

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. Shri Ashok Basu, Chairman
2. Shri K.N. Sinha, Member
3. Shri A.H. Jung, Member

Petition No. 56/2005

In the matter of

Revision of O&M expenses for the period 1.4.2001 to 31.3.2004 in respect
of Korba STPS

And in the matter of

National Thermal Power Corporation Ltd.

.... **Petitioner**

Vs

1. Madhya Pradesh State Electricity Board, Jabalpur
2. Maharashtra State Electricity Board, Mumbai
3. Gujarat Electricity Board, Vadodara
4. Chhattisgarh State Electricity Board, Raipur
5. Electricity Department, Govt. of Goa, Panaji, Goa
6. Electricity Department, Admn. Of Daman & Diu, Daman
7. Electricity Department, Admn. Of Dadra & Nagar Haveli, Silvassa.... **Respondents**

The following were present:

1. Shri C.S. Gupta, NTPC
2. Ms Pranav Kapoor, NTPC
3. Shri S.K. Sharma, NTPC
4. Ms. Alka Saigal, NTPC
5. Shri Balaji Dubey, Dy. Manager (Law), NTPC
6. Shri Ajay Dua, Sr. Manager, NTPC
7. Shri R. Singha, NTPC
8. Shri V.B.K. Jain, NTPC
9. Shri I.J. Kapoor, NTPC

**ORDER
(DATE OF HEARING: 7.6.2005)**

Introductory Remarks

The application is made by the petitioner, National Thermal Power Corporation Ltd. (NTPC) to seek revision of O&M expenses for the period 1.4.2001 to 31.3.2004 in respect of Korba Super Thermal Power Station (Korba STPS).

Background

2. The petitioner had filed Petition No. 30/2001 for approval of tariff for Korba STPS for the period 1.4.2001 to 31.3.2004 on 28.5.2001. This petition was based on the terms and conditions for determination of tariff contained in Ministry of Power notification dated 30.3.1992. Subsequently, the petitioner filed the amended petition on 31.1.2002, based on the terms and conditions notified by the Commission under Section 28 of the Electricity Regulatory Commissions Act, 1998. The application was disposed of by order dated 6.8.2003 when the Commission determined the final tariff for the period in question.

Petitioner's contention

3. In the present application, the petitioner has pleaded that it had actually incurred an expenditure of Rs.51673 lakh under O&M during the period 1.4.2001 to 31.3.2004, though the Commission has approved O&M expenses amounting to Rs.47238 lakh, leaving an uncovered gap of Rs.4435 lakh. Accordingly, the petitioner has sought revision of O&M expenses allowed by the Commission. According to the petitioner, the difference between the expenses actually incurred and those allowed is on account of the following factors, namely:

- (a) inadequacy in the base "employee cost" considered, and
- (b) actual O&M expenses incurred during 1995-2000 on *ex gratia*, incentive payments, professional charges, etc. but not allowed by the Commission in its order dated 6.8.2003, by taking as "abnormal" expenses, during the process of normalisation.

4. The petitioner in support of its claim for revision of O&M expenses has relied upon the observations made in the order dated 21.12.2000 as also para 49 of the order dated 6.8.2003, which according to the petitioner granted it liberty to

approach the Commission for reimbursement of actual expenses with proper justification.

5. The petitioner has stated that salary revision of the public sector employees was made with effect from 1.1.1997, though actually implemented in July 2000 and thereafter. It has been submitted that when the application for approval of tariff (Petition No.30/2001) was made, the salary revision arrears paid for the years 1997-98, 1998-99 and 1999-2000 were not added to the data submitted before the Commission. Therefore, the petitioner has suggested that the normalized cost arrived at by the Commission should have excluded the actual employee cost data for the years 1995-96 and 1996-97 as it did not represent the normal employee cost by reason of revision with effect from 1.1.1997 and the actual employee cost indicated in the present application for the years 1997-98, 1998-99 and 1999-2000 should be considered for the purpose of normalization. The petitioner has further sought to dispute the correctness of exclusion of some of the expenses like *ex gratia* and incentive payments, expenses on stores consumed and professional expenses for the years 1995-96 to 1999-2000 by the Commission in its order dated 6.8.2003 for the purpose of normalization. The petitioner has averred that less recovery of O&M expenses has caused great hardship to the petitioner as an amount of Rs.4435 lakh still remained unrecovered.

