

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**Appeal No. 86 of 2017**

**Dated: 20<sup>th</sup> March, 2024**

**Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member  
Hon'ble Mr. Virender Bhat, Judicial Member**

**In the matter of:**

Madhya Pradesh Power Management Co. Ltd.  
Shakti Bhawan, Rampur,  
JABALPUR (M.P.)- 482 008

...Appellant

Versus

- (1) Central Electricity Regulatory Commission  
3rd & 4th Floor, Chanderlok Building,  
Janpath, New Delhi- 110 001.
- (2) Powergrid Corporation of India Ltd  
"Saudamani", Plot Number 2,  
Sector- 29, Gurgaon (Haryana) — 122 001.
- (3) Bihar State Electricity Board  
Vidyut Bhawan, Bailey Road  
Patna — 800 001.
- (4) West Bengal State Electricity Distribution Company Ltd  
Bidyut Bhawan, 8th Floor (A Block)  
Block DJ, Salt Lake City  
Kolkata (WB) — 700 091.
- (5) Grid Corporation of Orissa Ltd  
Vidyut Bhawan, Janpath,  
Bhubaneshwar- 751 007.
- (6) Damodar Valley Corporation

- DVC Tower , VIP Road,  
Kolkatta (WB)- 700 054.
- (7) Power Department  
Govt. of Sikkim,  
Gangtok-727 102.
- (8) Jharkhand State Electricity Board  
Engineering Building,  
HEC Township Dhurwa,  
Ranchi- 834 004.
- (9) Assam State Electricity Board  
Bijulee Bhawan, 5th floor,  
Paltan Bazaar  
Guwahati- 781 001.
- (10) Meghalaya Energy Corporation Ltd.  
(Formerly Meghalaya State Electricity Board)  
"Lum Jingshai", Short Round Road,  
Shilong- 793 001.
- (11) Government of Arunachal Pradesh  
Department of Power,  
Vidyut Nagar, Itanagar  
Arunachal Pradesh – 791111.
- (12) Power and Electricity Deptt.,  
Aizawal, Mizoram- 796 001.
- (13) Electricity Department,  
Keishampat, Imphal  
Manipur- 795 004.
- (14) Department of Power,  
Govt. of Nagaland,  
Kohima, Nagaland — 797 001.
- (15) Department of Power

Govt. of Tripura, Agartala,  
Tripura- 799 00

- (16) Rajasthan Power Procurement Centre  
Vidyut Bhawan, Janpath,  
Jaipur (Rajasthan) - 303 904.
- (17) Ajmer Vidyut Vitaran Nigam Ltd  
400 KV GSS Building,  
Ajmer Road, Heerapura,  
Jaipur (Rajasthan) — 303 904.
- (18) Jaipur Vidyut Vitaran Nigam Ltd  
400 KV GSS Building,  
Ajmer Road, Heerapura,  
Jaipur (Rajasthan) — 303 904.
- (19) Jodhpur Vidyut Vitaran Nigam Ltd.,  
400 KV GSS Building,  
Ajmer Road, Heerapura,  
Jaipur (Rajasthan) — 303 904.
- (20) Himachal Pradesh Electricity Board,  
Vidyut Bhawan,  
Shimla (H.P.) - 171 004.
- (21) Punjab State Electricity Board  
220 KV Sub Station,  
Ablowal, Pataila- 147 001.
- (22) Haryana Power Purchase Centre  
2nd Floor, Shakti Bhawan, Sector-6,  
Panchkula (Haryana) - 134 109.
- (23) Power Development Department  
Janipura Grid Station,  
Jammu (Tawi) - 180 007.
- (24) Uttar Pradesh Power Corporation Ltd

- 10th Floor, Shakti Bhawan Extn.  
14, Ashok Marg,  
Lucknow (U.P.)- 226 001.
- (25) Uttarakhand Power Corporation Ltd  
Urja Bhawan, Kanwali Road,  
Dehradun – 248001.
- (26) Delhi Transco Ltd  
Shakti Sadan,  
Kotla Road (Near ITO).  
New Delhi - 110 003.
- (27) Chandigarh Administration,  
Sector-9, Chandigarh — 160 009.
- (28) BSES Yamuna Power Ltd  
Shakti Kiran Building, Karkardooma,  
Delhi- 110092.
- (29) BSES Rajdhani Power Ltd,  
BSES Bhawan, Building No- 20,  
Nehru Place, New Delhi.
- (30) North Delhi Power Ltd.,  
Power Trading & Load Dispatch Group  
Cennet Building, Adjacent to 66/11 Kv Pitampura-3  
Grid Building, Near PP Jewellers  
Pitampura, New Delhi- 110034.
- (31) New Delhi Municipal Council  
Palika Kendra, Sansad Marg,  
New Delhi – 110002.
- (32) North Central Railway,  
Allahabad (U.P.) — 211 033.
- (33) Karnataka Power Transmission Corporation Ltd.  
(KPTCL) Kaveri Bhavan,

Bangalore- 560 009.

- (34) Bangalore Electricity Supply Co. Ltd (BESCOM),  
Corporate Office, K.R. Circle Bangalore,  
Karnataka - 560 001.
- (35) Gulbarga Electricity Supply Co. Ltd (GESCOM)  
Station Main Road,  
Gulbarga, (Karnataka) — 585 102.
- (36) Hubli Electricity Supply Co. Ltd., (HESCOM)  
Navanagar, PB Road,  
Hubli, (Karnataka) — 585 102.
- (37) Mangalore Electricity Supply Co. Ltd.,  
Paradigm Plaza, AB Shetty Circle,  
Mangalore (Karnataka )- 575 001.
- (38) Chainundeshwari Electricity Supply Corporation Ltd.  
#927, LJ Avenue, Ground Floor,  
New Kantharaj Urs Road, Saraswatipuram,  
Mysore (Karnataka) - 570 009.
- (39) Transmission Corporation of Andhra Pradesh Ltd.,  
R No 147, Floor (APTRANSCO)  
Vidyut Soudha, Hyderabad - 500 082.
- (40) Eastern Power Distribution Co. of Andhra Pradesh Ltd.,  
APEPDCL, P&T Colony,  
Seethmmadhara ,  
Vishakhapatnam (A.P.) — 530 016.
- (41) Southern Power Distribution Co. of Andhra Pradesh Ltd.,  
(APSPDCL)  
Srinivasasa Kalyana Mandapam Backside,  
Tiruchanoor Road, Kesavayana Gunta,  
Distt. Chittoor (A P) 517 501.
- (42) Central Power Distribution Co. of Andhra Pradesh Ltd.,



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Ms. Anushree Bardhan  
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Mr. Mohit K. Mudgal  
Mr. Raj Bahadur Sharma  
Ms. Neha M. for R-3, 28, 29  
  
Mr. Rajiv Srivastava  
Ms. Garima Srivastava  
Ms. Gargi Srivastava  
Ms. Marshita Sinha for R-24  
  
Mr. S. Vallinayagam for R-45

## **JUDGEMENT**

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

1. The present appeal has been filed by M. P. Power Management Company Limited (hereinafter referred as "MPPMCL" or "Appellant") challenging the order dated 01.01.2013 (hereinafter referred as "Impugned Order") passed by the Central Electricity Regulatory Commission (in short "CERC" or "Central Commission") in Petition No. 101/MP/2010.

2. The Appellant is the nominee of the Government of the State of Madhya Pradesh for purchase of bulk power on behalf of the distribution companies of the State of Madhya Pradesh (in short "MP") and is the beneficiary of the transmission system for which the said petition was filed before the CERC.

3. The Respondent No. 1, the Central Commission is the statutory authority established under the Electricity Act, 2003 (in short "Act") and vested with the powers to adjudicate the matter under section 79 of the Act.

4. The Respondent No. 2 (in short "POWERGRID" or "R-2") is the transmission licensee, the other respondents are the beneficiaries of the transmission systems of R-2.

5. The R-2, POWERGRID filed the aforesaid petition before CERC seeking permission to bill and recover the additional O&M cost component due to increase in employee cost with respect to its Board level and below Board level executives as an additional component under O&M expense from the beneficiaries as a onetime payment in proportion to their Annual Transmission charges in the respective years.

