

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

Appeal No. 17 of 2013

Dated: 25th October, 2013

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

In the matter of:

**Madhya Pradesh Power Generating
Company Limited
Shakti Bhawan, Vidyut Nagar
Rampur Jabalpur (M.P.) – 482008**

....Appellant(s)

Versus

**1. Madhya Pradesh Electricity Regulatory
Commission
5th Floor, Metro Plaza
Arera Colony, Bittan Market
Bhopal (M.P.) – 462016**

....Respondent(s)

**2. Madhya Pradesh Power Management
Company Limited
Shakti Bhawan, Vidyut Nagar
Rampur Jabalpur (M.P.) – 482008**

3. **Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited**
Shakti Bhawan, Vidyut Nagar
Rampur Jabalpur (M.P.) – 482008

4. **Madhya Pradesh Madhya Kshetra Vidyut Vitran Company Limited**
Nishtha Parisar, Govindpura
Bhopal (M.P.) – 462023

5. **Madhya Pradesh Paschim Kshetra Vidyut Vitran Company Limited**
GPH Campus, Polo Ground
Indore (M.P. – 452015

6. **Madhya Pradesh Power Transmission Company Limited**
Shakti Bhawan, Vidyut Nagar
Rampur Jabalpur (M.P.) – 482008

Counsel for the Appellant (s):

Mr. M G Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Swagatika Sahoo

Counsel for the Respondents (s):

Mr. C.K. Rai
Mr. Gajendra Tiwari (Rep.)

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Madhya Pradesh Power Generating Company Ltd. against the order dated 1.5.2012 passed by Madhya Pradesh Electricity Regulatory Commission (“State Commission”) approving the final tariff of Unit no.5 of Amarkantak Thermal Power Station for the period from 10.9.2009 to 31.3.2012.

2. The brief facts of the case are as under:
 - (a) The Appellant is a generating company engaged in the business of generation of power in the State of Madhya Pradesh. One of the generating stations of the Appellant is Amarkantak Thermal Power Station where Unit no.5 of 210 MW capacity has been commissioned. The date of Commercial Operation of Unit no.5 was 10.9.2009.

- (b) The State Commission is the first Respondent. MP Power Management Company is the second Respondent. The distribution licensees are the Respondent nos. 3 to 5. The sixth Respondent is the transmission licensee.

- (c) On 8.5.2009 the State Commission notified the Tariff Regulations, 2009.

- (d) On 30.4.2010 the Appellant filed a petition before the State Commission for approval of the provisional tariff for Unit no.5 at Amarkantak for the control period 2009-12. The State Commission determined the provisional generation tariff by order dated 6.7.2010. Thereafter, the Appellant on 13.5.2011 filed a petition for determination of final generation tariff of Unit no.5 at Amarkantak for the period from Commercial Operation

- Date (COD) of the Unit to 31.3.2012. The State Commission directed the Appellant to substantiate the capital cost of the project claimed in the petition with the audited accounts.
- (e) On 31.12.2011, the Appellant filed petition no. 34 of 2011 based on the numbers in audited books of accounts of the Appellant for approval of final tariff of Unit no.5.
- (f) The State Commission decided the petition no. 34 of 2011 and determined the final tariff for Unit no.5 at Amarkantak for the period from 9.9.2009 to 31.3.2012.
- (g) Aggrieved by the same the Appellant filed a Review Petition but the same was dismissed by the State Commission. Thereafter, the Appellant has filed this Appeal.

3. The Appellant is aggrieved by the disallowance of expenditure on some capital assets put to use but retained under capital work-in-progress account and capital spares and disallowance of the taxes and other expenses admissible under the Regulations.

4. On the above issues the Appellant has made the following submissions:

(A) Disallowance of expenditure on capital assets:

(i) The State Commission has disallowed capital expenditure of 84.40 crores for FY 2009-10 and FY 2010-11 and has only admitted the value of fixed assets capitalized in the books of accounts as additional capitalization for FY 2009-10 and FY 2010-11 and has excluded the value of capital assets duly put to use but not capitalized in the books of accounts. The delay in

transferring the value of such assets to the capitalized entries has been because of the accounting process adopted by the Appellant.