6. We heard Shri V.B.K. Jain on admission. After hearing, we had orally asked the petitioner to file certain additional data. An affidavit has been filed on behalf of the petitioner on 1.8.2005.

7. In the affidavit filed on 1.8.2005 under the Commission's directions, the petitioner has submitted the following details, among others:

Sr. No.	Particulars	Details	
(a)	Date on which revision of salary of the employees was notified	(i) Executives	6.7.2000
		(ii) Supervisor	19.4.2001
		(iii) Workmen	2.3.2001
(b)	Date on which the payment of arrears was made	(i) Executives	July'2000
		(ii) Supervisor	April'2001
		(iii) Workmen	March'2001
(c)	Month from which the revised salary was paid to the employees	(i) Executives	July'2000
		(ii) Supervisor	April'2001
		(iii) Workmen	March'2001

Analysis

8. The tariff for the period 1.4.2001 to 31.3.2004 was regulated in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 notified on 26.3.2001 (hereinafter referred to as "the notification"). As per the notification, O&M expenses for the generating stations in operation for five years or more in the base year of 1999-2000 were to be derived on the basis of actual O&M expenses, excluding abnormal O&M expenses, if any, for the years 1995-96 to 1999-2000 duly certified by the statutory auditors. The average of actual O&M expenses for the years 1995-96 to 1999-2000 was considered as O&M expenses for the year 1997-98. The expenses for 1997-98 were escalated twice @ 10% per annum to arrive on O&M expenses for the base year 1999-2000. Thereafter, the base O&M expenses for the year 1999-2000 are further escalated @ 6% per annum to arrive at permissible O&M expenses for the relevant year. The notification further provides for adjustment of O&M expenses based on actual escalation factor, which is not relevant for the present proceedings and accordingly, the provision relating to adjustment of actual expenses is not being referred to.

9. The notification was preceded by the Commission's order dated 21.12.2000 in Petition No.4/2000 and other petitions. In the said order dated 21.12.2000 it was provided that any abnormal expenses incurred by the utilities in operating and maintaining their plants should not get reflected in the norms but should be dealt with separately on case to case basis through separate petitions. The Commission felt that this would provide an opportunity to the stakeholders to assess the merit of claims and to ensure transparency.

10. It needs to be noted that in terms of the Commission's order dated 21.12.2000 fresh revision of O&M base charges after determination of tariff is not warranted through the actual expenses. We may also point out that reliance on para 49 of the order dated 6.8.2003 by the petitioner is totally misconceived. In terms of para 49 ibid liberty was granted to the petitioner to claim revision of "professional charges" based on actual expenditure during the years 2001-02 to 2003-04. The professional charges do not include the "employee cost", which has been considered at paras 33 and 34 of the said order dated 6.8.2003. No liberty has been granted to the petitioner in the order dated 6.8.2003 to seek revision of O&M charges on account of expenditure under head "employee cost".

11. From the details extracted at para 7 above, it can be seen that revision of salary of the employees, executives, supervisors and other workmen was notified during July 2000 to April 2001 and the arrears on that account were also paid during the same period. Therefore, the complete employee cost data on account of revision of pay and allowances was available with the petitioner during April 2001. When the application for determination of tariff was filed on 28.5.2001, the data in this regard could be placed before the Commission by the petitioner in the petition itself. Further, the petitioner had filed an amended petition on 31.1.2002.

The petitioner did not incorporate the actual data of employee cost in the amended petition as well. The petitioner could have taken steps for further amendment of the petition during its pendency to place on record the actual data under the head "employee cost" till the issue of the order dated 6.8.2003. Thus, there were ample opportunities available to the petitioner to seek revision of employee cost under O&M expenses for the years 1997-98 to 1999-2000 which it did not avail of. The petitioner is, thus, deemed to have relinquished its claim for determination of normative O&M charges based on actual data for 1995-96 to 1999-2000 as regards the employee cost.