6. The Appellant herein and amongst the respondents to the aforesaid petition including the U.P. Power Corporation Ltd., Bihar State Electricity Board, Haryana Power Purchase Centre, Tamil Nadu Electricity Board and BSES Rajdhani Power Ltd. filed their objections opposing the said petition.



7. The factual matrix of the case is noted in brief, the Central Commission notified the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2004, (hereinafter "2004 Tariff Regulations") on 26.03.2004 providing for the norms and parameters for tariff determination for the period 01.04.2004 to 31.03.2009.

8. Regulation 56 (iv) of the 2004 Tariff Regulations specified the year-wise normative Operation and Maintenance expenses ('O&M Expenses') for the transmission systems in terms of Ckt kms and Bays for the period 2004-09, and, the norms under the 2004 Tariff Regulations were arrived at by the Central Commission on the basis of the O&M expenses of the Appellant for the years 1998-99, 1999-2000, 2000-01, 2001-02 and 2002-03.

9. The O&M expenses cover different components including the employee costs, and the norms for O&M Expenses were therefore determined based on the existing employee costs in the base years preceding the control period with appropriate escalations as provided in the Tariff Regulations.

10. The revision in the salaries and wages of the employees of the Central Public Sector Enterprises was due with effect from 01.01.2007, accordingly, when POWERGRID filed the Petitions for determination of Tariff for the control period 2004-09 for various transmission assets, POWERGRID specifically stated that wage revision was due from 01.01.2007 and the O&M expenses claimed in the transmission charges during 2004-09 period are subject to adjustment due to additional employee cost which becomes payable after the wage revision or alternatively, the increase in the employee

cost due to wage revision be allowed as per actual based on the auditor's certificate for such extra employee cost.

11. The Central Commission, while determining the tariff as per the 2004 Tariff Regulations permitted POWERGRID to seek relief on account of pay revision at an appropriate stage, the relevant extract in one of the Orders being Order dated 09.04.2009 in Petition No. 127 of 2008 reads as under:

*“34. The Petitioner has submitted that the wage revision of its employees is due with effect from 1.1.2007. therefore O&M expenses should be subject to revision on account of revision of employee cost from that date. In the alternative, it has been prayed that the increase in employee cost due to age revision be allowed as per actuals for extra cost to be incurred consequent to wage revision. We are not expressing any view, as this issue does not arise for consideration at this stage. The petitioner may approach for a relief in this regard at an appropriate stage in accordance with law.”*

12. After the notification of the 2004 Tariff Regulations, there were revision of pay with effect from 01.01.2007 for the Board level and below Board level executives, and non-unionised Supervisors in the Central Public Sector Enterprises in terms Department of Public Enterprises (DPE) issued Office Memorandum Nos. 2(70)/08-DPE(WC) dated 02.04.2009, 09.02.2009 and 26.11.2008 which were to be implemented as per the decision of the Administrative Ministry which in this case is Ministry of Power, as a

consequence, the component of employee cost of the Appellant increased for the years 2006-07, 2007-08 and 2008-09 (in the tariff period 2004-09).

13. Based on the above pay revision, the Central Commission while framing the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2009, (hereinafter referred to as "2009 Tariff Regulations") considered an overall increase of 50% in employee cost for the CPSUs. The relevant extract of the Statement of Reasons for the 2009 Tariff Regulations read as under:

*“19.9 The last revision of the scale of pay of below Board level and Board level executives and non-unionised supervisors, in Central Public Sector Enterprises was made effective from 1.1.1997. The Government had set up a Pay Revision Committee (2nd PRC) under the chairmanship of Justice M. Jagannadha Rao, Retd. Judge of Supreme Court of India, to recommend revision of pay and allowances for above categories of employees following IDA pattern of pay scales w.e.f. 1.1.2007. The recommendations of the Committee were before the Government for final decision and pending such decision, Commission had provided for a normative increase of 45% in the employee cost while arriving at the O&M norms for the thermal and transmission system in the draft regulations. The Government after due consideration of the recommendations of 2nd Pay Revision Committee, have decided vide OM No.2(70)/08- DPE(WC) dated 26.11.2008 on revision of scales and pay w.e.f. 1.1.2007, covering revised pay scales fitment*

*benefit, rate & increments, allowances, performance related pay and the like.....Commission after due consideration of various aspects covered in the implementation of pay revision has come to a conclusion that a uniform normative increase of 50% in employee cost would be just and reasonable for all CPSU's."*

14. The Respondent No. 2, in pursuance to the liberty granted by the earlier Orders of the Central Commission as well as under the relevant Regulations, filed the Petition being Petition 101/MP/2010 on 23.03.2010 for recovery of the additional O&M cost component due to increase in employee cost with respect to Board Level and below Board Level executives as a one-time payment in proportion to their Annual Transmission Charges, the Petition was filed under the Regulation 12 Power to remove difficulties and Regulation 13 Power to Relax.

15. The said petition was disposed of by CERC vide Impugned Order *inter-alia* exercising its powers under Regulation 12 ("**Power to Remove Difficulties**") of the CERC (Terms & Conditions of Tariff) Regulations, 2004 (in short "2004 Tariff Regulations"), with the direction as under:

*"Accordingly, in exercise of our power under Regulation 12 of the 2004 Tariff Regulations, we direct that the petitioner shall be entitled to recover the following from the beneficiaries on account of pay and wage revision of its employees with effect from 01-01-2007:*

*(a) Actual increase in employee cost for the period from 01-01-2007 to 31-03-2009 on account of pay and wage revision which shall be limited to 50% of the salary and wages (Basic+DA) of the employees of the petitioner company as on 31-12-2006.*

*(b) No interest on the arrears shall be charged from the beneficiaries keeping in view the interest of the consumers.*

*(c) The arrears shall be recovered from the beneficiaries in twelve equal monthly installments during the year 2013-14 in addition to the O&M charges in accordance with Regulation 33 of the 2009 Tariff Regulations.*

*(d) For clearance of doubt, it is clarified that the beneficiaries of the transmission Systems of the petitioner company prior to coming into force of the Central Electricity Regulatory Commission (Sharing of Transmission Charges and Losses) Regulations, 2009 shall be liable to pay the arrears in proportion to their shares in the annual transmission charges during the respective years."*

16. The Appellant is aggrieved on the following counts:

- a) Whether the Central Commission was justified in allowing recovery of arrears on account of increased employee cost pertaining to the Tariff Block Period 2004-09 after a period of more than 3 years?
- b) Whether the Central Commission has failed to consider that in view

of the DPE OMs the increase in employee cost is to be paid from own sources of the Respondent No. 2 and not to be recovered from the beneficiaries of the Transmission System?

- c) Whether the claim of the Respondent No. 2 to recover increase in employee cost as additional O&M cost component, particularly when the O&M cost has been admitted on normative basis and actual expense being less than normative, was legitimate and just to be recovered from the beneficiaries?

17. As the issue involved is pertaining to applicability and invocation of Regulation 12 of the 2004 Tariff Regulation, it is important to take a note of the said Regulation, quoted as under:

***“12. Power to Remove Difficulties: If any difficulty arises in giving effect to these regulations, the Commission may, of its own motion or otherwise, by an order and after giving a reasonable opportunity to those likely to be affected by such order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.”***

18. The argument of the Appellant is that the CERC has allowed the claim of the 2nd Respondent which is contrary to section 61(d) of Act 2003 inter-alia invocation of its powers under the Regulation 12 which is not applicable to the facts of the present case, also submitted that this expenditure on Employee Cost was not at all legitimate which is evident from the following:

- (a) the 2nd Respondent already recovered much more than the actual employee cost as against Normative Cost resulting in unjust enrichment at the cost of its beneficiaries;
- (b) it does not adhere to strict requisites of DPE OMs, the expenditure was on the highest side (30% fitment) which could have been reduced to 20% or even 10% fitment) or eliminated completely with the approval of appropriate Ministry / Department.

