

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO. 101 OF 2017
&
APPEAL NO. 110 OF 2017**

Dated : 11th January, 2022

**Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member.**

APPEAL NO.101 OF 2017

In the matter of:

NTPC Limited
NTPC Bhavan,
Core - 7, Institutional Area, Lodhi Road,
New Delhi-110003

...APPELLANT

VERSUS

1. The Secretary,
Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001
2. Chairman & Managing Director,
GRIDCO Ltd
24, Janpath
Bhubaneswar-751007
3. The Superintending Engineer HQ-1,
Power Department,
Govt of Sikkim, Kazi Road,
Gangtok, Sikkim-737101
4. The Managing Director,
Gujarat Urja Vikas Nigam Limited,

Vidyut Bhavan, Race Course,
Vadodara-390007

5. The Managing Director,
Madhya Pradesh Power Management
Company Limited,
Shakti Bhavan, Vidyut Nagar,
Jabalpur-482008
6. The Chairman & Managing Director,
Maharashtra State Electricity Distribution
Company Ltd,
'Prakashgad', Bandra (East),
Mumbai-400051
7. The Managing Director,
Chhattisgarh State Power Distribution
Company Ltd,
Dhagania, Raipur-492013
8. The Secretary,
Electricity Department
Administration of Dadra and Nagar Haveli,
Silvassa Via VAPI - 396230
9. The Secretary,
Electricity Department
Administration of Daman & Diu,
Daman-396210
10. The Managing Director,
Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan, 14, Ashok Road,
Lucknow- 226001.
11. The Director,
Uttarakhand Power Corporation Ltd,
Urja Bhawan, Kanwali Road,
Dehradun – 248001.
12. The Managing Director,
Jaipur Vidyut Vitran Nigam Ltd.,

Vidyut Bhawan, Janpath,
Jaipur – 302205.

13. The Managing Director,
Ajmer Vidyut Vitran Nigam Ltd.,
Old Power House, Hatthi Bhatta,
Jaipur Road; Ajmer — 305001
14. The Managing Director,
Jodhpur. Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur – 342003.
15. The Development Commissioner,
Power Development Department,
Government of J&K, Secretariat;
Srinagar-19009.
16. The Director,
BSES Rajdhani Power Ltd.,
BSES Bhawan, Nehru Place,
New Delhi-110019.
17. The Director,
BSES Yamuna Power Ltd.,
BSES Bhawan,
Nehru Place,
New Delhi-110019.
18. The Managing Director,
Tata Power Delhi- Distribution Ltd.,
33 kV Sub-station, Kingsway Camp,
Delhi -110009
19. The Managing Director,
Haryana Power Purchase Centre,
Shakti Bhawan, Sector-6
Panchkula-134109
20. The Legal Advisor,
Punjab State Power Corporation Ltd.,
The Mall, Secretariat Complex,

Patiala- 147001

21. The Director,
Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Kumar House;
Shinda-171004.
22. The Director,
Power Department,
Union Territory of Chandigarh,
1st Floor, UT Secretariat,
Sector-9D, Chandigarh - 160009

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Ms. Lasya Palmidi
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Mr. R.B. Sharma
Mr. Mohit K.Mudgal
Mr. Sachin Dubey
Ms. Akanksha Sharma
Ms. Gauri Gupta for Res 16 &
17

APPEAL NO.110 OF 2017

In the matter of:

NTPC Limited
NTPC Bhavan,
Core - 7, Institutional Area,
Lodhi Road,
New Delhi-110003

...APPELLANT

VERSUS

1. The Secretary,
Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001
2. The Managing Director,
Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan, 14, Ashok Road,
Lucknow- 226001.

3. The Managing Director,
Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Janpath,
Jaipur – 302005.
4. The Managing Director,
Ajmer Vidyut Vitran Nigam Ltd.,
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Jaipur Road, Ajmer — 305004.
5. The Director - Technical,
Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur – 342003.
6. The Managing Director,
Tata Power Delhi- Distribution Ltd.,
Grid Sub-Station, Hudson Road,
Kingsway Camp, Delhi -110009.
7. The Managing Director,
BSES Rajdhani Power Ltd.,
BSES Bhawan, Nehru Place,
New Delhi-110019.
8. The Managing Director,
BSES Yamuna Power Limited,
Shakti Kiran Building,
Karkardooma, Delhi – 110092.
9. The Managing Director,
Haryana Power Purchase Centre,
Shakti Bhawan, Sector – VI,
Panchkula, Haryana – 134109.
10. The Managing Director,
Punjab State Power Corporation Limited,
The Mall, Patiala – 147001.
11. The Director – Civil
Himachal Pradesh State Electricity Board Limited,

Kumar Housing Complex Building – II,
Vidyut Bhawan, Shimla – 171004.

12. Development Commissioner – Power,
Power Development Department,
Govt. Of J&K, Civil Secretariat,
Srinagar – 180006.
13. The Legal Remembrancer & Director Prosecution,
Electricity Department, Chandigarh,
Union Territory of Chandigarh,
Addl. Office Building, Sector 9D,
Chandigarh – 160009.
14. The Managing Director,
Uttarakhand Power Corporation Limited,
Urja Bhavan, Kanwali Road,
Dehradun – 248001.

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Ms. Anukriti Jain for Res 6

Mr. R.B. Sharma
Mr. Mohit K.Mudgal
Mr. Sachin Dubey for Res 7

J U D G M E N T

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. These two Appeals challenge the two orders passed by the Central Electricity Regulatory Commission (for short, "CERC" or "Central Commission" or "Commission"), order dated 21.01.2017 in Petition No. 283/GT/2014 ("Petition 283") and order dated 06.02.2017 in Petition No. 372/GT/2014 ("Petition 372"), challenging the legality, by way of which the Respondent Commission has used its power to remove difficulties under Regulation 55 of the CERC (Terms and Conditions of Tariff) Regulations, 2014 ("Tariff Regulations, 2014") to reduce the allowable O&M (Operation & Maintenance) expenses for the Kahalgaon Stage II power plant (hereinafter referred to as

“Kahalgaon II”) in Petition 283 and for the Rihand Stage III power plant (hereinafter referred to as "Rihand III") in Petition 372 of the Appellant for the period from 01.04.2014 to 31.03.2019.

2. During the course of proceedings, on 23.11.2021, it was decided that these two matters (Appeal no. 101/2017 and 110/2017) will be taken out from the batch of seven Appeals i.e., Appeal nos. 25/2017, 101/2017, 110/2017, 178/2017, 180/2017, 240/2017 and 311/2017 as these two Appeals challenge only one issue, the O&M charges, which is common amongst all and need priority. The Order is reproduced herewith:

“A request has been made for early hearing on these appeals, the submission of the learned counsel for the appellant being that the Central Electricity Regulatory Commission is in the midst of an exercise for passing true-up order for the corresponding control period which, if passed, might perpetuate, what is perceived by the appellant, an unfair and unjust determination by the impugned order.

We have heard learned counsel on all sides. Some of the parties to these matters are common, some beneficiaries not being a party respondent in some of them. The O&M expense is the issue which is common in all these appeals, the request for urgent hearing being connected thereto.

After some hearing, a consensus has emerged amongst the learned counsel for all the stakeholders, parties to these seven appeals, that two of these appeals i.e. Appeal nos. 101 of 2017 and 110 of 2017 wherein the issue of O&M expenses is the only issue requiring to be addressed, may be taken up separately, ahead of the others, though opportunity being given to the learned counsel for such parties as well who are not parties to these appeals but party respondents in other five appeals, to address us on the said issue, the determination whereof on the two appeals would regulate the questions raised in that regard in the other five appeals which would come up in due course.

We appreciate the sense of urgency expressed by the learned counsel for the appellant seeking early hearing. It has been fairly conceded by the learned counsel for all parties that the issue of O&M expenses is narrow and can be taken up under the category of “short matters” which can be covered by all sides in one session.

*In the foregoing facts and circumstances, we direct that the Appeal nos. 101 of 2017 and 110 of 2017 be segregated from this batch of appeals and to be listed before us for hearing under the category of “short matters” on **13.12.2021**.*

In view of above, we further clarify that the learned counsel for such parties as are not party respondents in the abovementioned two appeals (Appeal nos. 101 of 2017 and 110 of 2017), but are parties in other five

appeals, shall also have the liberty to appear and address us on the issue of O&M expenses during the hearing as scheduled above. But, in order to fully comprehend and understand their perspective, it would be advisable that each of them sets out briefly the factual matrix, if any, required to be quoted in their written submissions which must be circulated by one and all in advance. The rest of the appeals shall retain their present position in Court-II VC final hearing list.”

3. The Appellant, NTPC Ltd., common in all the seven Appeals, is aggrieved because, by the impugned decision, the Central Commission has amended the methodology, specified in the CERC (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as "Tariff Regulations, 2014"), by invoking "Power to remove difficulties" under Regulation 55 of the Tariff Regulation, 2014.

4. **Description of Parties:-**

4.1 The Appellant, NTPC Ltd. ("NTPC" or "Appellant") in both the Appeals is a 'Generating Company' as defined under Section 2(28) of the Electricity Act, 2003 having power stations/projects at different regions and places in the country including the power stations as mentioned in these Appeals, of which determination of the correct Operation & Maintenance (O & M expenses), is the subject matter of the instant appeal.

- 4.2 Respondent No.1, CERC, is a Statutory Authority constituted under the Electricity Act, 2003 and vested with the powers to adjudicate in the matter.
- 4.3 In Appeal No. 101 of 2017, Respondent Nos. 2 to 20 and in Appeal No. 110 of 2017, Respondent Nos. 2 to 10 are engaged in Distribution and Supply of Electricity at different States in the country.
- 4.4 Himachal Pradesh State Electricity Board is Respondent No.21 and Respondent No.11 in the First and Second Captioned Appeals respectively and is operating within the State of Himachal Pradesh, that Generates and Supplies power through a network of transmission, sub-transmission and distribution lines.
- 4.5 Respondent No.22 and Respondent No.13, in the First and Second Captioned Appeal respectively, is the Electricity Department, Union Territory of Chandigarh.
- 4.6 Power Development Department, Govt. of J & K is Respondent No.12 and Uttarakhand Power Corporation Limited is Respondent No.14 in the Second Captioned Appeal.

5. **Facts of the Case (Appeal No. 101 of 2017):-**

- 5.1 The Appellant is a 'Generating. Company' owning the Kahalgaon Super Thermal Power Station Stage II (hereinafter referred to as "KahalgaonII"), located in the State of Bihar having an approved installed capacity of 1500MW (3x500 MW),having challenged the impugned order dated 21.01.2017 passed by the Commission. The power generated from the project is being supplied to the Respondent Nos.2-22.

- 5.2 The tariff for the Kahalgaon II project for the period from 01.04.2009 to 31.03.2014 was determined by the Respondent Commission, vide its order dated 13.04.2012, in Petition No. 282/2009 in accordance with the CERC (Terms and Conditions of Tariff) Regulations, 2009 (Tariff Regulations 2009). Thereafter, the Appellant filed, a review petition before the Respondent Commission, being 11/RP/2012, for review of the tariff order dated 13.04.2012. The said review petition was disposed of by the Respondent Commission, vide its order dated 08.02.2013.
- 5.3 The Respondent Commission notified the CERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 (Tariff Regulations 2014), pursuant to which the Appellant herein filed a petition for determination of tariff for the Kahalgaon II for the period from 01.04.2014 to 31.03.2019 in terms of the aforementioned Tariff Regulations.
- 5.4 Pursuant to the filing of the aforesaid Tariff Petition, the Respondent Commission passed the impugned order dated 21.01.2017, wherein it has erroneously relied upon the ratio of the order passed in Petition No. 294/GT/2014 to reduce the allowable O&M expenses for the Kahalgaon II project of the Appellant.
- 5.5 Hence, aggrieved by the findings of the Respondent Commission, the Appellant has filed the present appeal. It is pertinent to mention herein that the Appellant has filed a review petition against the said order before the Respondent Commission on certain other grounds, which have not been

raised in the instant appeal and as such there is no impediment in the institution of the present appeal.

6. **Facts of the Case (Appeal No. 110 of 2017):-**

- 6.1 The Appellant is a 'Generating. Company' owning the Rihand Super Thermal Power Station, Stage III (hereinafter referred to as "Rihand III") located in the State of Uttar Pradesh having an approved installed capacity of 1000 MW, having challenged the impugned order dated 06.02.2017 passed by the Commission. The power generated from the project is being supplied to the Respondent Nos. 2-14.
- 6.2 The tariff for the Rihand III project for the period from the Commercial Operation Dates (COD) of the Units 1 and 2 to 31.03.2014 was determined by the Respondent Commission, vide its order dated 14.03.2016, in Petition No. 205/GT/2013 in accordance with the CERC (Terms and Conditions of Tariff) Regulations, 2009 (Tariff Regulations 2009).
- 6.3 Thereafter, the Appellant filed a review petition before the Respondent Commission, being 25/RP/2016, for review of the tariff order dated 14.03.2016, in Petition No. 205/GT/2013. The said review petition was disposed of by the Respondent Commission, vide its order dated 27.12.2016.
- 6.4 It is submitted that the COD of the two units of the Rihand III are 19.11.2012 and 27.03.2014. It is pertinent to mention herein that the two units of the Rihand III project of the Appellant were commissioned during the period of 2009-14 and as such at the time of notification of the CERC (Terms and Conditions of Tariff) Regulations, 2014 (Tariff Regulations

2014), the said units were 'existing units' for the purpose of the Tariff Regulations 2014.

6.5 Appellant filed a petition for determination of tariff for the Rihand III for the period from 01.04.2014 to 31.03.2019 in terms of the aforementioned Tariff Regulations 2014 against which the Respondent Commission passed the impugned order dated 06.02.2017, wherein it has erroneously relied upon the ratio of the order dated 29.07.2016 passed in Petition No. 294/GT/2014 to reduce the allowable O&M expenses for the Rihand III project of the Appellant.

6.6 Hence, aggrieved by the findings of the Respondent Commission to the extent elaborated above, the Appellant has filed the present appeal.

7. Questions of Law (Appeal No. 101 of 2017 & 110 of 2017):-

7.1 The Appellant has raised following questions of law in both the appeals:-

7.1.1 Whether the Impugned Order has been passed in violation of the provisions of the Electricity Act, 2003 and the CERC Tariff Regulations of 2009 and 2014?

7.1.2 Whether the Appellant is still governed by the O&M provisions, as contained in the 2009 Tariff Regulations, after coming into force of the 2014 Tariff Regulations?

7.1.3 Whether the Impugned Order violates the principles enumerated under the power to remove difficulty, vested in the Respondent Commission in terms of Regulation 55 of the 2014 Tariff Regulations?

- 7.1.4 Whether the scheme of the 2009 Tariff Regulations is fundamentally different from that of the 2014 Tariff Regulations?
- 7.1.5 Whether the O&M norms, as contained in the 2009 Tariff Regulations, lay down any guidelines/ formula for progressive escalation of the O&M expenses for the lifetime of the project?
- 7.1.6 Whether the proviso to Regulation 29(1)(a) of 2014, Tariff Regulations can be applied to a case where the COD of the power station has been achieved before 01.04.2014?
- 7.1.7 Whether the Commission is correct in passing the impugned order by applying the provisions of an erstwhile regulation in contradiction to the express provisions of the applicable regulations?
- 7.1.8 Whether the Commission has erred in violating and giving effect to the provisions of 2014 Tariff Regulations?
- 7.2 It may be seen that the issues are short and narrow and emerges due to invoking of Regulation 55 of the Tariff Regulations, 2014. The short question is whether the Central Commission is right in invoking the Regulation 55 and thereby amending the Proviso to Regulation 29(1)(a) after observing difficulty in implementing the provisions of the Tariff Regulations, 2014 for determination of Operation and Maintenance (O&M) charges. If the reasons given in the said impugned order are affirmative then the Appeal stands dismissed. However, if answer is negative then the Appeal need further deliberation. Therefore, it is important to understand the principles followed for determining the O&M

charges before the issue is adjudicated. The various provisions of law which are relevant to the present context are:

- (i) Explanatory Memorandum- Draft Terms and Conditions of Tariff Regulations 2014-19:
- (ii) Statement of Reasons for the said Regulations:
- (iii) Regulation 29 of Tariff Regulation 2014:

7.3 The relevant extracts are reproduced below:

7.3.1 **Explanatory Memorandum to Draft Terms and Conditions of Tariff for 2014-2019-**

*“After the enactment of the Electricity Act 2003, the CERC framed regulations, in exercise of the powers under Section 178 of the Act, on the terms and conditions for the determination of tariff for the period 2004-09 in March 2004 and subsequently for the period 2009-14 in January, 2009. **The present tariff period 2009-14 would end on 31st March 2014 and the Commission proposes to specify the terms and conditions of tariff for the next control period i.e. for 2014-19.***

[Emphasis supplied]

*4.4.3If the generating company or the transmission licensee continues to file a separate unit/element wise petition for unit/elements commissioned prior to 1.4.2014, the number of petitions will increase leading to avoidable regulatory burden. **In view of above, it is proposed that the tariff of the units or elements commissioned prior to 1.4.2014 shall be determined on consolidated basis***

only and accordingly, the generating company or transmission licensee shall have to file a petition. Further, for the new projects, if the commercial operation of units or elements falls within the span of six months, the generating company or transmission licensee shall have to file consolidated petitions from the notional DOCO. It is expected that this will reduce number of hearings, petitions and simplify the tariff determination.

[Emphasis supplied]

12. Operations and Maintenance Expenses

12.1 Background

*12.1.1 The Commission in its Tariff Regulations, 2001 specified that the O&M Expenses for stations in operation for five or more than five years shall be derived on the basis of past five year actual O&M expenses excluding the abnormal O&M expenses. For new stations as well as stations, which have not completed less than five years of operation, the Commission specified norm for O&M expenses for first year as 2.50% of the actual capital cost. The Commission in its subsequent Tariff Regulations, 2004 approved normative O&M expenses for thermal stations on the basis of unit sizes of 200/210/250 MW units. **The Commission also approved O&M norms for 500 MW***

and above units. For deriving such norms, the Commission relied upon the past years' actual data.

[Emphasis supplied]

12.4.2 Actual O&M Expenses

12.4.2.1 The Commission through its Order dated June 07, 2013 directed various Central Generating Stations to submit details of actual annual O&M expenses incurred for FY 2008-09 to FY 2012-13. In response the generating stations submitted the O&M expenses which has been analysed as discussed below.

12.4.2.2 The Central Generating Stations submitted the O&M expenses for FY 2008-09 to FY 2012-13 in the prescribed format with actual break up of expenses incurred for the above mentioned period under various sub heads.

A. Thermal Generating Stations

As discussed earlier the Commission in its Tariff Regulations, 2009 approved norms of O&M expenses based on the unit sizes. These units sizes were 200/210/250 MW, 300/330/350 MW, 500 MW and above (sub-critical) units and 600 MW and above super critical units. As discussed above the Commission has analysed

the actual O&M expenses for these stations. Most of the stations for which O&M data have been submitted are combination of different unit sizes therefore for determining the norms only stations with single unit type configuration have been considered.

12.5 Commission's Proposal

12.5.1 Escalation Rate

The Escalation rate computed based on the five year average WPI and CPI indices for FY 2008-09 to FY 2012-13 considering 60% WPI and 40% CPI works out to 8.35%. The Commission observed that after normalisation the increase in O&M expenses for the period FY 2008-09 to FY 2012-13 was around 5.71% for coal based generating stations of NTPC and around 6.19% for gas based generating stations (excluding Kayamkulam station).

The Commission is therefore of the view that average CPI and WPI indices are an indicator of inflation, however, the average increase in actual normalised O&M expenses for most of the stations is lower than the escalation rate of 8.35%. Therefore, for the purpose of escalation till FY 2013-14 the Commission proposes to consider the escalation rate of 5.72%, 6.19% and 6.04% for coal, gas and hydro generating stations respectively.

12.5.2 The average increase in actual normalised O&M expenses for generating stations is around 6% which is approximately 2.35% lower than the prevailing rate of inflation during the same period. The Commission for the purpose of escalating the norm during the next Tariff Period proposes to consider 2% lesser inflation rate as 6.35% for all generating stations.

a) Determination of Norms

12.5.3 The Commission based on the actual O&M expenses for FY 2008-09 to FY 2012-13 has re-computed the O&M expenses for FY 2012-13 by taking average of five year O&M expenses after escalating annual normalised O&M expenses by 6.35% per annum. O&M expenses thus computed for FY 2012-13 has been escalated further considering 6.35% to arrive at the O&M expenses for FY 2014-15 to FY 2018-19.

12.5.4 The Commission proposes to approve the norms based on the actual O&M expenses incurred after normalisation.

[Emphasis supplied]

12.6 Proposed Norms

(1) Normative Operation and Maintenance expenses of thermal generating station shall be as follows:

(a) Coal based and lignite fired (including those based on CFBC technology) generating stations, other than the generating stations/units referred to in clauses(b) and (d):

(Rs. lakh/MW)

Year	200/210/250 MW Sets	300/330/350 MW Sets	500 MW Sets	600 MW Sets and above
FY 2014-15	24.07	20.19	16.32	14.68
FY 2015-16	25.60	21.47	17.35	15.61
FY 2016-17	27.22	22.84	18.45	16.60
FY 2017-18	28.95	24.29	19.63	17.66
FY 2018-19	30.79	25.83	20.87	18.78

Provided that the norms shall be multiplied by the following factors for arriving at norms of O&M expenses for additional units in respective unit sizes for the units whose COD occurs on or after 1.4.2014 in the same station:

200/210/250 MW	Additional 5th& 6th units	0.90
	Additional 7th& more units	0.85
300/330/350 MW	Additional 4th& 5th units	0.90
	Additional 6th& more units	0.85
500 MW and above	Additional 3rd& 4th units	0.90
	Additional 5th& above units	0.85

”

7.3.2 Statement of Reasons:

**“29. Operation and Maintenance Expenses
{Regulation 29}**

29.1 The draft Regulations specified separate set of norms for the coal/lignite based stations depending upon unit size without distinguishing between new and existing stations.

29.2 **The Commission in its Explanatory Memorandum to the draft Regulations discussed the approach considered for arriving at O&M expenses for various generating stations, which was based on the actual O&M expenses for the period from FY 2008-09 to FY 2012-13.”**

[Emphasis supplied]

7.3.3 **Tariff Regulations, 2014:**

“1. Short title and commencement. (1) These regulations may be called the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014.

(2) These regulations shall come into force on 1.4.2014, and unless reviewed earlier or extended by the Commission, shall remain in force for a period of five years from 1.4.2014 to 31.3.2019:

Provided that where a project or a part thereof, has been declared under commercial operation before the date of commencement of these regulations and whose tariff has not been finally determined by the Commission till that date, tariff in respect of such project or such part thereof for the period

ending 31.3.2014 shall be determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 as amended from time to time.

3. **Definitions and Interpretations.**—In these regulations, unless the context otherwise requires-

(1) **'Act'** means the Electricity Act, 2003 (36 of 2003);

(22) **'Existing Project'** means a project which has been declared under commercial operation on a date prior to 1.4.2014;

(42) **'Operation and Maintenance Expenses'** or **'O&M expenses'** means the expenditure incurred for operation and maintenance of the project, or part thereof, and includes the expenditure on manpower, repairs, maintenance spares, consumables, insurance and overheads but excludes fuel expenses and water charges;

(46) **'Project'** means a generating station or a transmission system including communication system, as the case may be, and in case of a hydro generating station includes all components of generating facility such as dam, intake water conductor system, power generating station and generating units of the scheme, as apportioned to power generation and in case of

thermal generating stations does not include mining if it is a pit head project and dedicated captive coal mine;

29. Operation and Maintenance Expenses:

a. *Normative Operation and Maintenance expenses of thermal generating stations shall be as follows:*

a) Coal based and lignite fired (including those based on Circulating Fluidised Bed Combustion (CFBC) technology) generating stations, other than the generating stations/units referred to in clauses (b) and (d):

(in Rs Lakh/MW)

<i>Year</i>	<i>200/210/250 MW Sets</i>	<i>300/330/350 MW Sets</i>	<i>500 MW Sets</i>	<i>600 MW Sets and above</i>
<i>FY 2014-15</i>	<i>23.90</i>	<i>19.95</i>	<i>16.00</i>	<i>14.40</i>
<i>FY 2015-16</i>	<i>25.40</i>	<i>21.21</i>	<i>17.01</i>	<i>15.31</i>
<i>FY 2016-17</i>	<i>27.00</i>	<i>22.54</i>	<i>18.08</i>	<i>16.27</i>
<i>FY 2017-18</i>	<i>28.70</i>	<i>23.96</i>	<i>19.22</i>	<i>17.30</i>
<i>FY 2018-19</i>	<i>30.51</i>	<i>25.47</i>	<i>20.43</i>	<i>18.38</i>

Provided that the norms shall be multiplied by the following factors for arriving at norms of O&M expenses for additional units in respective unit sizes for the units whose COD occurs on or after 1.4.2014 in the same station:

<i>200/210/250 MW</i>	<i>Additional 5th & 6th units</i>	<i>0.90</i>
	<i>Additional 7th & more units</i>	<i>0.85</i>
<i>300/330/350 MW</i>	<i>Additional 4th & 5th units</i>	<i>0.90</i>
	<i>Additional 6th & more units</i>	<i>0.85</i>
<i>500 MW and above</i>	<i>Additional 3rd & 4th units</i>	<i>0.90</i>
	<i>Additional 5th & above units</i>	<i>0.85</i>

55. Power to Remove Difficulty:

If any difficulty arises in giving effect to the provisions of these regulations, the Commission may, by order, make such provision not inconsistent with the provisions of the Act or provisions of other regulations specified by the Commission, as may appear to be necessary for removing the difficulty in giving effect to the objectives of these regulations.”

8. **Our observations and Findings:**

8.1 The “Explanatory Memorandum to Draft Terms and Conditions of Tariff for 2014-2019” provides the basic methodology for determining the Normative O&M charges. It provides that:

(a) The Normative O&M charges for 2014-19 control period are determined on the basis of O&M charges incurred during the 2009-2014 control period.

