

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Review Petition No. 204/2010 in Petition No.126/2009

**Coram: Shri.S.Jayaraman, Member
Shri V.S. Verma, Member**

Date of hearing: 13.1.2011

Date of order: 22.2.2011

IN THE MATTER OF

Review of order dated 15.6.2010 in Petition No.126/2009 pertaining to the determination of impact of additional capital expenditure incurred during the years 2006-07, 2007-08 and 2008-09 on fixed charges in respect of Kahalgaon Super Thermal Power Station, Stage-I (840 MW).

AND IN THE MATTER OF

NTPC Ltd, New Delhi

.....Petitioner

Vs

1. West Bengal State Electricity Board, Kolkata
2. Bihar State Electricity Board, Patna
3. Jharkhand State Electricity Board, Ranchi
4. Grid Corporation of Orissa Ltd., Bhubaneshwar
5. Damodar Valley Corporation, Kolkata
6. Power Department, Govt. of Sikkim, Gangtok
7. Tamil Nadu Electricity Board, Chennai
8. Union Territory of Pondicherry, Electricity Deptt, Pondicherry
9. Uttar Pradesh Power Corporation Ltd, Lucknow
10. Power Development Department, Govt. of J&K, Srinagar
11. Power Deptt. Union Territory of Chandigarh, Chandigarh
12. Madhya Pradesh Power Trading Ltd., Jabalpur
13. Gujarat Urja Vikas Nigam Limited, Baroda
14. Electricity Deptt, Administration of Daman & Diu, Daman
15. Electricity Deptt. Administration of Dadra and Nagar Haveli, Silvassa
16. BSES Rajdhani Power Limited, New Delhi
17. BSES Yamuna Power Limited, Delhi
18. North Delhi Power Ltd, New Delhi
19. Maharashtra State Electricity Distribution Company Ltd., Mumbai....**Respondents**

The following were present

1. Shri V.K.Padha, NTPC
2. Shri Ajay Dua, NTPC



3. Shri A.K.Juneja, NTPC
4. Shri S.K.Samui, NTPC
5. Shri Vivake Kumar, NTPC
6. Shri S.K.Pathak, NTPC
7. Shri Manish Garg, UPPCL

ORDER

This application has been made by the petitioner, NTPC Ltd, a generating company, seeking review of the Commission's order dated 15.6.2010, in Petition No.126/2009, determining the impact of additional capital expenditure incurred during the period 2006-09 in respect of Kahalgaon STPS, Stage-I (840 MW) (hereinafter referred to as "the generating station), limited to the question of 'non-consideration of normative transit loss for coal import', pursuant to the judgment dated 13.6.2007 of the Appellate Tribunal for Electricity (the Tribunal) in Appeal No. 10/2007.

Background

2. The Commission by its order dated 23.11.2006 in Petition No.120/2005 determined the tariff for the generating station for the period 2004-09. Aggrieved by the said order, the petitioner filed Appeal No. 10/2007 before the Tribunal on various issues including the non-consideration of normative transit loss for coal import. Similar appeals (Appeal Nos.139 to 142 etc of 2006, 11 and 23/2007) were also filed by the petitioner before the Tribunal challenging the various orders of the Commission determining tariff for other generating stations during the period 2004-09. Appeal No.10/2007 was also clubbed with the said appeals and the Tribunal by its common judgment dated 13.6.2007 allowed the prayers of the petitioner and remanded the matters for re-determination by the Commission. On the issue of



normative transit loss for coal import, the Tribunal in its judgment dated 13.6.2007 had observed as under:

“The Commission has not admitted the claim of the appellant for higher transit losses on the plea that these two stations namely: Farakka and Kahalgaon are the pit head stations and have their own Merry Go Round (MGR). It is a fact that if appellant does not arrange coal from sources other than the linked mines the power stations will operate at much below their capacity which will further accentuate the excruciating power shortages prevailing in the country. It is in nobody’s interest to underutilize the available capacity in the country.

We find logic and rationale in the plea of the appellant and, therefore, direct as under:-

- (j) For operation of the plant up to 62.8%, even if the appellant has to import coal from mines other than the linked mines, transit loss of only 0.3% be allowed.*
- (ii) Transit loss of 0.8% be allowed on the requirement of coal between 62.8% and up to 80% PLF.*
- (iii) Coal required for operation of the plant beyond 80% Plant Load Factor where the appellant is entitled for an incentive of 25 paise per kWh, the additional transit losses of 0.5% should be absorbed by the appellant himself.*

The CERC shall act in consonance with the aforesaid directions while considering afresh the transit losses for coal imported from coal mines other than the dedicated ones for the respective stations.”