19. It is his claim that the impugned order was passed ignoring the cardinal principle of law that only legitimate expenses can be allowed as pass-through and is contrary to the provisions and true spirit of Section 61(d) of Act, 2003, the relevant extracts of the three Office Memorandums are as under:-

**OM Dated 26.11.2008**

*“3. Affordability for implementation of pay revision:*

*The revised pay scales would be adopted, subject to the condition that the additional outgo by such revision for a period should not result in more than 20% dip in profit before tax (PBT) for the year 2007-2008 of a CPSE in respect of Executives as well as Non-unionized supervisory staff taken together in a CPSE. CPSE that cannot afford to pay full package can implement with either PRP or No PRP. These CPSE's may pay the full package subsequently provided the dip in the profit (PBT) is fully recouped to the original level.*

*4. The CPSE's which are not able to adopt revised pay scales (2007) may give an increase on the basic pay plus DA drawn in the pre*

*revised scale as on 01.01.2007 with a uniform lower fitment of 10% or 20% depending upon their affordability with the approval of their Ministry/ Department.*

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*16. Financial Instructions: The CPSE concerned has to bear the additional financial implications on account of pay revision from their own sources and no budgetary support will be provided.*

**OM Dated 09.02.2009**

*“The undersigned is directed to refer this Department’s OM of even no. dated 26.11.2008 regarding pay revision of Board level executives and Non-Unionized Supervisors in CPSE’s w.e.f. 01.01.2007. Para (i) of Annex III to the said OM provides that Performance Related Pay (PRP) has been directly linked to the profits of the CPSE’s/Units and performance of the executives.”*

**OM dated 02.04.2009**

*“4. the ceilings mentioned under various items given in OMs dated 26.11.2008, 09.02.009 and this OM are the maximum permissible limits. However, lower limits against these maximum permissible limits can be provided in the Presidential Directives depending upon affordability, capacity to pay and sustainability of the concerned CPSE”*

20. In support of his contention, the Appellant submitted the actual Region-wise O&M Expenditure, as per Table-5 to Statements of Reasons of 2009 Tariff Regulations, reference page 86 of CERC order dated 03-02-2009,



extracted as under:

<b>REGION</b>	<b>2003-04</b>	<b>2004-05</b>	<b>2005-06</b>	<b>2006-07*</b>	<b>2007-08</b>
NR	11719.44	12333.18	12650.28	18488.59	19597.11
WR	4909.87	4882.07	5156.46	5873.03	7371.53
SR	8784.95	9112.76	10157.71	10685.67	11338.57
ER	5695.70	5924.48	6607.97	7831.04	9250.07
NER	4646.54	4766.77	4730.28	5086.33	5364.70
<b>TOTAL</b>	<b>35756.50</b>	<b>37019.26</b>	<b>39302.70</b>	<b>47928.66</b>	<b>52921.98</b>

The \*Provision of Rs. 1532 lakh in the year 2006-07 and Rs. 1103 lakh in the year 2007-08 towards wage revision in the O&M expenses have not been apportioned to various region and corporate office in the ratio of their respective “salary and wages” and deducted from the figures submitted by POWERGRID.” Thus, based on above table, the actual expenditure incurred by 2nd Respondent under head O&M during 2007-07 to 2008-09 were as under:

<b>2006-07 (01-01-2007 to 31-03-2007)</b>	<b>Rs. 11982.167 lakh*</b>
<b>2007-08</b>	<b>Rs. 52921.98 lakh</b>

<b>2008-09</b>	<b>Rs. <u>55658.05</u> lakh</b>
<b>Total:</b>	<b>Rs. <u>120562.20</u> lakh<sup>#</sup></b>

**\*Considered 1/4<sup>th</sup> of annual expenditure during 2006-07**

**#Arrived after escalation @ 5.71% over 2007-08**

However, as against the above Actual O&M Expenditure, the 2nd Respondent has received Normative O&M of Rs. 141008.63 lakh as under:

<u>Year</u>	<u>Rs. (In lakh)</u>
<b>2006-07</b>	<b>12022.46</b>
<b>2007-08</b>	<b>59181.31</b>
<b>2008-09</b>	<b><u>69804.86</u></b>
<b>TOTAL :</b>	<b><u>141008.63</u></b>

Thus, year-wise, excess money on account of O&M expenditure collected by the Respondent No. 2 is as under:

<u>Year</u>	<u>Rs. (In lakh)</u>
<b>2006-07</b>	<b>40.30</b>
<b>2007-08</b>	<b>6259.33</b>
<b>2008-09</b>	<b><u>1416.44</u></b>
<b>TOTAL :</b>	<b><u>20446.81</u></b>

21. The Appellant also argued that the CERC has failed to consider that the three OMs issued by DPE dated 26.11.2008, 09.02.2009 and 02.04.2009 did not allow for an upward hike in the actual employee costs to the 2nd

Respondent, further, 2nd Respondent was not put to any difficulty and had collected Rs. 141008.64 Lakh as Normative O&M against the actual O&M Expenditure of Rs. 120562.20 lakh only incurred by it and the actual difference between the normative and the actual expenses comes to Rs. 20446.44 Lakhs, since the 2nd Respondent already recovered more than the actual employee costs as against Normative Cost resulting in unjust enrichment of the cost of its beneficiaries.

22. Further, submitted that the 2nd Respondent could have lowered the ceiling as provided under the various OMs issued by the DPE, the OMs provide for "Affordability" as an important criterion for implementing the pay revision, however, the 2nd Respondent implemented wage revision using fitment of 30% of basic pay plus DA @ 68.8% as on 01.01.2007 and if it was not in a position to afford this out of its own profits, then it should have adopted a lower fitment of 10% or 20% under intimation to its Ministry/Department, once 2nd Respondent adopted a fitment of 30% as against 10% or 20%, it clearly means that it had sufficient affordability to bear the same from its own profits.

23. It is his submission that CERC has failed to consider that the OMs nowhere provide that the implementation of the pay revision should be implemented in case the concerned CPSE is not in a position to afford the same, as such, in case, the 2nd Respondent was not in a position to afford the wage revision out of its own profits, it ought not to have implemented the same and recovered the same from the beneficiaries which in turn has to pass on to the consumers resulting in higher tariff which is contrary to the

scheme of section 61 of Act 2003 as Section 61(d) mandates that in tariff determination is carried out by safeguarding of consumers interest and at the same time recovery of the cost of electricity in a reasonable manner, however, the Impugned Order passed by the CERC allowing the claim of the 2nd respondent without a proper prudence check and ignoring the factual position that it has already recovered more than the actual employee costs as against Normative Cost resulted in unjust enrichment to 2nd respondent at the cost of its beneficiaries which has to pass on the same to the consumers of the respective State which would result in increase in the tariff rates for such consumers.

24. In support, the Appellant submitted that para 4 of OM dated 26.11.2008 clearly provides that CPSE which are not able to adopt the revised pay scales w.e.f. 01.01.2007, may give a uniform lower fitment of 10% to 20% depending on their affordability with the approval of their Ministry/Department, however, 2nd Respondent considered a hike of 30% to its employees, which clearly implies that it is in a position to sustain the additional impact of its own, further, the CERC has failed to consider that the normative employee cost under O&M were allowed in tariff block 2004-2009 on the basis of the total line length and number of bays, whereas, the total line length and number of bays kept on increasing from time to time in the Tariff Block period of 2004-2009, however, the 2nd Respondent did not increase its work force in the same proportion during the same period, thus, the Normative Employee Cost got proportionately increased with increment in line length and number of bays, whereas, the Actual Employee Cost in O&M remained stagnant.

25. Further, submitted that the tariff is akin to budgetary support, Tariffs, in advance and just like budgets, identify and provide source of revenue to meet the liabilities and to ensure an assured return on equity, thus sourcing the impact of 6th pay commission for the period from 01.01.2007 to 31.03.2009 by way of revising the 2004 Tariff Regulations with retrospective effect runs contrary to the spirit of the OM's dated 26.11.2008, also, reiterated that the 2nd Respondent had already collected O&M expenses more than its actual expense including the additional burden of Rs. 8933.62 Lakh which was claimed in the petition.

26. Further, contended that the CERC in its order records that the claim has to be considered in addition to the norms after due prudence check as regards its reasonability, however, the impugned order was passed without a prudence check and failed to take into account that the 2nd Respondent has already over recovered the expenses, also the 2nd Respondent while filing the petition before CERC submitted an Auditors Certificate dated 09.03.2010, wherein additional employee cost was stated to be Rs. 8933.62 lakhs due to revision of wages, but the norms of O&M comprise of other components such as repair and maintenance, insurance, electricity charges, travels, CC allocations etc. other than the employee cost, this aspect has not at all been considered by the CERC.

