

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.179/2004

Coram: **1. Dr.Pramod Deo, Chairperson**
 2. Shri S.Jayaraman, Member
 3. Shri V.S.Verma, Member
 4. Shri M.Deena Dayalan, Member

DATE OF ORDER: 29.12.2011

In the matter of

Revision of annual fixed charges in respect of Talcher STPS, Stage-II (2000 MW) for the period from 1.4.2004 to 31.3.2009.

AND

In the matter of

Judgment of the Appellate Tribunal for Electricity dated 18.8.2010 in Appeal No. 66/2008. Judgment dated 4.2.2011 in Appeal No. 92/2010 and judgment dated 18.7.2011 in Appeal No. 64/2010.

AND

In the matter of

NTPC Ltd, New Delhi
Vs

.... Petitioner

1. Transmission Corporation of Andhra Pradesh Ltd, Hyderabad
2. Tamil Nadu State Electricity Board, Chennai
3. Karnataka Power Transmission Corporation Ltd, Bangalore
4. Kerala State Electricity Board, Thiruvananthapuram
5. Electricity Department, Govt. of Pondicherry

....Respondents

Parties present:

1. Shri V.K.Padha, NTPC
2. Shri A.K.Juneja, NTPC
3. Shri Ajay Dua, NTPC
4. Shri S.K.Mondal, NTPC

ORDER

The petitioner, NTPC Limited, filed this petition for approval of tariff in respect of Talcher Super Thermal power Station, Stage-II (2000 MW) (hereinafter referred to as

“the generating station”) for the period from 1.4.2004 to 31.3.2009, in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (hereinafter referred to as “the 2004 regulations”).

2. The generating station comprises of 4 units of 500 MW each and was to be commissioned by May 2006 as per the approved schedule. However, it was declared under commercial operation on 1.8.2005, ahead of schedule, as noted from the dates of commercial operation (COD) of different units of the generating station as given under:

Units	Scheduled COD	Actual COD
Unit I	February 2004	1.8.2003
Unit II	November 2004	1.3.2004
Unit III	August 2005	1.11.2004
Unit IV	May 2006	1.8.2005

3. The tariff of the generating station for the period from 1.4.2009 to 31.3.2009 was determined by Commission’s order dated 31.1.2008 in Petition No. 179/2004 (instant petition), considering the capital cost [(after excluding un-discharged liabilities and Interest During Construction (IDC)] as under:

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Opening Capital Cost	228962.77	335471.34	343514.66	437528.76	437528.76	437528.76	437528.76

(₹ in lakh)

4. The annual fixed charges determined by Commission’s order dated 31.1.2008 was as under:

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Interest on loan	13488	19158	18911	22998	19640	15304	10969
Interest on Working Capital;	1922	3304	3055	4867	4527	4507	4478
Depreciation	8279	12107	12398	15750	15750	15750	15750
Advance	2338	13355	0	30253	14877	14877	14877

(₹ in lakh)

Against Depreciation							
Return on Equity	9616	14090	14428	18376	18376	18376	18376
O&M expenses	9360	14040	14595	19460	20240	21040	21900
Total	45004	76054	63387	111704	93411	89855	86350

5. Against the order dated 31.1.2008, the respondent No.2, TNEB filed Review Petition No. 47/2008 and the same was dismissed by Commission's order dated 29.5.2008 at the admission stage. Aggrieved by order dated 31.1.2008, the petitioner filed Appeal No. 66/2008 before the Appellate Tribunal for Electricity (hereinafter referred to as "the Tribunal"), raising the following issues:

- (a) Exclusion of un-discharged liabilities
- (b) Depreciation as deemed Repayment of loan
- (c) Interest During Construction
- (d) Ignoring the amount of Opening capital costs as on 01.04.2004
- (e) Cut-off date for inclusion of additional capital expenditure
- (f) Cost of maintenance spares.

6. During the pendency of the above appeal, Petition No. 146/2008 was filed by the petitioner for determination of impact of additional capital expenditure incurred for the generating station during the period 2004-08. The Commission by its order dated 5.1.2010 revised the annual fixed charges for the generating station, for the period 2004-09, [(after excluding un-discharged liabilities and Interest During Construction (IDC)] as under:

	<i>(₹ in lakh)</i>						
	1.4. 2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31. 7. 2005	1.8.2005 to 31.3.2006	2006-07	2007-08	2008-09
Depreciation	8289	12249	12427	16427	17265	17542	17657
Interest on Loan	13506	19401	18960	23682	21630	18156	14085
Return on Equity	9628	14254	14461	19166	20144	20467	20601
Advance against Depreciation	2328	13214	0	29577	15994	16345	16678
Interest on Working Capital	1922	3311	3057	4892	4638	4650	4635
O & M Expenses	9360	14040	14595	19460	20240	21040	21900
Total	45034	76469	63500	113204	99911	98199	95557

7. Aggrieved by order dated 5.1.2010, the petitioner filed Review Petition 46/2010 before the Commission raising the following issues.

(a) Disallowance of capitalization Loco amounting to Rs 212.60 lakh for 2004-05 on its Inter-Unit Transfer from Farakka STPS

(b) Disallowance of capitalization of Diesel Locomotive works amounting to Rs 847.78 lakh for 2007-08 on its diversion/ Inter-Unit Transfer from Barh STPP.

