Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 47 of 2012

Dated: 14th December, 2012

Present: HON'BLE MR. JUSTICE P S DATTA, JUDICIAL MEMBER
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

Maharashtra State Power Generation Company Limited.
Prakashgad,
Plot No. G-9, Bandra (East)
Mumbai-400 051 … **APPELLANT**

VERSUS

1. Maharashtra Electricity Regulatory Commission
Through its Secretary,
13th Floor, Centre No.1, World Trade Centre,
Cuffe Parade, Colaba Mumbai-400005

2. Tata Power Co. Ltd (Generation Business)
Regulation department
Dharavi Receiving station
Labour Camp, Next to Shalimar Industries
Matunga East Mumbai 400019.

3. Reliance Infrastructure Ltd (Generation Business)
Regulatory Department,
7th Floor Devidas Lane, off SVP Road,
Devidas telephone exchange,
Borivali West, Mumbai 40092

4. Prayas (Energy Group)
Amrita Clinic, Athvale Corner,
Lakdipool, Karve Road Junction
Deccan Gymkhana, Karve Road
Pune – 411004

5. Mumbai Grahak Panchayat
Grahak Bhavan, Sant Dynaneshwar Marg,
Behind Cooper Hospital (Vile Parle West)
Mumbai – 4000056

6. The Vidarbha Industries Association
1st Floor, Udyog Bhawan,
Civil Line, Nagpur – 440001

7. The General Secretary,
Thane Belapur Industries Association
Rabale Village, Post Ghansoli,
Plot P – 14, MIDC
Navi Mumbai – 400701 … **RESPONDENTS**

Counsel for the Appellant : Mr Sanjay Sen
Mr. Ramandeep Singh (Rep.)

Counsel for the Respondent : Mr Buddy A Ranganathan for R-1

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant Maharashtra State Power Generation Company Limited is a Generation Company wholly owned by the Government of Maharashtra. Maharashtra Electricity Regulatory Commission (for short the Commission) is the 1st Respondent herein. 2nd and 3rd Respondents are the distribution licensees having city of Mumbai as licensed area of supply. Respondents Nos. 4 to 7 are the NGOs and the Consumers' representatives.

2. The present appeal has been preferred by the Appellant Maharashtra

State Power Generation Company Limited against the impugned order dated 30.12.2011 passed by the Commission in Case No. 107 of 2011.

3. The Appellant Company is a generating company, which is engaged in the generation of electricity in the State of Maharashtra.

4. The Appellant had filed a petition before the Commission, under Section 62 (4) of the Electricity Act, 2003 and MERC (Terms and Conditions for Tariff) Regulation, 2005 and MERC (Multi Year Tariff) Regulations 2011, for True up for FY 2009-10 and Annual Performance Review (APR) for FY 2010-11.

5. The Respondent Commission, pursuant to holding of hearings, proceeded to pass the impugned order on 30.12.2011. The Appellant is mainly aggrieved by the order of the Commission on the following issues.

i) True up for FY 2009-10

a) fuel cost;

b) operation and maintenance cost;

c) other debits, as mentioned in the audited expenses of the Appellant for the Financial Year 2009-10 under the head “Miscellaneous Losses and write-off”;

d) pro rata reduction in fixed cost due to availability;

e) prorate reduction in fixed cost due to recertified availability;

f) depreciation.

ii) Provisional true up for FY 2010-11

a) capital expenditure and capitalization;

b) impact of pay revision.

iii) True up for FY 2009-10 for Paras Unit 3 and Parli Unit 6

a) reduction in the Annual Fixed Cost and disallowance due to lower technical performance.

6. Apart from the above issues the Appellant has also raised an issue of disallowance in fixed cost in respect of Uran CCGT on account of non availability of gas.

7. Assailing the Impugned Order, the learned Counsel for the Appellant made elaborate submission on each of the above issues. Per-contra the learned Counsel for the Commission made equally elaborate submissions supporting the findings of the Commission and have added that the documents and information placed before this Tribunal by the Appellant was not made available to the Commission.

8. Having the learned Counsels for the Appellant and the Commission heard the following questions are framed for our consideration:

(i) Whether the Commission has erred in considering the calorific value of coal "as received", instead of "as fired" coal, for calculating the fuel costs for the FY 2009-10?

(ii) Whether the Commission has erred in considering the 'net' O & M expenses of FY 2006 – 07 as base expenses instead of considering the 'gross' O & M expenses as base expenses for allowing the O & M expenses for the subsequent years?

(iii) Whether the Commission has correctly disallowed the loss incurred by the Appellant due to obsolete spares?

(iv) Whether the Commission has correctly carried out reduction in fixed cost on account of lesser availability in the FY 2009 – 10 on pro-rata basis?