27. The Appellant also submitted that the annual fixed charges of the transmission system comprise of five components for tariff determination, the Regulations do not specify that each and every component of the annual fixed charges is required to be tested on the requirements of reasonability,

the Tariff is a complete package and the reasonability is required to be examined in totality, if the CERC opened the issue relating to O&M, then it ought to have reopened other parameters as well, reliance was placed on the Supreme Court judgment titled *UPPCL vs NTPC, (2009) 6 SCC 235*, the relevant extract is quoted as under:-

*“62. Framing of tariff is made in several stages. The generating companies get enough opportunity not only at the stage of making of tariff but may be at a later stage also to put forth its case including the amount it has to spend on operation and maintenance expenses as also escalation at the rate of 10% in each of the base year. It cannot, in our opinion, be permitted to re-agitate the said question after passing of many stages.*

*63. Furthermore, the direction of the tribunal that the additional costs may be absorbed in the new tariff, in our opinion, was not correct. Some persons who are consumers during the tariff year in question may not continue to be the consumers of the appellant. Some new consumers might have come in. There is no reason as to why they should bear the brunt. Such quick-fix attitude, in our opinion, is not contemplated as framing of forthcoming tariff was put subject to fresh regulations and not the old regulations.”*

28. Also submitted that in 2004 Tariff Regulations, the Employee Cost was determined on normative basis and not on the basis of actual cost, the normative cost left a cushion for increase in or savings on account of

Employee Cost, once the cushion was provided, it was incumbent on the part of the CERC to carry out a prudence check as to whether the Actual Revised Employee Cost exceeded the Normative Cost or not, and in case the same has not exceeded then there is no effect on the assured Return on Equity, therefore, non-factoring of the impact of 6<sup>th</sup> Pay Commission may not necessarily put the 2<sup>nd</sup> Respondent in any sort of difficulty, in case, 2<sup>nd</sup> Respondent really faced difficulty in implementing the Salaries in Wage Revision w.e.f. 01-01-2007 during Tariff Block Period 2004-09, it could have given effect to it from a later date in subsequent Tariff Block Period after the same factored in the Regulations, this could have been conveniently opted in view of the DPE Office Memorandum dated 02-04-2009, consequently, the Difficulty could have been avoided and the beneficiaries would have been saved with the additional burden causing tariff shock to its consumers.

29. The Respondent No. 29 (in short "R-29") submitted that the respondents filed their objections before the Central Commission which were examined by the Central Commission in the Impugned Order and delivered its decision on various grounds raised by respondents, these grounds as analyzed and decided by Commission are detailed at Para-18 of the Impugned Order would show that the Commission has taken note on conditionalities in the DPE OM dated 26.11.2008 which is reproduced below;

*"18. MPPTCL and UPPCL have submitted that as per para 16 of the DPE Office Memorandum dated 26.11.2008, the CPSE concerned has to bear the additional financial implications on account of pay revision from their own resources and no budgetary*

*support will be provided. Further, para 4 of the Office Memorandum dated 26.11.2008 provides that the CPSEs which are not able to adopt revised pay scales with effect from 1.1.2007, may give lower fitment of 10% or 20% depending on their affordability with the approval of their Ministry/Department. MPPTCL has submitted that since the petitioner has considered hike of 70% to its employees, it implies that the petitioner company is in a position to sustain the additional impact on its own and therefore, the impact of pay revision should not be passed on to the beneficiaries. The petitioner in its written submission has submitted that there is no merit in the allegation of MPPTCL in view of the fact that PGCIL has no budgetary support to meet the increased salary and wages and also in view of the mandate of section 61 of the Act that tariff should be decided on the basis of commercial principles. BSEB in its reply has submitted that any increase in the employee cost due to wage revision should be taken care of by improvement in the productivity levels by the petitioner company so that the beneficiaries are not unduly burdened on this account. We have considered the submission of the respondents and the petitioner. In a cost plus regime, all legitimate costs of the transmission licensee are borne by the beneficiaries. Since impact of pay and wage revision of its employees as per the DPE directives is a legitimate cost incurred by the petitioner for providing transmission services to the beneficiaries, the expenditure on this account must be borne by the beneficiaries.”*

30. However, R-29 argued that the OM dated 26.11.2008 of the



Department of Public Enterprises (DPE) is very clear which stipulates that any financial implications on pay and wage revision has to come from the internal resources and no outside support whether in the form of budgetary support or otherwise will be provided, Para-3 of the above O&M would deal with the affordability for implementation of pay revision which is also quoted below;

*“3. Affordability for implementation of pay revision:- The revised pay scales would be adopted subject to the conditions that the additional outgo by such revision for a period of 12 months should not result in more than 20% dip in profit before tax (PBT) for the year 2007-08 of a CPSE in respect of executives as well as non-unionized supervisory staff taken together in a CPSE. CPSEs that cannot afford to pay full package can implement with either part PRP or no PRP. These CPSEs may pay the full package subsequently, provided the dip in the profit (PBT) is fully recouped to the original level.”*

31. The above stipulation in the OM dated 26.11.2008 of the Department of Public Enterprises Government of India would show that the Union Government was ready to take a hit in the form of profit on the capital employed in these CPSEs, the other aspect of the above OM is that the Government had decided in very clear terms as to how the pay and wage revision will be implemented, however, the Central Commission in spite all these stipulations took upon itself to implement the pay and wage revision by invoking the provisions of Regulation 12 (Power to remove difficulties) of the

Tariff Regulations, 2004 as no provision to deal with such situation was provided in the Tariff Regulations, 2004, therefore, the decision of the Central Commission in undertaking the responsibility for implementation of the pay and wage revision is not only in disregard to the directions issued by the Union Government but it had also resulted in unduly penalizing the beneficiaries and through beneficiaries the ultimate electricity consumer, it is settled principle that the Commission is bound by the statutory duty to safeguard the interest of the electricity consumer under Section 61(d) of the Electricity Act, 2003 wherein the Commission is empowered to specify the terms and conditions for the determination of tariff, the mere fact that there was no provision to deal with such situation and the Commission taking judicial discretion to invoke Regulations, 12 & 13 of Tariff Regulations, 2004 forgetting its statutory duty was grave error in law, also, the Commission without discussing these important aspects opined and concluded that in a cost plus regime, all legitimate costs of the transmission licensee are borne by the beneficiaries.

32. Further, contended that Para-11 of the impugned order would show that the Commission has erred in holding that the denial of the pay and wage revision would result in under recovery of the cost of electricity even without examining whether the current liberal norms are adequate to meet the additional expenses on account of wage and pay revision, there is nothing in the impugned order that the Commission had called any information from the PGCIL to examine this issue as the Commission was to invoke the provisions of Regulation 12 (Power to remove difficulties) and Regulation 13 (Power to Relax) of the Tariff Regulations, 2004 which evidently is judicial discretion,

the norms prescribed by the Commission including the O&M expenses are very liberal and the mere fact that the Appellant has clearly brought out before the Commission that the PGCIL has collected Rs. 141008 lakh as normative O&M expenditure as part of the annual fixed charges against the actual O&M expenditure of Rs. 120562.20 lakh resulting in an excess recovery of Rs. 20446.44 lakh, in spite of knowing well this fact and yet the assertion of the legitimate claim is clear indication of exercise of judicial power in an arbitrary manner and thus the Appeal may be upheld exclusively on this ground.

33. The Respondent No. 29 also submitted that Para-12 and Para-13 of the aforesaid judgment of the Supreme Court (*UPPCL vs NTPC, (2009) 6 SCC 235*) has recorded the decision of the Central Commission that the reasons for not reimbursing the additional water charges on account of settlement of the pending dispute by NTPC with the State Authorities are that the water charges are part of the O&M Expenses which is a package and could not be interfered with as NTPC has not been able to show that it has suffered any loss, however, the Commission in this case did not ask if the PGCIL has suffered any loss as contended in the above para, it may, therefore, be noted that acting differently under the similar circumstances and accordingly we tend to agree with the Appellant that there may be case of favoritism to PGCIL, this is yet another ground that the Commission fell in grave error of law.

