

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 43 of 2009

Dated: 18th January, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial
Member**

In the matter of:

N.T.P.C. Ltd.

**NTPC Bhawan, SCOPE Complex
7, Institutional Area, Lodhi Road
New Delhi-110003**

... Appellant(s)

Versus

- 1. Central Electricity Regulatory Commission
Through its Secretary,
3rd & 4th Floor, Chanderlok Building
36, Janpath
New Delhi-110 001.**
- 2. GRIDCO Limited
Janpath, Bhubaneshwar
Orissa**

- 3. M/s Ferro Alloys Corporation Ltd.
GD2/10, Chandrasekharapur,
Bhubaneswar
Distt.Khurda, Orissa**
- 4. M/s Tata Steel Limited
Bombay House, 24, Homi Modi Street
Mumbai-400001**
- 5. Member Secretary, Eastern
Region Power Committee
14, Golf Club Road
Tollygunge
Kolkata-700033**
- 6. Bihar State Electricity Board
Vidyut Bhawan
Bailey Road
Patna-800021**
- 7. West Bengal State Electricity
Distribution Company Ltd.
Vidyut Bhawan
Block-DJ, Sector-II, Salt Lake City
Kolkata-700091**
- 8. Damodar Valley Corporation
DVC Towers, VIP Road
Kolkata-700054**
- 9. Jharkhand State Electricity Board
Engineering Bhawan,HEC, Dhurwa
Ranchi-834002**

**10. Power Department
Government of Sikkim
Gangtok, Sikkim-737101
Respondents**

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Counsel for Appellant(s) Mr. M.G. Ramachandran
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Mr. P.P.Mohanty
Mr. Lakhi
Mr. Hara Prasad Sahu
Mr. M.P. Siddiqui
Mr. Kedar Nath Tripathy
Mr.Athouba Khaidian
Mr. M.V. Rao
Mr. Happy Patnaik
Mr. Gaurav Srivastava
Mr. Mragank Sharma

JUDGMENT

PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

NTPC Limited is the Appellant. Challenging the order dated 30.9.2008 directing the Appellant NTPC to refund the amount of fixed charges recovered from the GRIDCO Limited, Respondent No.2 for the electricity supplied to GRIDCO Limited during October 1998, the Appellant has presented this Appeal.

2. The short facts are as follows:

(i) Appellant NTPC Limited is a Government of India Undertaking. It is engaged in the business of generation and sale of electricity. Electricity generated by the Appellant at different Generating Stations has been

- supplied to various purchasers including Respondent No.2 GRIDCO.**
- (ii) On 25.5.1993, the Appellant entered into a Bulk Power Supply Agreement with Respondent No.2 (GRIDCO) and other Respondents beneficiaries (Respondent Nos.6 to 10) for the sale of electricity generated by the Appellant at its different Generating Stations.**
- (iii) The Bulk Power Supply Agreement provided that the Tariff Terms & Conditions would be in accordance with the Notification issued by the Government of India under Section 43A of the Electricity (Supply) Act, 1948.**
- (iv) The Government of India issued various Notifications under Section 43A of the Electricity (Supply) Act, 1948 for**

determination of Tariff for the Generating Stations set up by the Appellant. In accordance with the said Notifications and the Bulk Power Supply Agreement, the fixed charges in respect of the electricity supplied by the Appellant to the Respondents were to be apportioned on the basis of the monthly drawal of energy by each beneficiary. For the period October, 1998, the supply of electricity by the Appellant to West Bengal State Electricity Distribution Company Ltd. & Damodar Valley Corporation, Respondents-7 & 8 herein, was reduced on account of regulation of supply due to non-payment of amount which had become due from them to the Appellant.