8. Against the order dated 5.1.2010, one of the respondent namely, TNEB filed Review Petition No. 139/2010 for review of the said order on the following issues:

(i) Weighted average rate of interest was excessively ordered at 8.3957% as against the rate arrived at 8.3433% in the working sheet available in the files of CERC for the year 2007-08.

(ii) Loan drawn towards additional capitalization were neither available along with the petition nor extracted in the order nor available in the files of CERC.

(iii) As per para 13 of the impugned order dated 5.1.2010, IDC allowed is Rs. 1066.23 lakh {Rs. 287.25 lakh (01.08.2005-31.03.2006) + Rs. 665.79 lakh (2006-07) + Rs. 113.19 lakh (2007-08)} whereas when calculation sheet interpolated it works out to Rs.694 lakh { Rs. 294 lakh (01.08.2005-31.03.2006) + Rs. 286 lakh (2006-07) + Rs. 114 lakh (2007-08)}. There is short deduction of Rs. 372.23 lakh from interest on loan for tariff purposes hence, part with IDC calculations arrived at by CERC.

(iv) To furnish the reconciliation statement between the amounts claimed and awarded in respect of additional capitalization.

9. The said review petition was heard on 21.9.2010 and the Commission reserved its orders.

10. Meanwhile, the petitioner filed Appeal No. 64/2010 before the Tribunal against the above order dated 5.1.2010 raising the following grounds:

(a) Exclusion of un-discharged liabilities

(b) Depreciation as deemed repayment of loan

(c) Interest During Construction (IDC)

(d) Cut-off date for inclusion of additional capital expenditure

(e) Cost of maintenance spares

(f) Opening capital cost as on 1.4.2004

(g) Disallowance of items diverted from other stations

11. While so, Petition No.138/2009 was filed by the petitioner for determination of impact of additional capital expenditure incurred in respect of the generating station during the period 2008-09 and the Commission by its order dated 19.2.2010 revised the annual fixed charges for the generating station, after exclusion of un-discharged liability of Rs 1275.17 lakh, as under:

(₹ In lakh)

	2004-05	2004-05	2005-06	2005-06	2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Depreciation	8289	12249	12427	16427	17265	17542	17783
Interest on Loan	13506	19401	18960	23682	21630	18156	14174
Return on Equity	9628	14254	14461	19166	20144	20467	20748
Advance against Depreciation	2328	13214	0	29577	15994	16345	16552
Interest on Working Capital	1922	3311	3057	4892	4638	4650	4639
O & M Expenses	9360	14040	14595	19460	20240	21040	21900
Total	45034	76469	63500	113204	99911	98199	95796

12. Aggrieved by order dated 19.2.2010, the petitioner filed Review Petition 126/2010 before the Commission, raising the following issue:

‘Non-consideration of un-discharged liabilities in terms of the judgment of the Tribunal dated 10.12.2008 in Appeal 138/2008 and the liabilities discharged during the year 2008-09 amounting to Rs. 5.90 crore has not been considered in the capital cost.’

13. The petitioner also filed appeal (Appeal No. 92/2010) against the order dated 19.2.2010, raising the following issues:

- (a) Exclusion of un-discharged liabilities
- (b) Depreciation as deemed Repayment of loan
- (c) Interest During Construction (IDC)
- (d) Cut-off date for inclusion of additional capital expenditure
- (e) Cost of maintenance spares
- (f) De-capitalization of capital spares and exclusion from capital base

14. Both the Review petitions viz., Review Petition Nos. 46/2010 and 126/2010 were heard by the Commission on 27.7.2010 and orders reserved.

15. Meanwhile on 18.8.2010, the Tribunal by its judgment in Appeal No. 66/2008, allowed the prayers of the petitioner *in part*, and set aside the order of the Commission dated 31.1.2008 in Petition No. 179/2004 to the extent indicated therein, following its earlier decisions contained in judgment dated 13.6.2007 in Appeal Nos. 139 to 142 etc of 2006 and other connected cases and judgment dated 16.3.2009 in Appeal Nos. 133, 135, 136 and 148/2008) in respect of other generating stations of the petitioner. The relevant extract of the observations of the Tribunal in its judgment dated 18.8.2010, is as under:

“46. Accordingly, on the following issues we are of the opinion that the findings of the Commission are not justifiable and they required to be re-examined in light of the settled legal position as have been discussed in the preceding paragraphs of this judgment:

(i) Un-discharged liabilities.

(ii) Opening capital cost as on 01.04.2004 having regard to the proviso to regulation 17 of the Regulations, 2004.

(iii) Disallowance of interest during construction on notional loan.

(iv) Treating depreciation as deemed loan repayment

47. With regard to the “cut-off” date we remand the matter to the Commission to consider the submissions of the appellant to extend the cut-off date appropriately in exercise of its power to relax under the Tariff Regulations, 2004.

48. With regard to escalation in cost of maintenance spares in working capital we are in agreement with the findings of the Commission.