34. Further, the perusal of Para-14 would show that the respondents narrated the problems before the Commission that the revision of the tariff

sought for by PGCIL is belated when the relevant tariff period 2004-09 is already over, it was also conveyed that the PGCIL got enough opportunities not only at the time of determining the tariff for the period 2004-09 but also at the later stage for revision of fixed charges on account of additional capital expenditure incurred during the tariff period 2004-09 were approved, PGCIL also filed the Review Petitions in large number of petitions and thus, even on facts alone enough opportunities were available to the PGCIL and thus the claim at this belated stage was not justified, reliance was placed on the judgment dated 03.03.2009 of Supreme Court and claimed that it had already set principles on all these issues in Civil Appeals No. 1110 of 2007 with Nos. 1138, 1152, 1327 and 1112 of 2007, the relevant para are quoted below;

“47. There cannot be any doubt whatsoever that for the purpose of making tariff the actual costs required for payment to the employees being a part of the operation and maintenance cost including a sum of Rs. 55 crores, which were to be paid by way of extra amount, could fall for determination by the Central Commission. **But, such an application ordinarily could have been filed within the period during which the tariff order was in force.**

48. It is difficult to agree with the opinion of the appellate tribunal that increase in the salary with retrospective effect could have been a subject matter for determination of tariff in another period. **In a fact situation obtaining herein, we are of the opinion that the claim of the respondent –corporation was not justified as the Central**

**Commission should not have been asked to revisit the tariff after five years and when everybody had arranged its affairs.”**

“50. Framing of tariff is made in several stages. **The generating companies get enough opportunity not only at the stage of making of tariff but may be at a later stage also to put forth its case including the amount it has to spend on operation and maintenance expenses as also escalation at the rate of 10% in each of the base year. It cannot, in our opinion, be permitted to re-agitate the said question after passing of many stages.** Furthermore, the direction of the tribunal that the additional costs may be absorbed in the new tariff, in our opinion, was not correct. Some persons who are consumers during the tariff year in question may not continue to be the consumers of the appellant. Some new consumers might have come in. There is no reason as to why they should bear the brunt. Such quick-fix attitude, in our opinion, is not contemplated as framing of forthcoming tariff was put subject to fresh regulations and not the old regulations.”

35. Thus, argued that the Supreme Court has held that the claim is permissible only when the tariff is in force and not after wards, this clearly means that the claim of the Petitioner-NTPC could be entertained by the Commission if the same was brought during the tariff period 2004-09, the Commission, however, in the impugned order has stated that the present case is distinguishable from the other case in the sense that PGCIL had approached the Commission during the 2004-09 period to consider the

impact of the pay and wage revision and the Commission has also given some kind of liberty to on the issue, however, from the facts as reported in various orders of the Commission, it is noted that this liberty was not given by the Commission in all the petitions filed by the PGCIL during the tariff period 2004-09, attempts have been made to take one petition from each region as well as the inter-regional link. This would show that the liberty by the Commission was given only partly and therefore as per the distinction made by the Commission the impact of the pay and wage revision cannot be extended in all those cases where the liberty has not been granted. It may, therefore, be noted that the Commission has been faulted even on facts.

36. On the contrary, the Respondent No. 1, the Central Commission submitted that the Appellant has prayed for setting aside the Impugned Order dated 01.01.2013 passed by it in Petition No. 101/MP/2010, wherein it has been held as under:

*“22. We decide the claim of the petitioner in the light of our decision in case of NTPC Ltd as extracted above. Accordingly, in exercise of our power under Regulation 12 of the 2004 Tariff Regulations, we direct that the petitioner shall be entitled to recover the following from the beneficiaries on account of pay and wage revision of its employees with effect from 1.1.2007:*

*(a) Actual increase in employee cost for the period from 1.1.2007 to 31.3.2009 on account of pay and wage revision which shall be limited to 50% of the salary and wages (Basic + DA) of the employees of the petitioner company as on 31.12.2006.*

- (b) No interest on the arrears shall be charged from the beneficiaries keeping in view the interest of the consumers.*
- (c) The arrears shall be recovered from the beneficiaries in twelve equal monthly instalments during the year 2013-14 in addition to the O&M charges in accordance with Regulation 33 of the 2009 Tariff Regulations.*
- (d) For clearance of doubt, it is clarified that the beneficiaries of the transmission systems of the petitioner company prior to coming into force of the Central Electricity Regulatory Commission (Sharing of Transmission Charges and Losses) Regulations, 2010 shall be liable to pay the arrears in proportion to their shares in the annual transmission charges during the respective years.”*

37. Further submitted that the issues considered while passing the Impugned Order have been listed in para 8 of the Impugned Order and dealt with in the succeeding paragraphs thereunder, also, in addition to the reasoning elaborated in the impugned order itself, some additional submissions are made in the succeeding paragraphs hereunder.

38. The CERC invited our attention to the following observation made by this Appellate Tribunal for Electricity, in its order dated 24.03.2015 in the batch of Appeals viz. Appeal No. 55 of 2013, 77 of 2013, 194 of 2013, 259 of 2012, 63 of 2013, 143, of 2013, 158 of 2013 & 43 of 2014:

*“18.11. So far as the ..... The facts of the reported case are quite distinguishable and are not applicable to the instant matters because in the present matters, the power generators NTPC etc. had made the claim in the first available instance and at that time the Central Commission vide its order dated 09.05.2006 deferred the consideration of the same to a later stage. The appellants did not challenge the said deferment granted in its order dated 09.05.2006 in Petition No. 160 of 2004 of the Central Commission at that relevant time and now the appellants cannot raise this issue of deferment at this stage.”*

39. Further added and quoted the relevant paragraphs providing for deferment in both the cases, as under:

A. In order dated 09.05.2006 in Petition No. 160 of 2004 relating to generating tariff:

*“57. The petitioner has submitted that the wage revision of its employees is due with effect from 1.1.2007. Therefore, O &M expenses should be subject to revision on account of revision of employee cost from that date. In the alternative, it has been prayed that the increase in employee cost due to wage revision be allowed as per actuals for extra cost to be incurred consequent to wage revision. We are not expressing any view, as this issue does not arise for consideration at this stage. The petitioner may approach for*



*a relief in this regard at an appropriate stage in accordance with law.”*

B. In the impugned order dated 01.01.2013 in Petition No. 101/MP/2010 relating to transmission tariff:

*“13. .... However, during the tariff period 2004-09, the petitioner had raised the issue in various tariff petitions. The Commission in its order dated 9.4.2009 in Petition No. 127/2008 relating to transmission tariff of 400 kV S/C Vindhyachal-Korba Ckt-II alongwith associated bays associated bay equipment at Vindhyachal and Korba Switch Yards in Western Region from 1.6.2007 to 31.3.2009 held as under:*

*“34. The petitioner has submitted that the wage revision of its employees is due with effect from 1.1.2007. Therefore, O&M expenses should be subject to revision on account of revision of employee cost from that date. In the alternative, it has been prayed that the increase in employee cost due to wage revision be allowed as per actuals for extra cost to be incurred consequent to wage revision. We are not expressing any view, as this issue does not arise for consideration at this stage. The petitioner may approach for a relief in this regard at an appropriate stage in accordance with law.”*

40. Accordingly, argued that in terms of the above extracted view of this

Appellate Tribunal, the present Appeal is not maintainable in the first instance.

41. Also submitted that, in the above mentioned batch of Appeals, this Tribunal vide its order dated 24.03.2015 identified the following issues for adjudication:

*(A) Whether the Commission can exercise its power to remove difficulties to overcome a difficulty which has arisen as a consequence of the application of Regulations themselves, as opposed to removing a difficulty that may arise in giving effect to the Regulations?*

*(B) Whether the Commission can, in the garb of exercise of its power to remove difficulties, amend the Regulations, contrary to express terms of the Regulations?*

*(C) Whether the Commission whilst allowing additional employees expenses to the respondent Corporations has failed to consider that the respondent Corporations approached the Commission after an inordinate delay specifically, when the relevant tariff period had already expired and the tariff petition for the next tariff period had also been filed by the respective respondent Corporation.*

*(D) Whether the Commission was correct in ignoring that the tariff is a package and as such each component of tariff cannot be looked at in isolation?*

42. It is, therefore, submitted that this Appellate Tribunal vide its order dated 24.03.2015 considered all the above questions inter-alia affirming the conclusions arrived at and the action taken by the Central Commission, accordingly, submitted that the Appeal is liable to be dismissed under the doctrine of stare decisis and the conclusions arrived at in the impugned order are liable to be upheld.