(v) In terms of the Notification which provided for the apportionment of the fixed charges on drawal basis, the Appellant calculated fixed and variable charges for the supply of electricity during October, 1998. Accordingly, NTPC raised the bills on Respondent No.2 GRIDCO as per the drawal of electricity for the recovery of fixed charges. Because of this discontinuance of the power supply to West Bengal Electricity Board and Damodar Valley Corporation, the unit cost of power supply became abnormally high. According to Respondent No.2 (GRIDCO), as against the amount of Rs. 13.72 crores, billed by the Appellant, only an amount of Rs.7.27 crores was payable. GRIDCO objected to the claim of the Appellant. However, there were

discussions and correspondences between the Appellant and Respondent No.2 (GRIDCO) with regard to their respective stand till 15.12.2002.

(vi) Thereafter, the claims of the Appellant were duly settled under One Time Settlement Scheme of the Central Government. During finalization of the dues as on 30th September, 2001, Respondent No.2 GRIDCO verified all the bills raised by the Appellant. Respondent No.2 GRIDCO intimated the Government of Orissa that the Respondent No.2 (GRIDCO) and the Appellant have reached joint reconciliation settlement as on 30th September, 2001. Accordingly, the Government of Orissa also wrote a letter to the Ministry of Power of the Government of India on 9.1.2003. Pursuant

thereto, the Tripartite Agreement was signed between the Government of Orissa, Government of India and Reserve Bank of India on 20th March, 2003. However, by letter dated 11.8.2005, Respondent No.2 (GRIDCO) raised a dispute relating to the payment of bill of October, 1998. The Appellant sent a reply on 16.11.2005 that all the disputes stood settled.

(viii)At this stage, Respondent No.2 (GRIDCO) filed a Petition in No.16 of 2006 before the Central Commission on 22.8.2006 under Section 79(1)(f) of the Electricity Act for adjudication of the disputes arising out of the recovery of fixed charges by the Appellant for supply of electricity during the month of October, 1998. Respondent Nos.3 and 4 also filed similar

Petitions Nos.152 and 153 of 2007 on the ground that the energy bills for the month of October and November, 1998 raised by the Respondent No.2 GRIDCO for drawal of power during peak hours was high which was on account of regulation of power by the Appellant for the month of October, 1998.

(ix) Central Commission heard all the above Petitions and passed the impugned order dated 30.9.2008 allowing the Petitions. In that impugned order, the Central Commission directed the Appellant to refund the amount of Rs.6.45 crores along with interest to Respondent No.2 on the ground that the Appellant had not correctly applied the provisions of the Notification and the Bulk Power Supply Agreement.

(x) Aggrieved with this order, the Appellant-NTPC has filed the present Appeal contending that Central Commission without considering the objections of the Appellant relating to the long delay and laches and also without taking note of the fact that the matter already stood settled between the Appellant and Respondent No.2 pursuant to the one-time settlement scheme of Government of India, passed the Impugned Order for the refund of the amount fixed charges.

3. On behalf of the Appellant-NTPC, the following 4 issues have been raised:

(I) Appellant-NTPC was justified in claiming the amount from the Respondent No.2-GRIDCO during the period of regulation on

**the basis of Government of India
Notification;**

- (II) The Petition filed by Respondent No.2
(GRIDCO) before the Central Commission
claiming refund of the amount was bad in
the light of laches and long delay in
approaching the Central Commission;**
- (III) The Petition filed by Respondent No.2
(GRIDCO) before the Central Commission
was not sustainable in view of the one-
time settlement as aforesaid;**
- (IV) The Central Commission ought to have
alternatively directed the payment of the
amount due to the Appellant-NTPC by the
other Respondents, namely, West Bengal
State Electricity Board and Damodar
Valley Corporation with interest.**

4. On these issues, elaborate arguments were advanced by the Learned Counsel for Appellant. The Learned Counsel for the Respondents also argued at length in justification of the Impugned Order passed by the Central Commission.

5. On consideration of the arguments of the Learned Counsel for the parties, let us now discuss over each of the issues.

6. In regard to the 1st issue, it is contended by the Appellant that the billing was done in terms of the Tariff Notification of the Government of India and as per the consistent practice followed and, therefore, the Appellant is justified in claiming the amount under the Notification and the Agreement which provides for fixed charges on the basis of

energy drawal. On the other hand, it is contended by the Respondent No.2 GRIDCO that the Tariff Notification did not contain any provision for regulation of power supply and, therefore, the Appellant could not recover the fixed charges as claimed by them.