49. The result of this discussion as aforesaid would be that the Respondent No. 1 is to re-examine the case and pass a fresh order on the issue referred to above in the light of the observations made in the body of the judgment.

50. Accordingly, we allow the appeal in part, set aside the order dated 31.1.2008 passed in Petition No. 179/04 to the extent as indicated above and remand the matter back to the Commission for re-examination on the issues as above so as to have a fresh decision reached in accordance with the law after hearing the parties.”

16. Pursuant to the above directions, Petition No.179/2004 was heard on 21.12.2010 and 18.1.2011 on the issue of relaxation of cut-off date for additional capitalization and the Commission reserved its order on the petition.

17. While so, the Tribunal by its judgment dated 4.2.2011 in Appeal No. 92/2010 allowed the prayers of the petitioner (*as in para 13 above*), except the prayer of the petitioner for de-capitalization of capital spares. However, on the issue of cut-off date for additional capitalization, the same was remanded to the Commission to consider the question of relaxation of cut-off date in terms of its observations contained in judgment dated 18.8.2010 in Appeal No. 66/2008.

18. Thereafter, the Commission by its order dated 30.5.2011 in Review Petition No. 139/2010 (TNEB-v- NTPC & ors) disposed of the said review petition filed by TNEB and directed the correction of errors as pointed out by the respondent, TNEB. However, the revision of tariff consequent upon correction of errors was directed to be undertaken at the time of revision of tariff after consideration of the question of relaxation of cut-off date in terms of the directions contained in the judgment of the Tribunal dated 18.8.2010 as stated above. The relevant portion of the order dated 30.5.2011 is extracted as under:

"16. The Appellate Tribunal for Electricity in its judgment dated 18.8.2010 in Appeal No. 66/2008 has set aside the order dated 31.1.2008 in Petition No.179/2004 pertaining to the original tariff order for the period 2004-09 of Talcher STPS, Stage-II (2000 MW) and remanded the matter for fresh determination in the light of the observations of the Tribunal. The Commission is in the process of revising the tariff of the generating station for implementing the said judgment. Our directions in para 12 above shall be taken into account while revising the tariff of the generating station. The loan particulars drawn for additional capitalization as mentioned in para 15 above, shall be included in the order while revising the tariff"

19. Subsequently, the Commission by its order dated 6.7.2011 in Review Petition No. 126/2010, allowed the prayer of the petitioner (*as in para 12 above*) and directed the

adjustment of liabilities at the time of disposal of the original petition (Petition No. 179/2004) after considering the question of relaxation of cut-off date for additional capital expenditure in terms of the judgment of the Tribunal dated 18.8.2010 in Appeal No. 66/2008. The relevant portion of the order dated 6.7.2011 is extracted as under:

"9. It is observed that the Tribunal in its judgment dated 18.8.2010 in Appeal No.66/2008 had allowed the prayer of the petitioner for relaxation of 'cut-off' for inclusion of additional capital expenditure and has remanded the matter to the Commission to consider the same by exercise of the 'Power to relax' under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004. The matter has been heard and orders have been reserved by the Commission. In view of this, we are of the view that the adjustment of liabilities should be given effect to while disposing of the original petition (Petition No.179/2004) after considering the question of relaxation of the 'cut-off' date for the generating station for the purpose of additional capital expenditure. We direct accordingly"

20. Thereafter, the Tribunal by its judgment dated 18.7.2011 in Appeal No. 64/2010 allowed the prayers of the petitioner (as in para 10 above) in terms of its earlier judgments and remanded the matter to the Commission to consider the question of relaxation of cut-off date for additional capitalization for the generating station. However, on the question of disallowance of items diverted from other stations (i.e *inter-unit transfers*), the Tribunal agreed with the findings of the Commission and disallowed the said prayer of the petitioner. The relevant portion of the judgment dated 18.7.2011 is extracted hereunder:

"11. The Learned Counsel for the Appellant cited the judgement of this Tribunal in Appeal No. 92 of 2010 dated 4.2.2011 reported in 2011 ELR (APTEL) 224 and contended that these issues have been considered and the findings has been rendered in favour of the Appellant on the basis of the earlier judgement of this Tribunal.

12. We have gone through the judgment of the Hon'ble Supreme Court as well as the judgment of this Tribunal reported in 2011 ELR (APTEL) 224 and in the light of the view taken by us earlier, we are unable to accept the contention urged by this Respondent. Therefore, this Appeal is allowed in respect of above issues No. 1 to 6 in terms of the judgment referred above.