(ii) The Tariff Regulations, 2009 defines and deals with the capital cost and additional capitalization under Regulations 17 and 20 as capital expenditure incurred or projected to be incurred and do not provide for capitalization of the assets in the books of accounts as a condition precedent for admitting the value of capital assets for the purpose of tariff.

iii) In terms of the accounting policy of the Appellant, all the capital expenditure is accounted for through capital work-in-Progress Accounts, Account Code 14. The expenditure is then transferred to the appropriate Fixed Assets Accounts, Account Code 10. The accounting process of capitalization in books takes

some time even after the asset has been actually put to use due to procedural issues, verification and paper work.

iv) All the expenditure incurred on account of purchase of capital spares of the generating Unit, which is deemed to be capitalized, as on the date of commissioning of the generating Unit or on the date or on the date of purchase subsequent to commissioning, become eligible to be considered under additional capitalization, as per Regulation 20 of the Tariff Regulations, 2009.

(v) The disallowance of additional capital expenditure will cause serious financial loss and prejudice to the Appellant till the tariff is allowed for such additional capitalisation in the later years.

**(B) Disallowance of taxes and other expenditure
admissible under Regulation 34.1:**

The State Commission has not allowed the taxes payable by the Appellant to the Government and other expenses admissible under Regulation 34.1 of the Tariff Regulations, 2009, except for the fee paid to the State Commission for determination of generation tariff and ED and cess on auxiliary power consumption levied by the Statutory Authorities. The disallowance has been done in an arbitrary manner without giving any reason or justification for the same.

5. The State Commission has filed reply and written submissions in support of its findings in the impugned order.

6. We have heard Shri M.G. Ramachandran, Learned Counsel for the Appellant and Shri C.K. Rai, Learned Counsel for the State Commission on the above issues.

7. In view of the submissions made by the parties, the following questions would arise for our consideration:
 - i) Whether the State Commission has erred in not capitalizing the capital assets including the capital spares which were not capitalized in the books of accounts of the Appellant but were claimed to have been put to use?

 - ii) Whether the State Commission was correct in disallowing certain taxes and other expenditure claimed by the Appellant in the ARR and whether it was done against the provisions of the Regulation?

8. The first issue is regarding capitalization of assets.
9. Let us first examine the Tariff Regulations, 2009.
10. Regulation 17.1 regarding capital cost stipulates that the expenditure incurred or projected to be incurred on original scope for work upto the Date of Commercial Operation of the project as admitted by the State Commission, after prudent check shall form the basis for determination of tariff. The capital cost shall also include the capitalized initial spares subject to the ceiling norms and additional capital expenditure determined under Regulation 20. The Regulation 17.2 stipulates that the capital cost admitted by the State Commission subject to prudent check, shall form the basis for determination of tariff.

11. Regulation 20.1 specifies the counts for which the expenditure incurred or projected to be incurred within the original scope of work after the date of commercial operation could be admitted by the Commission, subject to prudent check. It also includes procurement of initial spares within the original scope of work subject to the ceiling norms as specified under Regulation 17.1 (b). The additional capitalization to be allowed under Regulation 20.1 is subject to the proviso that the details of works included in the original scope of work along with estimates of expenditure, undischarged liabilities and works deferred for execution shall be submitted along with the application for Tariff.

12. Regulation 20.2 provides for the counts on which the capital expenditure incurred after the cut off date in the discretion of the State Commission may be admitted subject to prudent check. As the present case deals

with additional capitalization within the original scope of work after the date of commercial operation only Regulation 20.1 is relevant.

