

**Central Electricity Regulatory Commission  
New Delhi**

**Interlocutory Application No. 26/2013**

**in**

**Petition No. 274/2010**

**Coram:**

**Shri V.S.Verma, Member**

**Shri M.Deena Dayalan, Member**

**Date of Hearing: 12.9.2013**

**Date of Order: 7.10.2013**

**In the matter of**

Interlocutory Application seeking in-principle approval of Additional Capital Expenditure of 2 x 525 MW generating units of Maithon Power Ltd.

**And**

**In the matter of**

Approval of capital cost and determination of generation tariff of 2 x 525 MW generating units of Maithon Power Limited for the period from the anticipated date of commercial operation of Unit-I and Unit-II to 31.3.2014.

**And**

**In the matter of**

Maithon Power Ltd, Noida

.....**Petitioner**

Vs

(1) North Delhi Power Ltd, New Delhi

(2) Damodar Valley Corporation, Kolkata

(3) West Bengal State Electricity Distribution Company Ltd, Kolkata

(4) Punjab State Electricity Board, Patiala

(5) Tata Power Trading Company Ltd, Mumbai

.....**Respondents**

**Parties Present:**

Shri Amit Kapur, Advocate, MPL

Ms. Sugradha Somany, Advocate, MPL

Shri Aveek Chatterjee, MPL  
Shri Devesh Singh, MPL  
Shri V.Ranjan, MPL

## ORDER

Petition No. 274/2010 has been filed by the petitioner, Maithon Power Ltd, for approval of capital cost and determination of generation tariff of Maithon Right Bank Thermal Power Plant (Units-I and II) (2 x 525 MW) (hereinafter referred to as "the generating station") for the period from the anticipated date of commercial operation of Unit-I i.e. 25.12.2010 and Unit-II (25.4.2011) till 31.3.2014, based on the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 ('the 2009 Tariff Regulations').

2. The petitioner has entered into Power Purchase Agreement (PPA) with DVC on 28.9.2006 for sale of 300 MW of power on round the clock basis for a period of 30 years. The petitioner also entered into PPA with NDPL on 28.3.2008 for sale of 300 MW power from the project. Subsequently, based on the PPA dated 23.4.2008 between MPL and TPTCL for sale of 750 MW power from the project, Power Supply Agreements (PSA) were entered into by TPTCL for sale of power to the following distribution licensees as detailed under:

<b>Distribution licensee</b>	<b>MW</b>	<b>Date of Agreement</b>
WBSEDCL	150	PSA dated 24.12.2008
PSEB	300	PSA dated 26.2.2009
NDPL	300	TPA dated 10.9.2009

3. The Commission by its order dated 15.5.2012 allowed provisional tariff for Unit-I of the generating station by order dated 11.11.2011 in respect of 150 MW supply of power to the respondent No. 2 DVC from 1.4.2012 to 31.3.2014 or till the final disposal of the petition whichever was earlier.

4. Subsequently, the petition was heard on 16.5.2013 on the issue of jurisdiction of this Commission to determine the tariff of the generating station under Section 62 read with Section 79(1)(b) of the Act for sale of 750 MW of power from the generating station to the respondent Nos. 1, 3 and 4 through the respondent No. 5, TPTCL and the Commission by its order dated 7.6.2013 held that this Commission has the jurisdiction to determine the tariff of the generating station for supply of power by the petitioner to the distribution licensees in the States of West Bengal and Delhi, through TPTCL which is a trading licensee. The relevant portion of the order dated 7.6.2013 is extracted as under:

"28. In view of the above discussion, we hold that the tariff of the generating station for supply of power to WBSEDCL and NDPL shall also be determined by this Commission on the basis of the judicial interpretation available at present. However, if any other judicial interpretation is available in future with regard to the jurisdiction of the Commission to determine the tariff when the power is supplied to a distribution company through a trading licensee, the Commission will be at liberty to revisit the decision in this order"

5. Thereafter, the tariff petition was listed for hearing on 9.7.2013 and the Commission after directing the petitioner to make certain clarifications/additional submissions, reserved its order in the petition.

6. While so, the petitioner on 2.8.2013 has filed this Interlocutory Application (I.A.No. 26/2013) seeking in-principle approval of the Commission for the proposed additional capital schemes in respect of this generating station. Subsequently on 27.8.2013, the petitioner, in compliance with the directions contained in the record of the proceedings dated 9.7.2013 has filed its clarifications/additional submissions in the matter.