43. The Respondent No. 2, POWERGRID, submitted that the issue of allowance of impact of pay revision has been settled by this Tribunal vide judgment dated 24.03.2015 in Appeal Nos. 55 of 2013, 77 of 2013, 194 of 2013, 259 of 2012, 63 of 2013, 143, of 2013, 158 of 2013 & 43 of 2014 (titled ***BSES Yamuna Power Limited v. Central Electricity Regulatory Commission and Ors***) wherein this Tribunal had already upheld the allowance of additional employee cost on account of pay revision with effect from 01.01.2017 for various central sector generating stations such as NTPC, NHPC etc, the relevant extracts are quoted as under:

*“18.6. We have gone through the proposition of law settled by the Hon’ble Supreme Court of India in West Bengal Electricity Regulatory Commission Vs. CESC Limited (2002) 8 SCC 715 in which the Hon’ble Apex Court had observed that the employees cost prudently incurred needs to be reimbursed to the Utility. The Hon’ble*

*Supreme Court expressing agreement with the finding of the High Court held that since it is not disputed that the payments made to the employees are governed by the terms of the settlement form which it will not be possible for the Company to wriggle out during the existence of the settlement, therefore, the actual amounts spent by the Company as employees' costs will have to be allowed. In these matters in hand, after careful and deep scrutiny of the rival submissions made by the parties, we do not find any force in the submissions/contentions made on behalf of the appellants. Rather, the submissions of the respondent power generators/corporations have legal force to which we agree.*

*18.7. The 'power to remove difficulties' and the 'power to relax' provided in the 2004 Tariff Regulations supplement each other to deal with the situations which may arise from time to time. In the present matters, the learned Central Commission has exercised these powers correctly, properly and legally in allowing the impact of the 6<sup>th</sup> Pay Commission's Recommendations regarding increase in employees cost including increase in salaries of the employees and wages of the workmen. Apart from it, from the Regulations 12 and 13 conferring 'Power to remove difficulties' and 'Power to relax' upon the Central Commission in 2004 Tariff Regulations, the Central Commission has retained the powers such as savings of inherent powers of the Commission (Regulations 111, 113, 114) & power to remove difficulties (Regulation 115).*

18.8. We agree to these contentions of the respondents/power generators that if the 6th Pay Commission's Recommendations had been implemented prior to the framing of 2004 Tariff regulations and the salaries could have been known, the Central Commission would have factored the increase in the employees cost in the normative O & M expenses specified in Regulation 21 (iv) of 2004 Tariff Regulations over and above normalizing the O & M expenditure based on past years actual expenditure. Since the increase in the salary etc. pursuant to the Pay Commission's Recommendations, effective from 01.01.2007 was actually implemented by circulars dated 07.07.2010 and 17.08.2010 which obviously was after 2009 Tariff Regulations had come into force. However, the proposed increase was envisaged by the Corporations like NTPC and was placed before the Central Commission at the time when subsequently 2009 Tariff Regulations were considered. The learned Central Commission, at that time, after due consideration of various aspects covered in the implementation of pay revision had come to a conclusion that a uniform normative increase of 50% in employee cost would be just and reasonable for all CPSUs.

18.9. We may observe that even during the tariff period 2004-09, the Corporations like NTPC had raised the issue of increase in tariff on account of pay revision to the employees' cost which was expected to occur and for that purpose, the NTPC filed a Petition being Petition No. 160 of 2004 for Anta Gas Power Station (419.33 MW) for the period 01.04.2004 to 31.03.2009, seeking additional O & M

*expenses in view of the wage revision. Similar submissions were also made for other generating stations. The learned Central Commission by its order dated 09.05.2006 passed in Petition No. 160 of 2004 decided that this issue does not arise for their consideration at this stage and the petitioner may approach for a relief in this regard at an appropriate stage in accordance with law. Thus, the power generator like NTPC approached the learned Central Commission at the relevant time seeking additional O & M expenses on account of wage revision as a result of implementation of 6th Pay Commission's Recommendations and the Central Commission, at that time vide order dated 09.05.2006, directed the NTPC etc. to approach for such relief at an appropriate stage. It was in accordance with the said order dated 09.05.2006 of the Central Commission that the aforesaid petitions were filed by different power generating companies like NTPC etc before the Central Commission and the aforementioned impugned orders have been passed by the Central Commission which are under challenge before us in this batch of Appeals.*

*18.10. We further hold that a subsequent development occurred due to the implementation of the 6th Pay Commission's Recommendations and revision of pay scales and other benefits and such was a difficult situation which had arisen in giving effect to the 2004 Tariff Regulations, particularly, Regulation 23 of 2004 Tariff Regulations, if given effect to on its term in relation to O & M expenses would not enable the recovery of the entire legitimate*

*costs and expenses incurred by the power generators/Corporations like NTPC. In the circumstances of the present matters, we find that the learned Central Commission was justified in exercising the power to remove difficulties and power to relax as provided under Regulations 12 & 13 of 2004 Tariff Regulations. Apart from this power, the Commission has inherent powers under the Conduct of Business Regulations, 1999.*

*18.11 So far as the proposition of law as laid down by the Hon'ble Supreme Court of India in Uttar Pradesh Power Corporation Ltd Vs. NTPC Ltd & Ors (2009) 6 SCC 235 relied upon by the appellants is concerned, the Hon'ble Supreme Court did not grant the relief to NTPC as the NTPC did not claim amount in the first instance through NTPC was entitled to claim. The facts of the reported case are quite distinguishable and are not applicable to the instance matters because in the present matters, the power generators NTPC etc. had made the claim in the first available instance and at that time the Central Commission vide its Order dated 09.05.2006 deferred the consideration of he same to a later stage. The appellants did not challenge the said deferment granted in its order dated 09.05.2006 in Petition No. 160 of 2004 of the Central Commission at that relevant time and now the appellants cannot raise this issue of deferment at this stage.....*

*.....*

*18.13. We are further of the view that in view of the subsequent developments of implementation of 6th Pay Commission's Recommendations, the actual employees cost was not fully factored*



*in Regulation 21 (iv) of 2004 Tariff Regulations and the situation clearly warranted the exercise of 'Power to remove difficulties' and 'Power to relax' conferred upon the Central Commission. The Central Commission has committed no illegality in passing the impugned orders and allowing the increase in the employees cost subject to prudence check. We further note that the learned Central Commission, in the impugned orders, has cited sufficient reasons for exercising such powers and also exercised the said powers in its judicial discretion because non-exercise of judicial discretion by the Central Commission would cause hardship and injustice to the respondent Corporations or would lead to unjust result. The respondent Corporations like NTPC had successfully established that the circumstances were not created due to the act or omission attributable to them while claiming such relaxation and seeking exercise of 'powers to remove difficulties' or 'powers to relax' as provided in 2004 Tariff Regulations. We find that in the instant matters, there were justified causes and reasons before the Central Commission to exercise such discretion and to relax the norms in the head of O & M expenses. We further note that 2004 Tariff Regulations were notified based on the circumstances which existed at the time of notification of 2004 Tariff Regulations. In case of O & M expenses for the period 2004-09, it was determined based on previous years O & M expenses. The O & M expenses in respect of 2004 Tariff Regulations did not cover the increase in the employees' cost. Therefore, the cash outflow in the head of increase in the*



*employees' cost was not included in the O & M expenses under 2004 Tariff Regulations.*

*18.14. We hold that the Central Commission has rightly exercised its 'power to remove difficulties' or 'power to relax' to give effect to the subsequent developments, namely, directing reimbursement of the increase in employees' cost by the beneficiaries."*

*.....*

*21. We are to consider whether the learned Central Commission whilst allowing additional employees expenses to the respondent Corporations like NTPC has failed to consider that the respondent Corporations approached the Commission after an inordinate delay, namely, after the expiry of the tariff period and even after the tariff petition for the next control period had been filed by the respondent Corporations.*

*....*

*21.1. The main contention of the appellants on the point of delay in claiming the additional employees' cost by the respondent Corporations like NTPC is that the respondent Corporations did not provide any justification for the said delay and in the tariff order dated 05.05.2006 for the period 2004-09, the O & M expenses approved by the Commission were as per Regulation 21 (iv) of the 2004 Tariff Regulations. In the petition for tariff for the said period 2004-09, the respective respondent Corporations had sought for revision of O & M expenses on account of the wage revision of their respective employees w.e.f. 01.01.2007.*

21.2. We have considered the said contentions of the appellants but we do not find any force therein because the respondent Corporations like NTPC, even during tariff period 2004-09 had raised the issue of increase in tariff on account of revision in the employees cost which were then expected to occur and filed Petition No. 160 of 2004 for one power station for the period 01.04.2004 to 31.03.2009 where the NTPC had specifically sought additional O & M expenses in view of wage revision of the employees. Similar, submissions were also made for other generating stations also when the learned Central vide order dated 09.05.2006 passed in Petition No. 160 of 2004 decided that the prayer regarding increase in employees cost due to wage revision be allowed as per actual for extra cost to be incurred consequent to wage revision, may be considered at an appropriate stage and the Corporations like NTPC may approach for relief in this regard at an appropriate stage in accordance with law. Thus, a liberty was granted by the learned Central Commission in its order dated 09.05.2006 passed in Petition No. 160 of 2004 when the respondent - NTPC submitted that the revision of its employees was due w.e.f. 01.01.2007, therefore, the O & M expenses should be subject to revision on account of employees' cost from that date. In that matter, it was also prayed, in the alternative, that the increase due to wage revision be allowed as per actual for extra cost consequent to wage revision.

21.3. *At the time of passing order dated 09.05.2006, the learned Central Commission in this view of the matter clearly noted that the Central Commission was not expressing any view. Hence the said issue did not arise for consideration at that stage and the Central Commission granted liberty to the NTPC to approach for a relief in that regard at an appropriate stage.*

21.4. *In view of the order dated 09.05.2006 passed in Petition No. 160 of 2004 on the petition of respondent Corporations like NTPC etc, the learned Central Commission in the impugned orders, after due consideration, granted the said relief to the NTPC etc. In this view of the matter, we do not find any force in any of the contentions raised on behalf of the appellants on the issue relating to delay in claiming the O & M expenses on actual basis and the said issue is decided against the appellants as we do not find any illegality or irregularity in any of the findings recorded in the impugned orders on this issue. Thus, this issue is accordingly decided against the appellants and in favour of the respondent Corporations like NTPC etc.*

.....

25. *Now, we are considering the issue whether the Central Commission has failed to take notice of the fact that the tariff is a package and tariff cannot be amended in a piecemeal manner by modifying its individual components*

.....

25.3. After considering the rival contentions of the parties and perusing the impugned orders and the material available on record, we do not find any force in the contentions raised on behalf of the appellants. We are aware that 2004 Tariff Regulations do not provide for actual or norms whichever is lower. Accordingly, there is no truing up of the normative parameters to determine whether such norms are lower or higher than the actual in the case and if the actual are lower than the normative, the same need to be adjusted to actual. Each of the tariff elements are considered on normative basis, wherever specified, independent of other norms and there should not be any overlapping.

25.4. The contention of the appellants that the Sixth Pay Commission's Recommendations to provide the extra cost out of the profit and, therefore, the power generators like NTPC should not be allowed the increase in the employees cost as a part of O & M expenses is totally mis-conceived and not acceptable. The Sixth Pay Commission's Recommendations are in respect of all Public Sector Undertakings. Many of the CPSUs are not subject to regulatory tariff determination and they operate under market conditions where there is no restriction on the price to be charged for the products. The power generating Corporations like NTPC, NHPC etc., the price for generation and sale of electricity is regulated by virtue of the determination of tariff by the appropriate Commission based on the capital cost and expenses. We are of the view that the power generating Corporations like NTPC cannot be denied their legitimate

*claim on the hyper technical grounds. Once the employees cost is recognized as part of the O & M expenses, the same is to be allowed, there cannot be any reason to object to the employees cost including the increase in employees cost to be allowed as a pass through in the tariff. In the matter of NTPC, since the impact of pay revision of the employees during 2006-07 and 2007-08, had not been accounted for while fixing the tariff for 2009-14, there was no option for the Central Commission except to pass the appropriate orders like the impugned order under Regulations 12 and 13 of 2004 Tariff Regulations. Therefore, there is no error in claiming such O & M expenses after the completion of control period 2004-09. The consideration of the increased salary effective from 01.01.2007 was not there at the time when the 2004 Tariff Regulations were notified on account of the increase in the salary and wages having not been finalized and given effect to. Subsequently, the increase in the salary and wages were given effect pursuant to the decision of the Department of Public Enterprises (DPE), Government of India and implemented by NHPC with actual payment of the increased salary and wages to the employees including to the Central Industrial Security Force (CISF)/Indian Reserve Battalion (IRBN) employed with NHPC generating stations. Thus, the recommendations of the Sixth Pay Commission and justification of DPE was implemented by the NHPC at the relevant time and in accordance therewith, the learned Central Commission passed the impugned order along with increase in employees cost under O & M expenses.*

25.5. While deciding Issue Nos. A & B in the upper part of this judgment, we have made observations in Para Nos. 18.08, 18.09, 18.10 & 18.11. We do not want to repeat the same here once again. We further reiterate and observe that the contentions of the respondents/power generators that if the 6th Pay Commission's Recommendations had been implemented prior to the framing of the 2004 Regulations and the salaries could have been known, the Central Commission would have factored the increase in the employees cost in the normative O & M expenses specified in Regulation 21 (iv) of 2004 Tariff Regulations over and above normalizing the O & M expenses based on past years actual expenses. We further note that since the increase in the salary etc. pursuant to the 6th Pay Commission's Recommendations, effective from 01.01.2007 was actually implemented by circulars dated 07.07.2010 and 17.08.2010 which were issued by the Government of India and Department of Public Enterprises after the 2009 Tariff Regulations had come into force, the proposed increase in the employees cost of the NTPC, NHPC etc. was envisaged by the respective Corporations like NTPC and was placed before the Central Commission at the time when 2009 Tariff Regulations were being considered. The Central Commission at that time, after due consideration of various aspects relating to in the implementation of Pay Commission, had come to a conclusion that a uniform tariff increase of 50% in employees cost would be just and reasonable by all CPSUs.”

44. Reliance was also placed on the judgment dated 19.02.2016 of this Tribunal in *Bhaskar Shrachhi Alloys Limited v. Central Electricity Regulatory Commission (Appeal No. 184 of 2013)* wherein it has been upheld that the expenditure with regard to wage revision as the expenditure on employees is a legitimate cost and has to be recovered even as the Tariff Regulations 2004 did not cover the same, the relevant extract is quoted as under:

*“15.5 The expenditure on manpower related to their salaries, expenditure towards P&G fund of retired employees. Similarly, the pay revision is also expenditure towards manpower. It is the legitimate right that the employees have to be supported in their wages regarding inflation index etc. The expenditure on the employees has to be figured in the ARR and it is to be recovered from the beneficiaries. The Apex Court also opined that the expenditure regarding pay revision etc., needs to be reimbursed to the utility.*

*15.7 The Central Commission has to consider the actual expenditure incurred with respect to employees wage revision, considered the prayer of the Respondent regarding relaxation of the tariff Regulations, 2004 as the tariff Regulations did not cover the employees pay revision.”*

45. The R-2 submitted that in a cost plus Tariff determination under Section 62 of the Act, all legitimate costs of the transmission licensees in providing transmission services are to be allowed in tariff, Section 61 of the Electricity



Act, 2003 reads as under:

*“61. Tariff Regulations*

*The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely*

*.....*

*(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles*

*.....*

*(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner*

*(e) the principles rewarding efficiency in performance;*

*-----”*

46. Further, pleaded that the employee costs are a necessary input in the determination of cost of transmission of electricity and has to be considered while determining transmission charges/tariff, it cannot be denied that the pay and allowances are mandatory expenditure for POWERGRID and any revision in the pay by the DPE are to be followed by POWERGRID, the additional cost incurred by POWERGRID on account of pay revision by the DPE are not due to any inefficiency of POWERGRID and therefore are to be allowed to be recovered through transmission charges, reliance was placed on the judgment of the Supreme Court in West Bengal Electricity Regulatory Commission v. CESC Limited (2002) 8 SCC 715 (Para 87 and 88) wherein it has recognized that the amount towards actual employee costs will have to be allowed.