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17. *The view taken by the Central Commission that the inter unit transfers would not be considered in tariff as it results in frequent revision of tariff at both the generating stations and other factors of tariff at both the generating stations, in our view is perfectly justified.*

18. *Therefore, the submissions on this issue made by the Learned Counsel for the Appellant do not merit consideration. Therefore the claim on this issue is rejected. As indicated above, issue No.1 to 6 is allowed and Issue No.7 is rejected"*

21. Pursuant to the above judgment, the petitioner by its affidavit dated 26.8.2011 has submitted before the Commission that the Review Petition No. 46/2010 (*para 7 above*) cannot be proceeded with and that while recognizing the inter-unit transfer of the diverted items from Farakka and Barh station, the value of assets which were subject matter of the inter-unit transfer/diverted items should continue to be maintained in the capital cost of the generating station for the purpose of tariff. In consideration of this prayer, the Commission by its order dated 27.9.2011 in Review Petition No. 46/2010 dismissed the said review petition as infructuous. The relevant portion of the order dated 27.9.2011 is extracted as under:

"7. In view of the above findings of the Appellate Tribunal, the present review petition has become infructuous and is accordingly dismissed. Consequently, the loco from Barh STPS and diesel locomotive works from Farakka STPS which have been transferred to Talcher STPS Stage – II shall remain on the capital base of Barh STPS and Farakka STPS respectively and the value of the assets would continue to be maintained in the capital cost of Farakka and Barh STPS for tariff purpose."

22. In the above background, we consider the question of cut-off date for additional capital expenditure for the generating station based on the submissions of the parties' and the documents available on record, as discussed in the subsequent paragraphs.

Relaxation of Cut-off date for additional capitalization

23. On the prayer of the petitioner for relaxation of cut-off date for additional capitalization, the Tribunal in its judgment dated 18.8.2010 in Appeal No. 66/2008 has observed as under:

"44. The Appellant has submitted that the orders for certain work for a sum of Rs. 76 crores could not be placed by 31.03.2007 due to detailed review of initial spares. After detailed exercise enquiry for some of the spares was issued in July and September, 2006 against which offers were received from BHEL in September and November, 2006. The order could be placed after negotiation and bringing down the cost only after 31.03.2007. Also some orders relating to Civil Works were placed after 31.03.2007. It has been argued by the learned counsel for the Appellant that the present case is a just and proper case for exercising the Power to Relax.

45. We have examined the details of the items where the orders were placed after the cut off date submitted by the appellant. These are essentially the initial spares required for the power plant. In view of the explanation offered by the appellant we are convinced that it is a fit case for consideration of the Commission to exercise its power to relax under the Tariff Regulations, 2004. Accordingly we remand this matter to the Commission to consider the request of the appellant to extend the cut off date appropriately in exercise of its power to relax".

24. The petitioner in its affidavit dated 28.2.2007 in Petition No.179/2004, had made its submissions for computation of cut-off date from the scheduled date of commercial operation, which is summarized as under:

- (a) As per the approved schedule for the generating station, commercial operation was to commence in May 2006. Against the above, the petitioner has commissioned the project and declared commercial operation on 1.8.2005 i.e. about 10 months prior to the approved scheduled date of commercial operation.
- (b) The implementation of the project was taken up much before the notification of the 2004 regulations.
- (c) If commercial operation were declared on the scheduled date i.e. in May 2006, it would have enabled the petitioner to complete the residual capital works up to 31.3.2008 which would be the cut-off date as per clause (ix) of Regulation 14 of the 2004 regulations.
- (d) Commercial operation of the generating station was advanced by preponing the activities relating to commissioning and commercial operation. Some of the capital works such as off-site civil and administrative building, MGR doubling, MGR siding, PTS quarters, plant civil works, land payments, TG air compressors, cabling and station lighting and capital spares, etc, which though essentially required for smooth and safe operation in the long run have been taken up in due course of time.

25. During the hearings on 21.12.2010 and 18.1.2011 in Petition No. 179/2004, it was submitted by the petitioner that the cut-off date of the generating station for additional capital expenditure may be relaxed by the Commission from 31.3.2007 to 31.3.2008, in exercise of its 'power to relax' in terms of the observations of the Tribunal

in its judgment dated 18.8.2010 and consequently to revise the tariff of the generating station for 2004-09. The respondent No.2, TNEB in its written reply vide affidavit dated 16.12.2010 has submitted that the Tribunal in its judgment dated 18.8.2010 has ordered to extend the cut-off date "appropriately in exercise of its power to relax" under the 2004 regulations and hence the revision of earlier orders of the Commission based on the said judgment will be an improper exercise by the Commission. In its response vide affidavit dated 6.1.2011, the petitioner has submitted that the said respondent has raised extraneous and frivolous issues which are beyond the scope of the proceedings for execution and implementation of the directions of the Tribunal. The question of relaxation of cut-off date of the generating station in exercise of the 'power to relax' is required be considered by the Commission in compliance with the directions of the Tribunal and the same if allowed, would entail revision of tariff of the generating station for 2004-09. Hence, the submission of the respondent No.2, TNEB is not acceptable.

26. The Commission in its order dated 31.1.2008 had not allowed the capitalization of initial spares and other capital works which were in original scope of work, on the ground that orders placed for works or assets capitalized, were after the cut-off date. It is observed that some of the capital works such as off-site civil and administrative building, MGR system, PTS quarters, plant civil works, cabling, station lighting and other miscellaneous works and capital spares, etc, are essentially required for smooth and safe operation of the generating station and the orders in respect of these works have been placed by the petitioner after the cut-off date only after negotiation and bringing down the cost. Thus, taking into consideration the submissions of the petitioner and keeping in view the spirit of the judgment of the Tribunal dated 18.8.2010, we relax the cut-off date for the generating station to 31.3.2008, in exercise

of the 'power to relax', in terms of Regulation 13 of the 2004 regulations. Consequent upon this, expenditure incurred for the generating station after the date of commercial operation and upto the revised cut-off date is considered for capitalization, in terms of Regulation 18 of the 2004 Regulations, subject to prudent check. Accordingly, additional expenditure towards spares and other works /assets amounting to ₹320.38 lakh for 2007-08 and ₹1576.40 lakh for 2008-09 is allowed along with un-discharged liabilities of ₹3.26 lakh and ₹593.17 lakh for the years 2007-08 and 2008-09 respectively.

