IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 25 OF 2017
APPEAL NO. 178 OF 2017
APPEAL NO. 180 OF 2017
APPEAL NO. 240 OF 2017
AND
APPEAL NO. 311 OF 2017

Dated: **01.12.2022**

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

APPEAL NO. 25 OF 2017

In the matter of:

NTPC Limited
NTPC Bhavan, Core – 7,
Institutional Area, Lodhi Road,
New Delhi – 110003. **…APPELLANT**

VERSUS

1. Chairperson,
Central Electricity Regulatory Commission
3rd & 4thFloor, Chanderlok Building,
36, Janpath,
New Delhi- 110001.

2. Chairman and Managing Director,
Andhra Pradesh Power Coordination Committee,
APTRANSCO, Vidyut Soudha,
Khairatabad, Hyderabad-500 082.

3. Chairman and Managing Director,
Andhra Pradesh Eastern Power Distribution Company Ltd
Corporate Office P&T Colony,
Seethammadhara, Visakhapatnam-530013-(AP).

4. Chairman and Managing Director,
Andhra Pradesh Southern Power Distribution Company Ltd,
Corporate Office,

Back side Srinivasa Kalyana Mandapam
Tiruchhanur Road, Kesavayana Gunta,
Tirupati-517503-(AP).

5. Chairman and Managing Director,
Telengana Northern Power Distribution Company Ltd,
H. No. 2-5-31/2 Vidyut Bhavan,
Naralacutta, Hanamkonda,
Warangal-506001.

6. Chairman and Managing Director,
Telengana Southern Power Distribution Company Ltd,
Mint Compound, Corporate Office,
Hyderabad -500063

7. Chairman and Managing Director,
Tamil Nadu Generation & Distribution Corporation Ltd,
144, Anna Salai,
Chennai-600002

8. Managing Director,
Power Company of Karnataka Limited
KPTCL Complex, K.G Road,
Kaveri Bhawan, Bangalore-560009

9. Managing Director,
Bangalore Electricity Supply Company Ltd (BESCOM),
Krishna Rajendra Circle,
Bangalore-560009

10. Chairman,
Mangalore Electricity Supply Company Ltd (MESCOM)
MESCOM Bhavana,
Corporate Office, Bejai Kevai Cross Road,
Mangalore-575004.

11. President,
Chamundeshwari Electricity Supply Corp. Ltd,
CESC, Corporate Office, No 29, Ground Floor,
Kaveri Grameena Bank Road,
Vijayanagar 2nd Stage, Mysore – 570017

12. Managing Director,
Gulbarga Electricity Supply Company Ltd
Main Road, Gulbarga,
Karnataka – 585102.

13. Chairman
Hubli Electricity Supply Company Ltd.,
Corporate Office, P.B Road
Navannagar, Hubli-580025

14. Chairman and Managing Director
Kerala State Electricity Board,
Vaidyuthi Bhavanam, Pattom,
Thriruvanathapuram-695004.

15. Secretary to Government (Power),
Electricity Department,
Govt. of Puducherry
137, NSC Bose Salai,
Puducherry-605001 **…RESPONDENT(S)**

APPEAL NO. 178 OF 2017

In the matter of:

NTPC Limited
NTPC Bhavan, Core – 7, Scope Complex,
Institutional Area, Lodhi Road,
New Delhi – 110003. **…APPELLANT**

VERSUS

1. The Secretary,
Central Electricity Regulatory Commission
3rd& 4thFloor, Chanderlok Building,
36, Janpath, New Delhi- 110001.

2. The Manager,
West Bengal State Electricity Distribution Company Limited,
Vidyut Bhawan, Block-DJ,
Sector-II, Salt Lake City,
Kolkata- 700 091.

3. The General Managing Director,
Bihar State Power Holding Company Limited

(erstwhile Bihar State Electricity Board)
Vidyut Bhawan, Bailey Road,
Patna – 800001.

4. The Director,
Jharkhand State Electricity Board,
Engineering Building,
HEC, Dhurwa, Ranchi-834004.

5. The Chairman,
GRIDCO Limited,
24, Janpath,
Bhubaneswar – 751007.

6. The Director,
Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054. **…RESPONDENT(S)**

APPEAL NO. 180 OF 2017

In the matter of:

NTPC Limited
NTPC Bhavan, Core – 7,
Scope Complex, Institutional Area,
Lodhi Road, New Delhi – 110003. **…APPELLANT**

VERSUS

1. The Secretary,
Central Electricity Regulatory Commission
3rd & 4thFloor, Chanderlok Building,
36, Janpath, New Delhi- 110001.

2. The Managing Director,
Madhya Pradesh Power Management Company Limited,
Shakti Bhawan, Vidyut Nagar,
Rampur, Jabalpur – 482008.

3. The Chairman & Managing Director,
Maharashtra State Electricity Distribution Company Ltd.,
'Prakashgard', Bandra (East),
Mumbai- 400 051.

4. The Chairman,
Gujarat Urja Vikas Nigam Limited,
Sardar Patel, Vidyut Bhavan, Race Course,
Vadodra, Gujarat – 390 007.

5. The Managing Director,
Chhattisgarh State Power Distribution Company Ltd.,
Dhangania, Raipur-492013.

6. The Executive Engineer,
Electricity Department,
Department of Goa, Vidyut Bhawan,
Panaji, Goa – 403001.

7. The Assistant Engineer
Electricity Department,
Administration of Daman & Diu,
Daman – 396 210

8. The Executive Engineer,
Electricity Department,
Administration of Dadra and Nagar Haveli
Silvassa – 396230. **…RESPONDENT(S)**

APPEAL NO. 240 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 & 4thFloor, Chanderlok Building,
36, Janpath, New Delhi- 110001.

2. The Managing Director,
Madhya Pradesh Power Management Company Limited,
Shakti Bhawan, Vidyut Nagar,
Jabalpur-482008.

3. The Chairman and Managing Director,
Maharashtra State Electricity Distribution Company Ltd.,
'Prakashgard', Bandra (East), Mumbai- 400051.

4. The Managing Director,
Gujarat Urja Vikas Nigam Limited (GUVNL),
Vidyut Bhavan, Race Course,
Vadodra, Gujarat – 390007.

5. The Executive Engineer
Electricity Department,
Govt. of Goa, Vidyut Bhawan,
Panaji, Goa – 403001.

6. The Secretary (Power)
Electricity Department,
Administration of Daman & Diu,
Daman – 396210.

7. The Executive Engineer,
Electricity Department
Administration of Dadar & Nagar Haveli,
Silvassa – 396230.

8. The Managing Director,
Chhattisgarh State Power Distribution Co. Ltd.,
Dangania, Raipur – 492013. **…RESPONDENT(S)**

APPEAL NO. 311 OF 2017

In the matter of:

NTPC Limited,
NTPC Bhavan, Core – 7,
Scope Complex, Institutional Area,
Lodhi Road, New Delhi – 110003. **…APPELLANT**

VERSUS

1. Central Electricity Regulatory Commission
3rd & 4thFloor, Chanderlok Building,
36, Janpath, New Delhi- 110001.

2. The Chief General Manager (Regulatory),

Madhya Pradesh Power Management Company Limited,
Shakti Bhawan, Vidyut Nagar, Rampur,
Jabalpur-482008.

3. The Chairman and Managing Director
Maharashtra State Electricity Distribution Company Ltd.,
'Prakashgard', Bandra (East), Mumbai- 400051.

4. The Chairman
Gujarat Urja Vikas Nigam Limited,
Sardar Patel, Vidyut Bhava, Race Course,
Vadodra, Gujarat – 390007.

5. The Chairman,
Chhattisgarh State Power Distribution Company Ltd.,
Dhagania, Raipur – 492013.

6. The Principal Secretary (Power)
Electricity Department,
Department of Goa, Vidyut Bhawan,
Panaji, Goa – 403001.

7. The Secretary (Power)
Electricity Department,
Administration of Daman & Diu,
Daman – 396 210

8. The Executive Engineer
Electricity Department,
Administration of Dadra and Nagar Haveli
Silvassa – 396230. **…RESPONDENT(S)**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
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Mr. Rishabh Sehgal
Mr. Anant Singh
Mr. Lakshyajit Singh
Mr. V. M. Kannan
Mr. Samyak Mishra

Mr. Abhishek Nangia
Mr. Nihal Bhardwaj
Mr. Nishant Kumar
Ms. Pratiksha Chaturvedi
Mr. Shourya Malhotra
Mr. Tushar Srivastava
Ms. Ankita Bafna
Ms. Ananya Mohan
Mr. Nimesh Kumar Jha
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Ms. Kajal Singhal
Ms. Ramisha Jain
Mr. Vinod Kanna
Mr. Arindam Ghosh
Mr. Ritesh Patil
Ms. S. Mali for R-7

In APL No.178 of 2017
Mr. Raj Kumar Mehta
Ms. Himanshi Andley for R-5

In APL Nos. 180 & 240 of 2017
Mr. Ravin Dubey
Mr. Ravi Sharma
Mr. Kashij Khan
Mr. Sarthak

Mr. Dilip Singh
Mr. Rishabh D. Singh for R-2/MPPMCL

In APL No. 311 of of 2017
Mr. G. Umapathy, Sr. Adv.
Mr. Aditya Singh
Ms. Pavitra
Ms. Vaishnavi V
Ms. R. Mekhala
Mr. Anurag Naik for R-2

J U D G M E N T

PER HON'BLE MR SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The instant batch of appeals has been filed by the by M/s NTPC Limited ("Appellant" or "NTPC"), being aggrieved by the various tariff orders issued by the Central Electricity Regulatory Commission (in short "CERC" or the "Central Commission") pertaining to Financial Years (in short "FY") 2014-19 on various issues.

2. The issues which are assailed by these captioned Appeals are summarised as follows:

S.N.	Appeal No.	T.P.S.	Tariff Period	Issue
1	25 of 2017	Simhadri-II	2014-19	O&M Expenses
				Extension of cut-off date
				Projected Additional Capital Expenditure for -Main Plant & Offsite including roads and Residential Quarters, and -Construction of railway siding
2	178 of 2017	Farakka-III	2014-19	O&M Expenses
				Extension of cut-off date

				Projected Additional Capital Expenditure for Construction of Bridge over Ganga-Feeder Canal
3	180 of 2017	Korba-III	2009-14	O&M Expenses
			2014-19	O&M Expenses
			2014-19	Normative Heat Rate
			2014-19	Capitalization of additional capital expenditure for Simulator Package
4	240 of 2017	Vindhyanchal-IV	2014-19	O&M Expenses
			2014-19	Normative Heat Rate
5	311 of 2017	Sipat-I	2009-14	O&M Expenses
			2014-19	O&M Expenses
				Additional Capital Expenditure relating to wagon tippler and associated system

3. The first captioned Appeal No. 25 of 2017 has challenged the Order dated 29.07.2016 (in short "Impugned Order-25") in Petition No. 294/GT/2014 for issues as mentioned under paragraph to in relation to Simhadri Super Thermal Power Station Stage-II (hereinafter referred to as "Simhadri II").

4. The second captioned Appeal No. 178 of 2017 has challenged the Order dated 03.03.2017 (in short "Impugned Order-178") in Petition No. 280/GT/2014 for issues as mentioned under paragraph to in relation to Farakka Super Thermal Power Station-Stage III (herein after referred as "Farakka-III").

5. The third captioned Appeal No. 180 of 2017 has challenged the Order dated 03.03.2017 (in short "Impugned Order-180") in Petition No. 340/GT/2014 for issues as mentioned under paragraph to in relation to Korba Super Thermal Power Station-Stage III (hereinafter referred to as "Korba-III").

6. The fourth captioned Appeal No. 240 of 2017 has challenged the Order dated 10.03.2017 (in short "Impugned Order-240") in Petition No. 339/GT/2014 for issues as mentioned under paragraph to in relation to Vindhyachal STPS Stage-IV (hereinafter referred to as "Vindhyachal Stage IV").