13. Let us now refer to the averments in the petition dated 31.12.2011 filed by the Appellant before the State Commission regarding capital cost including additional capitalization for the FY 2009-10 and FY 2010-11. The relevant portions of the submissions are as under:-

- i) The net capital expenditure towards the project which has been capitalized as on COD, as per the audited books of accounts is 956.69 crores.
- ii) Additional capital expenditure after COD and upto 31.3.2011, as per audited books of accounts, is as given below:-

	Period	Amount
a)	w.e.f. COD and upto 31.3.2010	Rs. 122.44 crores
b)	w.e.f. 1.4.2010 and upto 31.3.2011	Rs. 32.51 crores
	Total	Rs. 154.96 crores

- iii) The projected additional capital expenditure w.e.f. 1.4.2011 and upto cut off date i.e. 31.3.2012 is Rs. 74.59 crores without taking into account the amounts deducted towards Liquidity Damages and ERV/CDV. Thus, the total additional capital expenditure w.e.f. COD and upto cut off date i.e. 31.3.2012, is projected to be Rs. 229.55 crores.
- iv) Completed cost of project as of 31.3.2012 is projected to be Rs. 1186.24 crores.

- v) The projected additional capital expenditure w.e.f. 1.4.2011 and upto 31.3.2012 is within the original scope of work of Unit no.5 and is in accordance with Regulation 20.1.

 - vi) The expenditure is claimed on the basis of the audited books of accounts for FYs 2009-10 and 2010-11 for fixation of tariff from 10.9.2009 to 31.3.2012.
14. According to Learned Counsel for the State Commission, the State Commission allowed the capital cost of Rs. 956.69 crores as on Commercial Operation Date (COD) as claimed by the Appellant after satisfying that the annual audited accounts for FY 2009-10 of the Appellant also recorded the capitalization of fixed assets of Rs. 956.69 crores as on COD of the Unit no.5 at Amarkantak Thermal Power Station. The Appellant

had also filed Asset-cum-Depreciation register giving complete details of each and every asset capitalized by the Appellant. The State Commission had relied on the audited accounts as well as Asset-cum-Depreciation register for exercising prudence check. The opening Gross Fixed Assets ('GFA'), asset addition, closing GFA and the rate of depreciation and cumulative depreciation as given in the Asset-cum-Depreciation register of the Appellant are same as decided by the State Commission in the impugned order. Even though the Appellant had claimed additional capitalization of Rs. 32.51 crores for FY 2010-11, the State Commission has allowed additional capitalization of Rs. 70.56 crores during FY 2010-11 based on actual capitilisation of assets recorded in the Annual Audited accounts of the Appellant.

15. Learned Counsel for the State Commission has further submitted that the Regulations provide that the capital cost and additional capitalization to be admitted by the State Commission would always be subject to prudent check. Accordingly, the State Commission applied prudent check by examining the Annual Audited accounts and Asset-cum-Depreciation register filed by the Appellant. Every generating Unit has number of assets and it would not be feasible for the State Commission to physically check the status of each and every asset and such physical check would also be beyond the scope of the Tariff Regulations.

16. Let us now examine the findings of the State Commission in the impugned order dated 1.5.2012.

17. It is noticed that the Appellant had filed the subject petition on which hearing was conducted on 21.6.2011.

However, the information filed by the Appellant was inadequate to admit and process the petition. The Appellant also informed that accounts for FY 2010-11 were in the process of auditing and reconciliation of certified expenditure with books of accounts was in progress. The State Commission therefore, directed the Appellant to reframe the petition based on the audited accounts of FY 2010-11. Thereafter, the Appellant filed the subject petition on 31.12.2011 based on the audited accounts for FY 2009-10 and 2010-11.

18. We find from the impugned order that the State Commission after prudent check has admitted the capital cost as on COD as Rs. 956.69 crores, as proposed by the Appellant. The State Commission correctly deducted the amount recovered as Liquidity Damage and ERV/CDV by the Appellant from BHEL from the approved capital cost to determine the net final

capital cost of Rs.906.10 crores as on COD of the project.

19. As regards additional capitalization, the State Commission has only considered the figures of fixed assets capitalized in the books of accounts and has approved additions of during 2009-10, 2010-11 as nil and Rs.70.56 crores respectively.

20. Thus, the State Commission has allowed additional capital expenditure for FY 2009-10 and 2010-11 as under:-

FY	Additional capitalization as claimed by the Appellant (Rs. - Crores)	Additional capitalization allowed (Rs. - Crores)	Additional capitalization disallowed (Rs. - Crores)
2009-10	122.44	Nil	122.44
2010-11	32.51	70.56	(-)38.05
Total	154.95	70.56	84.39

21. We find that the State Commission during the proceedings before it had sought clarification from the Appellant that the asset addition as recorded in the Audited Accounts for FY 2009-10 and 2010-11 did not match with the figures for asset additions claimed in the petition, if the station-wise break-up is taken from the Asset Register. The reply given by the Appellant to the above query on 3.4.2012 was as under:-

“(i) The capital expenditure actually incurred on the project as on 31-3-2010 as per audited books of accounts is Rs. 1079.14 crores, out of which Rs. 956.69 crores has been capitalized under the account code 10 (fixed assets), Rs. 115.30 crores under account code 14 (CWIP) and Rs. 7.14 crores under account code 22 (capital spares).

(ii) The actual expenditure incurred as on 31-3-2011 as per audited books of accounts is Rs. 1111.65 crores, out of which Rs. 1027.25 crores has been capitalized under the account code 10 (fixed assets), Rs. 65.90 crores under account code 14 (CWIP) and Rs. 18.51 crores under the account code 22 (capital spares).”

Thus the Appellant clarified that as on 31.3.2010 and 31.3.2011, capital expenditure of Rs. 956.69 crores and Rs.1027.25 crores have been capitalized. The remaining expenditure was not capitalized and shown

- as under capital works in progress (CWIP) and capital spares. Accordingly, the State Commission allowed only the capital expenditure as capitalized in the books of accounts, as indicated by the Appellants.
22. We find that the State Commission in determining the additional capitalization and capital cost has relied on the audited accounts and the Asset-cum-Depreciation register for prudence check. In fact for FY 2010-11 the State Commission has allowed additional capital expenditure of Rs.70.56 crores as against Rs.32.51 crores claimed by the Appellant. According to the State Commission it has allowed a higher additional capitalization during 2010-11 on the basis of the Asset-cum-Depreciation Register.
23. We do not find any infirmity in the approach of the State Commission in determining the capital cost including

additional capitalization. The State Commission is required to apply prudence check to the capital expenditure claimed by the Appellant as per its Regulations. The State Commission for prudence check of the capital cost/additional capitalization has relied on the audited accounts and Asset-cum-Depreciation Register. The State Commission could not have allowed the capital expenditure incurred in the capital Works in Progress for the FY 2009-10 and 2010-11 which were already over when the tariff order was issued.

24. Accordingly to the Learned Counsel for the Appellant the Regulations 20.1 stipulate that the capital expenditure incurred or projected to be incurred has to be considered for additional capitalization. We find that the 2009 Tariff Regulations are Multi Year Tariff Regulations. The control period under consideration is

for FY 2009-10 to FY 2011-12. Thus, if the tariff is to be determined before the commencement of the control period, the additional capitalization projected to be incurred during the various years of the control period will be considered. However, in the present case the final tariff of the project for FYs 2009-10 and 2010-11 is being decided after the period is already over. Thus, for FY 2009-10 and FY 2010-11, the State Commission has to consider the capital cost incurred and not projected to be incurred. The State Commission has gone as per the audited accounts and Asset-cum-Depreciation Register submitted by the Appellant in deciding the capital cost incurred during FY 2009-10 and FY 2010-11.

25. The Appellant has stated that the delay in transferring the value of assets to the capitalized entries has been due to the accounting process in vogue in the utility and

the accounting process of capitalization in books takes some time even after the asset has been actually put to use due to procedural issues, verification and paper work.

26. We do not find force in the submissions of the Appellant. The Appellant had replied to the queries of the State Commission on 3.4.2012, two years after the end of FY 2009-10 and one year after the end of FY 2010-11, and even then the additional capitalization had not been capitalized in the books of accounts. The Asset-cum-Depreciation Register had also not included the additional assets. Under these circumstances, the State Commission has correctly decided the capital cost/additional capitalization based on the books of accounts. If the Appellant has not been vigilant in updating its accounts and Asset Register, it could not find fault with the impugned order of the State

Commission. In fact we agree with the State Commission that it is not possible for them to physically check all the assets which are capitalized and has to rely on the books of accounts and records maintained by the Appellant.