### **Interlocutory Application No. 26/2013**

7. The petitioner in this IA has submitted that the Jharkhand State Pollution Control Board (JSPCB) had through its consent to operate dated 11.5.2012 has mandated the petitioner to ensure 'zero water discharge' to Maithon Reservoir and further directed the petitioner to ensure

100% utilization of Fly Ash through off-take to cement companies and disposal of 100% Bottom Ash to abandon coal mines of the Coal companies. In addition to this, the petitioner has also submitted that the Ministry of Environment & Forests (MOE&F), Govt. of India through its Notification dated 3.11.2009 had directed that the new coal-fired stations are required to meet the progressively increasing targets of Fly Ash utilization. Accordingly, the petitioner has submitted that in order to ensure compliance with the above Statutory notification and the directives of the MOE&F and JSPCB, it has become absolutely mandatory for the petitioner to take up appropriate additional capital expenditure schemes, viz.,

- (a) Installation of the Reverse Osmosis Plant; and
- (b) Construction of Ash Conveying pipeline.

8. The petitioner has also submitted that both the additional capital expenditure schemes above are estimated to be capitalized in the next tariff period of 2014-19.

9. The said IA was listed for hearing on 12.9.2013 on 'maintainability'. During the hearing, the learned counsel for the petitioner mainly submitted as under:

(a) The petitioner is obliged to undertake the activity of installation of Reverse Osmosis plant and incur the expenditure based on the 'Consent to operate' order dated 11.5.2012 directing the petitioner to ensure that the waste water is kept in close circuits and no industrial effluent is discharged out of the premises and to ensure that all fly ash is utilized for cement making and bottom ash, cinders, innocuous solid wastes in filling the voids of abandoned coal mines of coal companies and submit copy of the agreement executed in this respect to JSPCB. Similarly, based on the MOE&F notification dated 3.11.2009 directing all new coal fired stations to meet the progressively increasing targets of fly ash utilization, the expenditure towards the Construction of Ash Conveying pipeline is to be incurred.

(b) The project was commissioned on 24.7.2012 and in terms of Regulation 3(11) of the 2009 Tariff Regulations, the cut-off date of the generating station is 31.3.2015. Accordingly, in terms of clauses (iv) and (v) of Regulation 9(1) of the 2009 Tariff Regulations, which provides for capitalization of expenditure incurred or projected to be incurred after the date of commercial operation and up to the cut-off date, the proposed additional capital expenditure towards Reverse Osmosis Plant may be admitted, as the same is expected to be capitalized by 30.9.2014.

(c) The proposed additional capital expenditure towards 'Construction of ash conveying pipeline' is expected to be capitalized by 30.9.2015 (after the cut-off date) and hence falls within the scope of Clauses (a), (b) and (c) of Regulation 9(2) of the 2009 Tariff Regulations. The projected additional capital expenditure to be incurred after the cut-off date has been allowed by this Commission in exercise of its powers to relax in its earlier order dated 20.4.2012 pertaining to approval of tariff of Anta Gas Power Station for 2009-04 and in orders dated 7.5.2012 and 23.5.2012 in Petition Nos. 256/2009 and 332/2009.

(d) Upon the commencement of the next control period (2014-19), the additional capital expenditure incurred in the present control period (2009-14), not factored in tariff, may be treated according to the principle specified in terms of proviso to Regulation 1(2) of the 2009 Tariff Regulations.

(e) Since the petitioner has planned the capital expenditure to be incurred in the present control period, it is critical to obtain in-principle approval to commence these works and complete the same as per projected date.

10. None appeared on behalf of the respondents. We now consider as to whether the prayer of the petitioner for in-principle approval for the additional capital expenditure schemes is maintainable. Regulation 5 (2) of the 2009 Tariff Regulations provides that the generating company of the transmission licensee, as the case may be, shall make the application for determination of tariff based on capital expenditure incurred duly certified by auditors or projected to be incurred upto the date of commercial operation and additional capital expenditure incurred or projected to be incurred during the tariff period of the generating station or transmission system. The Commission in the tariff regulations applicable during the tariff period 2004-09 had made provisions for 'in principle' approval of the project capital cost for thermal power generating stations. There was no corresponding provision for hydro power generating stations. While framing the 2009 regulations, the Commission has done away with the provisions for 'in principle' approval of the project capital cost applicable to thermal power generating stations, through a conscious decision. The issue of grant of 'in-principle approval' of the project cost was considered by the Commission in Petition No. 153/2009 (Jaypee Karcham Hydro Corporation Ltd Vs PTC India Ltd) and the Commission by its order dated 26.12.2009 while rejecting the prayer of the petitioner, had observed as under:

"16.....While framing the 2009 regulations, the Commission has done away the provisions for 'in principle' approval of the project capital cost applicable to thermal power generating stations, through a conscious decision. Under the circumstances, granting approval to the estimated completion cost for the generating station by relaxing the provisions of the tariff regulations through invoking Regulation 44 thereof may amount to restoring the repealed provision, through back door."

11. In line with the above order and since the scheme of the 2009 Tariff Regulations do not provide for the grant of in principle approval, the prayer of the petitioner for in-principle approval of the additional capital expenditure schemes in this I.A. for the reasons as mentioned therein, is not maintainable. Hence, prayer in the I.A is rejected.

12. One more contention of the petitioner is that the generating station has achieved COD on 24.7.2012 and the cut-off date of the generating station in terms of the 2009 Tariff Regulations being 31.3.2015, the proposed additional capital expenditure of 'Reverse Osmosis plant' during 30.9.2014 is admissible in terms of Regulation 9(1) (iv) [liabilities to meet award of arbitration for compliance of the order or decree of court] and 9(1)(v) [Change in law] of the 2009 Tariff Regulations. It has also submitted that since the additional capital expenditure towards Construction of ash pipe line is to be capitalized after the cut-off date i.e 30.9.2015, the same is admissible in terms of Clauses (a), (b) and (c) of Regulation 9(2) of the 2009 Tariff Regulations. We do not agree with the submissions of the petitioner. As stated, the petitioner has sought in-principle approval of the additional capital expenditure schemes based on the MOE&F notification dated 3.11.2009 and the "Consent to operate order of JSPCB dated 15.5.2012. Though the said notification dated 3.11.2009 and the JSPCB directives dated 15.5.2012 have already come into effect, the petitioner has not explained as to why the petitioner has not taken steps immediately thereafter to include the expenditure on account of the said notification/directive in its claims for additional capitalization. However, it is noticed that the petitioner by affidavit dated 9.7.2013 had proposed the additional capital expenditure towards "Ash disposal expenses' based on the notification dated 3.11.2009 and directive of JSPCB

dated 15.5.2012, which also includes the scheme for 'Ash conveying pipeline', with the estimated commissioning by the end of the year 2015-16. Under the 2009 Tariff Regulations, the cut-off date was defined as 'the financial year closing after two years of the date of commercial operation of the generating station or the transmission system'. As it was expected that all liabilities and deferred works which could not be settled or completed by the COD of the station shall be settled or completed by the cut-off date, the period of 2 years was considered reasonable enough to complete all works within the original scope except the works relating to ash pond and ash handling system. Be that as it may, the prayer of the petitioner for in-principle approval of the said schemes during 2009-14 on the ground that the cut-off date of the generating station falls within the next tariff period, is not acceptable, as the same would extend the scope of the 2009 Tariff Regulations (applicable for the period 2009-14) to the next tariff period 2014-19. In short, the cut-off date specified under the 2009 Tariff Regulations cannot extend the provisions of the 2009 Tariff Regulations to the next tariff period. What is not permissible directly cannot be permitted indirectly. For the reasons stated above and since the expenditure in respect of these schemes are to be capitalised during the period 2014-19 as submitted by the petitioner, we are of the view that the same would be governed by the provisions of the 2014 Tariff Regulations, applicable or the period 2014-19. In view of this, the prayer of the petitioner cannot be accepted.