7. On this issue, it is to be stated that the Tariff Notification issued by the Government of India during the period in question provided for the recovery of fixed charges in normal circumstances. But the formula for apportioning of fixed charges given in Tariff Notification was not intended to be applied in the event of regulation of power supply to one or more of the beneficiaries which is an abnormal situation. By virtue of the *force majeure* provision contained in Article 9 of the Bulk Power

Supply Agreement, the Respondent No.2-GRIDCO cannot be made liable for the loss or damage, if any, suffered by the Appellant on account of the fixed charges by virtue of regulation of power supply to the West Bengal State Electricity Board and Damodar Valley Corporation. The Appellant could not recover the fixed charges for the period of regulation from the Respondent No.2 since the Appellant did not comply with the provisions contained in Clause 1.7.5 of the Appendix of the Bulk Power Supply Agreement. As per this Agreement, in case of regulation, the Appellant could re-allocate the shares of the defaulting beneficiaries to other beneficiaries. In the present case, the Appellant-NTPC has not produced any material to show that steps were taken to re-allocate the shares of the West Bengal State

Electricity Board and Damodar Valley Corporation to any other beneficiaries. On the other hand, Appellant stopped generation of power altogether at the Generating Stations during the period of regulation. In such an event, the Appellant is not entitled to claim the fixed charges from the Respondent No.2 and other beneficiaries excluding the regulated beneficiaries.

8. In this context, it would be relevant to quote the norms which are laid down by the Central Commission by the Order dated 21.12.2000. The same is as follows:

“The Commission took up the task of prescribing terms & conditions soon after assuming the Tariff jurisdiction. For this purpose, it had to state, understand and

appreciate the tariff mechanism in the past for the Central Generating Companies. The Government in its dual capacity as a regulator and sole investor of Generating Stations had some time compromised in maintaining a balance between the Utilities and the beneficiaries. In this experience, the Commission observed certain significant aspects which are worth recording.”

9. In view of the above norms, it has to be held that in the absence of Notification in respect of regulation period as to who will have to pay the fixed charges in case of regulation of power supply of one or more beneficiaries who have defaulted in payment, the Respondent No.2 GRIDCO alone cannot be made liable to pay fixed charges on

drawal basis. This issue accordingly is decided in favour of Respondent No.2 (GRIDCO).

9. The next issue relates to the question of delay and laches which is as follows:

“Whether the Petition filed by the Respondent No.2 before the Central Commission, claiming refund of the amount was barred due to delay and laches?”

10. According to the Appellant, there is a long delay in filing the petition before the Central Commission on the part of the Respondent No.2 (GRIDCO) and the said delay had not been properly explained. On going through the impugned order and also the reply filed by the Respondent No.2, it is clear that the explanation had been given for the

said delay. As a matter of fact, the Appellant itself has admitted in its written Statement that from 1.12.1988 onwards up to November 2002/2003, the issue of disbursement of bill for October, 1988 had been deliberated between the parties. The specific stand taken by the Appellant is that the Respondent No.2 has not explained the delay after the tripartite settlement in November, 2002/March, 2003. The following dates which are relevant would give details of the explanation given for the delay:

“15.11.02: To facilitate signing of Tripartite Agreement for one time settlement, GRIDCO agreed to club the disputed amount, under protest, in the total outstanding arrears up to cut off date i.e. 30.9.01.

22.11.02: GRIDCO informed Department of Energy, Government of Orissa, that a joint reconciliation statement has been signed between it and NTPC with regard to outstanding dues.

28.3.03: A Tripartite Agreement was signed between Central Government, Govt of Orissa and RBI wherein the total outstanding including 40% of the accrued DPS up to 30.09.01 was securitized. The outstanding amount was determined on the basis of the re-cast reconciliation between GRIDCO and NTPC in view of the one time settlement. In the said Reconciliation Statement this amount has been shown in category of disputed amount.