3. Against the judgment dated 13.6.2007, the Commission has filed 20 Civil Appeals before the Hon’ble Supreme Court (C.A. Nos. 5434/2007 to 5452/2007 and 5622/2007) including Civil Appeal No.5441/2007 pertaining to this generating station, on issues such as:

- (a) Consequences of refinancing of loan;*
- (b) Treating of depreciation as deemed repayment of loan;*
- (c) Cost of maintenance spares related to additional capitalization;*
- (d) Depreciation availability up to 90% in the event of disincentive; and*
- (e) Impact of de-capitalization of assets on cumulative repayment of loan*

4. The Hon’ble Supreme Court on 26.11.2007 granted an interim order of stay of the operation of the order dated 13.6.2007 of the Appellate Tribunal. However, on 10.12.2007, the Hon’ble Supreme Court passed interim order as follows:



“Learned Solicitor General appearing on behalf of the National Thermal Power Corporation stated that pursuant to the remand order, following five issues shall not be pressed for fresh determination:

- (a) Consequences of refinancing of loan;*
- (b) Treating of depreciation as deemed repayment of loan;*
- (c) Cost of maintenance spares related to additional capitalization;*
- (d) Depreciation availability up to 90% in the event of disincentive; and*
- (e) Impact of de-capitalization of assets on cumulative repayment of loan*

The Commission may, however, proceed to determine other issues.

It is clarified that this order shall apply to other cases also.

In view of this, the interim order passed by the Court on 26th November, 2007, is vacated.

The interlocutory applications are, accordingly, disposed of.”

5. While so, the Commission by its orders dated 29.9.2008 and 11.12.2008 in Petition No.27/2007 revised the annual fixed charges of the generating station on account of additional capital expenditure incurred during the years 2004-05 and 2005-06. Subsequently, by order dated 11.1.2010, the annual fixed charges of the generating station for the period 2004-09 were further revised on account of capitalization of FERV on normative basis against loan (instead of equity).

6. Thereafter, Petition No. 126/2009 was filed by the petitioner for determination of annual fixed charges of the generating station after considering the impact of additional capital expenditure incurred during the period 2006-09. The petitioner also filed interlocutory Application (I.A.No.38/2009) in the said petition, praying for revision of the annual fixed charges after considering the principles laid down in the judgment of the Tribunal dated 13.6.2007 in Appeal Nos.139 to 142 etc of 2006, 10,11 and 23/2007. However, the Commission by its order dated 15.6.2010 deferred the implementation of the judgment of the Tribunal dated 13.6.2007 on the five issues and determined the annual fixed charges for the generating station based on the existing principles subject to the final outcome of the Civil Appeals pending



before the Hon'ble Supreme Court. The annual fixed charges approved by order dated 15.6.2010 is as under:

(₹ in lakh)					
Particulars	2004-05	2005-06	2006-07	2007-08	2008-09
Interest on loan	678.93	100.97	0.00	0.00	0.00
Interest on Working Capital	2689.29	2706.94	2681.80	2717.06	2744.01
Depreciation	7475.92	7490.34	4499.13	4509.92	4511.81
Advance Against Depreciation	0.00	0.00	0.00	0.00	0.00
Return on Equity	14120.29	14136.75	14145.17	14155.32	14160.63
O & M Expenses	8736.00	9088.80	9450.00	9828.00	10222.80
Total	33700.43	33523.80	30776.10	31210.31	31639.25

7. In this application, the petitioner while seeking review of the order, has submitted that the Commission while deferring the implementation of the judgment dated 13.6.2007 of the Tribunal on the five issues, has not implemented the issue regarding 'normative transit loss for coal import i.e. *consideration of coal transit loss of 0.8% for requirement of coal between 62.8% and up to 80% plant load factor*', in terms of the directions contained in the said judgment of the Tribunal in Appeal No.10/2007.

8. During the hearing, it was submitted by the petitioner that the issue of normative transit loss for coal has not been included in the Civil Appeals filed by the Commission before the Hon'ble Supreme Court and hence was not covered by the interim order dated 10.12.2007 of the said Court. Referring to the said interim order, the petitioner pointed out that the Commission was at liberty to proceed to determine other issues in terms of the observations of the Hon'ble Supreme Court. Accordingly, the petitioner prayed that the overall coal transit loss of 0.4075% may be considered for the generating station for revision of annual fixed charges based on the additional capital expenditure for the period 2006-09.



9. Reply to the petition has been filed by the respondent No.9, UPPCL. The respondent has submitted that the prayer of the petitioner should not be allowed for the following reasons:

- (a) The petitioner has not substantiated its claim for relaxation of norms;
- (b) By judgment dated 13.6.2007, the Tribunal has amendment the regulations specified by the Commission as regards transit loss, which was not tenable;
- (c) The word 'determine' by definition would involve a process where the Commission could consider the matter afresh.

10. In accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), a person aggrieved by an order may apply for a review under the following circumstances:

- (a) On discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at a time when the order was made;
- (b) An error apparent on the face of the record;
- (c) For any other sufficient reason.

11. The Federal Court in *Jamna Quer Vs Lal Bahadur* (AIR 1950 FC 131) expounded the law in the terms that "where there is an error on the face of the record, whether error occurred of reason of the counsel's mistake or it crept in by reason of oversight on the part of the court, is not a circumstance which can affect the exercise of jurisdiction of the court to review its decision." In the light of this, it can be safely concluded that omission of the court to consider an important fact is a ground for review.