(v) Whether the Commission has erred in disallowing fixed cost of the Uran gas based thermal power station on account of unavailability/ lower availability of fuel?

(vi) Whether the judgment in Review Petition No.9 of 2011 in Appeal No. 199 of 2010 be an impediment in reassessing the issue of implementation of capex schemes for FY 2009-10.

(vii) Whether the Commission has erred in restricting the capitalisation of the assets costing less than Rs 10 Crores in the year 2010-11.

9. We shall now consider each of the questions framed above one by one. The first question for consideration is as to whether the Commission has erred in considering the calorific value of coal "as received", instead of "as fired" coal, for calculating the fuel costs for the FY 2009-10?

10. The learned Counsel for the Appellant made the following submissions in regard to this issue:

a) The Commission has made an error in computing the fuel costs for the FY 2009-10, by considering the weighted average

calorific value of the coal on “as received” basis. The Appellant detected the same only after perusal of the impugned order. Under the Regulations framed by Respondent Commission viz. the MERC (Terms & Conditions of Tariff) Regulations 2005 and the MERC (Multi Year Tariff) Regulations 2011, the same consider the calorific value of the coal on “as fired” basis for computation of fuel costs. It is the case of the Appellant that the “as fired” coal of the Appellant is the “bunkered coal” and the Commission failed to consider the same contrary to its own regulations.

b) At the time of hearing of the petition before the Commission, the Appellant had provided the bunkered calorific value of the coal and the same was even used by the Appellant to demonstrate the annual Station Heat Rate of the station. However, the Commission did not base its calculations on the bunkered calorific value. It is stated herein that it is virtually impossible for the Appellant to give bunkered calorific value of the individual coal since the coal being fired by the Appellant is a mix of domestic, washed and imported coal. The Appellant in the petition before the Commission, had submitted the calorific value of the coal on “as received” basis for individual coal and had also provided the bunkered calorific value of the coal mix. When the relevant tariff regulations of the Commission do not envisage considering calorific value of “as received” coal, the Commission was ill placed to have considered the same instead of the “as fired” bunkered coal.

c) For the record, the Appellant submits that it takes sample of coal after every two hours from the bunkers and records the calorific value of the coal blend being fired in the station in order to measure the “as fired calorific value” of the coal blend/ mix. The same is then averaged out in order to arrive at the annual calorific value of the coal blend being fired in the station. Therefore, as per the tariff regulations of the Commission, it is this “bunkered/as fired” calorific value of coal that ought to have been considered for computation of the fuel costs.

d) The wrongful consideration of the calorific value of coal on “as received coal” has denied the Appellant costs which have been incurred, in complete contrast to the existing tariff regulations. The said deviation in the computation of fuel costs has been done without citing any reasons whatsoever by the Respondent Commission in the impugned order. The Appellant has provided a comparison between the approved costs provided by the Commission and the actual costs incurred by the Appellant in the main appeal

e) It is further submitted that the Commission, in its previous true-up orders, has been considering the calorific value of the bunkered coal for determination of fuel costs of the Appellant. The same submission of bunkered calorific value is considered by the Commission for approval of Fuel Adjustment Charges (FAC). Further, it is pertinent to mention herein that the Respondent Commission, on 21.06.2012 i.e. after filing of the present appeal, in Case No. 6 of 2012 in a petition filed by the

Appellant for True up for FY 2010-11 and ARR and Tariff for FY 2011-12 and 2012-13, has passed a final order wherein it has considered "bunkered calorific value" of the coal for computation of fuel costs.

11. The learned Counsel for the Commission made the following submission on this issue:

a) The main contention of the Appellant is that the Commission ought to have considered the bunkered/fired calorific value of coal and not the calorific value of the coal as received.

b) It is admitted by the Appellant that the said issue was not raised before the Commission and the Appellant has admitted the same in the Appeal as well as in its written note of arguments.

c) Factually, even the data and figures now placed before this Tribunal were not placed before the Commission. The Commission has proceeded, in the impugned order on the basis of the figures given by the Appellant itself. The Commission has made that clear in its reply and the Appellant did not rejoin on this .

d) The MERC (Terms and Conditions of Tariff)Regulations, 2003 has specified the energy calculation formats to provide the Calorific Value ('CV') of the cost as used in the generation process. The Commission has considered the CV of the coal as submitted by the Appellant for calculation of the fuel cost. There is no mismatch between the CV of the coal as submitted

by the Appellant and as considered by the Commission for the calculation of the fuel cost. The MERC (Terms and Conditions of Tariff) Regulations, 2005 does not have any provision to allow any loss of CV in the process of transportation of coal. It only provides a transit loss as percentage of weight of coal procured. Therefore, the calorific value of the coal as received cannot be different from the calorific value of coal "as fired" as claimed by the Appellant.