2004: NTPC filed Petition No.27/2004 against BSEB with regard to its dues including its claim in respect of the period of regulation. GRIDCO was impleaded as a Respondent in the said petition.

23.6.05: Petition No.27/2004 was withdrawn by NTPC based on settlement reached between NTPC and Bihar State Electricity Board (BSEB).

11.8.05: In view of the withdrawal of said petition, GRIDCO requested NTPC for settlement of disputed energy Bill.

16.11.05: NTPC declined GRIDCO's request stating that the issue stands settled in view of its letter dated 22.11.02.

4.3.06: GRIDCO filed Petition 16/2006 before CERC for recovery of the said amount.”

11. From the above details, it cannot be said that there has been delay or laches on the part of the Respondent No.2 GRIDCO in filing the petition for the refund of the fixed charges. On behalf of the Appellant, it has been stated that the Appellant filed a Petition, being Petition No.27 of 2004 and the same has not been objected to by the Respondent No.2 (GRIDCO). Admittedly, this petition was filed mainly against the Bihar State Electricity Board. The Appellant had ultimately withdrawn the said Petition. In that petition, the Respondent No.2 (GRIDCO) was only a formal party as Respondent. It is noticed from the said Petition that no relief was claimed as against the Respondent No.2-GRIDCO. It is an admitted fact that the dispute between the Appellant and the

Respondent No.2 in that petition has not been adjudicated upon by the Central Commission. Therefore, the contention urged by the learned counsel for the Appellant with regard to delay and laches does not merit consideration.

12. The next question is as to whether the Petition of Respondent No.2 was barred in view of the one time settlement?

13. According the Appellant, all the issues including the issue in question between the Appellant and the Respondent No.2 as to the pending bills of Appellant had already been settled under the one-time settlement scheme of the Government of India reached in the year 2002 and this aspect which has been established through

various documents and documents written by the Respondent No.2 (GRIDCO) as well as the Government of Orissa have been ignored by the Central Commission. This is stoutly denied by the Respondent No.2(GRIDCO).

14. It is noticed that in the joint reconciliation statement signed on 15.11.2002 between the Respondent No.2 GRIDCO and the Appellant NTPC, which is the basis of the Tripartite Settlement, the amount claimed by the Appellant on account of regulation of power supply during October, 1998 was shown as the disputed amount. The Tripartite Settlement was subject to the resolution of the disputes in regard to the disputed amount. The Tripartite Settlement was subject to the resolution of the disputes in regard to the

disputed amount. One-time settlement scheme which forms part of the settlement contains the detailed procedure for adjustment of disputed amount upon resolution of dispute. The relevant extract from the settlement scheme is quoted below:

“10.1 Disputes relating to payments due shall be resolved in accordance with the due process of law. As and when a dispute is settled, the amount awarded shall be payable in the manner specified in paragraph 8, as if the bonds had been issued as on 1.10.2001, with the exception that the rate of interest for the period between 1.10.2001 and the actual date of securitization shall be 12 per cent per annum, to be paid upfront. Similarly, any

amounts required to be refunded by the CPSUs shall be adjusted through cancellation of equivalent/bonds with retrospective effect as from 1.10.2001 alongwith refund of interest calculated @ 12% per annum.

10.2 While determining the dues to be settled under this scheme, no dispute arising from fixation of power tariffs or coal prices shall be reckoned. In the event that such a dispute is settled subsequently through the due process of law and any amount is due to be refunded to the SEB, it shall be refunded in the manner specified in para 10.1 above.”

15. The above extract would indicate that there shall be resolution of dispute after following the detailed procedures for adjustment of disputed

amount. The above factors would not indicate that there was resolution of dispute in question.

16. The Appellant would refer to the letter dated 9.1.2003 of the Government of Orissa to the Central Government regarding the settlement of disputes. The said letter is based on the letter sent by the Respondent No.2 (GRIDCO) to the Government on 22.11.2002 which in turn is based on joint reconciliation statement dated 15.11.2002. As indicated above, the joint reconciliation statement dated 15.11.2002 and the letter dated 22.11.2002 sent by the Respondent No.2 (GRIDCO) and the letter dated 9.1.2003 sent by the Government of Orissa, if taken together, would clearly show that the sum of Rs.1102.87 crores includes the disputed amount which was

included as a subject to the resolution of the dispute. It cannot be debated that in the joint reconciliation statement dated 15.11.2002 signed by both the Appellant and the Respondent No.2 (GRIDCO) the amount in question has been shown as the disputed amount.

There is no material placed by the Appellant to show that between 15.11.2002, the date of joint reconciliation statement and 28.3.2003, the date of the Tripartite Settlement, the dispute in question was settled between the parties. Therefore, this ground also has no merit.

17. The next question is as to whether the Central Commission ought to have alternatively directed

the West Bengal State electricity Board and Damodar Valley Corporation for payment of award.

18. With reference to this question, it is contended by the learned Counsel for the Appellant that even assuming that the Central Commission is right in not applying drawal methodology in the case of regulation of power, the Central Commission ought to have proceeded to hold that the West Bengal State Electricity Board and Damodar Valley Corporation are liable for payment of the said fixed charges. With reference to this point the Central Commission has held that the question with reference to the liability of other beneficiaries cannot be decided in the proceedings before the Central Commission inasmuch as the said issue was beyond the scope of the present

proceedings initiated at the instance of the Appellant/Petitioner. As a matter of fact, the Central Commission left this question open to be decided separately. The relevant observation made by the Central Commission is as follows:

“Concluding Remarks

45. We make it clear that we have not decided the issue whether or not NTPC can claim this amount from the regulated entities since the issue is considered to be beyond the scope of the present proceedings initiated at the instance of the petitioner. We have, therefore, left this question open and undecided. Similarly, we also make it clear that this order shall not reopen the dispute relating to the payment of fixed charges for the month of October 1998 settled by NTPC with any other

bulk Power Customer through mutual negotiations.”

19. In view of the above conclusion arrived at by the Central Commission, there cannot be any grievance on the part of the Appellant with reference to the liability on part of the West Bengal State Electricity Board and Damodar Valley Corporation in regard to the payment of fixed charges to be required from them. Since the Central Commission has kept this question open, the Appellant is at liberty to take appropriate steps to recover the amount, if any, due to it from the said beneficiaries. As such, this point urged by the learned Counsel for the Appellant also does not deserve consideration.

SUMMARY OF OUR FINDINGS:

- (i) The claim of the Appellant-NTPC from Respondent No.2-GRIDCO under the provisions of the Notification and the Bulk Power Supply Agreement for the period of regulation in regard to fixed charges on drawal basis is not justified.**
- (ii) It cannot be said that there are laches and long delay on the part of the Respondent No.2 (GRIDCO) in approaching the Central Commission as there was continuous correspondence relating to the dispute and to this effect proper explanation had been given.**
- (iii) The Petition filed by the Respondent No.2 for the refund of the amount was not barred in view of the one-time settlement as the one-**

time settlement referred to by the Appellant through various documents would not relate to the amount in question which is disputed.

- (iv) The Central Commission cannot give alternative direction to the West Bengal State Electricity Board and Damodar Valley Corporation for giving a direction for payment of the award, especially, when that question is beyond the scope of these proceedings and also in the light of the fact that the Central Commission has left the question open giving liberty to the Appellant to take appropriate steps to recover the amount, if any from the said beneficiaries.**

20. In view of the above conclusions, we do not find any merit in the Appeal. Hence the Appeal is dismissed. No order as to costs.

(Justice P.S. Datta)
Judicial Member

(RAKESH NATH)
Technical Member

(Justice M. KARPAGA VINAYAGAM)
Chairperson

Dated: 18 .01.2011

REPORTABLE / NON-REPORTABLE