7. The fifth captioned Appeal No. 311 of 2017 has challenged the Order dated 29.03.2017 (in short "Impugned Order-311") in Petition No. 337/GT/2014 for issues as mentioned under paragraph to in relation to Sipat Super Thermal Power Station Stage-I (hereinafter referred as **"**Sipat-I").

DESCRIPTION OF PARTIES: -

8. The Appellant in batch of captioned Appeals i.e. M/s NTPC Limited is a Government Company engaged in the business of Generation of Electricity, having power stations/projects at different regions and places in the country.

9. Central Electricity Regulatory Commission is Respondent No.1, is a statutory body function under Section 76 of the Electricity Act, 2003. Other respondents are distribution companies having supply of power from the above-mentioned Thermal Power Stations (in short "TPSs") owned by the Appellant.

10. In the circumstances and aggrieved by the aforementioned Impugned Orders passed by the Central Commission, the Appellant has filed the present captioned appeals.

11. The various issues as assailed by the captioned Appeals are analysed issue-wise in the succeeding paragraphs.

A. ISSUE- O&M EXPENSES FOR THE TARIFF PERIOD 2014-19

12. Considering that the issue of Operation & Maintenance (in short "O&M") expenses for the Financial Years 2014-19 was common in seven Appeals filed by NTPC including the five captioned Appeals along with Appeal No. 101 of 2017 and 110 of 2017, these Appeals were tagged together in one batch, however, Appeal no. 101 of 2017 and Appeal No. 110 of 2017 were taken out from the batch to be heard together as a separate batch having only the O&M expenses issue, the common issue, vide interim order dated 23.11.2021 in IA No. 1814 of 2021 as under:

> "*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.

IA no. 1814 of 2021 is disposed of with above observations."

13. The issue on O&M expenses for the tariff period of 2014-19 was since been heard and final decision was rendered by judgment dated 11.01.2022. Therefore, the issue stands settled by the said judgment rendered in Appeals Nos. 101 of 2017 and 110 of 2017, the relevant extract is quoted as under:

"8. Our observations and Findings:

8.1The "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.*

"12.1.1The 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."

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*"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."*

"12.5.3The 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."

"12.5.4The 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 i**n 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 it 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 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. ***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.*
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:-

ii.

(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 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*

"

(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 3rdand 4thunits 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 3rdand 4thUnit 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 3rdand 4thunits 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 3rdand 4thunits 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]

(d) *Findings from the Impugned Order:*

Impugned findings of Order dated 21.01.2017 in	***Impugned findings of Order dated 06.02.2017 in***

283/GT/2014 [Appeal No. 101 of 27]	***372/GT/2014 [Appeal No. 110 of 27]***
"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 (determination of tariff of Simhadri Super Thermal Power Station Stage-II for the period 2014-19) as under:… *…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:"*	*"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 of tariff of Simhadri Super Thermal Power Station Stage-II for the period 2014-19) as under:…* *…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: "*

iii. 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 Sriniwas 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. It 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."

14. Thus, the common issue of reduced allowance of Operation & Maintenance (O&M) expenses for the control period from 01.04.2014 to 31.03.2019 for the Appellant's TPS in the five captioned Appeals, is decided

accordingly with the directions that the Impugned Orders passed by CERC as are challenged by these five captioned Appeals are set aside to the extent of our findings in aforesaid judgment dated 11.01.2022.

B. ISSUE- O&M EXPENSES FOR THE TARIFF PERIOD 2009-14

15. The Appellant has assailed the Impugned Orders on Reduction of Normative Operation and Maintenance ("O&M") expenses for the tariff period 2009-14 period by Appeal Nos. 180 of 2017 & 311 of 2017.

16. The Appellant submitted that Central Commission has reduced the normative O&M expenses for 2009-14 period, by treating the units of new stations as expansion unit of already existing stations, the Central Commission applied sub clause (a) of Regulations 29 of Tariff Regulations, 2009 for the new stations of Korba-III and Sipat-I and has proceeded to modify normative O&M expenses of 2009-14 period by invoking Regulation 103(A) of conduct of Business Regulations, 1999 while issuing the impugned orders for respective stations, the relevant extract of the order dated 03.03.2017 (reference is Appeal No. 180 of 2017 as the issue is identical) is reproduced as under:

> *"3. Before we proceed to determine the tariff of the generating station for the period of 2014-19, we intend to rectify an inadvertent error in the computation of O&M expenses of the generating station issued vide order dated 31.8.2015. Korba Super Thermal Power Station Stage-III consisting of one unit of 500 MW, is an expansion project to the existing Korba Super Thermal Power Station Stage-I & II, also consisting of three units of 500 MW each. Accordingly, the O&M expenses of Korba STPS Stage III was required to be determined in accordance with the proviso to Regulation 19(a) of the 2009 Tariff Regulations which provides the following normative O&M expenses for 500 MW coal based and lignite based generating stations, as under: -*

(₹ in lakh/MW) 2009-10	***2010-11***	***2011-12***	***2012-13***	***2013-14***
13.00	*13.74*	*14.53*	*15.36*	*16.24*

> *Provided that the above norms shall be multiplied by the following factors for additional units in respective unit sizes for the units whose COD occurs on or after 1.4.2009 in the same station*

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

4. As per the above provision, the O&M expenses of the units of this generating station which were commissioned after 1.4.2009 were required to be worked out by multiplying the normative O&M expenses with a factor of 0.9. The Commission in its order dated 31.8.2015 had inadvertently omitted to apply the said proviso under Regulation 19(a) while determining O&M expenses of this generating station which has resulted in the allowing O&M expenses in excess of what was admissible under Regulation 19(a) read with proviso thereunder.

5. Regulation 103(A) of the Central Electricity Regulatory Commission (Conduct of Business) Regulation, 1999, as amended from time to time (Conduct of Business Regulation) provides as under: -

"Clerical or arithmetical mistakes in the orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Commission either or its own motion or on the application of any of the parties."

6. The above provision enables the Commission to correct any accidental omission or error in an order at any time on its own motion. Hence, we consider it appropriate to correct the inadvertent omission in computation of O&M expenses of this generating station which was allowed vide orders dated 31.8.2015. Accordingly, in exercise of our power under Regulation 103(A) of Conduct of Business Regulations, the year-wise normative O&M expenses of this generating station for the period from 21.3.2011 to 31.3.2014 is worked out in accordance with the proviso under Regulation 19(a) of the 2009 Tariff Regulations (by multiplying the normative O&M expenses with a factor of 0.9) as allowed as under:

(₹ in lakh/MW) 2010-11 (21.3.2011 to 31.3.2011)	***2011-12***	***2012-13***	***2013-14***
6183.00	*6538.50*	*6912.00*	*7308.00*

7. The O&M expenses worked out as above shall be admissible in respect of the generating station for the period 2009-14 in supersession of the O&M expenses allowed vide orders dated 31.8.2015."

17. Similarly, vide the Impugned Order dated 29.03.2017 for Sipat-I the Central Commission held as under:

> *"4. Before we proceed to determine the tariff of the generating station for the period of 2014-19, we intend to rectify an inadvertent clerical error in the table regarding interest on loan in para 46 and O&M expenses in para 51 approved vide order dated 6.12.2016 in Petition No. 295/GT/2014.*
>
> *5. Regulation 103(A) of the Central Electricity Regulatory Commission (Conduct of Business) Regulation, 1999, as amended from time to time (Conduct of Business Regulation) provides as under: -*
>
> ***"Clerical or arithmetical mistakes in the orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Commission either of its own motion or on the application of any of the parties."***
>
> *6. The above provision enables the Commission to correct any accidental omission or error in an order at any time on its own motion. Hence, we consider it appropriate to correct the inadvertent clerical errors in the interest on loan and depreciation of this generating station as approved in table in para 46 and para 47 of order dated 6.12.2016 in Petition No. 295/GT/2014. Accordingly, in exercise of our power under Regulation 103(A) of Conduct of Business Regulations, table regarding interest on loan in para 46 of order dated 6.12.2016 in Petition No. 295/GT/2014 is revised as under: -*
> *----------*
>
> *8. Further, the O&M expenses approved to this generating station in table in para 51 in order dated 6.12.2016 in Petition No. 295/GT/2014 is revised as under: -*
> *----------"*

18. From the above, it can be seen that the Central Commission has invoked Regulation 103(A) of Conduct of Business Regulations, 1999 for correcting its inadvertent error in determining the O&M expenses of 2009-14 period and treated the new units of Sipat-I (3x660 MW) and Korba-III (1x500 MW) as expansion units of already existing units of Sipat-II (2x500 MW) and Korba-I&II (3x500 MW) respectively.

19. It is important to note the provisions of Tariff Regulations, 2009 and its Statement of Reasons (in short "SoR") regarding O&M expenses of new units

for using multiplication factor while determining normative O&M expenses. The Tariff Regulations, 2009 provide as under:

> *"19. Operation and Maintenance Expenses. Normative operation and maintenance expenses shall be as follows, namely:*
>
> *(a) Coal based and lignite fired (including those based on CFBC technology) generating stations, other than the generating stations referred to in clauses (b) and (d):*

Year	*200/210/250 MW sets*	*300/330/350 MW sets*	*500 MW sets*	*600 MW and above sets*
2009-10	*18.20*	*16.00*	*13.00*	*11.70*
2010-11	*19.24*	*16.92*	*13.74*	*12.37*
2011-12	*20.34*	*17.88*	*14.53*	*13.08*
2012-13	*21.51*	*18.91*	*15.36*	*13.82*
2013-14	*22.74*	*19.99*	*16.24*	*14.62*

> *Provided that the above norms shall be multiplied by the following factors for additional units in respective unit sizes for the units whose COD occurs on or after 1.4.2009 in the same station:*

200/210/250 MW	*Additional 5th & 6th units*	*0.9*
	Additional 7th & more units	*0.85*
300/330/350 MW	*Additional 4th & 5th units*	*0.9*
	Additional 6th & more units	*0.85*
500 MW and above	*Additional 3rd & 4th units*	*0.9*
	Additional 5th & above units	*0.85"*

20. The Statement of reasons for the Tariff Regulations, 2009 provide as under:

> *"20.9 For the generating stations having combination of above sets, the weighted average value for operation and maintenance expenses were to be adopted. It is also felt that O&M expenses for the extension units of the same type at the same location should not be of the same order. The above norms capture economy of scale for a capacity range of 1000 to 1200 MW on an average. Commission is therefore, providing for following multiplying factors to be applied to the above O&M norms for permissible O&M expenses in respect of future additional units, in respective unit sizes for the units whose COD occurs on or after 01.04.2009.:*

200/210/250 MW	*Additional 5th & 6th units*	*0.9*
	Additional 7th & more units	*0.85*
300/330/350 MW	*Additional 4th & 5th units*	*0.9*
	Additional 6th & more units	*0.85*
500 MW and above	*Additional 3rd & 4th units*	*0.9*
	Additional 5th & above units	*0.85*

20.10 To explain the applicability of above provisions, if a 210 MW unit comes into operation during 2009-10 in a station already having four or more 200/210 MW units, then the norm for the extension unit would be calculated as 0.90x Rs. 18.20 lakh/MW.

If 500 MW units come up in a station having only 200/210 MW units, then admissible O&M norm for the extension unit would be Rs.13.00 lakh/MW during 2009-10."

21. From the above, it can be established that multiplication factor for additional units is to be used for new units added of same type at the same location so that existing infrastructure including the spares can be shared resulting into optimisation of cost.