12. Under Order 2 Rule 2 of the Code of Civil Procedure (the Code) every suit is to include the whole of the claim to which the party is entitled to make in respect of the cause of action but a party may relinquish any portion of his claim. However, where the party omits to sue in respect of any claim or intentionally relinquishes any portion of his claim, he cannot afterwards sue in respect of the portion so omitted or relinquished. Further, under Section 11 of the Code, no court can try any suit in which the matter directly and substantially in issue was directly and substantially in issue in a former suit between the same parties in a court of competent jurisdiction and had been heard and finally decided by such court. Explanation IV below Section 11 of the Code further lays down that any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The provisions of the Code referred to above are not limited to civil suits but are based on public policy that there should be finality to litigation and that no person should be vexed twice for the same cause of action. These principles have been applied by the Hon'ble Supreme Court and High Courts to the proceedings before the quasi-judicial authorities.

13. By extending the principles contained in Order 2 Rule 2 of the Code to the present case, the petitioner cannot now be permitted to claim revision of O&M expenses by filing a fresh application based on the actual O&M cost under the head “employee cost” for the purpose of normalisation. The present petition is also barred by the principle of constructive res judicata because approval of O&M expenses on the basis of actual employee cost for the years 1997-98, 1998-99 and 1999-2000 was deemed to have been decided by the order dated 6.8.2003 since the petitioner is deemed to have made it a ground for claim for O&M expenses as it could and ought to have placed before the Commission actual “employee cost” data for the years 1997-98 to 1999-2000.

14. After deciding the tariff, the Commission cannot revisit the matters covered in the order dated 6.8.2003 which have acquired finality, unless authorized by law. The petitioner has not brought to our notice any provision of law to support its claim for revision of O&M charges under the present circumstances, except the liberty granted to it under para 49 of the order dated 6.8.2003, which, as we have already noted, is not in the context of “employee cost” but is with reference to “professional charges”. The observation made by the Commission cannot be construed in a manner so as to undo the computation of O&M expenses considered in the order dated 6.8.2003 in accordance with the principles contained in the notification, which is statutory. The observation in para 49 may only imply that in case any abnormal expenses were incurred under the head “professional charges” which could not be within the contemplation when approval for tariff was sought or immediately thereafter, could be revised. Any other interpretation in terms of the liberty granted would defeat the whole exercise of tariff determination undertaken pursuant to the notification, and culminating in the order dated 6.8.2003.

15. It is further noted that for the amounts indicated under the head “employee cost”, the petitioner had given increase of 34.28% in the year 1997-98 and 22.26% in the year 1998-99. The petitioner on affidavit explained that increases were on account of provision for pay revision of employees. On consideration of this, the employee cost indicated by the petitioner for the years 1997-98 and 1998-99, even though beyond the admissible limit of 20% was considered for normalisation. In the subsequent review application, the petitioner did not raise the question of revision of O&M charges, based on actuals. Therefore, no fault can be found with the order dated 6.8.2003 on this count and the case for revision of O&M charges is not made out. It also bears notice that the notification does not guarantee reimbursement of actual expenses in every case, but has specified the norms for computation of different components of tariff. There are situations where the petitioner has been paid in excess of the actual expenses, based on the norms specified in the notification. Thus, the tariff approved is the complete package.

16. The petitioner’s attempt to dispute the correctness of exclusion of some of the expenses like *ex gratia* and incentive payments etc. cannot be allowed, as the decision was arrived at after due consideration for which the reasons are recorded in the order dated 6.8.2003. The revision of O&M expenses can be ordered only after review of the order dated 6.8.2003 under Order 47, Rule I of the Code. The matter could not be considered in that context, since the petitioner, in its affidavit filed on 3.6.2005 has submitted that the present petition is not for review of any order passed by the Commission but is an independent petition in terms of the liberty granted. Similarly, the revision of O&M expenses on the ground of hardship is not maintainable since O&M expenses were computed in the tariff order in accordance with the methodology prescribed under the

notification, and based on the information placed on record by the petitioner in the proceedings in Petition No.34/2001.

Result

17. As a result, the present application fails and is dismissed at the admission stage.

Sd/-
(A.H. JUNG)
MEMBER

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRMAN

New Delhi dated the 11th August 2005