Other issues

27. As stated earlier, the Tribunal by its judgments dated 18.8.2010, 4.2.2011 and 18.7.2011 in respect of this generating station has allowed the prayers of the petitioner on other issues as under, based on its earlier decisions as contained in its judgments dated 13.6.2007 in Appeal Nos.139 to 142/2006 & other connected cases and the judgment dated 16.3.2009 in Appeal Nos. 133, 135, 136 and 148/2008 (NTPC-v- CERC & ors) as under:

- (a) Exclusion of un-discharged liabilities*
- (b) IDC*
- (c) Depreciation as deemed repayment of loan*
- (d) Cut-off date for inclusion of additional capital expenditure*
- (e) Cost of maintenance spares (for additional capital expenditure)*
- (f) Opening capital cost as on 1.4.2004*

Judgment of Tribunal dated 13.6.2007

28. Against the orders of the Commission determining tariff for the generating stations of the petitioner, the petitioner filed appeals (Appeal Nos.139 to 142 etc of 2006, 10, 11 and 23/2007 etc) before the Tribunal and the Tribunal by its judgment dated 13.6.2007 allowed the prayers and allowed the prayers of the petitioner and remanded the matters for re-determination of tariff by the Commission. Against the judgment dated 13.6.2007,

the Commission has filed Civil Appeals C.A. Nos. 5434/2007 to 5452/2007 and 5622/2007) on five issues as under:

- (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*

29. 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 Tribunal. However, on 10.12.2007, the Hon'ble Supreme Court passed interim order as under:

“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.”

30. Keeping in view the spirit of the interim order dated 10.12.2007 and since tariff was a composite package, the Commission while revising the tariff of the generating station for 2004-09 based on the additional capital expenditure incurred for the years 2004-08 (in Petition No. 146/2008) and for 2008-09 (in Petition No. 138/2009) had by its orders dated 5.1.2010 and 19.2.2010 respectively, deferred the implementation of the directions contained in the judgments of the Tribunal dated 13.6.2007.

31. Subsequently, based on the observations of the Tribunal in judgment dated 4.2.2011 in Appeal No. 92/2010 that mere pendency of appeal before the Hon'ble Supreme Court cannot be a ground to deny implementation of the orders of the Tribunal, the Commission by its various orders has implemented the directions contained in the judgment of the Tribunal dated 13.6.2007 in respect of the five issues covered by the interim order of the Hon'ble Supreme Court dated 10.12.2007 and has revised the annual fixed charges for some of the generating stations of the petitioner for the period 2004-09, subject to the final outcome of the Civil Appeals pending before the Hon'ble Supreme Court.

Judgment of Tribunal dated 16.3.2009

32. The Commission while determining tariff for some of the generating stations of the petitioner for 2004-09 had by its various orders disallowed un-discharged liabilities, IDC, from the capital cost for the purpose of tariff. Aggrieved, the petitioner filed appeals (Appeal Nos. 151& 152/2007 and Appeal Nos. 133,135, 136 and 148/2008) before the Tribunal and the Tribunal by its judgment dated 10.12.2008 and 16.3.2009 respectively directed the capitalization of un-discharged liabilities and IDC. Against these judgments, the Commission has filed Civil Appeals (C.A Nos. 4112-4113/2009 and C.A Nos. 6286 to 6288/2009) before the Hon'ble Supreme Court and the matters are pending. Since no stay has been granted, the Commission by its various orders has implemented the judgment of the Tribunal dated 10.12.208 and 16.3.2009 respectively and revised the tariff of various generating stations of the petitioner, subject to the outcome of the said Civil Appeals.

33. As stated in paragraph 15 above, the Tribunal by its judgment dated 18.8.2010 has remanded the matter to the Commission to consider the issues, namely:

- (a) Un-discharged liabilities;*
- (b) Disallowance of IDC on notional loan; and*
- (c) Treatment of depreciation as deemed loan repayment.*

34. Against this judgment dated 18.8.2010 (in Appeal No. 66/2008), the Commission has filed Appeal (Civil Appeal D. No.8776/2011) before the Hon'ble Supreme Court and the Hon'ble Court on 25.4.2011 has passed interim order as under:

“It is pointed out that in connected appeals, orders have already been passed admitting those appeals.

Our attention is also drawn to an order passed by this Court in the connected appeals, which is dated 10.12.2007. In the said interim order passed by this Court by way of vacation of the earlier interim order, this Court recorded the statement of the Solicitor General for India that in view of order of remand, the following five issues would not be pressed for fresh determination:

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

In view of the aforesaid statement made this Court made it clear that the Commission may apply to other cases also.