22. The Appellant submitted that the new units are not identical in capacity as in the case of Sipat-I or the resources of the existing Power Station cannot be extended to the new units as are different, a detailed reason is quoted by the Appellant as under:

	Korba-III	**Sipat-I**
1.	Korba-III is an altogether independent and separate project, the deployment of resources for which are further independent of the resources available for Korba Stage-I&II.	The capacity of Sipat-I units is 660 MW while the units of Sipat-II are of 500 MW.
2	Existing Auxiliaries of Korba-I&II like coal handling plant, ash handling plant, switchyard, unit control room, ash dyke, compressor house etc. have all outlived their useful life and as such the appellant was required to develop separate independent facilities for Korba-III for which new board approval was taken in 2006.	The Sipat-I is LMZ (Russia) Turbo Generator and M/S Doosan (South Korea) for steam generator . Whereas Stage-II was awarded to BHEL. The technology for Sipat-I is supercritical whereas Sipat-II was subcritical.
3	Separate agreement was done with vendors for procurement of equipment for Stage-III which were completely different than those procured for Stage-I&II, which	The Stage-II was declared commercial on 20.06.2009 while the Stage-I was declared commercial on 01.08.2012.

	were put under operation in 01.06.1990, while Korba-III is put under operation in 21.03.2011. The technological obsolescence of spares in Korba-I&II in two decades renders the spares unusable in Korba-III.	
4	The design of Stage-III turbine is from new fleet (2010-11) while the design of Stage-II is old. The design of turbine inlet, blades and stages are different therefore independent fleet of spares are kept for these units.	The Appellant has developed separate independent facilities for this generating station by way of separate investment approval.
5	The control room and location of all plant auxiliaries are separate and as such no benefit on account of shared manpower can be availed.	The station was developed as a green field project and is not an extension of existing generating station.

23. The SoR to the Tariff Regulations, 2009 provides an illustration which clarifies that the multiplication factor is applicable only if same type of power plant unit is commissioned at same station i.e. where 200/210 MW unit is being commissioned at the station already having 200/210 MW unit then only the multiplication factor will be applicable, however, if, in case the new unit commissioned is of different capacity say 500 MW then the multiplication factor is not applicable.

24. Considering the new capacity of 660 MW commissioned at Sipat-I is not identical to the existing unit configuration of Stage-II i.e. 500 MW, therefore, the applicability of the relevant provision fails here.

25. Further, Appellant submitted that Sipat-I has been developed independently with independent facilities as a greenfield project, even the tariff of Sipat-I and Sipat-II is being determined by the Central Commission as tariff for separate stations.

26. Differently, in the case of Korba-III, we find that unit configuration is same i.e. 500 MW, however, units commissioned in the year 1990at Korba-I&II are much older whereas the Korba-I&II units are newer of the year 2011 and there is reason not being identical due to obsolescence and design difference due to long age difference, thus the submission of the Appellant has reason to be agreed to.

27. Additionally, the control room and location of all plant auxiliaries are separate for Korba-I&II and Korba-III as such no benefit on account of shared manpower can be availed, even the Central Commission itself has been treating both the stages of Korba-I&II and Korba-III as independent generating stations and has been determining tariff accordingly in various orders as submitted by the Appellant, also in order dated 20.06.2016 in 26/RP/2016, it has negated the argument of one of the respondent in this regard.

28. The Appellant also invited our attention towards various orders wherein the Central Commission has been determining the normative O&M expenses of Sipat-I as an independent station without treating them as additional units and using multiplying factor and similarly for Korba-III.

29. Further, the Central Commission has invoked Regulation 103A of conduct of Business Regulations 1999 to change its principle in calculation of O&M expenses retrospectively for 2009-14 period, while determining the tariff for 2014-19 period. The Regulation 103A provides as under:

> *"103A. Clerical or arithmetical mistakes in the orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Commission either of its own motion or on the application of any of the parties."*

30. Thus, as per Regulation 103A it is clear that the Regulations 103A can be invoked for correcting clerical or arithmetic mistakes/errors, however in the instant case, the Central Commission has changed the principal of determination of O&M expenses by treating the new station units as additional units of already existing stations, which is not in consonance with the intent of Regulation 103A of Conduct of Business Regulations considering that any other interpretation of the aforesaid regulations is bad in law, we are inclined to accept the prayer of the Appellant.

31. The above principle has already been settled by the judgment rendered by the Hon'ble Supreme Court in *PTC India Limited V Central Commission & Ors. (2010) 4 SCC 603,* thus, Central Commission is bound by its own Regulations and must take action in conformity of with its Regulations.

32. Considering the above, this issue is decided in favour of the Appellant.

C. EXTENSION OF CUT-OFF DATE -PROJECTED ADDITIONAL CAPITAL EXPENDITURE FOR MAIN PLANT & OFFSITE

33. The Appellant in Appeal No. 25 of 2017 is aggrieved by the decision of the Central Commission for rejecting its request for declaring the occurrence of two severe cyclones namely the Phailin in October 2013 and Hud-Hud in October-2014 as Force Majeure/Uncontrollable events for extension of cut-off date for the generating stations beyond 31.03.2015, although similar natural events were considered by the Central Commission while considering condonation of delay in achieving the Commercial Operation Date (COD) by its order dated 26.09.2012 in Petition No 55 of 2011 and order dated 02.11.2015 in Petition No 303/GT/2014.

34. The Central Commission has disallowed additional capitalisation claims on account of Main plant & Offsite, including roads and residential quarters, for 2015-16 while observing that:

> *"Main Plant & Off- site including Plant Road*
>
> *20. The petitioner has claimed projected additional capital expenditure of Rs3752.88 lakh in 2014-15 under Regulation14 (1)(ii) [Works deferred for execution] and Rs900.00 lakh in 2015-16 underRegulation14(1)(ii) read with Regulation 54 of the 2014 Tariff Regulations towards Main Plant &Offsite including Plant Roads and has submitted that the cut-off date of the generating station is 31.3.2015 and all works are within the original scope of work. In justification of the same, the petitioner vide affidavit dated 14.8.2014 has submitted as under:*
>
> *"It is submitted that the work of Main plant & offsite including plant road was awarded to M/s ERA Infra Engg Ltd.for Rs 136.37 crore on 1.8.2007 with a schedule to complete the work in 43 months. However, the work of approxRs9.0 cr consisting of construction of Roads, drains and culverts, service building and balance structural and civil works of main plant off site area awarded under Main plant and off site civil work package got delayed despite regular follow up/meetings with ERA at various levels. It is submitted that despite various communications to M/s ERA vide letters dated 19.3.2013,6.4.2013, 25.4.2013 and 15.10.2013 to expedite the work, agency could complete only 65% of work by Jan"14. To expedite the work, M/s ERA vide letter dated 14.2.2014 was communicated for Cancellation of contract in part & offloading the work.....works package" and the same was then awarded to other party to avoid any further delay.*
>
> *Work of construction of service building was also awarded under Main Plant Offsite civil work package to M/s ERA. As mentioned above, NTPC Simhadri wrote several letters dated 19.3.2013, 6.4.2013, 25.4.2013 and 15.10.2013 to M/s ERA to expedite the work of service building. But despite regular follow ups M/s ERA could complete only 65% of work and finally on 27.3.2014, NTPC wrote a letter to the Chairman of M/s ERA for „Cancellation of contract in part & offloading the work..... package". As stated above, to avoid any further delay, the work has been awarded to other party and the same is expected to be completed during 2015-16.*
>
> *It is submitted that the balance structural and civil works of main plant off site area has also got delayed and NTPC is in the process of offloading the same to other party due to non- execution by original agency M/s ERA. The same shall be awarded shortly and is expected to be capitalised during 2015-16."*
>
> *……..*
>
> *22. In addition to the information submitted vide affidavit dated 14.8.2014, the petitioner vide affidavit dated 3.9.2015 has submitted that in addition to the reason submitted vide affidavit dated 14.8.2014, very severe cyclonic*

storm PHAILIN in October, 2013 and HUD-HUD in October 2014, affected the generating station and also delayed the overall progress of the balance works. The petitioner has submitted that works like Bunker balance structural/sheeting work, pipeline erection, Railway siding, Main plant office, administrative building, Service building, Plant road & drains, Coal Bhawan, fire-fighting, high rise building roof sheeting, concreting etc. got severely affected by the Cyclonic storms followed by rain. The petitioner has further submitted that despite the best efforts to deal with these natural calamities beyond its control, the balance work could not be completed as per the original completion date and got delayed beyond the cut-off date.

Accordingly, the petitioner has submitted that the delay in completion of balance works may be condoned and the cut-off date for the generating station may be relaxed beyond 31.3.2015 in exercise of Power to Relax under Regulation 54 of the 2014 Tariff Regulations.

23. We have examined the matter. It is observed that the projected additional capital expenditure for Rs3752.88 lakh claimed during 2014-15is in respect of deferred works within the cut-off date of the generating station. As the projected expenditure for the year 2014-15 is for planned works relating to the Main plant as per approved scheme under the original scope of work, the same is allowed to be capitalised in 2014-15 under Regulation 14(1)(ii) of the 2014 Tariff Regulations. The petitioner has also claimed projected additional capital expenditure of Rs900.00 lakh in 2015-16 and has prayed for allowing the same in exercise of the „Power to relax" under Regulation 54 of the 2014 Tariff Regulations. As against the scheduled COD (as per Investment approval) of 1.2.2011 (Unit-I) and 1.8.2011 (Unit-II), the actual COD of Unit-I and Unit-II of the generating station is 16.9.2011 and 30.9.2012 respectively. The time overrun of 7.5 months for Unit-I and 14 months for Unit-II was condoned based on the submissions of the petitioner in orders dated 16.9.2012 in Petition No. 55/2011 and 2.11.2015 in Petition No. 303/GT/2014 respectively. Accordingly, the cut-off date of the generating station is 31.3.2015 in terms of the 2009 Tariff Regulations. It is noticed that the additional capital expenditure allowed was Rs5168.88 lakh from COD of Unit-I (16.9.2011) to 31.3.2012 and Rs5861.24 lakh from 1.4.2012 to 29.9.2012 which included deferred liabilities / balance work under the original scope of work relating to Main plant, Initial spares, MGR system and Ash Handling system etc., Moreover, the projected additional capital expenditure allowed from the actual date of commercial operation of the generating station (Unit-II -30.9.2012) till 31.3.2014 wasRs3071.00 lakh (Rs2071.00 lakh from30.9.2012 to 31.3.2013 and Rs1000.00 lakh in 2013-14) towards Buildings and Rs2357.00 lakh in 2013-14 for Plant off-site works in order dated 26.9.2012 in Petition No.55/2011. However, this claim was revised to Rs2330.00 lakh (Rs103 lakh from 30.9.2012 to 31.3.2013 and Rs1300.00 lakh in 2013-14) towards Buildings and Rs1400.00 lakh (Rs150.00 lakh from 30.9.2012 to 31.3.2013 and Rs1250.00 lakh in 2013-14) which was also allowed by order dated 19.3.2015 in Petition No. 226/GT/2013. Against this projected additional capital expenditure allowed for the period from 30.9.2012 to 31.3.2014, the actual additional capital expenditure of Rs3714.74 lakh (Rs2040.81 lakh from 30.9.2012 to

31.3.2013 and Rs1673.93 in 2013-14) towards Plant off-site works was allowed by Commission's order dated 2.11.2015 in Petition No. 303/GT/2014. In our view, the condonation of delay in declaration of COD has necessarily impacted the cut-off date of the generating station by at least one year. Despite this and the additional capital expenditure being allowed in the previous orders towards plant off site works, these works have been deferred to the year 2015-16. It is noticed that the communications made to the agency M/s ERA by the petitioner through its letters are only after the scheduled date of completion of the said works by the said agency. It cannot be said that the cyclone PHALIN in October, 2013 and HUD-HUD in October, 2014 had impacted the said work since the process of cancellation of the contract due to failure of M/s ERA and awarding the contract to other agency had began only during the period from January, 2014 to March 2014. There has been laxity on the part of the petitioner in coordinating with the contractor/agency for completion of the work prior to the scheduled date of completion of the said work by M/s ERA for which the petitioner is responsible. It is evident from the above that delay in completion of the said work is attributable to the petitioner and the question of cyclone affecting the said work after the same was awarded to another contractor cannot be a ground to condone the delay and extend the cut-off date of the generating station beyond 31.3.2015 by exercise of the „Power to relax" under Regulation 54 of the 2014 Tariff Regulations. No case has been made out by the petitioner for relaxing the cut-off date.
In these circumstances, we reject the prayer of the petitioner for extending the cut-off date of the generating station and the claim for capitalization of the additional capital expenditure of Rs900.00 lakh in 2015-16 is not allowed.