47. The normative parameters are set with reference to a specific tariff element and based on the position prevalent at the time of the normative determination, subsequent developments may change the basis on which the norms had been fixed with reference to a particular tariff element and if such subsequent developments are not on account of any imprudence or failure or default on the part of the utility, or otherwise attributable to the Utility, the normative parameters need to be revised to adjust for the impact of the subsequent developments.

48. We agree to the contentions of R-2 as submitted above and also the submission that the expenditure of POWERGRID is in pursuance to the recommendations for pay revision by Government of India and the same is to be followed by POWERGRID, the said additional cost on account of pay revision was not factored in the 2004 Tariff Regulations and therefore the POWERGRID had approached the Central Commission for its recovery.

49. However, the same must be in accordance with the government notification.

50. Regarding the issue of whether the Tariff is a complete package and if POWERGRID can cover the costs out of its profits or efficiency gains, the costs should not be allowed to be recovered, the R-2 placed its reliance on the following judgments of this Tribunal:

- a. BSES Yamuna Power Limited v. Central Electricity Regulatory Commission and Ors in Appeal No, 55 of 2013 (Supra),
- b. National Hydroelectric Power Corporation Ltd v. Chairman, Punjab State Electricity Board Appeal No. 131 of 2006 dated 28.08.2009.

51. The R-2 countered the reliance of the R-29 on decision of this Tribunal in Appeal No. 134 and 140 of 2008 dated 03.06.2010 stating that the same is not applicable as the said decision was on a different point namely, water charges on account of settlement with the local authorities, therein it was also held that the water charges were already included in the operation and maintenance expenses and the same is not applicable to a case of increase in employee cost due to pay revision as per Government of India which is a binding.

52. The R-2 also argued that the recommendation of pay revision is in respect of all Public Sector Undertakings and many of the CPSUs are not subject to regulatory tariff determination and they operate under market conditions where there is no restriction on the price to be charged for the products whereas POWERGRID's charges for transmission of electricity is regulated by virtue of the determination of tariff by the Central Commission based on the capital cost and expenses, accordingly, R-2 is deriving a regulated return/profit, it is nobody's case that by payment of employees cost, there would be a dip in the profit of R-2 by more than 20%.

53. Further submitted that the provision that no budgetary support would be provided refers to the allocation from the Government of India and does

not mean that the cost cannot be recovered from the beneficiaries, R-2 is entitled to recovery of all legitimate costs and pay revision by the Government of India resulting into increase in the employee cost, such costs cannot be refused to be implemented for the pay revision and deny its employees the requisite pay only so that the beneficiaries do not have to pay higher transmission charges.

54. It is the argument of R-2 that merely because R-2 may be able to afford the pay revision out of its profits does not mean that R-2 should bear the costs of pay revision, the profits of R-2 are regulated and assured by the 2004 Tariff Regulations, therefore, R-2 cannot be made to bear additional legitimate costs from its profits, in a cost plus regime, R-2 is entitled to recover all legitimate costs, also added that the additional employee cost on account of pay revision is a legitimate cost which was not factored in the 2004 Tariff Regulations, therefore, such costs have to be allowed to him, however, the Central Commission after considering the facts has only allowed recovery of up to 50% of salary and wages and further has not allowed interest on the arrears.

55. We failed to appreciate the submission of the R-2 that CERC has allowed recovery limited to 50 % of the salary and wages, it is the actual increase which has been allowed however, capped to an increase of 50%, in case the increase is below 50% the same is completely allowed.

56. The R-2 also contended that the submission of the Appellant that such an increase be met from the efficiency gains of the company is contrary to the

tariff regulations, the normative concept is that the gain or loss on account of efficiency or inefficiency on the part of the R-2 under the Normative norms is on account of R-2 only, reliance was placed on this Tribunal's judgment in: -

- a. BSES Yamuna Power Limited v. Central Electricity Regulatory Commission and Ors in Appeal No. 55 of 2013 **at Para 25.3:**
- b. U.P. Power Corporation Ltd. V. Central Electricity Regulatory Commission & Ors. 2011 ELR (APTEL) 0858 **Para 10:**
- c. Haryana Power generation Corporation Ltd. vs. Haryana Electricity Regulatory Commission & Anr. (Judgment dated 31.07.2009 in Appeal No. 42 and 43 of 2008) **at Para 34.**

57. The contention of the Appellants that the relief has been granted after the completion of the control period, the R-2 placed reliance on *BSES Yamuna Power Limited v. Central Electricity Regulatory Commission and Ors* in Appeal No. 55 of 2013 (Supra)- **Para 18.8 and 21**, wherein this Tribunal has settled the issue inter-alia rejected the similar contention raised by the Appellants therein.

58. The R-2 argued that the Respondent No. 29 has in its Reply raised an issue on liberty granted by Central Commission, however, the R-29 has not raised the issue and therefore the Respondent cannot expand the scope of the Appeal by raising new grounds.

59. We decline to accept the contention of R-2 as the first appeal is in continuation on the question of law and facts, however, the fact is that the CERC has granted liberty to the R-2 as already argued and noted in the

foregoing paragraphs where contentions of R-1, CERC are noted.

**Observation and Conclusion**

60. We are satisfied that most of the contentions / objections of the Appellant and R-29 have been covered by various judgments of this Tribunal as noted above, and found to be devoid of merit.

61. However, we find that the contention of the Appellant regarding the contents of the OMs issued by DPE have neither been dealt by the CERC even after recording the submissions of the Respondents at para 18 of the Impugned Order nor have been replied or argued by POWERGRID.

62. The Respondent No. 2 in its written submission has contended that in terms Department of Public Enterprises (DPE) issued Office Memorandum Nos. 2(70)/08-DPE(WC) dated 02.04.2009, 09.02.2009 and 26.11.2008, the pay revisions were to be implemented as per the decision of the Administrative Ministry which in this case is Ministry of Power, therefore, the component of employee cost of the Appellant increased for the years 2006-07, 2007-08 and 2008-09 (in the tariff period 2004-09).

63. However, we could not find any recommendation or decision of Ministry of Power in respect of pay revision in the highest slab, i.e. fitment of 30% of basic pay plus DA @ 68.8% (as submitted by the Appellant).

64. Further, the OMs prescribe wage revision under three different slabs,

the wage revision of 30% can be implemented only if certain conditions are satisfied, however, the Central Commission without carrying out any judicious examination has accepted the highest fitment slab as proposed by R-2.

65. We find it unjust and without any reason, the CERC is ought to have carried out detailed examination before accepting the same, that too after obtaining the advice of the concerned Ministry i.e. Ministry of Power.

66. It cannot be disputed that such an increase in the O&M charges have to be finally borne by the individual consumers of the country, therefore, we find it appropriate to set aside the Impugned Order to this extent.

67. We also direct, as an interim arrangement, that no adjustment shall be made regarding the past payments made in compliance to the Impugned Order, however, shall be subjected to the fresh order passed by the Central Commission.

### **ORDER**

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 86 of 2017 has merit and is allowed, the Impugned Order dated 01.01.2013 passed by the Central Electricity Regulatory Commission in Petition No. 101/MP/2010 is set aside to the extent of foregoing observations and conclusion.

We remand the case back to the Central Commission with the directions to

pass a fresh Order in strict compliance to the observation & conclusion as above, after hearing all the parties, considering every averment made therein and within a reasonable time but not later than three months from the date of this judgment.

**PRONOUNCED IN THE OPEN COURT ON THIS 20<sup>th</sup> DAY OF MARCH, 2024.**

**(Virender Bhatt)**  
**Judicial Member**

**(Sandesh Kumar Sharma)**  
**Technical Member**

*pr/mkj*