12. The petitioner's plea for review is to be considered in the light of above noted



legal position. In the interlocutory application, the petitioner had revised the annual fixed charges for the generating station taking into consideration the principles laid down in the judgment dated 13.6.2007 in Appeal Nos.139 to 142 etc of 2006, 10,11 and 23/2007. By judgment of the Tribunal dated 13.6.2007 in Appeal No.10/2007, the Commission was directed to implement the issue of normative transit loss for coal import for the generating station.

13. In our order dated 15.6.2010, the implementation of the judgment dated 13.6.2007 of the Tribunal as prayed by the petitioner was deferred till the final disposal of the said Civil Appeals in order to maintain regulatory uniformity and continuity and keeping in line with the spirit of the interim order dated 10.12.2007 of the Hon'ble Supreme Court. We notice that the judgment dated 13.6.2007 of the Tribunal on the issue of normative transit loss for coal import for the generating station was not challenged by the Commission and did not form part of the interim order dated 10.12.2007 of the Hon'ble Supreme Court in the Civil Appeals (as stated at para 3 above). The implementation of the directions of the Tribunal dated 13.6.2007 in Appeal No.10/2007 on the issue of normative transit loss for coal import for the generating station had inadvertently escaped the attention of the Commission while passing the order dated 15.6.2010 and the omission to consider the same as directed by the Tribunal, in our considered opinion, constitute an error apparent on the face of the record which squarely falls within the scope of Order 47 Rule 1 of the CPC. In view of the above discussions, the submissions of the respondent No.9, UPPCL is rejected and the prayer of the petitioner for review of order dated 15.6.2010 is allowed.



14. Consequent on the above, we proceed to revise order dated 15.6.2010 determining the annual fixed charges for 2004-09 after considering the coal transit loss of 0.3% for 62.8% and 0.8% from 62.8% to 80% PLF, i.e overall coal transit loss of 0.4075% in respect of the generating station in the subsequent paragraphs.

15. In our order dated 15.6.2010 in Petition No.126/2009, the fuel component in working capital was worked out based on the weighted average of GCV (2698.33 kCal/Kg for coal and 9905 kCal/l for HFO only) and price of fuels (coal at 1043.75 Rs/MT and HFO at 13997.47 Rs/KL) 2009 as considered in order dated 23.11.2006 in Petition No.120/2005 for the period 2004-09 for the generating station. After considering the overall coal transit loss of 0.4075% in terms of the directions of the Tribunal, the revised price of coal works out to Rs 1044.94/MT. However, the GCV of coal (2698.33 kCal/Kg) as considered in order dated 15.6.2010 shall remain unchanged. Based on this, the rate of Energy Charge ex-bus per kWh works out to 108.50 paise/kWh.

16. Based on the above, the interest on working capital in paragraph 57 of the order dated 15.6.2010 is revised as under:

Particulars	<i>(₹ in lakh)</i>				
	2004-05	2005-06	2006-07	2007-08	2008-09
Coal Stock – 1.1/2 months	7067.48	7067.48	7067.48	7086.84	7067.48
Oil Stock-2 months	274.66	274.66	274.66	275.42	274.66
O & M expenses	728.00	757.40	787.50	819.00	851.90
Spares	2870.87	3043.12	3225.71	3419.25	3624.41
Receivables	15315.04	15285.60	14827.65	14926.59	14971.51
Total Working Capital	26256.05	26428.27	26183.00	26527.10	26789.96
Rate of Interest	10.25%	10.25%	10.25%	10.25%	10.25%
Total Interest on Working capital	2691.25	2708.90	2683.76	2719.03	2745.97



17. Consequently, the annual fixed charges approved in para 58 of the order dated 15.6.2010 is revised as under:

(₹ in lakh)

Particulars	2004-05	2005-06	2006-07	2007-08	2008-09
Interest on loan	678.93	100.97	0.00	0.00	0.00
Interest on Working Capital	2691.25	2708.90	2683.76	2719.03	2745.97
Depreciation	7475.92	7490.34	4499.13	4509.92	4511.81
Advance Against Depreciation	0.00	0.00	0.00	0.00	0.00
Return on Equity	14120.29	14136.75	14145.17	14155.32	14160.63
O & M Expenses	8736.00	9088.80	9450.00	9828.00	10222.80
Total	33702.38	33525.76	30778.06	31212.27	31641.21

18. The order dated 15.6.2010 in Petition No. 126/2009 shall stand revised as above. The petitioner shall claim the difference between the fixed charges approved vide order dated 15.6.2010 and those approved now from the beneficiaries in three equal monthly installments.

19. Review Petition No.204/2010 stands disposed of in terms of the above.

Sd/-
[V.S. VERMA]
MEMBER

Sd/-
[S.JAYARAMAN]
MEMBER