13. Another contention of the petitioner is that the the projected additional capital expenditure to be incurred after the cut-off date has been allowed by this Commission in exercise of its powers to relax in its earlier order dated 20.4.2012 pertaining to approval of tariff of Anta Gas Power Station for 2009-04 and in orders dated 7.5.2012 and 23.5.2012 in Petition Nos. 256/2009 and 332/2009 and the same would be applicable in the present case. We have considered the matter. It is observed that the issue which arose for consideration in those tariff

petitions was 'whether the additional capitalization projected to be incurred after the cut-off date during period 2009-14 was admissible under Regulation 9(2) of the 2009 Tariff Regulations". The Commission, considering the scheme of the 2009 Tariff Regulations and following its decision in a similar case, held in the case of Anta GPS as under:

*"18. It thus emerges from the scheme of the 2009 Tariff Regulations that the additional capital expenditure projected to be incurred after the cut-off date can be admitted by the Commission after prudence check. Keeping in view the scheme of the 2009 Tariff Regulations and in order to remove the inconsistency between last proviso to Regulation 7(2) and Regulation 9(2), we have relaxed in our order dated 13.4.2012 in Petition No. 282 of 2009 the provisions of Regulation 9(2) of the 2009 Tariff Regulations in exercise of our power under Regulation 44 to allow additional capital expenditure projected to be incurred after the cut-off date. The said decision is applicable in the present case.*

Similar view was followed by the Commission in its orders in Petition Nos. 256/2009 and 332/2009. The case of the petitioner in this IA is different from the facts in issue in those cases referred above. In the instant case, the petitioner has sought for in-principle approval for expenditure on schemes which are to be capitalized during the next tariff period. While the scheme of the 2009 Tariff regulations necessarily provides for the consideration of claim of projected additional capital expenditure for 2009-14, the same does not envisage in-principle approval of expenditure on additional capital expenditure schemes, more so when these schemes are to be capitalized during the next tariff period. On the contrary, the Commission in its orders, while truing up tariff for some of the generating stations of NTPC for 2009-14 had rejected the prayer of NTPC to allow capitalization of expenditure on R&M package on the ground that the R&M activities is to be completed during the next tariff period. Accordingly, it was decided that the expenditure should also be considered only in the next tariff period. In this background and since the facts and circumstances leading to the decision of the Commission in those tariff petitions of NTPC are different from the facts and circumstances in the present case, we find no reason to allow the prayer of the petitioner in this IA. The submissions of the petitioner are accordingly rejected. However, the concern of the petitioner for capitalization of



such expenditure, more so, on account of the statutory directives would be considered by the Commission while specifying the tariff regulations applicable for the period 2014-19.

14. The petitioner has also contended that upon the commencement of the next control period i.e 2014-19, the additional capital expenditure incurred in the present control period 2009-14, not factored in tariff, may be treated according to the principle specified in terms of proviso to Regulation 1(2) of the 2009 Tariff Regulations. The submissions have been considered. Regulation 1(2) of the 2009 Tariff Regulations provides as under:

"(2) These regulations shall come into force on 1.4.2009, and unless reviewed earlier or extended by the Commission, shall remain in force for a period of 5 years from the date of commencement:

Provided that where a project, or a part thereof, has been declared under commercial operation before the date of commencement of these regulations and whose tariff has not been finally determined by the Commission till that date, tariff in respect of such project or such part thereof for the period ending 31.3.2009 shall be determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004"

Admittedly, the 2009 Tariff Regulations notified by the Commission has come into force from 1.4.2009 and is applicable till 31.3.2014, unless extended/renewed by the Commission. It has been made clear in the above proviso that the project which had been declared under commercial operation prior to 1.4.2009 and whose tariff has not been determined till 31.3.2009, the tariff in those cases are to be determined in terms of the 2004 Tariff Regulations. In our view, this proviso is not applicable in the instant case of the petitioner. The Tariff Regulations applicable for the period 2014-19 are yet to be specified by the Commission. Moreover, the generating station of the petitioner has been declared under commercial operation on 24.7.2012 (during the period 2009-14) and the determination of tariff of the generating station is under the active consideration of the Commission, pursuant to the hearing of the tariff petition on 9.7.2013. Since Regulation 1(2) is applicable only for those generating stations which had been commissioned during 2004-09 and tariff has not been determined till 31.3.2009, the reliance

made on Regulation 1(2) by the petitioner in support of its justification for in-principle approval of additional capital expenditure schemes, is in our view, not maintainable. The prayer of the petitioner is thus rejected.

15. Based on the above discussions, the prayer of the petitioner for in-principle approval of additional capital expenditure schemes is rejected and the IA is accordingly disposed of. The tariff of the generating station for the period from the date of commercial operation till 31.3.2014 shall be determined by a separate order.

*Sd/-*  
**[M.Deena Dayalan]**  
**Member**

*Sd/-*  
**[V S Verma]**  
**Member**