Residential Quarters
24. The petitioner has claimed projected additional capital expenditure of Rs3557.32 lakh in 2014-15 under Regulation 14(1)(ii) (Work deferred for execution) and Rs200.00 lakh in 2015-16 under Regulation 14(1)(ii) with Regulation 54 (i.e. power to relax) for the Work of Residential quarters.

The petitioner has submitted that the construction of various types of residential quarters was awarded to M/s Gangotri Enterprise Limited on 14.10.2010 with a scheduled completion date on13.10.2012. It has also submitted that the work got delayed despite various communications and follows ups and finally, the contract was cancelled on 9.7.2012 to avoid any further delay. The petitioner vide affidavit dated 3.9.2015 has also submitted that in addition to above, severe cyclonic storm PHAILIN in October 2013 and cyclonic storm HUD-HUD in October 2014 followed by heavy rainfall had also delayed the overall progress of the balance works. The petitioner further stated that despite the best efforts to deal with these natural calamities, the balance work could not be completed as per original completion date and thus got delayed beyond the cut-off date.

Accordingly, the petitioner had requested the Commission to condone the delay in the completion of balance works by relaxing cut-off date beyond

31.3.2015 under Regulations54 (Power to relax) of the 2014 Tariff Regulations.

25. We have examined the matter. It is noticed that against the projected additional capital expenditure of Rs1410.00 lakh allowed for 2012-14 in order dated 19.3.2015, the petitioner had claimed actual additional capital expenditure of Rs536.75 lakh during 2012-14 which was allowed vide order dated 2.11.2015 in Petition No. 303/GT/2014. Since the expenditure of Rs3557.32 lakh for residential quarters claimed by the petitioner is as per the approved scheme under original scope of work and is within the cut-off date, the same is allowed in terms of Regulation 14(1)(ii) of the 2014Tariff Regulations. In respect of the projected additional capital expenditure of Rs200.00 lakh claimed beyond the cut-off date of the generating station, the petitioner has prayed for condonation of the delay in completion of the balance works by relaxing the cut-off date beyond 31.3.2015 under Regulations 54 (Power to Relax) of the 2014 Tariff Regulations. As per the Order in Petition No. 294/GT/2014 Page 14 of 50 schedule, the work should have been completed by 13.10.2012 and the contract had been cancelled only on 9.7.2012 by the petitioner. In our view, the condonation of delay in declaration of COD has necessarily impacted the cut-off date of the generating station by at least one year. There has been laxity on the part of the petitioner in coordinating with the contractor/agency for completion of the work prior to the scheduled date of completion of the said work for which the petitioner is responsible. It is evident from the above that delay in completion of the said work is attributable to the petitioner and the question of cyclone affecting the said work after the same was awarded to another contractor cannot be a ground to condone the delay and extend the cut-off date of the generating station beyond 31.3.2015 by exercise of the "Power to relax" under Regulation 54 of the 2014 Tariff Regulations. No case has been made out by the petitioner for relaxing the cut-off date. In these circumstances, we reject the prayer of the petitioner for extending the cut-off date of the generating station and the claim for capitalization of the additional capital expenditure of Rs200.00 lakh in 2015-16 is not allowed."

35. Being aggrieved by the above decision, the Appellant filed a Review petition no 50/RP/2016 which was dismissed by the Central Commission vide its order dated 01.05.2017, the relevant extract of the review order is provided below:

"7. The petitioner has submitted that while the Commission had condoned the delay in achieving COD on account of heavy rainfall and cyclones during the year 2010, the relief was denied to the petitioner in the order dated 29.7.2016 when such cyclones had occurred during the years 2013 and 2014 after the COD but prior to the cut-off date. It has also submitted that there was no laxity on part of the petitioner in coordination with its contractors to get the work completed within the scheduled completion period and the Commission has erred in ignoring the various letters placed on record by the petitioner wherein

it had repeatedly request to its contractors to expedite the work at site. This submission of the petitioner is not acceptable.

The extension of cut-off date as considered in order dated 26.9.2012 was based on the facts and circumstances stated by the petitioner therein and cannot be a ground for granting relief in the instant petition. In fact, the Commission in this order dated 29.7.2016 had considered the impact of cyclone Phalin in October 2013 and cyclone Hudhud in October 2014 and had observed that these natural calamities cannot be said to have impacted the work since the process of cancellation of the contract due to failure of the contract M/s ERA and awarding the contract to other agency had begun only during the period from January 2014 to March 2014.

The Commission had also examined the various correspondences between the petitioner and the contractor including the letters referred to by the petitioner and had observed that there has been laxity on the part of the petitioner in coordinating with the contractors/ agency for completion of the said works by M/s ERA for which the petitioner was responsible. Hence the contention of the petitioner that the Commission had not considered the letters between the parties for grant of relief is baseless and arbitrary. Accordingly, the Commission after considering the submissions of the petitioner had by a conscious decision rejected the prayer of the petitioner for extending the cut-off date of the generating station and thereby the claim for capitalization of Rs900.00 lakh in 2015-16 was also not allowed. In these circumstances, we find no reason to review the order dated 29.7.2016 on this ground. The petitioner has sought to reargue the case on merits and the same is not permissible in review. In our considered view, no valid ground exists for review of order dated 29.7.2016 and hence the review sought for by the petitioner on this ground fails."

36. Vide the Impugned Order-25 dated 29.07.2016 passed in Petition No. 294/GT/2014, the Central Commission has denied the extension of cut-off date beyond 31.03.2015 as they had already condoned the delay in achieving COD, due to occurrence of cyclone in 2010, which provided additional one year to Appellant for completing the works beyond originally envisaged cut-off date. Also, the Central Commission has observed that the Appellant did not take-up the delay in execution process of works with contractor and the closure of contract was taken up in Jan-14 to March-14.

37. The Respondent No.7, TANGEDCO in its submission on the issue of cut-off date extension has taken reference to observations of Central

commission in the impugned order 29.07.2016 and the review order dated 01.05.2017 on this issue and has stated that Central Commission has correctly decided the issue against the Appellant, further, submitted that in terms of Regulation 3(11) of the CERC (Terms and Conditions of Tariff) Regulations, 2009 (herein the "Tariff Regulations, 2009"), the cut-off date of the project is 31.03.2014, considering the Scheduled COD as 01.08.2011, however, due to condonation of the delay by the Central Commission in its order dated 16.09.2012 in Petition No. 55/2011 and in order dated 02.11.2015 in Petition No. 303/GT/2014, the cut-off date of the project is determined as 31.03.2015, still the Appellant has deferred the plant off-site works amounting to Rs. 900 lakhs towards the construction of roads, drains and culverts to the year 2015-16.

38. TANGEDCO further contended that the principle of Constructive Res judicata is applicable in this case as this issue was disallowed by the Commission after hearing the Review Petition No. 50/RP/2016 and that the Appellant is seeking to reopen the issues already decided through detailed orders.

39. The Appellant in its defence has placed before us the copies of various letters / documents including letters dated 19.3.2013, 06.4.2013, 25.4.2013 and 15.10.2013 for taking up the issue with contractor for delay in execution of project and directing the contractor to expedite the work, finally vide letter dated 14.2.2014 communicated the initiation of process for cancellation of contract. In the process of closing of contract and re-awarding the work, the delay has occurred beyond original cut-off date of 31.03.2015, further, submitted that one of the cyclones occurred before cancellation of project and the second occurred after the cancellation of the project.

40. The Regulation 13 and Regulation 14(1) of the Tariff Regulations, 2014 notified by the Central Commission, applicable for the period under consideration provide as under:

> *"(13) "Cut-off Date" means 31st March of the year closing after two years of the year of commercial operation of whole or part of the project, and in case the whole or part of the project is declared under commercial operation in the last quarter of a year, the cutoff date shall be 31st March of the year closing after three years of the year of commercial operation:*
>
> *Provided that the cut-off date may be extended by the Commission if it is proved on the basis of documentary evidence that the capitalisation could not be made within the cut-off date for reasons beyond the control of the project developer;"*
>
> ***"**14. Additional Capitalisation and De-capitalisation:*
> *(1) The capital expenditure in respect of the new project or an existing project incurred or projected to be incurred, on the following counts within the original scope of work, after the date of commercial operation and up to the cut-off date may be admitted by the Commission, subject to prudence check:*
> *(i) Undischarged liabilities recognized to be payable at a future date;*
> *(ii) Works deferred for execution;*
> *(iii) Procurement of initial capital spares within the original scope of work, in accordance with the provisions of Regulation 13;*
> *(iv) Liabilities to meet award of arbitration or for compliance of the order or decree of a court of law; and*
> ***……..."***

41. Further, the Regulation 54 of Tariff Regulations, 2014 provides "Power to Relax" to the Central Commission, reproduced as under;

> ***"**54. Power to Relax. The Commission, for reasons to be recorded in writing, may relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person."*

42. Certainly, the Central Commission is vested with the Regulatory Powers by virtue of Regulation 54 as quoted above, therefore, the Central Commission can extend the cut-off date, if satisfied after examination of the documentary evidence that the capitalisation could not be made within cut-off date for reasons beyond the control of Appellant, we opine that in the instant case, the

said provision should have been invoked as the reasons put forth by the Appellant are beyond its control.

43. The reasons as given by the Central Commission that if once delay in achievement of COD was condoned, there is no scope for further relaxation in cut-off date, even if such an event reoccurred, therefore, in our view the works beyond cut-off date should be looked afresh based on the evidences placed before it for not completing the works in time, *inter-alia* considering that Central Commission while condoning the delay in COD has agreed with the hardship faced in completion of work in case of plant is frequently affected with cyclone and heavy rainfall.

44. Accordingly, in the light of above, we direct the Central Commission to relook at the delay in completing the works beyond cut-off date based on documentary evidence provided by Appellant, thus, the matter is remitted back to the Central Commission to this extent for re-examination and passing the order(s) afresh.

D. DISALLOWANCE OF PROJECTED ADDITIONAL CAPITAL EXPENDITURE WORK TOWARDS CONSTRUCTION OF RAILWAY SIDING FOR THE FY 2015-16

45. The Appellant in Appeal No. 25 of 2017, submitted that railway siding is constructed for the transportation of Fly Ash to the cement manufacturing industries from Simhadri-II in compliance to the MOEFCC Notification dated 03.11.2009 mandating utilization of 100% Fly Ash, accordingly, it had claimed projected additional capital expenditure of Rs. 2431.99 Lacs for FY 2014-15 on account of work deferred for execution under Regulation 14(1)(ii) (as quoted in the foregoing paragraphs) and Rs. 733.51 Lacs in FY 2015-16 for “Balance Work” of Signalling and Telecom system associated with the Railway line taken

up during the year 2015-16 under Regulation 14(3) (ii) &(iv) after completion of the Rail Line work.