Counsel appearing for the appellant also states that although in the Synopsis and List of Dates, it was stated that the present appeal would be confined to three issues, namely,

- 1. Un-discharged liabilities;*
- 2. Interest during construction; and*
- 3. Treatment of depreciation and its adjustment towards deemed repayment of loans.*

According to him, he would not press for stay so far as the first two issues are concerned.

Taking notice of the entire facts and circumstances of the case, the delay of 71 days is condoned.

This civil appeal is admitted.

The interim order dated 10.12.2007 would also apply to the present case as issues are stated to be identical.

Tag with Civil Appeal No. 5434 of 2007.”

35. Subsequently, against the judgment of the Tribunal dated 4.2.2011 in Appeal No. 92/2010, the Commission filed Civil Appeal [Civil Appeal D.No. 24694/2011] and the matter has been admitted and is pending.

36. Keeping in view the spirit of the interim orders dated 10.12.2007 and 25.4.2011 of the Hon'ble Supreme Court as quoted above and since tariff is a composite package, we defer the implementation of the issues covered under the said interim orders dated 10.12.2007/25.4.2011, till the final disposal of the said Civil Appeals. Other issues namely, un-discharged liabilities and IDC has been considered for capitalization for the purpose of tariff, subject to final outcome of the Civil Appeals pending before the Hon'ble Supreme Court.

37. Based on the above discussions, we now proceed to determine the tariff of the generating station for the period 2004-09 taking in to consideration, the following:

(a) In compliance with the directions contained in the judgment of the Tribunal dated 30.3.2007 in Appeal No. 117/2006 to consider normative repayment of loan (*as against normative or actuals, whichever is higher*), the Commission by its order dated 16.6.2010 revised the tariff of the generating station for the period from 1.8.2003 to 31.3.2004. As the corresponding figures for cumulative repayment, net loan closing and cumulative depreciation as on 31.3.2004 could not be considered for the period 2004-09 in the Petition Nos.179/2004, 146/2008 and 138/2009, the same is considered in this order.

(b) In line with our observations in order dated 30.5.2011 in Review Application No.139/2010 (TNEB-v-NTPC & ors), the arithmetical errors are corrected by this order. The weighted average rate of interest of 8.3433% shall be considered for calculation of interest on loan and ₹1066.33 lakh on account of IDC is deducted from interest on loan

instead of ₹694.00 lakh. Further, the details of actual loans drawn towards additional capitalization have been furnished by the petitioner vide its affidavit dated 9.6.2009 in Petition No.146/2008 and these details form part of the calculations in this order.

(c) In terms of our observations in order dated 6.7.2011 in Review Petition No.126/2010, the un-discharged liabilities disallowed earlier has been considered in the capital cost for the purpose of tariff. As a consequence, the liabilities discharged earlier and allowed for the purpose of tariff are being deducted from the earlier allowed additional capital expenditure. Further, the reversal of liabilities ignored earlier is being adjusted now to arrive at the allowable additional capital expenditure.

(d) Interest During Construction (IDC) prior to the date of commercial operation: In its order dated 31.1.2008, the Commission had deducted the differential amount of IDC up to the date of commercial operation of the generating station by disallowing the claims made by the petitioner on FIFO method of repayment and allowing claims calculated on the average method of repayment. In its judgment dated 10.12.2008 in Appeal No. 151 & 152/2007, the Tribunal while confirming that the average method adopted by the Commission does not need any change, has observed that the petitioner is liable to get IDC on the amount considered as repayment and made out of equity during the construction period by treating the same as notional loan provided the amount of equity is more than 30%. As observed in our order dated 31.1.2008, the amount of equity infusion is more than 30% during the tariff period 2004-09 when these adjustments to IDC were made. Hence, the IDC disallowed is now allowed in terms of the judgment of the Tribunal by treating the amount as notional loan.

(e) Inter-Unit transfers have been disallowed in terms of the judgment of the Tribunal dated 18.7.2011 in Appeal No. 64/2010.

Capital Cost

38. The capital cost of the generating station is worked out as under, after considering the un-discharged liabilities, after including the IDC disallowed earlier on FIFO basis, the additional capital expenditure allowed due to extension of cut-off date and the disallowance of inter-unit transfers:

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Opening capital cost (allowed on the date of commercial operation)	228962.77	335471.34	343514.66	437528.76	-	-	-
Add: un-discharged liabilities deducted on the date of commercial operation vide order dated 31.1.2008	31557.58	46648.70	42689.45	58522.21	-	-	-
Add: IDC allowed out of IDC deducted by order dated 31.1.2008	12.69	30.94	39.27	58.82	-	-	-
Less: Inter-unit transfer of assets/ work not with original scope of work not allowed as additional capital expenditure during preceding periods		(-) 3.85	220.54	291.31	-	-	-
Opening Capital cost considered now (A)	260533.04	382154.83	386022.83	495818.48	495964.77	504123.72	508350.92
Additional capital expenditure allowed by orders dated 5.1.2010 & 19.2.2010	567.33	7827.25	1598.74	37597.30	8972.64	6401.70	6990.43
Add: Un-discharged liabilities disallowed in Additional capital expenditure by order dated 5.1.2010 & 19.2.2010	188.84	84.99	403.97	2031.63	1027.56	297.12	1275.17
Less: Discharge of liabilities allowed by order dated 5.1.2010 & 19.2.2010	572.43	3616.92	219.57	32875.94	817.70	1268.26	0.00
Less: Liabilities reversed ignored earlier	0.00	427.31	15.36	6606.69	1023.54	1523.73	0.00
Add: Additional capital expenditure	0.00	0.00	0.00	0.00	0.00	320.38	1576.40

allowed due to extension of cut-off date							
Additional capital expenditure considered now (B)	183.74	3868.00	1767.78	146.29	8158.95	4227.20	9842.00
Closing capital cost (A+B)	260716.78	386022.83	387790.62	495964.77	504123.72	508350.92	518192.92
Average capital cost	260624.91	384088.83	386906.73	495891.62	500044.24	506237.32	513271.92

Debt-Equity ratio

39. Debt equity ratio of 70:30 has been considered in terms of the 2004 regulations.

Return on equity

40. Return on Equity at 14% is worked out as under:

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Opening Equity	78159.91	114646.45	115806.85	148745.54	148789.43	151237.12	152505.28
Add: Addition to equity on account of additional capital expenditure	55.12	1160.40	530.33	43.89	2447.69	1268.16	2952.60
Closing Equity	78215.03	115806.85	116337.19	148789.43	151237.12	152505.28	155457.88
Average capital cost	78187.47	115226.65	116072.02	148767.49	150013.27	151871.20	153981.58
Return on equity @14%	10946.25	16131.73	16250.08	20827.45	21001.86	21261.97	21557.42

Interest on loan

41. Interest on loan has been worked out as mentioned below:

- Gross normative loan corresponding to 70% of the capital cost works out to ₹182373.13 lakh as on 1.4.2004, ₹267508.38 as on 1.11.2004, ₹270215.99 lakh as on 1.4.2005 and ₹347072.93 lakh as on 1.8.2005.
- Cumulative repayment of loan of Rs.3333.56 lakh as on 31.3.2004 as per order dated 16.6.2010 in Petition No.1/2003 has been considered as on 1.4.2004.
- Accordingly, net opening normative loan as on 1.4.2004 works out to ₹179039.57 lakh.
- Actual repayments as considered in orders dated 30.1.2008 / 5.1.2010 / 19.2.2010 has been retained for the calculation of normative repayment.
- Repayment of normative loan has been considered as higher of normative repayment or depreciation for the period, as per formula shown below:

$$\text{Normative repayment} = \frac{\text{Actual Repayment} \times \text{Normative Loan}}{\text{Actual loan}}$$

- (f) Weighted average rate of interest has been arrived at after considering the actual loans as considered in order dated 31.1.2008 in Petition No.179/2004, addition of actual loans raised during 2004-08 as considered in order dated 5.1.2010 in Petition No.146/2008 and addition of actual loans during 2008-09 as considered in order dated 19.2.2010 in Petition No.138/2009.

42. The interest on loan is computed as under:

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Gross Opening Loan – Considered now	182373.13	267508.38	270215.99	347072.93	347175.34	352886.60	355845.64
Cumulative Repayment of Loan upto previous year	3333.56	10633.61	22877.63	27544.97	64741.71	104928.08	157426.95
Net Loan Opening	179039.57	256874.77	247338.35	319527.96	282433.63	247958.53	198418.70
Addition of loan due to additional capital expenditure allowed for 2004-09	128.62	2707.60	1237.45	102.40	5711.27	2959.04	6889.40
Repayment of loan	7300.05	12244.03	4667.34	37196.73	40186.37	52498.87	43192.50
Net Loan Closing	171868.14	247338.35	243908.46	282433.63	247958.53	198418.70	162115.59
Average Loan	175453.85	252106.56	245623.41	300980.80	265196.08	223188.61	180267.14
Weighted Average Rate of Interest on Loan	9.0190%	8.8803%	8.8361%	8.6197%	8.3162%	8.3433%	8.1191%
Interest on Loan	15824.25	22387.89	21703.51	25943.54	22054.33	18621.19	14636.07

Depreciation

43. Weighted average rate of depreciation of 3.6159% for the period from 1.4.2004 to 31.10.2004, 3.6091% for the period from 1.11.2004 to 31.7.2005 and 3.5998% for the period from 1.8.2005 onwards, as considered in orders dated 30.1.2008/ 5.1.2010 / 19.2.2010 has been retained for the purpose of calculation of depreciation. Value of land as on respective date of commercial operation of the units of the generating station along with addition of land has been considered to arrive at the depreciable value. Cumulative depreciation as on 31.3.2004 as per order dated 16.6.2010 in Petition No.1/2003 is ₹4880.46 lakh and the same has been considered for the calculation of balance depreciable value as on 1.4.2004. The depreciation for the period 2004-09 has been calculated as under:

(₹ in lakh)

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Opening capital cost	260533.04	382154.83	386022.83	495818.48	495964.77	504123.72	508350.92
Closing capital cost	260716.78	386022.83	387790.62	495964.77	504123.72	508350.92	518192.92
Average capital cost	260624.91	384088.83	386906.73	495891.62	500044.24	506237.32	513271.92
Depreciable value @ 90%	233164.60	343578.99	345284.01	443330.13	447067.14	452398.36	458210.33
Balance depreciable value (at the beginning)	228284.15	332945.38	322406.37	415785.16	384814.87	355428.56	325951.87
Depreciation (for the period)	5525.31	5734.71	4667.34	11884.55	18000.76	18223.70	18476.94
Depreciation (annualized)	9424.01	13862.05	13963.75	17851.28	18000.76	18223.70	18476.94

Advance Against Depreciation

44. On account of the above revisions, Advance against Depreciation is also revised as under:

(₹ in lakh)

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
1/10th of Gross Loan(s)	18237.31	26750.84	27021.60	34707.29	34717.53	35288.66	35584.56
Repayment of the Loan	7300.05	12244.03	4667.34	37196.73	40186.37	52498.87	43192.50
Minimum of the above	7300.05	12244.03	4667.34	34707.29	34717.53	35288.66	35584.56
Depreciation during the year	5525.31	5734.71	4667.34	11884.55	18000.76	18223.70	18476.94
(A) Difference	1774.74	6509.31	0.00	22822.75	16716.77	17064.96	17107.63
Cumulative Repayment of the Loan	10633.61	22877.63	27544.97	64741.71	104928.08	157426.95	200619.45
Cumulative Depreciation / AAD	10405.77	16368.32	27544.97	39429.52	80253.03	115193.50	150727.68
(B) Difference	227.84	6509.31	0.00	25312.19	24675.05	42233.45	49891.77
Advance Against Depreciation (AAD) [Minimum of (A) and (B)]	227.84	6509.31	0.00	22822.75	16716.77	17064.96	17107.63
AAD (annualized)	388.61	15734.43	0.00	34281.08	16716.77	17064.96	17107.63

O&M expenses

45. The O&M expenses as considered in our earlier orders in respect of this generating station have been considered for the purpose of revision of tariff.

Interest on Working Capital

46. For the purpose of calculation of working capital the operating parameters including the price of fuel components as considered in the order dated 19.2.2010 has been kept unchanged. The “receivables” component of the working capital has been revised for the reason of revision of return on equity, interest on loan etc. The necessary details in support of calculation of interest on working capital are as under:

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Coal Stock- 1.1/2 months	3130.87	5816.90	5771.02	8951.19	8899.50	8923.88	8899.50
Oil stock -2 months	448.15	749.08	581.14	1014.30	823.64	825.90	823.64
O & M expenses	780	1170	1216	1622	1687	1753	1825
Maintenance Spares	2267.86	3317.87	3398.31	4327.01	4500	4770	5056
Receivables	12608	22776	19888	33521	29806	29542	29083
Total Working Capital	19235.31	33829.42	30855.05	49435.12	45716.14	45815.60	45687.58
Rate of Interest	10.2500%	10.2500%	10.2500%	10.2500%	10.2500%	10.2500%	10.2500%
Total Interest on Working capital	1971.62	3467.52	3162.64	5067.10	4685.90	4696.10	4682.98

Annual Fixed Charges for 2004-09

47. Based on the above, the annual fixed charges allowed for the generating station for 2004-09 is summarised as under:

	2004-05		2005-06		2006-07	2007-08	2008-09
	1.4.2004 to 31.10.2004	1.11.2004 to 31.3.2005	1.4.2005 to 31.7.2005	1.8.2005 to 31.3.2006			
Depreciation	9424.01	13862.05	13963.75	17851.28	18000.76	18223.70	18476.94
Interest on Loan	15824.25	22387.89	21703.51	25943.54	22054.33	18621.19	14636.07
Return on Equity	10946.25	16131.73	16250.08	20827.45	21001.86	21261.97	21557.42
Advance Against Depreciation	388.61	15734.43	0.00	34281.08	16716.77	17064.96	17107.63
Interest on Working Capital	1971.62	3467.52	3162.64	5067.10	4685.90	4696.10	4682.98
O&M Expenses	9360.00	14040.00	14595.00	19460.00	20240.00	21040.00	21900.00
TOTAL	47914.73	85623.62	69674.99	123430.44	102699.63	100907.92	98361.03

Note: The figures stated above are on annualized basis.

48. The annual fixed charges allowed by this order is subject to the outcome of Civil Appeals pending before the Hon'ble Supreme Court.

49. In addition to the charges approved above, the petitioner is entitled to recover other charges like incentive, claim for reimbursement of income-tax, other taxes, cess levied by statutory authority, in accordance with the 2004 regulations, as applicable.

50. The petitioner shall claim the difference in respect of the tariff determined by order dated 19.2.2010 and the tariff determined by this order, from the beneficiaries in three equal monthly installments.

51. Petition No. 179/2004 is disposed of in terms of the above.

Sd/-

(M.DEENA DAYALAN)
MEMBER

Sd/-

(V.S.VERMA)
MEMBER

Sd/-

(S.JAYARAMAN)
MEMBER

Sd/-

(DR.PRAMOD DEO)
CHAIRPERSON