

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 91/2004

**Coram
Dr. Pramod Deo, Chairperson
Shri V. S. Verma, Member
Shri M. Deena Dayalan, Member**

Date of Hearing: 6.11.2012

Date of Order: 8.6.2013

In the matter of

Approval of annual fixed charges in respect of Talcher Thermal Power Station (460 MW) after accounting for the impact of additional capital expenditure incurred during 2004-09.

And in the matter of

NTPC Ltd, New Delhi

Vs

Grid Corporation of Orissa Ltd, Bhubaneswar

..... **Petitioner**

..... **Respondent**

Parties Present:

1. Shri M.G. Ramachandran, Advocate, NTPC
2. Ms. Swapna Seshadri, NTPC
3. Shri Rohit Chhabra, NTPC
4. Shri B. S. Rajput, NTPC
5. Shri Shyam Kumar, NTPC
6. Shri Ajay Dua, NTPC
7. Shri Shankar Saran, NTPC
8. Shri A.K.Bishoi, NTPC
9. Shri Sameer Aggarwal, NTPC
10. Shri Shailendra Singh, NTPC
11. Shri S.K.Jain, NTPC
12. Shri R.K Mehta, Advocate, GRIDCO

ORDER

Petition No. 91/2004 was filed by the petitioner NTPC Ltd for approval of tariff of Talcher Thermal Power Station (hereinafter referred to as "the generating station") for the period from 1.4.2004 to 31.3.2009 based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, (hereinafter referred to as "the 2004 Tariff Regulations"). The Commission by its order dated 23.3.2007 approved the tariff of the generating station as detailed below.

(₹ in lakh)

	2004-05	2005-06	2006-07	2007-08	2008-09
Interest on Loan	1043	854	663	471	278
Interest on Working Capital	865	875	885	897	908
Depreciation	2236	2236	2236	2236	2236
Advance Against Depreciation	0	0	0	0	0
Return on Equity	4872	4872	4872	4872	4872
O & M Expenses	8700	9029	9372	9728	10098
Total	17717	17866	18028	18205	18392

2. Subsequently, in Petition No. 59/2007 filed by the respondent GRIDCO, the Commission by its order dated 20.8.2007 revised the operational parameters of the generating station with effect from 1.10.2007 consequent upon the completion of major R&M works of the generating station. Accordingly, the provisions of the 2004 Tariff Regulations were amended by notification dated 27.9.2007.

3. Aggrieved by order dated 23.3.2007 in Petition No. 91/2004, the petitioner filed Review Petition No. 72/2007 raising the following issues:

(a) *Computation of Interest on loan;*

(b) *Loss on account of de-capitalisation of assets-Impact on allowable O&M expenditure for the period 2004-09;*

(c) *Depreciation;*

(d) *Non-recovery of full depreciation in tariff due to de-capitalisation of certain assets;*

(e) *Non-recovery of full depreciation in tariff due to disincentive for not achieving the specified target availability.*

4. Against the Commission's order dated 23.3.2007 in Petition No.91/2004 the petitioner also filed Appeal No. 88/2007 before the Appellate Tribunal for Electricity ('the Tribunal') raising the following issues:

(a) *Treating Depreciation available as Deemed loan Repayment;*

(b) *Cost of Maintenance Spares;*

(c) *Non-consideration of Normative Transit Loss for coal received through Railway System;*

(d) *Admissibility of Depreciation upto 90%;*

(e) *Computation of Interest on loan;*

(f) Loss on account of de-capitalisation of assets- its impact on allowable O&M Expenditure for the period 2004-2009;

(g) Depreciation;

*(h) (i) Non recovery of full depreciation due to de-capitalisation of certain assets
(ii) interest on loan in tariff due to de-capitalisation of certain assets*

5. While so, the Commission by its order dated 5.9.2008 disposed of the said review petition (Review Petition No. 72/2007) by allowing the rate of depreciation of 4.5% and the adjustment of cumulative depreciation and directed the same to be considered while determining the tariff of the generating station based on additional capital expenditure for 2004-09.