46. In the first instance, the Central Commission has disallowed the said work vide the Impugned Order-25, however, against the review petition allowed the capitalisation during FY 2014-15 considering the submissions of the Appellant however, for the FY 2015-16, it has not considered the prayer in the review petition, the relevant extract of the order is quoted as under:

> *"Railway Siding*
>
> *30. The petitioner has claimed projected additional capital expenditure of Rs2431.99 lakh in 2014-15 under Regulation14 (1)(ii) and Rs733.51 lakh in 2015-16 under Regulation14(3)(iii) and 14(3)(iv) for work towards railway siding. In justification of the same, the petitioner has submitted that the work of railway sliding is essential in view of notification dated 3.11.2009 of the Ministry of Environment & Forests, GOI as regards Ash utilization. It has also submitted that site has envisaged bulk transportation of dry ash through Railway rakes to the nearby Cement Industries and this package is being executed through RITES and is a planned work only to be taken up after completion of the dry ash evacuation system and front clearance given by the agency. The petitioner has stated that the balance work of Signalling and Telecom system associated with the Railway line will be taken up during the year 2015-16 after completion of the Rail Line work.*
>
> *31. The matter has been examined. It is also observed that the said notification provides that all coal/lignite based thermal stations would be free to sell the fly ash to user agencies subject to certain conditions as mentioned therein. Moreover, the amount collected from sale of fly ash or fly ash based products by coal and/or lignite based thermal power stations or their subsidiary or sister concern unit, as applicable should be kept in a separate account head and shall be utilized only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash until 100% fly ash utilization level is achieved. Since the said notification provides that the money collected from the sale of fly ash or fly ash based products should be utilized for development of infrastructure for use of fly ash, the petitioner is not prevented from utilizing the money for the work of railways siding. Moreover, the income generated from sale of fly ash is not passed on to the beneficiaries. Hence, we are of the view that it would not be prudent to load the said expenditure on railway siding as additional capital expenditure, when such expenditure is neither covered under change in law nor the income from fly ash utilization is shared with the beneficiaries. Based on the above, the projected additional capital expenditure is not allowed."*

47. The relevant observation in the review order dated 01.05.2017 is as follows:

> *"13. It is evident from the above that the Commission had disallowed the additional capital expenditure of Rs2431.99 lakh in 2014-15 and Rs733.51 lakh in 2015-16 towards Railway siding mainly on the ground that the notification of the MoEF dated 3.11.2009 provides for 100% ash utilization and that the money collected from the sale of fly ash or fly ash based products should be utilized for the development of infrastructure for use of fly ash. It also observed that the income generated from the sale of fly ash was not being passed on to the beneficiaries and that the petitioner is not prevented from utilizing the money for the work of Railway siding.*
>
> *The petitioner has submitted that the denial of expenditure of Rs2431.99 lakh in 2014-15 is contrary to the earlier orders as the expenditure on railway siding forms part of the original scope of work and has been deferred for work of execution. It is however noticed from the submissions of the petitioner and the earlier orders of the Commission dated 26.9.2012 in Petition No. 55/2011 and 2.11.2015 in Petition No. 303/GT/2014 that the expenditure towards railway siding had been allowed to the petitioner as it is within the original scope of work of the generating station and within the original cut-off date of 31.3.2015. This aspect was overlooked by the Commission while passing order dated 29.7.2016 wherein the said expenditure was disallowed. This in our view is an error apparent on the face of the order and the same is required to be reviewed. Accordingly, we are inclined to allow the additional capital expenditure of Rs2431.99 lakh in 2014-15 towards railway siding which form part of the original scope of work of the project. Hence review of order dated 29.7.2016 is allowed on this ground.*
>
> *As regards the expenditure of Rs733.51 lakh in 2015-16, it is noticed that the same is for the work of transportation of dry ash through railway rakes to nearby cement industries and hence the money collected from the sale of fly ash and fly ash based products should be utilized by the petitioner towards fulfilling the obligations of 100% ash utilization as per MoEF notification dated 3.11.2009. Accordingly we find no reason to review the order dated 29.7.2016 and allow the additional capital expenditure of Rs733.51 lakh in 2015-16. There exists no sufficient reasons to review the order dated 29.7.2016 on this ground and accordingly the submissions of the petitioner are rejected. As stated above the expenditure of Rs2431.99 lakh is allowed to be capitalized in 2014-15".*

48. TANGEDCO has submitted that MOEF notification dated 03.11.2009 provides that amount collected from sale of fly ash based products by coal / or lignite based thermal power stations or their subsidiary or sister concern unit, as applicable should be kept in a separate account head and shall be utilised

only for development of infrastructure or facilities, promotion and facilitation activities for use of fly ash unit 100% fly ash utilization is achieved. Therefore, the Appellant should utilise the money earned from sale of fly ash for development of infrastructure for transportation of fly ash through railway rakes. TANGEDCO further submits that said expenditure is neither covered under change in law nor the income from fly ash utilisation is shared with the beneficiaries. Therefore, the claim of the Appellant is not reasonable and is liable to be rejected.

49. However, it is seen from the submissions made by the Appellant that the work of railway siding was claimed under original scope of works in 2014-15 and under change in law in 2015-16 in view of MoEF guidelines regarding 100% utilization of ash, on the contrary we find that the Central Commission overlooked the aspect of work being part of original scope of works and disallowed the full amount vide the Impugned Order and directed to fund the above infrastructure from sale of fly ash.

50. Subsequently, during the proceedings in the review petition, the Central Commission re-examined the issue and considering that the work was covered under the original scope of work, allowed the expenditure for the FY 2014-15 but maintained its stance intact for disallowance in 2015-16 and re-iterated to fund the said amount from sale of fly ash.

51. It cannot be denied that the balance work of Signalling and Telecom system associated with the Railway line during the year 2015-16 after completion of the Rail Line work is part of the main work and is the necessity for operationalisation the main work, therefore, it is part of the original scope of work which was taken-up for meeting the requirement of 100% ash utilisation.

52. Once, in the review order, the Central Commission has taken the conscious decision to allow the work during 2014-15 as it was part of original scope of works, the remaining work of signalling in 2015-16 after railway line work also required consideration to make the facility as functional, however, the Central Commission by allowing the balance work but with the condition that it should be funded from sale of ash, which is the dispute herein.

53. We do not find strength in the decision of the Central Commission, once the original scope works planned for 2014-15 has been allowed, then, its balance work cannot be funded differently, the decision is not harmonious in nature and unreasonable, hence, the complete work should be allowed under the same principle of funding.

54. In view of above, we allow the issue in favour of Appellant.

E. DISALLOWANCE OF PROJECTED ADDITIONAL CAPITAL EXPENDITURE ON ACCOUNT OF DEFERRED WORKS

55. The Appellant in Appeal No. 178 of 2017 has submitted that Central Commission has rejected the Appellant's claim of additional capitalization of original scope works carried beyond cut-off date in 2015-16 by stating that the Appellant has not submitted any reasons / justifications for the delay in completion of the said works and the steps taken by the Appellant to mitigate the delay in the execution of work, further added that the Central Commission has not considered the reasons submitted by the Appellant *vide* its Additional Affidavit dated 07.01.2016.

56. The relevant extract of the order passed by the Central Commission is reproduced as under:

"Deferred Works after the cut-off date

24. The petitioner has claimed total projected additional capital expenditure of Rs 3603.79 lakh in 2015-16 in respect of works indicated SI. No. 31 to 40 and S.No.43 to 48 in the table under para 19 towards Township and colony, Main plant civil works, Offsite civil works, Stores and electrification, Chimney, Condensate polishing unit, Control & Instrumentation, Water pre-treatment system package, CW system, DM plant, Drainage and piping, Air conditioning and ventilation. The petitioner has submitted that these works are within the original scope of work but have got delayed.

Accordingly, the petitioner has claimed the capitalization of these works and has prayed that the same may be allowed under Regulation 14(1) in exercise of Power to relax under Regulation 54 of the 2014 Tariff Regulations.

25. The respondent, GRIDCO has submitted that the Commission may not consider the prayer of petitioner to exercise the 'Power to Relax' as the same can be invoked only for technical and procedural considerations and not for commercial and financial considerations.

26. We have considered the submission of the parties. It is noticed that these works which were approved by order dated 24.8.2016 have been deferred for execution after the cut-off date of the generating station. The petitioner had sufficient time period of three years from the COD of the generating station till the cut-off date (31.3.2015) for execution of these works. It is however noticed that the petitioner has also not submitted any reasons/justifications for the delay in completion of the said works and the steps taken by the petitioner to mitigate the delay in the execution. Accordingly, in our view there is no reason for us to consider the claim of the petitioner in exercise of the power to relax and allow the capitalization. Hence, the claim of the petitioner for capitalization of the said works in 2015-16 is not allowed."

57. The Appellant has claimed that some of the works deferred for execution beyond cut-off date of 31.03.2015, however, these works were also part of the original scope and prayed the Central Commission for invoking power to relax under Regulation 54 of Tariff Regulations, 2014 as quoted in the preceding paragraphs.

58. As seen from the order, the Central Commission rejected the claim as the Appellant has also not submitted any reasons/justifications for the delay in completion of the said works and the steps taken to mitigate the delay in the execution, further, stating that there is, as such, no reason for invoking power

to relax, on the contrary, the Appellant has submitted that it had provided justification/documentation for claiming these works vide affidavit dated 07.01.2016, which was not considered.

59. The Respondent No. 5, GRIDCO also submitted that Appellant has not been able to justify cause of delay for seeking extension beyond cut-off date, therefore, there is no justification for invocation of relaxation of power under Regulation 54 of CERC Tariff Regulations, 2014 for allowing the additional capitalisation since the delay in execution of the work within the cut-off date was solely attributable to NTPC.

60. On the contrary, the Appellant submitted that the reason for delay in execution of works is on account of abandoning of works by one of the contractor: M/S B.P. Constructions and thus, the balance works were offloaded to the other Contractor, which took some time, the justification as provided for delay in execution of the works in 2015-16, even, if otherwise, some more documents were required, the Central Commission could have sought the additional documentation.

61. We find the submissions of the Respondent No. 5 as unreasonable in the light of the above submissions of the Appellant.

62. From the above, it is noticed that the Central Commission has negated the justification provided without going into the details of it, therefore, we opine that the Central Commission ought to have considered the information/ documents provided by the Appellant or directed the Appellant to provide additional documents, if required.

63. We find it just and reasonable to direct the Central Commission to relook afresh on the basis of the justification provided by the Appellant, seeking

additional documentation, if required for the sake of justice and issue necessary order(s), the matter is remitted back to the Central Commission accordingly.

F. PROPORTIONATE ADDITIONAL EXPENDITURE UNDER BY SPECIAL ALLOWANCE FOR FARAKKA STAGE I & II-CONSTRUCTION OF BRIDGE OVER GANGA-FEEDER CANAL

64. The Appellant in 178 of 2017, has contested that the Central Commission has incorrectly considered the proportionate additional capitalisation of Farakka Barrage from special allowance of Farakka Stage-I&II, the relevant extract of the Impugned Order is quoted as under:

> *"Enabling works (Construction of two Lane Bridge on Ganga Feeder Canal)*
> *30. The petitioner has claimed total projected additional capital expenditure of Rs 5700.00 lakh in 2016-17 towards the Construction of two lane bridge on Ganga Feeder Canal under Regulation 14(1) in exercise of Power to relax under Regulation 54 of the 2014 Tariff Regulations. In justification of the same, the petitioner has submitted that at present only one old (40 years old) narrow public bridge (single lane) exists across the Farakka Feeder Canal owned by Farraka Barrage Projects Authority (FBPA), which connects the Farakka Station and Farakka Township/ NH-34.The petitioner has further submitted that since the existing bridge is very narrow the traffic movement is only in one direction at any instant and the traffic from the opposite direction waits on other side resulting in vehicular queue. It has also submitted that the problem has been aggravated due to increased vehicular movement with time and increase in station capacity and over 600 or more loaded vehicles and private vehicles cross the bridge daily including ash trucks and containers that supply materials for day to day working of generating station. It has further submitted that in the event of breakdown of the bridge, the entire traffic along with the vehicles carrying the material for plant's operation comes to a halt. Accordingly, the petitioner has submitted that in view of these difficulties and increased movement of ash trucks due to increased dry ash evacuation, containers etc. the expenditure towards the bridge across Feeder Canal may be allowed.*
> *……..*
>
> *34. We have considered the matter. It is observed that the construction of the two-lane Bridge over Ganga Feeder Canal is necessary for smooth movement of traffic as well as for the heavy trucks for works related to this generating station. It is also observed that the two-lane Bridge is common to Stages I, II and III of this generating station and accordingly serves all of the stages of this generating station. Considering the fact that the two lane bridge is common to all the stages and is an approach bridge for employees/operating staff/agencies/person from township/, and would contribute to the efficient*

operation of the generation station, we are inclined to allow the additional capital expenditure of Rs 5700.00 lakh claimed by the petitioner. It is noticed that the provision of Regulation 14(1) or 14(3) do not provide for capitalization of additional capital expenditure which have become necessary for successful and efficient plant operation. Since the expenditure of the two-lane Bridge over Ganga Feeder Canal is necessary for smooth operation of the generating station as narrated above, we in exercise of the power under Regulation 54 of the 2014 Tariff Regulation, relax the provision of Regulation 14(3)(viii) and allow the additional capital expenditure incurred in respect of this generation stations. However, out of the total expenditure of Rs 5700.00 lakh claimed, only the proportionate cost of Rs 1357.00 lakh has been allowed in respect of this generating station after apportioning the cost between Stage- I&II and Stage III of Farakka generating station. The remaining cost of Rs 4343.00 lakh shall be considered from special allowance of Stage I and II."