e) The MERC fuel calculation format only requires the individual gross calorific value (GCV) of the different variety of coal used (Domestic /Washed/ Imported) in energy computation. The formats have no place to separately consider the bunkered calorific value of the coal. The Commission has considered the actual calorific value of the coal as submitted by the Appellant. Further, the Commission considered the same blending ratio as used and mentioned by the Appellant in the energy calculation sheet.

f) The Appellant has not submitted any sample report regarding the sampling of the coal in every two hours. Furthermore, any such sampling has to be produced before the Commission with certification from any designated Agency or Auditors for the consideration of the Commission for the Prudence Check plus nowhere in the Petition has the Appellant mentioned that the "bunkered CV" is the "CV as fired".

g) The Appellant has not discussed in the past, the issue of using the parameter "bunkered CV" to be used in addition to the CV of coal procured, with the Commission. The appellant has always submitted the CV of the individual coal (Raw/washed/Imported) separately in the fuel cost sheet and the same has always been considered for the fuel cost calculation taking into account the blending ratio as submitted by the Appellant. The Coal price and coal CV are correlated and therefore any variation of coal CV cannot be considered in isolation. The Appellant has paid the coal price based on the CV of the coal received and the same price is being considered by the Commission for fuel cost calculation.

h) The findings in the impugned Order are as under:-

> *"4.8.1 The Commission, for carrying out the Truing up of fuel expenses for FY 2009-10, has considered the actual fuel price, actual calorific value and actual proportion of domestic, washed and imported coal for each station **as submitted by MSPGCL**."*

i) The reliance by the Appellant on a part of the True Up Order dated 21.6.2012, for the next year, i.e. 2010-11 is misplaced. It is submitted that the Commission in the Order dated 21.6.2012 has considered the detailed submissions of the Appellant on the so called losses between the calorific value of the coal as received and "as fired". What the Appellant has omitted to mention before this Tribunal is that in the said Order dated 21.6.2012 the Commission has also referred to the CPRI report for the methodology for computing stacking losses and has

directed the Appellant to constitute a Committee to investigate the huge variation in the "bunkered" calorific value and the calorific value of the actual "as received". The Commission has also directed the Appellant to submit its report with recommendation and action plan to limit such stacking lose to 1.50 kcal/kwh within six months from the date of the issuance of such order.

12. In the light of contention of the Commission that for carrying out the Truing up of fuel expenses for FY 2009-10, it has considered the actual fuel price, actual calorific value and actual proportion of domestic, washed and imported coal for each station as submitted by the Appellant and in the light of the Appellant's own assertion that the Appellant detected the error in computing the fuel costs for FY 2009-10 by considering the weighted average calorific value of the coal on as received basis, we are of the view that it would be appropriate to direct the Appellant to approach the Commission with complete data and the Commission may carryout the true up for FY 2009-10 on the basis of fresh data submitted by the Appellant. We order accordingly.

13. Before we consider the next issue we would like to express our concern over loss of CV and vast difference between calorific value of fuel 'as received' and 'as fired'. The coal looses calorific value when stored for very long time in the open due to presence of oxygen in atmosphere. It is understood that presently, due to country wide shortage of coal; power stations have fuel stock for few days only. Any loss of CV in such a short duration needs

proper explanation.

14. Next question for consideration is as to whether the Commission has erred in considering the “net” O & M expenses of FY 2006 – 07 as base expenses instead of considering the “gross” O & M expenses as base expenses for allowing the O & M expenses for the subsequent years?

15. The learned Counsel for the Appellant made very elaborate submissions on this issue. The gist of his submissions are:

a) The Commission, while passing the impugned order has approved the Operation and Maintenance (hereinafter referred to as “O&M”) expenses of Rs 1000.01 Crores. As per the Appellant, against the same, the actual O&M expenses were Rs. 1119.19 Crores. There is a deviation and the same is on account of the fact that the Commission has considered the net O&M expenses of 2006-07 as the base expenses and has allowed the O&M expenses in the subsequent years by applying yearly escalation factors. The same is not a prudent approach.

b) As per the books of accounts of the Appellant for FY 2006-07, the gross O&M expenses were Rs. 948.12 Crores. There was a capitalization of O&M expenses to the tune of Rs. 93.66 crores by the Appellant and, therefore, the net O&M expenses come about to Rs 854.45 crores. The Commission, for working out the allowed normative expenses for future years, has considered the above net O&M expenses of Rs. 854.45

crores. From the year 2007-08 the Appellant started preparing its accounts as per the Companies Act 1956, wherein the principles of capitalization of O&M expenses are in compliance of the said act.