6. Accordingly, in Petition No. 31/2008 filed by the petitioner for revision of tariff based on additional capital expenditure for 2004-07, the Commission by its order dated 3.2.2009 revised the tariff of the generating station considering the above directions in order dated 5.9.2008 and after accounting for the additional capital expenditure for the period 2004-07.

7. Against the order dated 3.2.2009 in Petition No.31/2008 revising the annual fixed charges on account of additional capital expenditure incurred during the years 2004-07, the petitioner filed Appeal No.82/2009 before the Tribunal and the Tribunal by its judgment dated 27.7.2010 allowed the prayers of the petitioner as regards the non-inclusion of un-discharged liabilities and Interest During Construction (IDC) in the light of its earlier judgments dated 10.12.2008 in Appeal Nos.151 & 152/2007 and 16.3.2009 in Appeal Nos.133,135,136 and 148/2008 and directed implementation of the same. Similarly, the respondent also filed Appeal No.81/2009 before the Tribunal against the said order on the issue of restoration of lost capacity / re-rating of units, non sharing of benefits of efficiency improvement, capitalization of R&M works allowed by the Commission etc and the Tribunal by its judgment dated 12.1.2011 dismissed the said appeal.

8. Subsequently, the petitioner filed Review Application No. 67/2009 seeking review of the order dated 3.2.2009, on the ground that the Commission while working out interest on Working Capital (IWC) for the period 1.10.2007 to 31.3.2009, had wrongly considered the fuel

prices for the months of January, February and March 2004, instead of the fuel prices for the months of July, August and September 2007. The Commission by order dated 29.9.2009 allowed the review of order dated 3.2.2009 on the question of computation of Interest on working capital (IWC) and thereafter, by order dated 11.1.2010 revised the IWC and approved the annual fixed charges of the generating station for 2004-09. Since certain arithmetical errors had occurred in the computation of IWC for the year 2007-08, in order dated 11.1.2010, the Commission by order 9.2.2010 revised the tariff of the generating station after correction of the said ministerial errors in order dated 11.1.2010.

9. Thereafter, the petitioner filed Petition No. 184/2009 for revision of tariff for the period 2004-09 due to additional capital expenditure incurred for the years 2007-08 and 2008-09 respectively. The Commission after considering the maintainability of the petition on the question of 'jurisdiction' determined by the tariff of the generating station by its order dated 3.9.2012 taking into consideration the directions contained in the judgment of the Tribunal dated 13.6.2007 in Appeal Nos. Appeal Nos.139,140 etc of 2006,10,11 and 23/2007 etc (NTPC-v-CERC & ors) subject to the final outcome of the Civil Appeals (C.A. Nos. 5434/2007 to 5452/2007 and 5622/2007 etc) and the judgments of the Tribunal dated 10.12.2008 and 16.3.2009 in Appeal No 151 & 152/ 2007 and Appeal Nos.133, 135,136 and 148/2008 respectively, subject to the final outcome of the Civil Appeals (C.A.Nos.4112-4113/2009 and Civil Appeal Nos. 6286 to 6288/2009) filed by the Commission and pending before the Hon'ble Supreme Court. Subsequently, after correction of certain inadvertent clerical errors the tariff of the generating station for 2004-09 was revised by order dated 2.4.2013 in Petition No.184/2009 as under:

	(₹ in lakh)				
	2004-05	2005-06	2006-07	2007-08	2008-09
Interest on loan	1041.84	1169.72	986.91	1007.23	927.43
Interest on working capital	919.94	943.31	959.46	1055.48	1150.83
Depreciation	3251.37	3398.76	3458.46	3597.87	3815.81
Advance against Depreciation	0.00	0.00	0.00	0.00	0.00
Return on Equity	4983.44	5121.01	5176.73	5306.84	5510.25
O&M Expenses	8700.00	9029.00	9372.00	9728.00	10098.00
Total	18896.59	19661.81	19953.56	20695.43	21502.32

10. Meanwhile, in Appeal No. 88/2007 filed by the petitioner before the Tribunal, the Tribunal by its judgment dated 19.4.2012 allowed the issues raised in clauses (a) to (d) and [h(ii)] in para 4 above, in terms of its judgment dated 13.6.2007 in Appeal Nos. 139,140 etc of 2006,10,11 and 23/2007 etc (NTPC-v-CERC & ors). While the issues raised in clauses (g) and [h (i)] in para 4 above were not pressed by the petitioner, the issues raised in clauses (e) and (f) were however rejected by the Tribunal. The Tribunal also directed the Commission to pass consequential orders in terms of the above findings after hearing the parties.

11. Against the judgment of Tribunal dated 19.4.2012 allowing the issues (a) to (d) and h(ii) as stated above, the respondent has filed Civil Appeal No.5873/2012 (GRIDCO-v- NTPC & anr) before the Hon'ble Supreme Court and the same was admitted on 27.8.2012 and directed to be tagged with the Civil Appeals 5434/2007 and 5843/2007. Thereafter, the respondent filed I.A.1/2012 for stay of the judgment of the Tribunal dated 19.4.2012 and the Hon'ble Supreme Court by its order dated 7.12.2012 dismissed the said I.A observing as under:

"This is an application by the appellant for stay of judgment dated 19.4.2012 passed by of the Appellate Tribunal for Electricity in Appeal No.88/2007.

We have heard learned counsel for the parties and perused the record.

In our view, there is no valid ground or justification to entertain the appellant's prayer for restraining the Central Electricity Regulatory Commission (for short, 'the Central Commission') to pass order in terms of the impugned judgment.

The application is accordingly dismissed. However, it is made clear that the appellant shall be free to file fresh application after the final order is passed by the Central Commission".

12. The Commission has also filed Civil Appeals in respect of some of the issues allowed in the said judgment. However, as the judgment of the Tribunal dated 19.4.2012 in Appeal No. 88/2007 in respect of the issues (a), (b) (d) and h (ii) was based on the judgment of the Tribunal dated 13.6.2007, the same had been taken into consideration by the Commission in its order dated 3.9.2012 in Petition No. 91/2004 for revision of tariff for 2004-09 due to additional capital expenditure incurred for the years 2007-08 and 2008-09, subject to the final outcome of the Civil Appeals filed by the Commission and pending before the Hon'ble Supreme Court. However, the issue in paragraph 4(c) above, namely, the '*non-consideration of normative transit loss for coal received through railway system*' which was also allowed by

the Tribunal in terms of its earlier judgment dated 13.6.2007 was inadvertently not considered by the Commission in its order dated 3.9.2012 in Petition No.184/2009.

13. Accordingly, in order to consider the question of 'non-consideration of normative transit loss for coal received through railway system' for this generating station in line with the judgment of the Tribunal dated 19.4.2012, Petition No.91/2004 was listed for hearing and both the parties were heard on 11.10.2012 and 6.11.2012 respectively and orders reserved. Keeping in view the observations of the Tribunal in its judgment dated 19.4.2012, we now proceed to examine the submissions of the parties in respect of the said issue, as stated in the subsequent paragraphs.

14. During the hearing, the learned counsel for the respondent submitted that the judgment of the Tribunal dated 13.6.2007 in Appeal Nos. 139 to 142/2006 & other connected cases based on which the prayer of the petitioner in Appeal No. 88/2007 was allowed by the Tribunal cannot be made applicable in the instant case. He also submitted that the order of the Commission with regard to normative transit loss for transport of coal does not call for any interference mainly for the following reasons:

- (a) The generating station is a pit head station having 100% linkage from jagannath open cast coal mine which is situated near the generating station. In case of non-pit generating stations, the regulations of the Commission provide for 0.8% normative transit loss in view of long distance between the plant and mine and not because railway system is used for transportation of coal. The distance of the mine in case of the generating station is 5 to 10 km.
- (b) The higher transit loss was allowed in respect of coal required to be arranged from sources other than linked mines since it was the case of the petitioner that the coal linkage from linked mines was corresponding to 62.8% PLF operation and it has to procure coal from other sources to operate at higher PLF. It is on account of short distance between plant and coal mine and not because of MGR system that a lower level of 0.3% is prescribed in case of pit head plants.

15. In response to the above, the learned counsel for the petitioner pointed out to the written submissions filed by the respondent before the Tribunal in Appeal No. 88/2007 with regard to normative transit loss for transportation of coal and submitted that the Tribunal after taking into consideration the submissions of the respondent and the petitioner on this issue had allowed

the prayer of the petitioner in its judgment dated 19.4.2012. He also clarified that it was for the respondent to seek review of the said judgment, in case it was aggrieved by the observations/findings of the Tribunal on this issue. The learned counsel further submitted that the Tribunal having decided the issue in favour of the petitioner and directed the Commission to pass consequential orders, it was not open to the respondent to challenge the findings of the Tribunal on this issue at the stage of implementation of the said judgment. He therefore prayed that the Commission may implement the judgment of the Tribunal subject to the final outcome of the civil appeal pending before the Hon'ble Supreme Court.

16. The submissions have been considered. In Appeal No.88/2007 pertaining to this generating station, the issue of 'normative transit loss for coal received through railway system' was examined by the Tribunal and by its judgment dated 19.4.2012 the Tribunal has observed as under:

"It is pointed out by the Appellant that the issue has also been covered in the very same judgment dated 13.6.2007 in favor of the Appellant". In this judgment, the Tribunal directed the Central Commission to pass necessary consequential orders while deciding this issue in favor of the Appellant. Thus, this point also has been covered by the above judgment."

17. In Appeal Nos. 139,140 etc of 2006, 10, 11 and 23/2007 etc (NTPC-v-CERC & ors), the Tribunal while considering the prayer of the petitioner for allowing normative transit loss for coal import in respect of some of its other generating stations, namely, Farakka STPS (Appeal No.155/2006) and Kahalgaon STPS (Appeal No.10/2007) had by its judgment dated 13.6.2007 decided as under:

"As per the CERC Regulations, transit loss in coal of 0.3% is allowed for pit head stations, for other stations transit loss allowed is 0.8%.

Whereas the benchmark for recovery of full fixed capacity charges has been raised to 80%, the designated coal mines, over which appellant has no control, are not able to provide additional coal to produce power corresponding to 80% Plant Load Factor and beyond. In order to operate these two stations at maximum Plant Load Factor, the appellant is arranging coal from sources other than the linked mines and transporting coal via the Indian Railway system.

The rationale for giving higher coal transit losses of 0.8% for the non Pit Head Stations is that the power stations operators have no control over curtailing pilferage of coal during its haulage by the Indian Railways. The rationale for specifying 0.8% transit losses in the Regulations is that when coal is transported by the Indian Railways, the generator has no supervision and control during the haulage of coal by Indian Railways system. When coal is actually being transported by the Indian Railways system and not by MGR it logically follows that transit loss applicable, for the portion of coal being hauled by the Indian Railway system has to be allowed 0.8% transit loss and not 0.3% which is applicable only if the coal is being transported by generator's own MGR system, where he

has full supervision and control during the movement of coal

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 MGRs. 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% Plant Load Factor.

(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."

18. It is observed that the petitioner in its submissions before the Tribunal in Appeal No. 88/2007 had amongst others, submitted that the system of coal transportation from the linked mines is not Merry Go Round (MGR) but a single stream cross country conveyor system, which was not sufficient to transport coal and became unreliable over a period of time. It was also submitted that coal transportation system through railway wagon was also commissioned during June, 2004 to cater to the requirements of the generating station for transportation of coal from the linked mines, under which transportation of coal is delivered at the railway siding and thereafter taken by bottom discharge wagons. The petitioner had also submitted that the Target Availability of the generating station which was fixed at 75% as per order dated 23.3.2007 was revised to 80% by the Commission with effect from 1.10.2007 and thus prayed that the transit and handling loss be allowed at 0.8% as against 0.3% on the portion of coal (around 54 to 64%) being transported through railway system. Accordingly, the petitioner had prayed that the analogy given by the Tribunal in its judgment dated 13.6.2007 (as quoted in para 17 above) be considered and a normative loss of 0.8% on coal transported through railway system be allowed for this generating station also. In response, the respondent herein, had in its reply/written submissions objected to the application of the ratio in the Tribunal judgment dated 13.6.2007 to the present case and had submitted that higher transit loss was

allowed to those generating stations wherein NTPC had submitted that coal was required to be arranged from sources other than linked mines in order to operate the plant at a higher PLF, since coal linkage from linked mines was corresponding to only 62.8% PLF. It had also submitted that it was the responsibility of the petitioner herein to maintain and upgrade the conveyor belt considering the fact that R&M of ₹518 crore was allowed by the Commission till 31.3.2009. Only after hearing both the parties on these issues, the Tribunal has in its judgment dated 19.4.2012 arrived at a conclusion that the issue of normative transit loss for coal is covered by its earlier judgment dated 13.6.2007 and has directed the Commission to pass consequential orders. In view of this, the respondent cannot be permitted to raise the issue again on merits as the Tribunal had decided the issue in favour of the petitioner. It is not permissible for the Commission to reopen the issue again and review the findings of the Tribunal which had already been decided at the instance of the parties. The proper remedy for the respondent would have been to seek relief before the appropriate forum, for reconsideration of the findings on this issue, which admittedly has not been done. However, it is noticed that the respondent has filed Civil Appeal before the Hon'ble Supreme Court and stay of the operation of the judgment dated 19.4.2012 has been rejected. Accordingly, the issue of normative transit loss for coal in respect of this generating station has been considered in terms of the findings of the Tribunal in its judgment dated 13.6.2007.

19. The Target Availability for the generating station during the period from 1.4.2004 to 30.9.2007 was fixed as 75%, which was revised to 80% with effect from 1.10.2007 vide Commission's notification dated 27.9.2007. In terms of the observations of the Tribunal in its judgment dated 13.6.2007 (as in para 17 above) that "*Transit loss of 0.8% be allowed on the requirement of coal between 62.8% and up to 80% Plant Load Factor*", the normative transit and handling loss of 0.8% is considered for the generating station. Accordingly, the weighted average price of coal worked out in our order dated 23.3.2007 has been revised in accordance with the observations of the Tribunal in its judgment dated 13.6.2007 as discussed below:

From 1.4.2004 to 30.9.2007

20. The operational norms considered for the generating station during the period from 1.4.2004 to 30.9.2007 are as under:

Availability (%)	75
PLF (%)	75
Auxiliary Power Consumption (%)	11.00
Specific Oil Consumption (ml/kWh)	3.50
Gross Heat Rate (kcal/kWh)	3100

21. The revised price of coal based on GCV of coal as worked out in order dated 23.3.2007 and after making overall adjustments for transit & handling losses at 0.3813% for the period from 1.4.2004 to 30.9.2007, works out to ₹474.12/MT. As such, the revised price of coal and GCV earlier adopted are considered for the purpose of revision of the fuel component in Interest on Working Capital (IWC) as under.

GCV of Coal (as fired basis)	kCal/Kg	3710
Price of coal allowed in order dated 23.3.2007 considering transit & handling losses of 0.3%	Rs./MT	473.73
Revised price of coal (as procured basis) considering weighted average transit & handling losses of 0.3813% as per judgment of Tribunal dated 13.6.2007	Rs./MT	474.12

Energy Charge Rate (ECR)

22. Based on the above, the Energy Charge Rate (ECR) for the period from 1.4.2004 to 30.9.2007 corresponding to Transit & Handling loss of 0.3813% works out as 50.857 paisa/kWh as against 50.82 paisa/kWh earlier approved by the Commission.

From 1.10.2007 to 31.3.2009

23. The revised operational norms applicable for this generating station with effect from 1.10.2007 are as under:

Availability (%)	80
PLF (%)	80
Auxiliary Power Consumption (%)	10.50
Specific Oil Consumption (ml/kWh)	2.0
Gross Heat Rate (Kcal/kWh)	2975

24. Based on the GCV and price of coal procured and burnt during the preceding three months (from July, 2007 to September, 2007), the revised price of coal works out to

₹616.63/MT considering the transit & handling losses of 0.4075% (0.3% upto 62.80% PLF and 0.8% from 62.80% to 80% PLF). The revised price of coal considered for revision of the fuel component in Interest on Working Capital (IWC) is as under:

GCV of Coal (as fired basis)	kCal/kg	3637.33
Price of coal allowed in the order dated 9.2.2010 (Petition no. 31/2008) considering transit & handling losses of 0.3%	Rs./MT	615.97
Revised price of coal (on procured basis) considering the weighted average transit & handling losses of 0.4075% as per judgment of Tribunal dated 13.6.2007	Rs./MT	616.63

Energy Charge Rate (ECR)

25. Based on revision of operational norms for the generating station with effect from 1.10.2007 and the revision of price of coal, the ECR for the period from 1.10.2007 to 31.3.2009, corresponding to the transit & handling loss of 0.4075% is worked out as 62.855 paise/kWh, as against 62.79 paise/kWh earlier approved by the Commission.

26. Based on the above, the coal stock for 1.5 months in working capital corresponding to 75% PLF with overall transit loss of 0.3813% from 1.4.2007 to 30.9.2007 and corresponding to 80 % PLF with overall transit loss of coal of 0.4075% for linked as well as non- linked mines and considering the revised operational norms from 1.10.2007 to 31.3.2009 is worked out as under:

	(₹ in lakh)					
	2004-05	2005-06	2006-07	1.4.2004 to 30.9.2007	1.10.2007 to 31.3.2008	2008-09
Coal Stock-1.5 months	1480.64	1480.64	1480.64	742.35	1012.40	2019.27

27. There is no change in the capital cost, return on equity, interest on loan, depreciation, O&M expenses allowed by order dated 2.4.2013 in Petition No.184/2009. However, the receivable component of working capital undergoes revision as under:

Receivables

	(₹ in lakh)					
	2004-05	2005-06	2006-07	1.4.2004 to 30.9.2007	1.10.2007 to 31.3.2008	2008-09
Variable Charges - 2 months	2279.88	2279.88	2279.88	1143.06	1515.38	3022.48
Fixed Charges - 2 months	3149.48	3277.02	3325.64	1724.65	1724.65	3583.81
Total	5429.36	5556.90	5605.52	2867.72	3240.03	6606.28

Interest on working capital

28. Accordingly, interest on working capital is computed as under:

(₹ in lakh)

	2004-05	2005-06	2006-07	1.4.2004 to 30.9.2007	1.10.2007 to 31.3.2008	2008-09
Coal Stock – 1.5 months	1480.63	1480.63	1480.63	742.34	1012.40	2019.27
Oil Stock – 2 months	305.71	305.71	305.71	153.28	165.51	330.11
O&M expenses – 1 month	725.00	752.42	781.00	405.33	405.33	841.50
Maintenance Spares	1037.15	1110.25	1190.56	654.73	654.73	1435.56
Receivables – 2 months	5429.36	5556.90	5605.52	2867.72	3240.03	6606.28
Total working capital	8977.85	9205.91	9363.42	4823.40	5478.01	11232.73
Rate of interest	10.2500%	10.2500%	10.2500%	10.2500%	10.2500%	10.2500%
Interest on working capital	920.23	943.61	959.75	494.40	561.50	1151.35

Annual Fixed Charges

29. Based on the above discussions, the annual fixed charges for the period 2004-09 are revised as under.

(₹ in lakh)

	2004-05	2005-06	2006-07	2007-08	2008-09
Depreciation	3251.37	3398.76	3458.46	3597.87	3815.81
Interest on Loan	1041.84	1169.72	986.91	1007.23	927.43
Return on Equity	4983.44	5121.01	5176.73	5306.84	5510.25
Advance against Depreciation	0.00	0.00	0.00	0.00	0.00
Interest on Working Capital	920.23	943.61	959.75	1055.89	1151.35
O&M Expenses	8700.00	9029.00	9372.00	9728.00	10098.00
Total	18896.88	19662.10	19953.85	20695.84	21502.85

30. One more issue for consideration is the prayer of the petitioner for consideration of Relatable Fixed Charges on account of units under shut down for R&M as claimed in Petition No.35/2004 (additional capitalization for 2000-04) which was disposed of by order dated 25.9.2006. In the said order, the Commission had decided that the Relatable Fixed Charges on account of units under shutdown for R&M was not payable. The petitioner has submitted that this issue had been specifically raised before the Tribunal in Appeal No. 88/2007 by way of additional submissions dated 18.3.2009, seeking consideration of depreciation unrecovered on account of units under shutdown for R&M under the head "Admissibility of Depreciation up to 90%". A copy of the additional submissions has also been enclosed by the petitioner. It has

also submitted that the Tribunal has allowed the claim of the petitioner on this issue in its judgment dated 19.4.2012 and accordingly, the value of depreciation not recovered till 31.3.2004 may be revised from ₹0.29 crore to ₹12.99 crore.

31. The matter has been examined. It is noticed that the Commission in its order dated 25.9.2006 in Petition No. 35/204 had rejected the claim of the petitioner and decided that Relatable Fixed Charges on account of units under shut down for R&M was not payable. However, in Appeal No. 88/2007, the petitioner has raised this issue which was allowed by the Tribunal by its judgment dated 19.4.2012 in Appeal No. 88/2007 as under:

13. As pointed out by the Appellant, this issue also has been considered by this Tribunal in the very same judgment dated 13.6.2007. In this decision, the Tribunal held that the depreciation cannot be denied forever and directed the Central Commission to allow the unpaid portion of the depreciation (upto 90%) after the plant has lived its designated useful life. Thus, this issue also has been decided by this Tribunal in favour of the Appellant in the above judgment

32. In its earlier judgment dated 13.6.2007 in Appeal Nos.139,140 etc of 2006, 10, 11 and 23/2007, the Tribunal while considering the "Admissibility of Depreciation upto 90% had observed as under:

".....If due to under performance in a particular year the appellant is not able to receive full depreciation allowed in that year and if the denial is forever, it will tantamount to a penalty. It will, therefore, be enough deterrent for the appellant if the depreciation is not allowed during the year of underperformance. However, the same cannot be denied forever and, therefore, it will be only fair to allow the unpaid portion of the depreciation after the plant has lived its designated useful life. In this view of the matter, the CERC needs to examine this aspect as per aforesaid observations."

33. Against the judgment of the Tribunal dated 13.6.2007, the Commission has filed Civil Appeals and the same is pending. Since the issue of unrecovered depreciation on account of shut down of units due to R&M is treated as underperformance and in view of the directions contained in the judgment dated 19.4.2012 and in compliance with the same, the value of depreciation not recovered till 31.3.2004 shall be allowed after the plant has lived its designated useful life (after 31.3.2021). This is however subject to the Civil Appeals pending before the Hon'ble Supreme Court.

34. The marginal difference between the annual fixed charges determined by this order for the period 2004-09 and those allowed in order dated 2.4.2013 in Petition No. 184/2009 shall

be adjusted between the parties in three monthly installments.

35. The annual fixed charges determined above is subject to the final decision of the Hon'ble Supreme Court in the pending Civil Appeals.

36. Petition No. 91/2004 is disposed of as above in the light of the directions contained in the judgment of the Tribunal dated 19.4.2012 in Appeal No. 88/2007.

Sd/-
(M.Deena Dayalan)
Member

Sd/-
(V.S. Verma)
Member

Sd/-
(Dr. Pramod Deo)
Chairperson