65. The Appellant has made a detailed submission regarding the usability of the bridge in submission dtd 07.01.2016, which has been recorded in the impugned order, the same is reproduced for the sake of interest of all parties effected:

"33. In response to the directions of the Commission vide Record of proceedings of the hearing dated 17.11.2015, the petitioner vide affidavit dated 7.1.2016 has submitted detailed justification for the same claim as under:

"Para 5(a)(i): It is submitted that at present there exists only one very old (about 40 years old) single lane bridge across the Farakka Feeder Canal owned and maintained by Farakka Barrage Authority (FBA). This existing bridge connects the Farakka Station and Farakka Township / NH-34 thereby acting as a life line to the Farakka Station. NTPC personnel, all staff and contract labourers use this bridge to reach the station. Further, as the existing bridge is very narrow (single lane), at any particular time the traffic movement is only in one direction and meanwhile traffic from the opposite direction waits on the other side of the bridge resulting in long vehicular queue. Once the traffic clears in one direction, the vehicle movement starts from the opposite direction and vice versa. The problem has further aggravated due to the increased vehicular movement with time and increase in Station capacity. Further, many loaded vehicles and trucks cross (in both directions) the bridge daily including ash trucks and containers that supply materials for day to day working of plant. If there is a breakdown of one vehicle (four or more wheeler) on the bridge, the traffic comes to the halt. There have been instances, in such cases when NTPC personnel/ contract staff has to park the vehicles on the far end of the bridge and walk over the bridge on foot to reach the Station for its operation/ maintenance requirements. The materials required for smooth running of the Station on daily basis has to wait for the bridge to be cleared off for vehicular movement or travel more distance (approx 30-35 kms via Dhuliyan-Pakur) to reach the Station. The single lane existing bridge was constructed during the same period when the Farakka Barrage was commissioned in the year 1975 i.e. the existing bridge is about 40 years old and is presently in a very

precarious and unsafe condition due to extensive usage/ plying of heavy vehicles over the years. The same being very old also requires lot of repair work for its survival on day to day basis. In such cases the movement of the traffic on the bridge is stopped which leads to traffic jams/ congestion. Due to the poor condition the movement of heavy vehicles on to the bridge is also restricted. In this regard, a snapshot of this existing narrow bridge is attached at Annexure-A. The image also shows a Caution Board at the entry of the bridge reading "BRIDGE IS IN DANGER, HEAVY VEHICLES ARE NOT ALLOWED"

As the movement of material and operating staff (including contract persons) for the Station is from this existing single lane bridge, it is humbly submitted that due to above mentioned difficulties, it became necessary for NTPC to construct a separate new Bridge. In short, this bridge (the new one under construction) will act as a life line for Farakka Station.

Para 5(a)(ii) : It is humbly submitted that the requirement of two lane bridge i.e. one lane for onward and second lane for return traffic, has arisen due to regular problem of traffic jam/ congestion being faced as elaborated in Para-1 due to all round increase in vehicular traffic in the locality including 2 and 4 wheelers compared to time when Farakka Stage-I was constructed. Further with increased plant capacity and dry ash utilization from plant, the movement of ash trucks/containers has also increased causing further traffic congestion. It is further submitted that since the new bridge was required to be constructed from safety point of view also due to the poor condition of existing bridge, the day to day difficulties already being faced were also planned to be mitigated by construction of this new two lane bridge. The execution cost (excluding material cost) of construction of 2 lane bridge/1 lane bridge may not vary much and may be comparable and hence would be always prudent to go for 2 Lane Bridge looking at the current and future requirements.

Therefore, keeping in view of the movement of ash trucks / containers and other vehicles, dilapidated condition of the existing bridge which is susceptible to accident, submissions made at Para (1) above and difficulties faced by NTPC, it became necessary to construct a separate two lane bridge over feeder canal connecting Farakka Station to NTPC Farakka Township/ NH-34 for smooth operation of Station and for safety of Men and Materials. In this regard few letters/ correspondence showing the precarious condition of the bridge is attached at Annexure-B.

Para 5(a)(iii) : It is submitted that NTPC had earlier taken up construction of bridge (at location RD 16.5) on Feeder Canal in 1981 (at the time of Farakka Stage-I implementation) to meet the traffic requirement over Feeder Canal between Farakka Station and NTPC Township/ NH-34. The contract of bridge was awarded to Farakka Barrage Authority (FBA). However, the bridge could not be completed due to arbitration issues by the sub-agency of FBA. Later work was awarded to NPCC, however, NPCC also couldn't execute the work. Subsequently, NTPC took over and issued tenders for undertaking the balance work in 2005 and 2007 but due to non-response of the parties the work could not be awarded. In above circumstances, NTPC approached RITES in 2007

to undertake the completion of balance work of bridge (RD 16.5). Since the existing unfinished structure of the unfinished bridge were old, RITES proposed to first study the viability of the existing structure and thereafter undertake the construction if the structure were proved to be viable. This proposed study was to be carried out in Two Phases with a total duration of 14 months. On 13.10.2009, M/s RITES submitted a report on the study recommending that the structure foundation were grossly inadequate for stability and safety point of view under the present and future loading especially in seismic conditions. Keeping the future increase in functional demands also, high investment would be required towards rehabilitation and strengthening of present structure with less residual life of retained portion and maintenance cost would be more. Considering the safety which is of paramount importance and costs involved, it was recommended by RITES to construct a new bridge instead of completing the balance works of unfinished bridge.

Based on the outcome of the study as brought out by M/s RITES in its reports in October 2009, regular traffic congestion/ jams on the existing single lane bridge, dilapidated condition of the existing bridge and keeping in view the safety of persons/ material, decision was taken to construct this new bridge. Accordingly, permission was sought from Farakka Barrage Authority for construction of New Two Lane Bridge over feeder canal on 09.08.2010.

Further, it is humbly submitted that the work of construction of two lane bridge has been included in the original scope of works under Revised Cost Estimates (RCE) duly approved for Farakka Stage-III. Extracts of RCE is attached at Annexure-C.

Para 5(a)(iv) : It is clarified that the Two Lane Bridge over the Feeder Canal under construction is common for all the stages of Farakka Station. It is further submitted that it is only the approach bridge for the employees/ operating staff including the contract/ agency persons from Field Hostel Complex/ Township (TTS)/ NH-34 side to reach the Farakka Station. Thus this bridge acts as life line to the power station therefore, it may not be considered under CSR. This new bridge connecting the township/ NH-34 and station will also be used by general public living in and around the plant area similar to the existing single lane bridge. Similarly, this new bridge shall be used for all Stages and for local public also.

Although the New Bridge is commonly serving both Stages of Farakka Station i.e. Farakka Stage-I&II and Farakka Stage-III, however, the capital cost has been considered in the instant station as it was included in the original scope of works of Farakka Stage-III. The cost may be apportioned to both the stages of Farakka Station by the petitioner if Hon'ble Commission so directs."

66. From the observations of Central Commission in the impugned order, it is seen that the Central Commission is fully satisfied with the usability of bridge for smooth vehicular traffic movement and smooth functioning of Farakka

station, based on which the Central Commission has invoked its power under Regulation 54 to relax provisions for allowing additional capitalisation under Regulation 14 for allowing the additional capital expenditure for Farakka –III and on the same time denied it in Farakka-I&II allowing it under special allowance.

67. The Appellant has argued that the Additional Capital Expenditure incurred by it falls under Regulation 14 and thus cannot be directed to be met under Special Allowance i.e. Regulation 16 of Tariff Regulations, 2014, it is therefore, important to refer the relevant Regulations of Tariff Regulations, 2014, as under:

> *"14. Additional Capitalisation and De-capitalisation:*
> *(1) The capital expenditure in respect of the new project or an existing project incurred or projected to be incurred, on the following counts within the original scope of work, after the date of commercial operation and up to the cut-off date may be admitted by the Commission, subject to prudence check:*
> *(i) Undischarged liabilities recognized to be payable at a future date;*
> *(ii) Works deferred for execution;*
> *(iii) Procurement of initial capital spares within the original scope of work, in accordance with the provisions of Regulation 13;*
> *(iv) Liabilities to meet award of arbitration or for compliance of the order or decree of a court of law; and*
> *(v) Change in law or compliance of any existing law:*
> *Provided that the details of works asset wise/work wise included in the original scope of work along with estimates of expenditure, liabilities recognized to be payable at a future date and the works deferred for execution shall be submitted along with the application for determination of tariff.*
> *.....*
> *(3) The capital expenditure, in respect of existing generating station or the transmission system including communication system, incurred or projected to be incurred on the following counts after the cut-off date, may be admitted by the Commission, subject to prudence check:*
> *...*
> *(viii) In case of hydro generating stations, any expenditure which has become necessary on account of damage caused by natural calamities (but not due to flooding of power house attributable to the negligence of the generating company) and due to geological reasons after adjusting the proceeds from any insurance scheme, and expenditure incurred due to any additional work which has become necessary for successful and efficient plant operation;*
> *.....*
> *Provided also that if any expenditure has been claimed under Renovation and Modernisation (R&M), repairs and maintenance under O&M expenses and*

Compensation Allowance, same expenditure cannot be claimed under this regulation...."

"15. Renovation and Modernisation:

The generating company or the transmission licensee, as the case may be, for meeting the expenditure on renovation and modernization (R&M) for the purpose of extension of life beyond the originally recognised useful life for the purpose of tariff of the generating station or a unit thereof or the transmission system or an element thereof, shall make an application before the Commission for approval of the proposal with a Detailed Project Report giving complete scope, justification, cost-benefit analysis, estimated life extension from a reference date, financial package, phasing of expenditure, schedule of completion, reference price level, estimated completion cost including foreign exchange component, if any, and any other information considered to be relevant by the generating company or the transmission licensee.

……..

(4) Any expenditure incurred or projected to be incurred and admitted by the Commission after prudence check based on the estimates of renovation and modernization expenditure and life extension, and after deducting the accumulated depreciation already recovered from the original project cost, shall form the basis for determination of tariff."

"16. Special Allowance for Coal-based/Lignite fired Thermal Generating station:

In case of coal-based/lignite fired thermal generating station, the generating company, instead of availing R&M may opt to avail a „special allowance" in accordance with the norms specified in this regulation, as compensation for meeting the requirement of expenses including renovation and modernisation beyond the useful life of the generating station or a unit thereof, and in such an event, revision of the capital cost shall not be allowed and the applicable operational norms shall not be relaxed but the special allowance shall be included in the annual fixed cost.