27. We also find that the Appellant did not provide any documents to the State Commission after their query regarding difference in capital cost claimed in the petition and the audited accounts to establish that the assets for which additional capitalization has been claimed had been commissioned and put to use.
28. Thus, we do not find any infirmity in the order of the State Commission. The 1st issue is decided against the Appellant.

29. The second issue is regarding disallowance of taxes and other expenditure.

30. According to the Appellant, the State Commission has not allowed the taxes payable by the Appellant to the Government and other expenses admissible under Regulation 34.1.

31. According to the Learned Counsel for the State Commission, the State Commission has allowed other charges in accordance with the Regulation and also in line with the principles adopted by it in MYT order for the control period 2009-10 to 2011-12.

32. Let us examine the Tariff Regulations. The relevant Regulation 34.1 is reproduced below:-

“34.1 The Operation and Maintenance expenses admissible to existing thermal power stations comprise

of employee cost, Repair & Maintenance (R&M) cost and Administrative and General (A&G) cost. These norms exclude Pension, Terminal Benefits and Incentive to be paid to employees, taxes payable to the Government, MPSEB expenses and fees payable to MPERC. The Generating Company shall claim the taxes payable to the Government and fees to be paid to MPERC separately as actuals. The claim of pension and Terminal Benefits shall be dealt as per Regulation 26.”

According to the Tariff Regulations, the operation and maintenance norms exclude besides extra employees expenses mentioned in the Regulation, the taxes payable to the Government, MPSEB expenses and fees payable to the State Commission. The generation company could claim the taxes payable to Government and fees paid to the State Commission as per actuals.

33. The Appellant had claimed water charges, cess on auxiliary consumption, fee paid to the State Commission, rent rate and taxes, entry tax and common expenses. Out of these the State Commission

has allowed the electricity cess on auxiliary consumption and the fee paid to the State Commission.

34. Regarding water charges, Learned Counsel for the State Commission has submitted that water charges for thermal generating stations are considered as part of R&M expenses and the State Commission has been following this approach in past MYT orders and true-up orders. The State Commission in the MYT order dated 3.3.2010 for the thermal and hydro stations of the Appellant had not allowed water charges for thermal power stations of the Appellants. The Appellant filed an Appeal no. 105 of 2010 before this Tribunal against the MYT order but this issue of water charges was not raised in the aforesaid Appeal. Thus, the issue of water charges has reached finality by acceptance of the MYT order for the period FY 2009-10 to FY 2011-12.

35. As regards other charges, the Learned Counsel for the State Commission has made the following submissions:

i) Rent rates & taxes:

The Regulations do not provide for recovery of rent and rate separately as the same are part of Administrative & General expenses.

ii) Repair & Maintenance:

The entry tax is a part of R&M expenses and the Regulations do not provide that the norms for O&M expenses exclude the entry tax on R&M. in the MYT order dated 3.3.2010 also the State Commission had not allowed entry tax on R&M.

iii) MPSEB Common expenses:

The Tribunal in its judgments dated 21.4.2011 and 30.9.2011 in Appeal no. 24 of 2012 and Appeal no. 105 of 2010 respectively had already decided this issue against the Appellant.

Publication expenses:

These are part of A&G expenses and the Regulation do not provide for allowance of publication expenses separately.

36. The Appellant has not made any arguments to counter the above contentions of the Learned Counsel for the State Commission. Hence, we are in agreement with the contentions of the Learned Counsel for the State Commission. Accordingly, we decide this issue also as against the Appellant.

37. Summary of our findings:

- i) The State Commission has correctly determined the capital cost and the additional capitalization for the FY 2009-10 and 2010-11 as per the Regulations.**
- ii) The State Commission has correctly disallowed other expenses as per its Regulations and as per the findings in the MYT order dated 3.3.2010 for the control period 2009-10 to 2011-12.**

38. In view of the above, the Appeal is dismissed as devoid of any merits. However, there is no order as to costs.

39. Pronounced in the open court on this 25th day of October, 2013.

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

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REPORTABLE/NON-REPORTABLE

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