c) With reduction in the capitalization amount, the net O&M expenses of the Appellant have almost fallen in line with the gross expenses. However, the approval of O&M expenses by the Commission considering a net base of Rs 854.45 crores has created a shortfall in the approved O&M expenses. The wide gap has been observed in allowed O&M expenses vis-à-vis the approved expenses.

d) Therefore, the huge difference between normative expenses vis-à-vis the actual expenses can be overcome by consideration of gross O&M expenses of the base year (2006-07). As per the impugned order, there exists a gap of around Rs. 151 crores between the allowed expenses vis-à-vis the actual expenses for the period starting from 2007-08 to 2009-10. Gross O&M expenses must have been considered for working out the normative expenses by the Commission.

e) Earlier in Case No. 16 of 2008, the Commission undertook the true-up for FYs 2005-06 to 2007-08 and provisional true-up for FY 2008-09. In the order passed, the Commission has provided the rationale for allowing net expenses of Rs. 854.45 crores for the year FY 2006-07 as under:.

"As may be observed from the above Table, MSPGCL has proposed to consider the capitalisation of O&M expenses to the extent of Rs. 61.25 Crore towards the upcoming stations as against the gross O&M expenses of Rs. 28.99 Crore allocated to the upcoming stations. The capitalisation of O&M expenses means that the expenses incurred on Projects under development/ construction are capitalised as part of capital cost of the Project and not booked as revenue expenditure. In case of Generating Company with some existing stations and some upcoming stations, the total O&M expenses are allocated between the existing stations and upcoming stations. The expenses allocated to existing stations are considered as revenue expenses and expenses allocated to stations under development are considered as expenses to be capitalised as part of Project Cost. The gross expenses allocated to the upcoming stations cannot be lower than the expenses capitalised as the entire expenses allocated to upcoming stations have to be capitalised. Therefore, the Commission has considered the total gross O&M expenses of FY 2006-07 as Rs 948.11 Crore and after deducting the capitalised O&M expenses of Rs. 93.66 Crore, the net actual O&M expenses works out to Rs 854.45 Crore."

f) While the Commission has given the basis for considering the net expenses in FY 2006-07, the above order was non-speaking on the issue as to whether gross or net expenses ought to be considered as base for the future years. The Appellant was further aggrieved by the manner in which the Commission considered the segregation of capitalization of O&M expenses in FY 2006-07. Both the said issues were raised by the Appellant before this Tribunal in Appeal No. 191 of 2009. This Tribunal while disposing off the said appeal (191 of 2009) gave liberty to the Appellant to approach the

Commission for consideration of gross O & M expenses. This Tribunal, in Appeal No. 191 of 2009, observed as follows:

> *"8.8. In view of the above, we do not find any reason to interfere with the order of the State Commission on O&M expenses. However, we give liberty to the Appellant to place the issue of gross/ net O&M expenses raised in this Appeal before the State Commission for consideration in subsequent True Up or Tariff petition and in that event the State Commission may consider the same to ensure that the Appellant is not denied of the legitimate O&M expenses on account of booking of O&M expenses to Capital Works".*

g) The Appellant raised the above issue before the Commission, however, the Commission in the impugned order has not dealt with the issue regarding consideration of gross expenses for the purpose of allowing the O&M expenses for future years. The Commission has reiterated its findings on capitalization for FY 2006-07, which as per the Appellant was not an issue to be considered. The Commission failed to consider the fact that in future years i.e. 2007- 08 onwards, there has not been any capitalization in the books of accounts of the Appellant and, therefore, consideration of net expenses as base was leading to severe disallowances. The Commission, therefore, has grossly ignored the facts of the present case and the observations of this Tribunal in the judgment in appeal 191 of 2009.

h) The findings of the Respondent Commission in Case No. 16 of 2008 are only relevant to the allowance of O&M expenses for

the FY 2006-07. The said findings cannot be applied to the future years since there is no "capitalization" in the future years under the established principles of Companies Act which have been adopted by the Appellant. So far as the gross expenses of existing and upcoming units are concerned, their expenses are booked on actuals and are not allocated as wrongly observed by the Commission.

i) In the event of the Commission intending to consider a base year expense (2006-07 in the present case) the Commission ought to ensure that such base year expenses are adequate to cover the future year expenses. In case the base year O & M expenses have significant capitalization, then such net expenses cannot cover the expenses of future years, especially in case when no capitalization is happening in the future years, which is the situation in the present case. The gross expenses of the existing stations reflect the actual expenses spent by the Appellant, and in the absence of any significant capital works, there would not be any capitalization of such expenses and, therefore, the gross expenses and net expenses would remain the same for individual stations. In light of the above submissions, it is submitted that the gross O&M expenses in 2006-07 must be considered for working out the allowable expenses.