……

(3) In the event of granting special allowance by the Commission, the expenditure incurred or utilized from special allowance shall be maintained separately by the generating station and details of same shall be made available to the Commission as and when directed to furnish details of such expenditure."

68. The Appellant has submitted that the Central Commission while exercising Power to Relax under Regulation 54 of the Tariff Regulations, 2014 has relaxed Regulation 14(3)(viii) of Tariff Regulations, 2014 and allowed proportionate cost of Rs. 1357 Lakhs in Farakka -III, however, disallowed the cost of Rs. 4343 Lakhs, claimed by the Appellant under Additional Capital

Expenditure as per Regulation 14 (1) towards construction of two lane bridge on Ganga Feeder Canal, further arguing that while disallowing the cost of Rs. 4343 Lakhs, the Central Commission directed the Appellant to recover the said cost of Rs. 4343 Lakhs from the Special Allowance granted to Farakka STPS for its Stage I and II.

69. The Appellant further submitted that the Special allowance under Regulation 16 of the Tariff Regulations, 2014 provides for Special Allowance, which is a compensation to a thermal generating station for renovation and modernization beyond its useful life, whereas, the work of construction of two lane bridge over Ganga Feeder Canal was never envisaged under renovation and modernization, it was the compelling reasons that the Appellant has to undertake construction of two lane bridge over Ganga Feeder Canal on account of the precarious condition of the bridge, which fact is also admitted and acknowledged by the Central Commission.

70. The Appellant is agreeable to apportion the total cost of construction i.e. Rs. 5700 Lakhs to both the stages of the project (Stage I& II and Stage III), in case the Central Commission allowed the cost by exercising its power to relax (Regulation 54), as it was necessary for the successful and efficient operation of the plant, however, the Central Commission, while admitting the proportionate cost of Rs. 1357 lakhs apportioned to Stage III, remarked that the remaining cost of Rs. 4343 lakhs shall be realized from the special allowance of Stage I & II.

71. It is seen that the Central Commission has misconstrued the application of Regulation 16 vis-à-vis additional capital expenditure (allowable under Regulation 14), for creation of a separate infrastructure for which the Appellant has evidently incurred an amount of Rs. 5700 Lakhs, additionally the Central

Commission has deviated from the established norm of mandatory capitalization of borrowed funds by providing for a recovery of apportioned cost of Rs. 4343 lakhs, through the special allowance.

72. It cannot be disputed that the Special allowance is a pre-emptive right of the Appellant to be obligatorily allowed for any of its generating unit which has been under commercial operation for over 25 years, whereas Regulation 14 is a provision for seeking expenditure which may be incurred by any 'existing generating station' during the course of its operation, therefore, any co-relation sought to be established by the Central Commission between Regulation 16 and Regulation 14 to deny legitimate expenditure to the Appellant is unjust and unreasonable.

73. On the contrary, the arguments of Respondents were relied upon the Judgement dated 12.05.2015 passed by this Tribunal in Appeal No. 129 of 2012, wherein similar issues were adjudicated, we note here that the said Judgment does not apply to the merits and the facts of the case as in the said Appeal, the Appellant had challenged various Orders passed by the Central Commission disallowing the Additional Capital Expenditure incurred by the Appellant on the premise that the Appellant was availing Special Allowance as per the Regulation 10(4) of the Tariff Regulations, 2009.

74. We find merit in the submissions of the Appellant and directs the Central Commission to re-examine the case and pass fresh order(s) after duly considering the provisions and intent of Regulation 14 and Regulation 16.

G. ADDITIONAL CAPITAL EXPENDITURE IN KORBA-III TOWARDS SIMULATOR PACKAGE UNDER THE HEAD OF O&M EXPENSES

75. The Appellant in Appeal No. 180 of 2017 has challenged the decision of approval of the expenditure for the Simulator Package under corporate expenses allocated to the O&M norms of various other generating stations on the ground that the expenditure to the tune of Rs. 920 Lakhs was part of the original scope of work Korba-III and any disallowance of capitalization of the said expenditure would be contrary to the principles of the Electricity Act, 2003.

76. The Appellant has further submitted that Central Commission has already allowed such expenses under capital cost, vide orders dated 06.12.2016 in Petition No. 295/GT/2014 and 15.03.2017 in Petition No. 344/GT/2014 respectively in case of Sipat-I and Sipat-II, as per the accounting principle, the expenses against this work cannot be booked under O&M expenses, rather the same has to be capitalized in the books of accounts.

77. The relevant observations of the Central Commission are as below:

> *"42. The petitioner has projected additional capital expenditure of ₹920.00 lakh in 2016-17 for Simulator package on cash basis under Regulation 14(1)(ii) and Regulation 54 of the 2014 Tariff Regulations. In justification, the petitioner has submitted that initially, the provision of Simulator package was not there in FR. However, in view of installation of technologically advanced unit of 500 MW in Korba, the simulator training facility for O&M employees was felt necessary for successful operation of the plant ensuring supply of power to beneficiaries on sustainable basis and hence the same has been incorporated in the revised cost estimate of Korba STPS Stage-III. The petitioner has further submitted that the work is expected to be completed in 2016-17*
>
> *43. The Respondent No.1 MPPMCL in its reply dated 1.7.2016 has submitted that the COD of the KSTPS Stage III is 21.03.2011 and accordingly the cut-off date for the plant is 31.03.2014. Thus, the expenditure incurred during 2016-17 on Simulator Package does not comes under the purview of Regulation 14(1) (ii), which is applicable for the expenditures incurred up to the cut-off date. Further, the Respondent has submitted that claim of expenditure of ₹920 lakh on simulator package just for training facility for O&M employees of the plant is appears to be on very much higher side and thus the claim of petitioner is not justifiable and submitted that the expenditure on training facilities of O&M employees has to be catered from the O&M expenses being recovered from the beneficiaries by the petitioner and therefore should not be allowed.*
>
> *44. In response to the above the petitioner in its rejoinder dated 22.7.2016 has submitted that it has already prayed for the extension of cut off date by two (2)*

years under Regulation 54 i.e. 'Power to relax' for the works pertaining to original scope of work spilling beyond the cut-off date. The petitioner has submitted that since the expenditure against the balance works under the original scope of work is less than 1% of the approved project cost, the petitioner has claimed these works under Regulation 14 (1)(ii) and Regulation 54 of the 2014 Tariff Regulations.

45. We have gone through the submissions of the petitioner and respondents. We are of the view that since the simulator training facility could be used for training of personnel of other stations as well, it would be more reasonable that this cost is booked under corporate expenses and is allocated to various other generating stations and form part of O&M expenses. We have therefore not considered the same separately."

78. The Appellant placed before us that the Central Commission has allowed similar relief of Rs 93.34 Lakhs vide order dated 06.12.2016 in Petition No. 295/GT/2014 under original scope of works along with other packages of Sipat-I for project in truing up tariff order for the period 2009-14 period.

79. Undisputedly, the asset is primarily meant for training of personnel working in O&M Department of the Appellant, which will be used for all stations besides Korba-III, however, the asset is of the nature of capital expenditure and does not belong to regular O&M expenditure incurred by Appellant for operating its stations, further, the Central Commission itself has considered this such package as separate package in case of Sipat-I and allowed as part of original scope of works.

80. The Appellant has submitted that the installation was meant for training of personnel on technologically advanced unit of 500 MW in Korba-III, thus, the asset may be used for training of personnel belonging to other stations or personnel belonging to other organisations.

81. Considering the above, the Central Commission is directed to reconsider its decision and passed a reasoned order afresh.

H. DETERMINATION OF NORMATIVE HEAT RATE

82. The Appellant in Appeal No. 180 of 2017 and Appeal No. 240 of 2017 has challenged the decision of the Central Commission considering the boiler efficiency as 85% instead of Design Boiler Efficiency while determining the Design Heat Rate of the units, which resulted in lower Normative Heat Rate, and is contrary to the intent and purpose behind the Regulation 36(C)(c) of Tariff Regulations 2014.

83. It has been submitted that Central Commission has, however, interpreted and applied provisions under Regulation 36(C)(c) differently for other stations, the references are placed as under:

i. Farakka-III (Para 67&68 in order dated 03.03.2017 in Petition No. 280/GT/2014),
ii. Mauda-I (Para 58-62 in order dated 01.02.2017 in Petition No. 328/GT/2014),
iii. Simhadri -II (Para 76 to 78 in order dated 29.07.2016 in Petition No. 294/GT/2014),
iv. Kahalgaon -II (para 72&73 in order dated 21.01.2017 in Petition No. 283/GT/2014),
v. Rihand -III (Para 55&56 in order dated 06.02.2017 in Petition No. 372/GT/2014).

84. The Respondent No.2, MPPMCL has contended that the Tariff Regulations 2014 specifies the normative minimum boiler efficiency of 86.00% in case of sub- Bituminous Indian Coal, whereas, the Central Commission has considered a rate of 85% boiler efficiency for this plant, as this thermal generating station has its COD on or after 01.04.2009 till 31.03.2014, based on the provision contained in Regulation 26(B)(a) which provides for an efficiency of 85% for sub- Bituminous Indian Coal, further, contented that instead of considering the efficiency as provided in the Tariff Regulations, 2009

the Central Commission must have considered the efficiency @ 86% as provided in Regulation 2014, the efficiency and economical use of resources has to be ensured and consumers interest has to be safeguarded in accordance with Section 61 (c) & (d), whereas the plant which were existing as on 01.04.2009 were allowed a GSHR of 2375 kCal/kWh whereas, the Appellant has been allowed a GHSR of 2390.52 kCal/kWh. Thus, the plant which has been commissioned in year 2011 has been less efficient to those which were commissioned before 01.04.2009.

85. The Appellant submitted that the Central Commission has considered the boiler efficiency at 85% instead of guaranteed boiler efficiency of 84.91% as per the Original Equipment Manufacturer (OEM), with a margin on 4.50% as specified in the Tariff Regulations, 2014, for the purpose of computation of Design Heat Rate for the period from FY 2014-19, whereas, the Central Commission considered the boiler efficiency at 84.91% (for Korba Stage III) and 84% (for Vindhyanchal Stage IV) for the same quality of coal, for the tariff period FY 2009-14, in computing the gross station heat rate.

86. The relevant Regulation 36(C)(c) of the Tariff Regulations, 2014 specifies the gross station heat rate, applicable to units/ stations commissioned on or after 01.04.2009 till 31.03.2014, the applicable Regulation as the units for both the Stations were commissioned prior to 31.03.2014, as per the said regulation, design heat rate, inter alia, means the unit heat rate derived from the design turbine cycle heat rate and guaranteed boiler efficiency. The relevant regulation (ref: Page No. 365 of the appeal paperbook) is reproduced hereunder:

> "(C) Gross Station Heat Rate
>
> …

(c) Thermal Generating Station having COD on or after 1.4.2009 till 31.03.2014

(i) Coal-based and lignite-fired Thermal Generating Stations = 1.045 X Design Heat Rate (kCal/kWh) Where the Design Heat Rate of a generating unit means the unit heat rate guaranteed by the supplier at conditions of 100% MCR, zero percent make up, design coal and design cooling water temperature/back pressure:

Provided that the heat rate norms computed as per above shall be limited to the heat rate norms approved during FY 2009-10 to FY 2013-14."

87. In the present case, the Appellant had submitted that the Guaranteed Design Gross Turbine Cycle Heat Rate is 1944.44 kCal/Kwh and Design/ Guaranteed Boiler Efficiency is 84.91%, which works out the Gross Station Heat Rate of the generating station for FY 2014-19 is 2393.05 kCal/kWh (= 1.045 x 1944.40/0.8491), however, the Central Commission determined Gross Station Heat Rate of the generating station for FY 2014-19 as 2390.52 kCal/kWh by considering the boiler efficiency as 85%, which is not provided under the Tariff Regulations, 2014.