“12.1.1 The Commission in its Tariff Regulations, 2001 specified that the O&M Expenses for stations in operation for five or more than five years shall be derived on the basis of past five year actual O&M expenses excluding the abnormal O&M expenses.”

“12.4.2.1 The Commission through its Order dated June 07, 2013 directed various Central Generating Stations to submit details of actual annual O&M expenses incurred for FY 2008-09 to FY 2012-13. In response the generating stations submitted the O&M expenses which has been analysed as discussed below.”

“12.5.3 The Commission based on the actual O&M expenses for FY 2008-09 to FY 2012-13 has re-computed the O&M expenses for FY 2012-13 by taking average of five year O&M expenses after escalating annual normalised O&M expenses by 6.35% per annum. O&M expenses thus computed for FY 2012-13 has been escalated further

considering 6.35% to arrive at the O&M expenses for FY 2014-15 to FY 2018-19.”

“12.5.4 The Commission proposes to approve the norms based on the actual O&M expenses incurred after normalisation.”

[Emphasis supplied]

- (b) Further, the O&M charges for the past years are collected as consolidated charges for the complete project /generating station irrespective of new /additional units during that period or existing units. As may be seen from the Explanatory Memorandum:

“In view of above, it is proposed that the tariff of the units or elements commissioned prior to 1.4.2014 shall be determined on consolidated basis only and accordingly, the generating company or transmission licensee shall have to file a petition.”

[Emphasis supplied]

- (c) Further, the Statement of Reasons also reiterated that Normative O&M charges are determined on the basis of past years data:

“29.2 The Commission in its Explanatory Memorandum to *the draft Regulations discussed the approach considered for arriving at O&M expenses for various generating stations, which was based on the actual O&M expenses for the period from FY 2008-09 to FY 2012-13.*”

[Emphasis supplied]

8.2 From the above, it is crystal clear that the Normative O&M charges are determined based on the actual consolidated O&M charges for the past five years for a specific project having similar unit sizes.

8.3 Also, the Normative O&M charges are determined for the complete Generating Station including all the units which achieve COD prior to 1.4.2014. The multiplication factor is to be applied for new units which achieve COD after 1.4.2014 and during the control period 2014-19.

8.4 Further, the Tariff Regulations, 2014 provides that:

“(22) ‘Existing Project’ means a project which has been declared under commercial operation on a date prior to 1.4.2014;”

As such, any project or unit commissioned prior to 1.4.2014 is an existing unit/ project and the consolidated actual O&M charges for such project is considered for determining the Normative O&M charges, irrespective of the fact whether such unit/ project is new /additional during the past five years.

8.5 The Regulation 55 provides that:

“55. Power to Remove Difficulty: If any difficulty arises in giving effect to the provisions of these regulations, the Commission may, by order, make such provision not inconsistent with the provisions of the Act or provisions of other regulations specified by the Commission, as may appear to be necessary for removing the difficulty in giving effect to the objectives of these regulations.”

The provision should be invoked only if some difficulty arises in the implementation of the said Regulations. However, we do

not find any reason for which the provisions of Tariff Regulations, 2014 cannot be implemented in its true spirit.

8.6 Mr. Sanjay Sen, Learned Counsel for the Appellant (NTPC) has filed the written submission in both the Appeals for our consideration. He has argued that **in Appeal No. 101 of 2017:** Order dated 21.01.2017 in Petition No. 283/GT/2014 [pertaining to Kahalgaon Super Thermal Power Station Stage II (3X500 MW) ("**KSTPS-II**")]; and **In Appeal No. 110 of 2017:** Order dated 06.02.2017 in Petition No. 372/GT/2014 [pertaining to Rihand Super Thermal Power Station Stage III (2 X 500 MW) ("**RSTPS-III**")], the Commission has erroneously relied upon its Order dated 27.07.2016 in Petition No. 294/GT/2014 passed in the case of Simhadari Super Thermal Power Station Stage II (subject matter of Appeal No. 25 of 2017) and has:-

- i. Exercised its power to remove difficulties under Regulation 55 of CERC (Terms and Conditions of Tariff) Regulations 2014 and has, *inter alia*, reduced the allowable Operation and Maintenance ("**O&M**") for KSTPS-II and RSTPS-III for the period from 01.04.2014 to 31.03.2019;
- ii. This is being done by holding that the proviso under Regulation 29(1)(a) of the Tariff Regulations 2014 also applies to units under Commercial Operation Date ("**COD**") before 01.04.2014 and has resultantly considered KSTPS-II and RSTPS-III as an 'Additional Unit' for computation of O&M Expenses.

8.6.1 For our consideration the following list of dates have been

placed on record, differently for the two Appeals, wherein the non-shaded dates pertain to Appeal No. 101 of 2017 and shaded dates pertain Appeal No. 110 of 2017.

SL. NO.	DATES	EVENTS
1.	01.08.2008	First unit of KSTPS-II achieved its Commercial Operation Date (“COD”).
2.	30.12.2008	Second unit of KSTPS-II achieved its COD.
3.	20.03.2010	Third unit of KSTPS-II achieved its COD.
4.	19.11.2012	Unit 1 of the RSTPS-III achieved COD.
5.	21.02.2014	CERC notified the Tariff Regulations, 2014 to be in effect from 01.04.2014.
6.	27.03.2014	Unit 2 of the RSTPS-III achieved COD.
7.	14.08.2014	NTPC filed Petition No. 283/GT/2014 for determination of Tariff for KSTPS-II for the period 01.04.2014 to 31.03.2019 in terms of the Tariff Regulations, 2014.
8.	14.08.2014	NTPC filed a Petition No. 372/GT/2014 for approval of Tariff of RSTPS-III for the period from 01.04.2014 to 31.03.2019 in terms of the Tariff Regulations 2014.
9.	29.07.2016	CERC vide its Order in Petition No. 294/GT/2014 invoked “Power to Remove Difficulty” under Regulation 55

		<p>and reduced the allowable O & M expenses for Simhadri - II for the period from 01.04.2014 to 31.03.2019, by holding that the proviso under Regulation 29 (1)(a) of the Tariff Regulations, 2014 also applies to units whose COD occurred on or after 01.04.2009 and before 01.04.2014.</p> <p>Note: The said Order passed in Petition No. 294/GT/2014 has been challenged before this Tribunal in Appeal No. 25 of 2017 and is pending consideration before this Hon'ble Tribunal.</p>
10.	27.12.2016	CERC vide Order disposed of the Review Petition No. 25/RP/2016 filed by NTPC.
11.	21.01.2017	CERC vide Order in Petition No. 283/GT/2014 (" Impugned Order "), wherein it erroneously relied upon the ratio of the Order passed in Petition No. 294/GT/2014 to reduce the allowable O & M expenses for the KSTPS-II Project of NTPC.
12.	06.02.2017	CERC vide Order (" Impugned Order ") in Petition No. 372/GT/2014, wherein it erroneously relied upon the ratio of the Order dated 27.07.2016 passed in Petition No. 294/GT/2014 to reduce the

		allowable O&M expenses for the RSTPS-III.
13.	10.03.2017	Hence, aggrieved by the Order dated 21.01.2017, NTPC has filed the instant Appeal No. 101 of 2017
14.	22.03.2017	Hence, aggrieved by the Order dated 06.02.2017, NTPC has filed the instant Appeal No. 110 of 2017.

