Appeal. Consequently, the same is dismissed.

63. However there is no order to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 20th Sept, 2012

√REPORTABLE/~~NON-REPORTABALE~~