88. Further, as per Regulation 36(C)(c) of Tariff Regulations 2014 as quoted above, the computed heat rate norms shall be limited to or less than the heat rate norms approved during FY 2009-10 to FY 2013-14, in the instant case the claimed gross station heat rate in 2014-19 is 2393.05 kCal/kWh whereas the gross station heat rate approved by the Central Commission for Korba-III for 2009-14 vide Order dated 03.05.2012 in Petition No 247/2010 was 2438.80 kCal/kWh.

89. Considering that the gross station heat rate of 2393.05 kCal/kWh claimed by the Appellant for 2014-19 is less than the gross station heat rate approved during 2009-14 in compliance with the Regulation 36(C)(c) of Tariff Regulations 2014 and thus ought to be allowed.

90. As already noted above, the approach, adopted by the Central Commission, in the Impugned Order is at variance with the practice followed by it in the Orders for 2014-19 period for several other stations, the Central Commission is expected to maintain a consistent stand.

91. Based on above we direct the Central Commission to revise the Heat Rate for Korba-III and Vindhyanchal-IV in 2014-19 period based on actual design boiler efficiency for consistency with its other orders. The issue is decided in favour of appellant.

I. DISALLOWANCE OF THE ADDITIONAL CAPITAL EXPENDITURE TOWARDS WAGON TIPPLER

92. The Appellant in Appeal No. 311 of 2017 has contested that the need for augmentation of fuel receipt system was due to the non-materialization of adequate quantity of coal from coal mines of the Sipat-I, adding Sipat-I was procuring Coal through the MoU route pursuant to which a Fuel Supply Agreement ("FSA") was signed with Coal India Limited ("CIL") after presidential directive thereby assuring coal corresponding to PLF of 68% without any penalty which was lower in comparison to the quantum needed for normative PLF of 85% for fixed cost recovery for Sipat-I.

93. However, due to less supply of coal, the Station is constrained to procure coal from non-linked mines which is supplied through Box N wagons and has to be unloaded by a Wagon Tippler.

94. Further on account of nationwide shortage of coal, the Appellant installed wagon tippler at Sipat-I, however, the Central Commission disallowed the claim of the Appellant considering achievement of Plant Availability Factor ("PAF") for the FY 2012-13 to FY 2015-16, which was more than the NAPAF, ignoring the efforts made by Appellant for procuring balance coal during different years from Box N wagons from different sources.

95. The Appellant has further submitted that Sipat-I, being a new station, is not entitled to any additional allowance such as compensation allowance or special allowance etc, and hence, it may not be possible to recover the Additional expenditure from the Tariff, also added that the Central Commission has not maintained consistency within its stand and has acted in contravention to its own orders passed in the cases of Farakka STPS Stage I and II, Kahalogaon Stage II, VSTSP, wherein it has rightly allowed installation of Wagon Tippler and associated systems due to non-materialization of coal from linked mines.

96. The Central Commission on this issue has observed in impugned order as below:

> *"Wagon Tippler*
> *33. Against the amount of ₹1500.00 lakh allowed towards Wagon tippler in 2013-14 in order dated 22.8.2013 in Petition No. 28/2011, the petitioner has claimed projected additional capital expenditure of ₹2500.00 lakh in 2014-15 and ₹5980.00 lakh in 2015-16 under Regulation 14(3)(ii) & 14(3)(x) of the 2014 Tariff Regulations. In justification of the same, the petitioner has submitted that as per the Presidential directive for New Fuel Security Agreement (FSA), the receipt of coal at the generating station through MGR system is not sufficient to run the plant at PLF/PAF of 85%, necessary for the generator for fixed charge recovery as per the 2014 Tariff Regulations. The petitioner has also submitted that as per the presidential directive, the coal company is bound to supply only upto 80% of the Annual Contracted Quantity (ACQ) without penalty, which does not secure the availability of fuel to the generator even to the extent of generation corresponding to NAPAF required for Fixed Cost recovery of the plant. The petitioner has further submitted that the non availability of coal shall also not ensure the supply of power at sustainable basis to the beneficiaries at higher PLF. The petitioner has submitted that the Wagon Tippler and associated accessories/locos is required to overcome the*

deficiency in coal receipt system so that the quantum of coal being received from non-linked mines through Box-N wagons of Indian Railways, may be unloaded properly at site. Accordingly, the petitioner has submitted that the Commission may allow the expenditure against the augmentation of fuel receipt system under the Regulation 14(3)(x) as well as under the Regulation 14(3)(ii) of the 2014 Tariff Regulations.

34. The respondent, MPPMCL has submitted that the petitioner has not submitted any proper justification for claiming such expenditure even when the petitioner has achieved Target Availability during the years 2013-14, 2014-15 and 2015-16 as noticed from the REA prepared by WRPC. Accordingly, it has submitted that the claim for the year 2014-15 may be disallowed as Regulation 14(3)(x) is applicable only after cut-off date of the generating station. The respondent has further submitted that there is sufficient coal available to the petitioner for the period 2013-14 to 2015-16 and therefore the claim may be disallowed.

35. We have examined the matter. It is noticed that the petitioner in support of its claim for Capitalization of Wagon Tippler had not substantiated the shortage of coal experienced by the generating station and its impact on the Plant Availability Factor for the period 2012-13 to 2014-15. As pointed out by the respondent, MPPMCL the Plant Availability Factor of the generating station has been above the normative availability since 2013-14. The details of the cumulative plant availability factor for the year 2012-13 to 2015-16 is as under:

	Cumulative plant availability factor (%)
2012-13	*83.3533*
2013-14	*89.6247*
2014-15	*89.0274*
2015-16	*87.8533*

36. It is evident from the above that the cumulative Plant Availability Factor for the generating station is well above the normative plant availability factor, except for the year 2012-13. The petitioner has also not substantiated the shortage of coal for the generating station. In this background, we are not inclined to allow the additional capital expenditure of ₹2500 lakh in 2014-15 and ₹5980 lakh in 2015-16 claimed by the petitioner. We direct accordingly."

97. From the above it is understood that the Central Commission did not allow the Wagon tippler as the Appellant did not successfully substantiate its claim of fuel security, as observed by the Central Commission for NAPAF from 2012-13 to 2015-16.

98. However, the Appellant in the instant appeal has submitted that in original scope of scheme, the track hopper system was envisaged for unloading of coal through BOBR wagons from linked mines, however, the

station started facing the fuel shortage from the beginning of its commercial operation and after signing of FSA under the Presidential Directive.

99. There was a need to make the alternate arrangement for unloading the additional coal being arranged from non-linked sources and received in Box-N wagons, the Central Commission has failed to consider the arrangement during different years through Box-N wagons that to from different sources, not only to ensure sustainable supply of power to the beneficiaries, but also to achieve the actual PAF as stated by the Central Commission, rather it would have incurred under-recovery of fixed charges.

100. The Respondent, MPPMCL has contended that the Appellant has modified the fuel receiving system without any proper justification i.e. no proper justification has been provided for claiming such expenditure even when the Station has achieved target availability during the years 2013-14 to 2015-16 and therefore, the same may be disallowed as Regulation 14 (3)(x) is applicable only after cut-off date of the generating station.

101. The Respondent further argued that sufficient coal was available during the period 2013-14 to 2015-16 and therefore, the Central Commission has rightly disallowed the claim of the Appellant and has passed a reasoned order.

102. The Appellant contended that the Central Commission has failed to appreciate the problems of manual unloading of coal from Box-N wagons, which is highly unsafe practice of coal onloading as manual unloading increases the cycle time of the rake by approx. 4 to 5 hours, thereby causing Demurrage charges on the generator for detention of the subsequent rakes, additionally, the mobilisation of manpower during festivals and rainy season for coal unloading is a herculean task.

103. Undisputedly, the automated facilities cannot be compared with the manual unloading of coal, therefore, the reason considered that only because the Plant Availability Factor is getting achieved by the generator even through manual unloading of coal from BOXN wagons is highly unsafe. The only safe & reliable mechanism for unloading coal from BOXN wagons is through Wagon Tippler.

104. It was submitted by the Appellant that Central Commission has not considered the material fact that the decision for installation of Wagon Tippler was taken by it in the scenario of shortage of coal, which was a countrywide problem during the period 2009-14 and was also recognised by the Central Commission also and accordingly, the normative PAF of 83% was allowed for coal stations for fixed charge recovery, subject to mid-period review. In such a scenario, it was highly unpredictable and unlikely to envisage that there will be any improvement in the receipt of coal through BOBR (Bottom Opening Bottom Release) wagons.

105. The Appellant further, submitted the quantum of receipt of coal through Box-N wagon as is still maintain, as shown below:

FY	**Coal receipt thru' Box-N Wagons (LMT)**	**Contribution of Box-N receipt to PAF of Station**
2012-13	12.45	12%
2013-14	22.57	21%
2014-15	21.96	20%
2015-16	14.93	14%
2016-17 (till Dec'16)	10.17	10%

106. From the submissions of Appellant, it is seen that the Appellant has taken up the scheme based on coal shortage situation faced during 2009-14, there

is no denying of the fact that in view of coal shortage situation in the country, the Central Commission itself provided lower availability norms and the manual unloading of BoXN wagons is highly unsafe and inefficient way of unloading the coal.

107. It is pertinent to note here that the Central Commission has recorded the importance of Wagon Tippler, as seen from the order dated 23.05.2012 in Petition No 245/2009, as under:

> *"31. The submissions of the parties have been examined. It is noticed that substantial quantity of coal was being received through the railway system supplied in Box-N wagons. From the submissions made by the petitioner in Petition No.189/2010 (as referred to in the tabular Order in Petition No. 245-2009 Page 16 of 31 statement in Table-I under paragraph 7(b) of the order dated 25.4.2012), it is evident that this generating station was in operation with a Target Availability of 91-92% (approx) during the period 2005-06 to 2007-08 even without Wagon Tippler. However,* ***considering the fact that installation of Wagon tippler would bring about reduction in unloading time of coal rakes and shall give flexibility in overall movement of rakes which would reduce the apprehension of diversion of wagons by the railways, the claim of the petitioner is justified.*** *Also, if the petitioner is unable to arrange coal for generation up to the specified NAPAF of 85%, it would not be able to recover the full fixed charges which include the cost of Wagon tippler. This, according to us, would adequately take care of the concerns raised by the respondent beneficiaries. Moreover, the utilities are resorting to blending of imported coal taking into account the overall shortage of coal in the country. Considering the above factors in totality, we allow the expenditure claimed by the petitioner for Wagon Tippler and its associated works, under Regulation 9 (2) (vii) of the 2009 Tariff Regulations, -----"*

108. We, therefore, opined that the decision of the Central Commission to this extent is not justifiable, as such, the prayer is allowed.

ORDER

For foregoing reasons as stated supra, we are of the considered view that the captioned Appeals being Appeal No. 25 of 2017, Appeal No. 178 of 2017, Appeal No. 180 of 2017, Appeal No. 240 of 2017 and Appeal No. 311 of 2017 filed by NTPC have merit and are allowed.

The Impugned Orders passed by the Central Electricity Regulatory Commission being Order dated 29.07.2016 in Petition No. 294/GT/2014, Order dated 03.03.2017 in Petition No. 280/GT/2014, Order dated 03.03.2017 in Petition No. 340/GT/2014, Order dated 10.03.2017 in Petition No. 339/GT/2014 and Order dated 29.03.2017 in Petition No. 337/GT/2014 are set aside to the extent as concluded in the foregoing paragraphs.

The Central Electricity Regulatory Commission is directed to pass reasoned order expeditiously in strict compliance to the observations and conclusions made by us, expeditiously but not later than four months from the date of this judgment.

The captioned Appeals are disposed of accordingly.

Pronounced in the Open Court on this 1ST DAY OF DECEMBER, 2022.

(Sandesh Kumar Sharma)	**(Justice R. K. Gauba)**
Technical Member	**Officiating Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj