

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 300/2009

Coram

Dr. Pramod Deo, Chairperson

Shri S Jayaraman, Member

Shri V S Verma, Member

Shri M Deena Dayalan, Member

Date of Hearing: 29.7.2010

Date of Order : 21.8.2012

In the matter of

Approval of recovery of fixed charges on account of capital expenditure incurred at the various offices of NTPC between 1.4.2004 and 31.3.2009

And in the matter of

NTPC Ltd New Delhi

.... Petitioner

Vs

1. Uttar Pradesh Power Corporation Ltd., Lucknow
2. Ajmer Vidyut Vitran Nigam Ltd., Ajmer
3. Jaipur Vidyut Vitran Nigam Ltd., Jaipur
4. Jodhpur Vidyut Vitran Nigam Ltd., Jodhpur
5. Delhi Transco Ltd., New Delhi - 110001
6. North Delhi Power Ltd, Delhi - 110009
7. BSES Rajdhani Power Ltd, New Delhi - 110019
8. BSES Yamuna Power Ltd, New Delhi - 110092
9. New Delhi Municipal Council, New Delhi - 110001
10. Military Engineering service, New Delhi - 110010
11. Punjab State Electricity Board, Patiala
12. Haryana Vidyut Prasaran Nigam Ltd., Panchkula
13. Haryana Power Generation Company Ltd., Panchkula
14. Haryana Power Purchase Centre, Panchkula
15. Himachal Pradesh State Electricity Board, Shimla
16. Power Development Department, Govt. J&K, Jammu
17. Chief Manager, Chandigarh Admn, Chandigarh
18. Uttarakhand Power Corporation Ltd., Dehradun
19. Madhya Pradesh State Electricity Board, Jabalpur
20. Maharashtra State Electricity Distribution Co. Ltd., Mumbai
21. Gujarat Urja Vikas Nigam Ltd., Vadodara
22. Chattisgarh State Electricity Board, Raipur
23. Electricity Department, Govt. of Goa, Panaji
24. Electricity Department, Admn of Daman & Diu, Daman
25. Electricity Department, Admn of Dadra & Nagar Haveli, Silvassa
26. Transmission Corporation of Andhra Pradesh Ltd., Hyderabad



27. AP Eastern Power Distribution Co.Ltd., Vishakapatnam
 28. AP Southern Power Distribution Co.Ltd., Tirupathi
 29. AP Northern Power Distribution Co.Ltd., Warangal
 30. AP Central Power Distribution Co.Ltd., Hyderabad
 31. Karnatka Power Transmission Corporation Ltd., Bangalore
 32. Bangalore Electricity Supply Co. Ltd., Bangalore
 33. Mangalore Electricity Supply Co.Ltd., Mangalore
 34. Chamundeshwari Electricity Supply Corp.Ltd., Mysore
 35. Gulbarga Electricity Supply Co.Ltd., Karnataka
 36. Hubli Electricity Supply Co.Ltd., Hubli
 37. Kerala State Electricity Board, Thiruvananthapuram
 38. Electricity Department, Govt. of Pudducherry, Pudducherry
 39. Tamil Nadu Electricity Board, Chennai
 40. Gird Corporation of Orissa Ltd., Bhubaneshwar
 41. Damodar Valley Corporation, Kolkata
 42. Bihar State Electricity Board, Patna
 43. West Bengal State Electricity Distribution Company Ltd, Kolkata
 44. Department of Power, Govt. of Sikkim, Gangtok
 45. Jharkhand State Electricity Board, Ranchi
- ...Respondents**

Present:

1. Shri M.G.Ramachandran, Advocate, NTPC
2. Shri V.K.Padha, NTPC
3. Shri M.K.V.Rama Rao, NTPC
4. Shri Ajay Dua, NTPC
5. Shri G.K.Dua, NTPC
6. Shri Pradip Misra, Advocate, UPPCL
7. Shri Daleep Kr. Dhayani, Advocate, UPPCL
8. Shri Deepak Shrivastava, MPPTCL
9. Shri T.P.S.Bawa, HPPC
10. Shri Bharat Sharma, NDPL

ORDER

The petitioner, a generating company owned or controlled by the Central Government owns the generating stations in four regions of the country, namely Northern, Western, Southern and Eastern Regions. The power generated at these generating stations is supplied for further distribution by the respondents. The tariff of the petitioner's generating stations is regulated by this Commission by virtue of



powers under clause (a) of sub-section (1) of Section 62 read with under clause (a) of sub-section (1) Section 79 of the Electricity Act, 2003 (the Act).

2. The petitioner has stated that for effective coordination of the activities of the generating stations/projects in a region, the petitioner has established certain offices which it calls the Regional Headquarters, stated to be seven in number. The activities of the Regional Headquarters Offices are further coordinated through the Corporate Offices located at New Delhi and NOIDA. The Corporate Offices lay down the policy for guidance to the Regional Headquarters and the generating stations/projects, to meet their needs related to engineering, procurement, technical, commercial and financial matters. In addition, the petitioner has established Transport and Custom Clearance offices at Chennai and Kolkata to facilitate functioning of different field offices/generating stations. The capital expenditure incurred by the petitioner on establishment of these offices is not taken into consideration for determination of tariff for supply of electricity generated at the generating stations owned by the petitioner, though the revenue expenditure by these offices is allocated to different generating stations and thus enters the tariff in the form of O & M expenses. The petitioner has stated that the depreciation on these assets also becomes part of 'Corporate Centre revenue expenses' and is booked to various projects and stations as per the petitioner's accounting policy. Accordingly, the petitioner has filed the present petition for recovery of the fixed charges on account of capital expenditure on the corporate and other offices. The details of expenditure on corporate and other offices and the fixed charges claimed in the petition are given in the table overleaf.

(` in crore)

Year	Gross Block of Offices at the end of the year	Cumulative of capital expenditure incurred after 1.4.2004	Fixed charges for the year @ 14%
2004-05	413.04	42.72	2.99
2005-06	483.92	113.20	10.91
2006-07	498.61	128.29	16.90
2007-08	559.68	189.36	22.24
2008-09	591.34	221.02	28.73

3. The petitioner had filed a petition, being Petition No 3/2006 for approval for recovery of fixed charges on account of capital expenditure incurred for these offices based on capital cost as on 1.4.2004. This Commission vide its order dated 26.4.2006 dismissed the petition at the admission stage holding that there was no provision in the regulations for determination of tariff. The relevant part of the order is extracted hereunder:

“7. Traditionally, the actual expenditure incurred on the generating station only reckons for the purpose of determination of tariff. The petitioner has not brought to our notice any provision of law which may enable the petitioner to reckon the capital expenditure incurred on offices other than on the project for the purpose of determination of tariff. The tariff is to be determined in accordance with the regulations and the regulations do not contain any provision for consideration of capital cost at other offices for tariff determination. Therefore, it is not possible to concede to the prayer of the petitioner made in the present petition.

8. The general accounting practice is that the expenditure on an administrative establishment is charged to productive units in the form of overheads. The expenditure on an administrative establishment includes depreciation, interest and other O & M expenses. The petitioner in the

petition has stated that as per audited accounts, the depreciation on the capital assets of all these offices becomes part of the Corporate Centre revenue expenses and is booked to various projects and stations and thus depreciation on these assets gets recovered through tariff. Similarly, revenue expenses of these offices, are also recovered through tariff as O&M expenses, by apportioning these expenses among all the generating stations owned by the petitioner. The petitioner is thus already availing of the benefits available under the established financial accounting practices.”

4. The petitioner filed an appeal (Appeal No 94/2006) before the Appellate Tribunal, which was dismissed by judgment dated 30.3.2007 observing that –

“4. In the circumstances, therefore, it is too late in a day to claim the capital expenditure of `370.30 crores as on April 1, 2004 for determination of tariff. This controversy cannot be permitted to be raked up at such a belated stage. The question whether the appellant can claim capital expenditure incurred after 2004 on establishment of offices for managing the stations, is left open as it cannot be considered in this Appeal since the appellant has claimed capital expenditure as on April 1, 2004.”

5. The petitioner filed the second appeal before the Hon’ble Supreme Court against the judgment of the Appellate Tribunal under section 125 of the Act. The Hon’ble Supreme Court by its order dated 2.12.2010 remanded the matter to the Appellate Tribunal who after elaborate discussion on this Commission’s order again dismissed the appeal by its judgment dated 30.8.2011.

6. Meanwhile, the Appellate Tribunal in its judgment dated 23.11.2007 in Appeal No 273/2006 (Damodar Valley Corporation Vs Central Electricity Regulatory Commission and others) held that

“1.4 We feel that once the Commission has agreed to treat these assets as part of the generating and transmission activities of the Appellant by permitting recovery of their O&M cost, these assets, after due prudence check, should also be included in the capital cost and consequential effect be given through determination of tariff.”



7. The petitioner in the present petition has relied upon the judgment of the Appellate Tribunal in Appeal No.273/2006.

8. Some of the respondents have filed their affidavits-in-opposition. The main grounds of opposition are summarized below:

(a) The capitalization of expenses for corporate and other offices cannot be considered, since the tariff for the period 2004-09 had been determined by the Commission and the petitioner could have placed the issue of recovery of fixed charges on account of capital expenditure incurred on corporate and other offices, while seeking fixation of tariff.

(b) It would be difficult for the respondents to recover tariff from their consumers at this belated stage.

(c) The judgment by the Appellate Tribunal in Appeal No. 273/2006 in DVC's appeal cannot be relied upon because it was rendered under different set of facts and circumstances and in any case appeals were pending before the Hon'ble Supreme Court against the judgment.

(d) Regulations 4 and 5 of the 2004 Tariff Regulations specified by the Commission provide for determination of tariff unit-wise/station-wise and do not permit recovery of fixed charges against any expenses other than the expenditure on the generating stations.

(e) The consent of the beneficiaries had not been obtained by the petitioner for the capital expenditure on corporate and other offices and hence the petitioner cannot seek capitalization of these expenses.

9. The petitioner has sought to meet the above objections in the following terms-

(a) The claim for corporate and other offices expenses could not be raised earlier since the claim for additional capitalization could be filed after the tariff period and as such there was no delay in filing the petition.

(b) The Act envisages determination of tariff in respect of the generating company as a whole and therefore fixation of tariff by this Commission for the units of the generating stations is not of much relevance.

(c) There was no need to obtain the consent of the respondents as the quantum of claim for capitalization of expenses is considered and allowed on prudence check by this Commission.

10. We heard the learned counsel/representatives of the parties. We have perused the relevant records and the judgments relied upon by the parties.

11. Historically speaking, prior to 1992, the tariff in respect central power sector utilities was determined through the Power Purchase Agreements signed by such utilities with the State beneficiaries, as single part tariff. With effect from 15.10.1991 Section 43A (2) was introduced in the Electricity (Supply) Act, 1948, which enabled

the Central Government and CEA to prescribe norms for determination of tariff. The proviso to section 43A (2) further empowered the appropriate Government to determine the terms, conditions and tariff for sale of electricity in respect of the generating companies wholly or partly owned by that Government. By virtue of powers under Section 43 A(2), the Central Government in Ministry of Power issued a general notification dated 30.3.1992 to determine factors in accordance with which the tariff for sale of electricity by Generating Companies to the State Electricity Boards and to other persons was to be determined. Para 1.2 of this notification provided, *inter alia*, that the actual capital expenditure incurred on completion of the project was to be the criterion for fixation of tariff. It was further provided that where the actual expenditure exceeded the approved project cost, the excess as approved by the Central Electricity Authority was to be deemed as the capital expenditure for the purpose of determining the tariff. In keeping with the principles contained in the notification dated 30.3.1992, the tariff for the generating stations owned by the petitioner was determined by the Central Government under proviso to Section 43 A(2) based on the actual capital expenditure incurred. The terms and conditions prescribed by the Central Government were continued up to 31.3.2001. With effect from 1.4.2001, the terms and conditions for determination of tariff as contained in the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 (the 2001 Tariff Regulations) became applicable. The 2001 Tariff Regulations also provided that the actual expenditure on the project was to be the basis for computation of tariff. Thus, historically since introduction of the two-part tariff regime for the generating stations of the petitioner, only the capital expenditure incurred on the generating station was considered as part of the capital cost.

12. Admittedly, the present petition has been filed under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (the 2004 Tariff Regulation) which came into effect on 1.4.2004 and were in force up to 31.3.2009. The 2004 Tariff Regulations were notified by this Commission under Section 178 of the Electricity. The provisions of the 2004 Tariff Regulations, so far as they are relevant, are extracted hereunder:

*“4. **Tariff determination:** (1) Tariff in respect of a generating station under these regulations shall be determined stage-wise, unit-wise or for the whole generating station and tariff for the transmission system shall be determined line-wise, sub-station-wise and system-wise, as the case may be, and aggregated to regional tariff.*

(2) For the purpose of tariff, the capital cost of the project shall be broken up into stages and by distinct units forming part of the project. Where the stage-wise, unit-wise, line-wise or sub-station-wise breakup of the capital cost of the project is not available and in case of on-going projects, the common facilities shall be apportioned on the basis of the installed capacity of the units and lines or sub-stations. In relation to multipurpose hydro electric projects, with irrigation, flood control and power components, the capital cost chargeable to the power component of the project only shall be considered for determination of tariff.

Explanation

For the purpose of this chapter, 'project' includes a generating station and the transmission system. (Emphasis added)

*“17. **Capital Cost:** Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the generating station and shall include capitalised initial spares subject to following ceiling norms as a percentage of the original project cost as on the cut off date:*

- | | |
|---|---------------|
| <i>(i) Coal-based/lignite-fired generating stations</i> | <i>- 2.5%</i> |
| <i>(ii) Gas Turbine/Combined Cycle generating stations
(Emphasis added)</i> | <i>-4.0%”</i> |

13. Thus, the 2004 Tariff Regulations provided for determination of tariff of a generating station unit-wise, or stage-wise or for the generating station as a whole. The 2004 Tariff Regulations further provided that for the purpose of determination of tariff, the capital cost of the “project” was broken up into stages and by distinct units, forming part of the project. In the explanation below clause (1) of Regulation 4, it was clarified that the project included the generating station and the transmission system. The term “project” used in the 2004 Tariff Regulations was synonymous with the generating station or the transmission system. Therefore, according to Regulation 4, it is only the capital cost of the generating station that is to be taken into account for determination of tariff. The Regulation necessarily excludes capital cost incurred on any other asset for tariff determination. Regulation 4 further provides that where the stage-wise, unit-wise breakup of the capital cost of the generating station was not available and in case of on-going projects, the common facilities were apportioned on the basis of the installed capacity of the units. The petitioner has sought to argue that the common facilities include the corporate and other offices since they render varied services to the generating stations. In our view, this interpretation of the petitioner is wholly misplaced. Every generating station has the common facilities like roads, hospital, school and recreational facilities etc. The term cannot be construed to include the corporate and other offices. This construction has been placed since beginning of the era of two-part tariff. In accordance with the 2004 Tariff Regulations, the capital cost of such common facilities is to be apportioned between different units based on the installed capacity in case the unit-wise capital cost is not available. The provision thus refers the capital cost of the unit only. We next refer to clause (1) of Regulation 17, extracted above. It unambiguously states that the final tariff is determined based on the admitted capital expenditure actually incurred up to the

date of commercial operation **of the generating station**. This again is a pointer to the fact that cost incurred on the generating station qualifies to be considered for determination of tariff. The admission of the capital cost for the purposes of tariff is subject to prudence check by this Commission. An analysis of the 2004 Tariff Regulations unequivocally leads to the conclusion that it is only the actual expenditure incurred on completion of the generating station in the case of the petitioner that forms the basis for determination of final tariff. The 2004 Tariff Regulations do not specify that the fixed charges are to be allowed on the capital cost incurred on the corporate and other offices of the petitioner. Therefore, to permit the petitioner to recover the fixed charges on that account shall be *de hors* the 2004 Tariff Regulations, which are statutory in nature.

14. The 2004 Tariff Regulations were finalized by this Commission after previous publication of the draft regulations as mandated by sub-section (3) of Section 178 of the Electricity Act. The records available with this Commission show that the petitioner had elaborately commented upon the draft regulations circulated by this Commission. However, it did not make any suggestion as regards recovery of the fixed charges on the capital expenditure on corporate and other offices. It implies that for historical reasons, the petitioner was satisfied that the capital cost incurred on corporate and other offices did not qualify for recovery of fixed charges. Therefore, the petitioner cannot be permitted to turn around and lay claim for fixed charges on account of the capital expenses on corporate and other offices.

15. The petitioner has claimed that the Appellate Tribunal dismissed its appeal against the order of this Commission dated 26.4.2006 in Petition No 3/2006 on

ground of delay and that its claim was not examined by the Appellate Tribunal on merits. The petitioner has contended that there is no delay in filing the present petition since it has been filed immediately after expiry of the tariff period on 31.3.2009. There is no doubt that earlier the petitioner's claim was not considered by the Appellate Tribunal on merits. However, the Appellate Tribunal in its subsequent judgment dated 30.8.2011 while upholding the order of this Commission has held that the corporate offices or the regional offices cannot be a part of a generating station. The petitioner further relied upon para 1.4 of the judgment of the Appellate Tribunal dated 23.11.2007 in Appeal No 273/2006 extracted above. It bears attention that the argument was considered by the Appellate Tribunal in its judgment dated 30.8.2011 *ibid*. The Appellate Tribunal has distinguished the facts and circumstances of the petitioner's case and those of Damodar Valley Corporation, the appellant in Appeal No 273/2006. The conclusion drawn by the Appellate Tribunal is that –

“24.1. The Tariff Regulations, 2004 of the Central Commission do not provide for inclusion of the capital cost incurred on corporate office and other common offices as on 1.4.2004 or after 1.4.2004 in the capital cost of the generating stations. The Appellant has not been able to bring to our notice any provision of law which enables inclusion of such capital cost for claiming Return on Equity. The findings of the Tribunal in judgment in Appeal No. 271 etc., of 2006 dated 23.11.2007 in Damodar Valley Corporation vs. Central Electricity Regulatory Commission & Ors. will not be applicable to the present case.”

16. The petitioner in the present petition has claimed recovery of fixed charges since 2004-05. It is not possible to accept that the details of the additional capital cost for the year 2004-05 and thereafter did not become available till November 2009. The petitioner had in fact in 2007 itself filed petitions for revision of annual fixed charges for its generating stations for the years 2004-05, 2005-06 and 2006-07. There could be no reason for the petitioner to delay filing of the petitions for recovery

of fixed charges till the end 2009 pertaining to the claim for the year 2004-05 or the succeeding years. The present petition cannot be considered on ground of delay as well.

17. The petitioner seeks sustenance from the Central Electricity Regulatory Commission (Fees and charges of Regional Load Dispatch Centre and other related matters) Regulations, 2009 and has submitted that the capital expenditure on assets at the corporate office have to considered. There is no force in the petitioner's this contention either. The tariff is to be determined in accordance with the terms and conditions notified by this Commission under Section 178 of the Electricity Act. As we have already seen, the 2004 Tariff Regulations framed under Section 178 of the Act, which govern determination of tariff of the generating stations, do not contain any provision for inclusion of the capital expenditure on corporate and other offices for recovery of fixed charges. The regulations on fees and charges of Regional Load Despatch Centres referred to by the petitioner, have no application to the petitioner's claim. The petitioner has also contended that the Sections 62, 64 and 79 of the Act refer to determination of tariff of the generating companies and not the generating stations. While it is true that the Act empowers this Commission to exercise tariff jurisdiction over the generating companies, this Commission to facilitate the exercise of tariff determination has specified in the 2004 Tariff Regulations that the tariff is to be determined unit-wise or stage-wise or station-wise.

18. We have considered the matter from all possible angles and are unable to persuade ourselves that the petitioner has a case in support of the relief prayed for. Accordingly, the petition is dismissed. There shall be no order as to costs.

sd/-
(M Deena Dayalan)
Member

sd/-
(V S Verma)
Member

sd/-
(S Jayaraman)
Member

sd/-
(DR. Pramod Deo)
Chairperson