8.6.2 It may, therefore, be seen that all the units of the two projects were commissioned prior to 1.4.2014 and thus are the existing units for the control period 2014-19 as per the definition provided in the Tariff Regulations.

8.6.3 At the outset, it is submitted that the issue involved in both the Appeals (Appeal No. 101/2017 & Appeal No. 110/2017) is the interpretation of Proviso to Regulation 29(1)(a) of the Tariff Regulations, 2014 and its consideration while allowing the O&M Expenses to the Appellant. The Impugned Order has been passed by relying upon the Order dated 29.07.2016 in Petition No. 294/GT/2014, CERC has arbitrarily and erroneously held that the proviso to Regulation 29 (1)(a) of Tariff Regulations, 2014 is also applicable to units whose COD occurred even before 01.04.2014 when as per the plain reading of the said Proviso it is evident that it is limited in its application to Additional Units which achieved COD after 01.04.2014.

- i. Regulation 29 (1)(a) of the Tariff Regulations, 2014 as well as the finding of CERC concerning the issue of O&M Expenses is reproduced as follows:-

(a) Proviso to Regulation 29 (1)(a) of the Tariff Regulations 2014:

*“Provided that the norms shall be multiplied by the following factors for arriving at norms of O&M expenses for additional units in respective unit sizes for the units whose **COD occurs on or after***

1.4.2014 in the same station:

200/210/250 MW	Additional 5 th & 6 th units	0.90
	Additional 7 th & more units	0.85
300/330/350 MW	Additional 4 th & 5 th units	0.90
	Additional 6 th & more units	0.85
500 MW and above	Additional 3 rd & 4 th units	0.90
	Additional 5 th & above units	0.85

”

(b) The findings of CERC in Petition No. 294/GT/2014 (also challenged in Appeal No. 25 of 2017):

“52. It is noticed that under the 2009 Tariff Regulations, any generating station having 3rd and 4th units with a capacity of 500 MW and above, if commissioned on or after 1.4.2009 but before 31.3.2014, shall be entitled to O&M

expenses at the rate to be worked out on the basis of normative O&M multiplied by 0.9%. There is no corresponding provision in the 2014 Tariff Regulations for determination of the O&M expenses of the units commissioned on or after 1.4.2009 but before 31.3.2014 during the 2009-14 period. However, in the 2014 Tariff Regulations, the O&M expenses of 3rd and 4th Unit of the generating stations having capacity of 500 MW and above whose COD occurred on or after 1.4.2014 are required to be worked out by multiplying the O&M norms with the factor of 0.9%. This has given rise to a situation where in the restrictions imposed on admissible O&M expenses of the 3rd and 4th units of the generating station commissioned during 2009-14 period are not continued during 2014-19 period, though the intent is that the O&M expenses of 3rd and 4th units of a generating station should be rationalized by multiplying with a factor of 0.9 since these units are sharing certain common facilities developed for Units 1 and 2 of the generating station. **In our view, this anomalous situation can be addressed if the provision to Regulation 29(a) of 2014 Tariff Regulations is made applicable in respect of generating stations whose additional units have been commissioned on or after 1.4.2009. This in our view, will balance**

the interest of the generating station and the beneficiaries and will be in conformity with the objective of section 61(d) of the Act.”

[Emphasis supplied]

(c) Findings from the Impugned Order:

Impugned findings of Order dated 21.01.2017 in 283/GT/2014 [Appeal No. 101 of 27]	Impugned findings of Order dated 06.02.2017 in 372/GT/2014 [Appeal No. 110 of 27]
<p><i>“64. The generating station with a capacity of 1500 MW comprises of three units of 500 MW each was declared under commercial operation on 20.3.2010 and is an expansion project. The question of rationalisation of O&M expenses in respect of expansion units commissioned during the period 2009-14 and continued during the tariff period 2014-19 has been addressed by the Commission in order dated 29.7.2016 in Petition No. 294/GT/2014</i></p>	<p><i>“34. The generating station with a capacity of 1000 MW comprises of two units of 500 MW each was declared under commercial operation on 27.3.2014 and is an expansion project. The question of rationalization of O&M expenses in respect of expansion units commissioned during the period 2009-14 and continued during the tariff period 2014-19 has been addressed by the Commission in order dated 29.7.2016 in Petition No. 294/GT/2014(determination</i></p>

<p><i>(determination of tariff of Simhadri Super Thermal Power Station Stage-II for the period 2014-19) as under:...</i></p> <p><i>...65. Accordingly, in line with the above decision, the normative O&M expenses for additional units of the generating station has been worked out and allowed as under:"</i></p>	<p><i>of tariff of Simhadri Super Thermal Power Station Stage-II for the period 2014-19) as under:...</i></p> <p><i>...35. Accordingly, in line with the above decision, the normative O&M expenses for additional units of the generating station has been worked out and allowed as under:"</i></p>
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- ii. It is evident from the plain reading to the proviso to Regulation 29 (1)(a) of the Tariff Regulations cannot be made applicable to NTPC's KSTPS-II and RSTPS-III as the said provision is only applicable to those additional units whose COD occurs on or after 01.04.2014. The Appellant Units, having achieved COD of its units in the previous control period of 2009-14 itself, cannot be governed by the aforementioned proviso to Regulation 29(1)(a) of the Tariff Regulations, 2014. Following are the COD dates of the concerned unit for kind convenience of this Tribunal:

- (a) **KSTPS-II:** Unit I (01.08.2008), Unit II (30.12.2008) and Unit III (20.03.2010); and

(b) **RSTPS-III**: Unit I (19.11.2012) and Unit II (27.03.2014).

- 8.7 We agree with the submissions made by the Appellant that considering the above COD, only the revised O&M norms for units existing as on 01.04.2014, as laid down in Regulation 29 (1) (a) of the 2014 Tariff Regulations are to be applied in case of the Appellant. As such any other interpretation of the aforesaid regulations is contrary to the plain text and meaning.
- 8.8 It is now a settled position of law that CERC is bound by its own Regulations and must take action in conformity of with its Regulations. In this regard reliance is placed on the Constitutional Bench Judgment of the Hon'ble Supreme Court in *PTC India Limited V CERC & Ors.*(2010) 4 SCC 603, the relevant extracts of the Judgment are being reproduced as follows:-

“54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions

*enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. **These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178...***

*56. Similarly, while exercising power to frame the terms and conditions for determination of tariff under Section 178, the commission has been guided with the factors specified in Section 61. It is open for the Central Commission to specify terms and conditions for determination of tariff even in the absence of Regulation under Section 178. **However, if a Regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the Regulations under Section 178.***

[Emphasis supplied]

- 8.9 Therefore, as per the law laid down by the Hon'ble Supreme Court Central Commission is bound to comply with the

Regulations notified by it.

8.10 Central Commission vide Tariff Regulations, 2019 further continued with the past practice similar to what has been specified under Regulation 29 of the Tariff Regulations, 2014. If Central Commission has observed some difficulty in implementing such a provision there seems to be no reason for reiterating the same mistake for the Tariff Regulations, 2019. We failed to understand the same. If we accept the views of Central Commission that the intent of Central Commission was to apply the Multiplication Factor to all similar Units (irrespective of their date of COD) then in Central Commission(Terms and Conditions of Tariff)Regulations, 2019 the CERC ("**Tariff Regulations, 2019**") Central Commission would have inserted such a Proviso rectifying the earlier mistake. However, from the perusal Proviso of Regulation 35 (1) of the Tariff Regulations, 2019 it is evident that the said Multiplication Factor has again been confined to Additional Units which achieve COD after 01.04.2019. The relevant extract of Tariff Regulations, 2019 is reproduced as follows: -

"35. Operation and Maintenance Expenses:

***(1) Thermal Generating Station:** Normative Operation and Maintenance expenses of thermal generating stations shall be as follows:*

(1) Coal based and lignite fired (including those based on Circulating Fluidised Bed Combustion (CFBC) technology) generating stations, other than the generating stations or units referred to in clauses (2), (4) and (5) of this Regulation:...

...Provided that where the date of commercial operation of any additional unit(s) of a generating station after first four units occurs on or after 1.4.2019, the O&M expenses of such additional unit(s) shall be admissible at 90% of the operation and maintenance expenses as specified above;”

8.11 It is a settled principle of law that when a statute provides for a thing to be done in a particular manner, it has to be done only in that manner and no other manner. Reliance in this regard is placed on the following judgments of Hon'ble Supreme Court:—

- i. *Gujarat Urja Vikas Nigam v. Essar Power Ltd.*, (2008) 4 SCC 755 (**Para 35**)
- ii. *J. Jayalalitha v. State of Karnataka*, (2014) 2 SCC 401 (**Para 34**)
- iii. *A.R. Antulay v. Ramdas Srinivas Nayak*, (1984) 2 SCC 500 (**Para 22**)

8.12 Mr. Arijit Maitra, Learned Counsel for the Respondent No.2/GRIDCO, in Appeal no. 101/2017, defended the decision of CERC by submitting that the preamble to the 2003 Act enshrines “rationalization of electricity tariff”. The impugned Order dated 21.01.2017 determined the tariff of Kahalgaon Super Thermal Power Station Stage – II for the period 01.04.2014 to 31.03.2019. For one of the items viz. O&M Expenses, the Respondent Commission has rationalized the O&M expenses of the Appellant i.e. Unit III of the said power plant to 90 % of the normative O&M expenses. The reason

being that Unit III of the said power plant is an expansion of Unit Nos. I and II. The expansion Unit No.III is sharing the infrastructure of the existing Unit Nos. I and II. The common facilities that are being shared by Unit No. III from Unit Nos. I and II would be in the nature of employees; ash disposal; water treatment; ash pond etc.

8.13 We decline to accept the said contention as the provisions of the Tariff Regulations, 2014 have already been deliberated in the foregoing paras and there is no doubt that the Normative O&M charges are determined by consolidating the actual O&M charges for the past five years (the last control period) thus considering the actual sharing benefits by the additional units for that period and rationalising the expenditure.

8.14 He further added that the Tariff Policy dated 28.01.2016 notified by the Central Government in terms of Section 3 of the 2003 Act is a statutory policy as held by the Supreme Court in the matter of Energy Watchdog Vs. CERC &Ors. reported in (2017) 14 SCC 80. The first proviso to para 5.2 of the said Policy provides inter alia “ Provided that in case of expansion of such project, the benefit of sharing of infrastructure of existing project and efficiency of new technology is passed on to consumer through tariff”. Hence, the impugned Order which is passing on to the consumer through tariff the benefit of rationalised O&M expenses of Unit No.III sharing the infrastructure of the existing Unit Nos. I and II, is justified even in terms of the mandate in the Tariff Policy. The wording used in the Tariff Policy, inter alia is “**the Appropriate Commission shall ensure**”.

- 8.15 We do not find any relevance to the above submission as the benefit of sharing of resources by the additional units have already been factored in the actual O&M charges considered for the past years.
- 8.16 He further invited our attention towards the observation of the Central Commission which *inter alia* provides that -

“58. The Commission took note of the fact that the generators like NTPC are going for expansion of the existing generating station for optimum utilization of the resources. Since the expansion Unit No.III would be sharing some of the common facilities which are already in place and the normative O&M expenses allowed in the regulation captures the economy scale for a capacity range of 1000 to 1200 MW on an average, the Commission felt that the O&M expenses for the expansion Unit of the same type at the same location should not be of the same order. Accordingly, the Commission provided for multiplying factors to be applied to the normative O&M expenses to arrive at the O&M expenses in respect of future additional Units whose COD would occur on or after 01.04.2009. ...

59. It is apparent from the above that the intention of providing multiplying factor for determination of the O&M expenses for additional

units was to pass on the benefit of economy scale to the consumer.”

- 8.17 There is no denial that the benefit of sharing of resources by the additional units should be passed on to the consumers, however, once already factored into the actual O&M charges which is the basis for determination of Normative O&M charges for the next control period, such a benefit becomes the integral part of O&M charges.
- 8.18 Similar contentions have been raised by the learned Advocates of the other respondents.
- 8.19 Ms. Rukmani Bobode, Learned Counsel for the Respondent No.5 (MPPMCL) has argued that the Appellant has contended that KhSTPP-Stage II achieved COD on 20.03.2010 i.e. during Tariff Control Period 2009-14 and Proviso to Regulation 19 of Regulation, 2009 could not be made applicable, as it is applicable only to those plants which achieve COD after 01.04.2014. The said submission is wholly untenable. CERC has consistently applied multiplying factor given in the Proviso to Regulation 29(1)(a) of Regulations 2014 to Units commissioned after 01.03.2009 also. Admittedly CERC has been consistently passing Tariff Orders applying the same principle. Further, it is submitted that the provision of applying multiplying factor to the normative O&M expenses for the extension units, so as to capture economy of scale, in an existing Project was introduced by CERC in its Regulations, 2009 through proviso to Regulation 19 (a). Thus the concept of applying multiplying factor to O&M norms for permissible O&M expenses in respect of additional units is to take into account

the economy of scale being achieved for a capacity range of 1000 to 1200 MW on an average and to pass on the benefit to the beneficiaries. This provision was made effective for units whose COD occurred on or after 01.04.2009. Further, this provision was retained in Regulations, 2014 providing norms of O&M expenses for additional units in respective unit sizes for the units whose COD occurs on or after 01.04.2014. Thus the object of provision of multiplying factor for determination of O&M charges for additional units was to pass on the benefits of economy of scale to the consumers from 3rd Unit onwards (having Unit size of 500MW) in the existing Project. The said provisions are also in conformity with the provisions Section 61 of Act 2003.

- 8.20 We have already deliberated on this issue and find no additional merit to reconsider our decision.
- 8.21 We have heard Mr. Pradeep Misra, Learned Counsel, Mr. R.B. Sharma, Learned Counsel and Mr. Apoorva Misra, Learned Counsel for the Respondents. Similar submissions have been made by them. The issue has already been discussed in detail and we find that their contentions are similar to what we have already discussed. We decline to accept the contentions of the Respondents that the multiplication factor as envisaged for the control period 2009-14 shall continue to be applied for such units during the control period 2014-19.
- 8.22 The other issue which has been raised before us is the invoking of powers vested with the Central Commission under Regulation 55 of the Tariff Regulations, 2014 for amending the Proviso to Regulation 29(1)(a).

8.23 The Learned Advocate for the Appellant submitted that the settled position of law that power to relax/remove difficulties cannot be employed to alter/amend the statutes. In this regard reliance is placed on the judgment of the Hon'ble Supreme Court in *M.U. Sinai Vs Union of India*, (1975) 2 SCR 640 and the relevant extracts of the Judgment are reproduced as follows: -

*“.....It will be seen that the power given by it is not uncontrolled or unfettered. It is strictly circumscribed, and its use is conditioned and restricted. The existence or arising of a “difficulty” is the sine qua non for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under this Clause cannot be invoked at all. Again, the “difficulty” contemplated by the Clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. **Further, the Central Government can exercise the power under the Clause only to the extent it is necessary for applying or giving effect to the Act etc. and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.**”*

[Emphasis supplied]

- 8.24 As per the MU Sinai (Supra) the Power to Remove Difficulty cannot be invoked to substantially amend the scheme of the Act. Hence, in the present case the said power cannot be invoked to substantially amend proviso to Regulation 29 (1) read with Proviso to Regulation 1 (2) of the Tariff Regulations, 2014. In fact, this Tribunal at various instances, relying upon the MU Sinai (Supra) has observed that Power to remove difficulty must be exercised in exceptional circumstance where the Regulation could not be implemented. However, in the present case, there was not such recording in the Impugned Order that the said Regulations could not have been applied as it could not have implemented it. [Reference- Tribunal's Judgment dated 25.03.2011 in Appeal No. 130 of 2009 – *RGPPL v. CERC & Ors.* (**Para 10.3& 10.7**)]
- 8.25 Central Commission while finalising the Regulations invited detailed stakeholder consultations and also issued a detailed Approach Paper for the stakeholders. The Proviso, thus, incorporated after prior consultation from the Appellant as well as other Stakeholders. However, in the Impugned Order, CERC has essentially amended Proviso to Regulation 29 (1) (a) of the Tariff Regulations, 2014 without providing an opportunity to the Appellant to make submissions on this issue of Proviso to Regulation 29 (1)(a) of the Tariff Regulations, 2014. It is apposite to mention that in the entire proceedings no party had even whispered that the Proviso to Regulation 29 (1)(a) ought to be made applicable to units achieving COD Prior to 01.04.2014. Hence, there was no occasion for the

Appellant to even respond to such a course being adopted by Central Commission. Even Central Commission at no stage indicated that it is seeking to apply to Proviso to Regulation 29 (1)(a) to Units achieving COD before 01.04.2014. Such a course adopted by Central Commission violates the principle of Natural Justice and for this ground alone the Impugned Order is liable to be set aside.

8.26 On the contrary, Mr. Arijit Maitra argued that the Respondent Commission has rightly invoked the power to remove difficulty in accordance with the law settled by the Supreme Court of India. In *Madeva Upendra Sinai Vs. Union of India &Ors.* (1975) 3 SCC 765, the Hon'ble Supreme Court inter alia held that

“39. In order to obviate the necessity of approaching for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time consuming amendatory process, the legislature sometimes thinks it expedient to invest the executive with a very limited power to make minor adoption and peripheral adjustment in the statute for making its implementation effective, without touching its substance.

.....” **{Underlining added}**

8.27 He further added that the Respondent Commission has therefore correctly passed the impugned order inter alia applying the multiplication factor for determining the O&M expenses for the period 2014-2019, since the 2014 Regulations do not specifically state that the O&M expenses for additional Units i.e. for the units whose COD has occurred

prior to 01.04.2014 cannot be rationalised by use of the multiplying factor of 0.90.

8.28 We do not find any reason by which the provisions of Regulation 29 cannot be implemented or there is a difficulty in its implementation. As such the above Judgement quoted by Mr. Arijit is not relevant here.

8.29 Differently, the judgment of the Hon'ble Supreme Court in *M.U. Sinai Vs Union of India*, (1975) 2 SCR 640 is relevant in the present case

8.30 We agree that in the present case the said power cannot be invoked to substantially amend proviso to Regulation 29 (1) read with Proviso to Regulation 1 (2) of the Tariff Regulations, 2014. The Power to Remove Difficulty must be exercised in exceptional circumstance where the Regulation could not be implemented.

ORDER

In light of the above, we are of the considered view that the issues raised in the Batch of Appeals have merit and hence Appeals are allowed. The impugned order dated 21.01.2017 in Petition No. 283/GT/2014 and order dated 06.02.2017 in Petition No. 372/GT/2014 ("Petition 372"), are hereby set aside to the extent of our findings. The matter is remitted back to the Central Commission for passing a reasoned order pursuant to our observations are scrupulously complied with expeditiously and in a time-bound manner.

The appeals are disposed of in above terms. Pending IAs, if any, shall stand disposed of.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 11th DAY OF JANUARY, 2022.**

(Sandesh Kumar Sharma)
Technical Member
pr

(Justice R.K. Gauba)
Officiating Chairperson