16. The main grievance of the Appellant is that the Commission should have considered the 'gross O&M' expenses for the base year 2006-

07 instead of 'net O&M' expenses for projection for the future years.

17. The learned Counsel for the Commission made the following equally elaborate submissions on this issue.

a. The main contention of the Appellant is that in using the base costs of O & M the Commission ought to have taken the "gross" O & M (i.e. including amounts which are capitalized) and not the "net" O & M (i.e after deducting the capitalized amounts)

b. Such contention is fundamentally and factually wrong. O & M as a revenue expenses has always necessarily to exclude the capitalized amounts. , it would amount to allowing such amounts both as a revenue expense and also form a part of the capital base on which the Appellant could claim RoE. Such effect would be a classic case of double-accounting.

c. Once any part of O&M expenses are capitalized, in effect they lose their character as O&M and such expenses will form part of the capital cost of the concerned assets. Hence the expression of "gross O&M" is actually a bit of misnomer.

d. Accepting the contentions of the Appellant would mean that certain portions of the expenses would form a part of the capital base attracting return on equity and also form

part of expenses which would be recovered through tariff. Such contention ought only to be raised to be rejected.

e. The findings of the Commission in the impugned Order are **as under:**

i. "4.11.2 The Commission, vide Order dated March 5, 2010 in Case 16 of 2008 approved the O&M expenses by revising the base O&M figures for FY 2006-07. In the said Order the Commission ruled as under,

1. "MSPGCL has proposed to consider the capitalisation of O&M expenses to the extent of Rs. 61.25 Crore towards the upcoming stations as against the gross O&M expenses of Rs. 28.99 Crore allocated to the upcoming stations. The capitalisation of O&M expenses means that the expenses incurred on Projects under development/construction are capitalised as part of capital cost of the Project and not booked as revenue expenditure. In case of Generating Company with some existing stations and some upcoming stations, the total O&M expenses are allocated between the existing stations and upcoming stations. The expenses allocated to existing stations are considered as revenue expenses and expenses allocated to stations under development are considered as expenses to be capitalised as part of Project Cost. The gross expenses allocated to the upcoming stations cannot be lower than the expenses capitalised as the entire expenses allocated to upcoming stations have to be capitalised. Therefore, the Commission has considered the total gross O&M expenses of FY 2006-07 as Rs 948.11 Crore and after deducting the capitalised O&M expenses of Rs. 93.66 Crore, the net actual O&M expenses works out to Rs 854.45 Crore"

ii. *4.11.3 Based on the above observation, the O&M expense for FY 2006-07 was fixed as Rs. 854.45 Crore. The Commission approved the escalation rate of 5.38% and 5.29%, based on the CPI and WPI index, to arrive at the O&M expenses for the FY 2007-08 and FY 2008-09 respectively.*

iii. *4.11.7 The Commission in its previous Order dated September 12, 2010, had approved the escalation rate of 5.48% to be applied on the normative O&M expenses of FY 2008- 09 to arrive at the normative O&M expense for the FY 2009-10. Accordingly the O&M expenses for FY 2009-10 are Rs.1001.01 Crore.*

iv. *4.11.8 The Commission has considered the normative O&M expenses for the FY 2009-10 as approved in the previous APR Order. Apart from the normative O&M expense, the Commission has considered Rs.95.51 Crore towards the impact of the pay revision. The total O&M expenses approved for FY 2009-10 are Rs 1095.52 Crore.* ***The Commission has considered the variation in actual and approved O&M expenses as efficiency loss and has carried out the sharing of losses as provided in detail in Section 4****."*

f. The reliance by the Appellant on the Judgment in Appeal No. 191 of 2009 of this Tribunal is erroneous. It is submitted that this Tribunal did not direct in the said judgment that O & M expenses must be taken at "gross" and not at "net" levels. All that this Tribunal held in such judgment is that "legitimate" O&M expenses ought not to be disallowed on account of the capitalization of O&M expenses. Adding the capitalized expenses as part of O &

M would not only permit the Appellant its O&M but also pad up the O&M expenses beyond what is legitimate.

g. In fact, the Commission has allowed the Appellant all the legitimate O&M expenses of the relevant years. Such legitimate O&M expenses for the concerned years have been compared with the allowable O& M expenses for such year and the difference between the two has been shared as efficiency loss and in terms of the Tariff Regulations. The treatment by the Commission is fully in accordance with the Tariff Regulations.

18. We have heard the contentions of the learned Counsels of both the parties. The issue before us for consideration is as to whether the employees' cost that had been capitalised in the past is to be considered as O&M expenses for that particular year for the purpose of projecting O&M expenses for the future years.

19. The Annual Revenue Requirement comprises of two expenditures viz., Capital Expenditure and Revenue Expenditure. Capital Expenditure includes Return on Equity, Financing costs and Depreciation of the Capital cost of the asset. Revenue expenditure includes Operation and Maintenance (O&M) expenditure, interest on working capital etc. The O&M expenditure has three components viz., Employees Cost, Administrative and General Expenses and Repair and Maintenance costs. As the nomenclature O&M indicates, employees costs includes the salaries and other allowance payable to employees employed in Operation and Maintenance of the

projects. Utilities, like the Appellant herein, have two categories of employees viz., (i) category employed in Construction and Erection of projects and (ii) category employed in Operation and Maintenance of projects. The cost of employees employed in construction activity is capitalised along with capital cost of the asset and the utility earns Return on Equity, Depreciation, financing costs etc for the life time of the project. The cost of employees involved in the O&M activity is added to O&M expenses. O&M expenses are the expenses which have been incurred in operation and maintenance of the project and would not include the expenses which had been incurred in construction of the project. All those expenses, including employees' cost, which have been capitalised and entitles the utility to earn RoE and other benefits for the life time of the project cannot be considered as O&M expenses for that year. Only the expenditure which has been actually incurred in operation and maintenance can form part of O&M expenses. Thus, there is no such term as 'gross O&M' expense or 'net O&M' expenses. The acceptance of the Contention of the Appellant would amount to allowing such amounts both as a revenue expense and also form a part of the capital base on which the Appellant could claim RoE, depreciation etc resulting in to double-accounting and, therefore, not permissible.

20. Accordingly, the question is answered against the Appellant.

21. The third question for consideration is as to whether the Commission has correctly disallowed the loss incurred by the Appellant due to obsolete spares?

22. The learned Counsel for the Appellant made the following submissions relating to the issue.

a) From FY 2007-08, the Appellant migrated from earlier system of accounting under the Electricity Act, to revised accounting system prescribed under the Companies Act, 1956. As a part of this process, the Appellant has been following the Accounting Standards prescribed under the Companies Act. In accordance with provisions of Accounting Standards, the Appellant conducts annual physical verification of inventory. As a part of this exercise, it also identifies, slow-moving, non-moving and obsolete items in the inventory and provides for 30% value of slow moving, 60% value of non-moving and 100% value of obsolete items in the Books of Accounts. The difference between provision of previous year (i.e. opening provision) and Closing Provision is debited / credited to Profit & Loss Account i.e. Loss on obsolescence of stores.

b) However, practically certain items do not get consumed in routine manner but the same are utilized during annual and capital overhauls hence consumption pattern of such items appear irregular. Such items create increase/ decrease in slow/ non-moving inventory. Further, the inventory items also get shifted from slow moving to non-moving category and increase the provision amount due to increase in weight from 30% to 60%. <u>However, the Appellant carried out the exercise of proper classification of inventory and it was observed that certain capital/ insurance spares which have been retained for future</u>

use as standby, were wrongly classified as non-moving spares instead of capitalizing them. Subsequently in FY 2010-11, as a result of completion of exercise of identification of capital/ insurance spares and capitalizing them by power stations, this position has been corrected which has resulted into reduction in provision on account of slow/non-moving/obsolescence stock/ spares.

c) So far as increase in obsolete spares is concerned, it is submitted that the Appellant is carrying out significant Renovation and Modernisation in its power plants as a result of which some of the spares are getting classified as obsolete. Further, around 1000 MW of old generating capacities have been shut down as a result of which there has been an increase in quantum of obsolete spares. However, it is submitted that the entire classification of inventory has been made after following an elaborate process which has been overseen by the statutory auditors as well. Hence the increase or decrease in provisioning amount against slow moving, non-moving and obsolete spares ought to have been considered by the Commission.

d) In the subsequent order (Case 6 of 2012), the commission has approved the entire amount against such spares. In the true-up for 2008-09 also (Case No. 102 of 2009), the Commission has approved the entire such amount. It is only as an exception in 2009-10 that the commission has disallowed this amount.

23. The learned Counsel for the Commission pointed out that none of the contentions raised in the Appeal were placed before the Commission. The Commission had undertaken a prudence check and has disallowed such expenses only on account of inefficiency of the Appellant. In such case the consumers of the State ought not to suffer the costs of such inefficiency.

24. The findings of the Commission on the issue are reproduced below:

> *"4.17.4 The Commission observed that the percentage of Non-Moving and Obsolete spares to the closing inventory of spares is 16% for the FY 2008-09 and 23% for the FY 2009- 10.*
> *4.17.5 There is increase in such inventory year on year and hence it indicates that MSPGCL may not have proper monitoring system for identification of such assets and also it has no alternate policy for utilization of such spares. Therefore the Commission has concluded that the loss of Rs 37.62 Crore claimed as loss on obsolete spares should be dis-allowed. Therefore, the Commission approves Rs.4.20 Crore as "other debits".*

25. According to the Appellant, the Accounting Standards prescribed under the Companies Act are being followed. In accordance with provisions of Accounting Standards, the Appellant conducts annual physical verification of inventory. As a part of this exercise, it also identifies, slow-moving, non-moving and obsolete items in the inventory and provides for 30% value of slow moving, 60% value of non-moving and 100% value of obsolete items in the Books of Accounts. The difference between provision of previous year (i.e. opening provision) and Closing Provision is debited / credited to Profit & Loss Account i.e. Loss on obsolescence of stores. If that be so, the

provision of slow moving, non-moving and obsolete spares should have been reduced year after year. However, as observed by the Commission in the Impugned Order, there has been increase in inventory year after year. The Appellant, in its submission before this Tribunal has accepted that "*the Appellant carried out the exercise of proper classification of inventory and it was observed that certain capital/ insurance spares which have been retained for future use as standby, were wrongly classified as non-moving spares instead of capitalizing them. Subsequently in FY 2010-11, as a result of completion of exercise of identification of capital/ insurance spares and capitalizing them by power stations, this position has been corrected which has resulted into reduction in provision on account of slow / non-moving / obsolescence stock/ spares.*"

26. The above submission of the Appellant has clearly established that there was some problem with the accounting of spares till the year 2009-10 and the same was rectified in the year 2010-11. Thus, the Commission had rightly disallowed the 'loss' incurred on account of spares.

27. The issue is decided against the Appellant.

28. The fourth Question for consideration is whether the Commission has correctly carried out reduction in fixed cost on account of lesser availability in the FY 2009 – 10 on pro-rata basis?

29. The main grievance of the Appellant is reduction in annual fixed charges due to lower plant availability/PLF on pro-rata basis. The learned Counsel for the Appellant contended that the plants could not

achieve the target PLF/availability only because of poor quality of coal which is supplied by Coal India Limited and the Appellant has no control over the quality of coal. Appellant is a company wholly owned by the State Government and have no profit earning motive. Therefore, it should not be made to suffer due to poor quality of coal over which it has no control.

30. The learned counsel for the Commission submitted that The issue is squarely covered by three different judgments of this Tribunal in the case of the Appellant itself viz., Judgment dated 4-8-2011 in Appeal No. 199 of 2010; Judgment dated 19-4-2012 in RP No 9 of 2011 in Appeal No. 199 of 2010 and Judgment dated 18-10-2010 in Appeal No. 161 of 2011.

31. As pointed out by the learned Counsel for the Appellant the very same issue was raised by the Appellant is Appeal No. 199 of 2010 and this Tribunal in its judgment dated 4.8.2011 observed that

> *"13.4 …*
>
> *We find that the State Commission has allowed the Availability/PLF more or less at the same level as was allowed for FY 2008-09 as per the recommendations of the CPRI. The recommendations of CPRI for FY 2008-09 are based on the field study. Since the target availability/PLF has been kept more or less at the level of 2008-09, we do not find any infirmity in the findings of the State Commission regarding the plant availability/PLF and, therefore, reject the contentions of the appellant in this regard.*
>
> *14. The seventh issue is regarding the reduction of annual fixed charges for FY 2008-09.*

14.1. According to the learned counsel for the appellant, the report of CPRI was finalized only in December, 2009 and a reasonable time is to be given for implementation of its recommendations. Further the actual income tax of Rs. 37.53 Cr. and prior period true up should not be linked to annual fixed charges and these should be allowed in full. There are amortizations of the previous year item when pro-rata reduction concept was not applicable.

14.2. According to learned counsel for the State Commission, Annual Fixed charges have been reduced on pro-rata basis for power stations where the Annual Availability was lower than the revised norms fixed by the State Commission on the recommendations of CPRI. Also, the Tariff Regulations do not differentiate the AFC elements for pro-rata reduction of AFC for availability lower than normative level irrespective of whether the AFC element is a pass through or otherwise.

14.3. Regarding annual availability we have already given the findings in paragraph 13.4 above. ***Accordingly, the Annual Fixed Charges will be reduced for those power stations where the annual availability is less than the normative annual availability according to the Regulations.***

32. The Appellant had filed a Review Petition No. 9 of 2011 in Appeal No. 199 of 2010 and this Tribunal rejected the review petition in the following terms:

10. Regarding Availability/PLF of the power plants the Tribunal in paragraph 13.4 of the judgment has rejected the contention of the review petitioner since the target availability/PLF has been kept by the State Commission more or less at the level as recommended by CPRI for the FY 2008-09 based on its field study. Now the appellant wants the Availability/PLF to be kept at the same level as actually achieved on the grounds argued extensively before us in the main appeal. ***We do not accept that the quality of coal is totally beyond the control of the appellant. If the quality of raw coal supplied by the coal companies is poor, the appellant has to make***

arrangements for washing of coal and blending with superior quality of coal.

11. ***The appellant wants to maintain status quo in performance parameters. We feel that the consumers cannot be burdened due to non-performance by the appellant. Thus, we do not find any reason to review our judgment.***

33. The findings of this Tribunal in the Appeals quoted above would squarely apply to this Appeal. The issue is accordingly decided against the Appellant.

34. The fifth question for consideration is as to whether the Commission has erred in disallowing fixed cost of the Uran gas based thermal power station on account of unavailability/ lower availability of fuel.

35. The Commission is its reply has submitted that the Appellant has pleaded various facts and figures in its application for additional facts, grounds etc that were never pleaded or placed before the Commission. These facts and figures inter alia, pertain to the lower availability of the Uran Gas based station on account of lower gas availability. The Appellant, in its rejoinder has sought the leave of this Tribunal to approach the Commission with the new and further facts and figures.

36. In view of the above, it would be appropriate to give leave to the Appellant to approach the Commission and the Commission may decide the issue taking into account the new facts and figures provided by the Appellant.

37. Next question is as to whether the judgment in Review Petition No.9

of 2011 in Appeal No. 199 of 2010 be an impediment in reassessing the issue of implementation of capex schemes for FY 2009-10.

38. According to Appellant the CPRI had submitted its report only in December 2009. Although the tests were conducted largely in FY 2009-10, however, the tests results were suggested to be applicable for the year 2009 itself. In practical terms, the Appellant was left with only few months in FY 2009-10 to implement the capital expenditure schemes. The Appellant further submit that the CPRI has conducted another study on the implementation of Capex Schemes for improvement in SHR. The report of CPRI dated April 2012 has given certain findings on reasons for delay in implementation of schemes.

39. The CPRI Report, being a subsequent development, was not available to the Commission, the Appellant has prayed for direction to the Commission to relook into issue of delay in implementation of Capex Schemes and pass appropriate order.

40. The learned Counsel for the Commission did not object to the above prayer of the Appellant. Accordingly, we find it appropriate to direct the Commission to reconsider the issue in the light of CPRI Report on implementation of Capex Schemes. We would like to clarify that at this stage we are not giving any findings on the merits of issue or CPRI Report.

41. The question is answered accordingly.

42. Next issue raised by the Appellant is related to capitalisation of the assets costing less than Rs 10 Crores in the year 2010-11.

43. According to the Appellant some of the capex schemes, especially the small ones (less than Rs 10 crores) pertain to replacement of equipments/ components in order to maintain/ sustain the current performance of the stations. It is not possible for the Appellant to prepare a Detailed Project Report (DPR) for all such small schemes and then after internal approvals, send such schemes for approval by the Respondent Commission. For generating stations, with significantly higher amount of rotating components, there are higher chances of equipment failure, wear and tear and corrosion. Such equipments need to be proactively replaced by the Appellant for safe operations of the stations and to sustain the current level of generation. Therefore, preparation of DPRs for approval for all such schemes is not possible. The generation of electricity has been de-licensed under the provisions of the Electricity Act, 2003. However, by putting such restrictions on the capital expenditure of the Appellant, the Respondent Commission is indulging in micro-management of the Appellant, which is against the said Act.

44. This issue of capitalisation of non-DPR schemes has been decided by this Tribunal in Appeal No. 199 of 2010. The relevant extracts of findings of this Tribunal are reproduced below:

> *"As far as the capitalization for FY 2010-11 is concerned, the Appellant was bound by the directions of the State Commission to club similar non-DPR schemes for approval of the State Commission and restricting non-DPR schemes to 20% of the proposed expenditure for DPR schemes."*

45. The above findings of this Tribunal in the Appeal No. 199 of 2010 would squarely apply to this Appeal. The issue is accordingly decided

against the Appellant.

46. The Seventh question is related to prorate reduction in fixed cost due to recertified availability in FY 2009-10. The Appellant has submitted that the Appellant is unable to understand the basis of estimating the fixed cost of Rs 2128 crores for all the stations. The Appellant has sought a direction upon the Commission to provide the Appellant a calculation sheet for scrutinizing and raising any further issue. We are surprised to see the attitude of the Appellant in approaching this august body under Section 111 of the Act 2003 to achieve some insignificant remedy which is available under RTI Act in much cheaper and faster way.

47. The appeal in the result is dismissed subject to our observations in paragraphs no. 12, 36, 40 in the body of this judgment. However, no order as to costs.

(V J Talwar)
Technical Member

(Justice P S Datta)
Judicial Member

Dated: 14th December, 2012

REPORTABLE/~~NOT REPORTABLE~~