

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri A.K. Basu, Chairperson**
2. **Shri K.N. Sinha, Member**
3. **Shri Bhanu Bhushan, Member**
4. **Shri A.H. Jung, Member**

Petition No. 145/2005

In the matter of

Revision of O&M expenses for the period 1.4.2001 to 31.3.2004 in respect of
Kahalgaon Super Thermal Power Station (840 MW).

And in the matter of

National Thermal Power Corporation Ltd.

.... **Petitioner**

Vs

1. West Bengal State Electricity Board, Kolkata
2. Bihar State Electricity Board, Patna
3. Jharkand State Electricity Board, Ranchi
4. Grid Corporation of Orissa Ltd., Bhubaneshwar
5. Damodar Valley Corporation, Kolkata
6. Power Deptt., Govt. of Sikkim, Gangtok
7. Assam State Electricity Board, Guwahati
8. Transmission Corporation of Andhra Pradesh Ltd., Hyderabad
9. AP Eastern Power Distribution Company Ltd., Vishakhapatnam
10. AP Southern Power Distribution Company Ltd., Tirupathi
11. AP Northern Powr Distribution Company Ltd., Warangal
12. AP Central Power Distribution Company Ltd., Hyderabad
13. Tamil Nadu State Electricity Board, Chennai
14. Kerala State Electricity Board, Trivandrum
15. Karnataka Power Transmission Corporation Ltd., Bangalore
16. Bangalore Electricity Supply Company Ltd., Bangalore
17. Mangalore Electricity Supply Company Ltd., Mangalore
18. Chamundeswari Electricity Supply Company Ltd., Mysore
19. Gulberga Electricity Supply Company Ltd., Gulbarga
20. Hubli Electricity Supply Company Ltd., Hubli
21. Uttar Pradesh Power Corpn. Limited, Lucknow
22. Rajasthan Rajya Vidyut Prasaran Nigam Ltd., Jaipur
23. Jaipur Vidyut Vitran Nigam Ltd., Jaipur
24. Ajmer Vidyut Vitran Nigam Ltd., Ajmer
25. Jodhpur Vidyut Vitran Nigam Ltd., Jodhpur
26. Haryana Vidyut Prasaran Nigam Ltd, Panchkula
27. Haryana Power Generation Corporation Ltd., Panchkula

28. Power Department, Union Territory of Chandigarh, Chandigarh
29. Madhya Pradesh State Electricity Board, Jabalpur
30. Electricity Deptt., Union Territory of Pondicherry, Pondicherry
31. Gujarat Electricity Board, Baroda
32. Gujarat Urja Vikas Nigam Ltd., Baroda

...Respondents

The following were present:

1. Shri V.B.K. Jain, NTPC
2. Shri D.G. Salpekar, NTPC
3. Shri S.D. Jha, NTPC
4. Shri Shankar Saran, NTPC
5. Shri Surendra, NTPC
6. Shri A. Sardana, NTPC
7. Shri G. Maheshwari, NTPC
8. Shri D. Kar, NTPC
9. Shri Guryog Singh, NTPC
10. Shri Robin Mazumdar, NTPC
11. Shri N. Sree Ramachandramurthy, APTRANSCO
12. Shri G.V. Narayanarao, APTRANSCO
13. Shri V.A. Kishore, APTRANSCO
14. Shri R.K. Mehta, Advocate, GRIDCO
15. Shri M.K. Das, GRIDCO

**ORDER
(DATE OF HEARING: 10.1.2006)**

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 Kahalgaon Super Power Station (Kahalgaon STPS).

2. The petitioner had filed Petition No. 37/2001 for approval of tariff for Kahalgaon STPS for the period 1.4.2001 to 31.3.2004 on 1.1.2001. 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 4.8.2005 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.29620 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. 27793 lakh, leaving an uncovered gap of Rs.1827 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 fact that the base "employee cost" considered for the generating station and the corporate office was provisional and that a part of actual O&M expenses incurred during 1995-2000 under certain heads, particularly the employee cost, were disallowed for 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, 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.37/2001) 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 averred that less recovery of O&M expenses has caused great hardship to the petitioner as an amount of Rs.1827.00 lakh still remained unrecovered.

6. The petitioner has submitted the following details, among others, for the pay revision with effect from 1.1.1997:

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

7. We heard Shri V. B. K. Jain for the petitioner on admission.

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 the particular observation relied upon by the petitioner had not been incorporated in the notification.

11. From the details extracted at para 6 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 1.1.2001, 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, which was the basis for determination of tariff. 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 4.8.2005. 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. Even the actual O&M expenses for 2001-04 were not brought to the notice of the Commission till approval of tariff on 4.8.2005. 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. The petitioner filed petition No. 56/2005 to claim revision of O&M expenses for Korba Super Thermal Power Station for the period 1.4.2001 to 31.3.2004 under similar circumstances. This petition was dismissed by the order dated 11.8.2005.

While ordering dismissal of the petition, the Commission observed:

"11. 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.

12. 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."

13. The above observations squarely apply to the facts of the case in hand. After deciding the tariff, the Commission cannot revisit the matters covered in the earlier order dated 4.8.2005 which has otherwise acquired finality, unless otherwise 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.

14. For the amounts indicated under the head "employee cost", the petitioner had given increase of more than 20% in the years 1997-98 and 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 (less incentive and ex gratia payment) indicated by the petitioner for the years 1997-98 and 1998-99, even though beyond the admissible limit of 20% was considered for normalisation. Against this background, the petitioner has contended that revision of O&M expenses is warranted in any case since those approved by the Commission were anticipated provisional, based as they were on anticipated "employee cost" which exceeded the actual expenses. No one else but the petitioner is responsible for this. The petitioner gave

certain details, which were accepted. It is only petitioner who is to own up the consequences for its actions. Therefore, no fault can be found with the order dated 4.8.2005 on this count and the case for revision of O&M charges is not made out.

15. The petitioner's further grievance is that incentive and ex gratia payments are excluded for the purpose of normalization under the head "employee cost".

16. This aspect has been considered and deliberated upon by the Commission in its order dated 4.8.2005 in Petition No.37/2001. While disallowing an incentive and ex gratia payment the Commission in its order dated 4.8.2005 ibid held as under

"36. In view of above, the expenditure for the years 1995-96 and 1996-97 are not the representative and has not been considered for the normalisation. Further, the Commission's policy is to allow only the statutory bonus payable under the payment of Bonus Act. The beneficiaries like HVPNL, RRVPNL and UPPCL have stated that incentive and ex-gratia should be payable from the incentive earned by the petitioner and should not be charged from beneficiaries in the O&M cost. As such, the following amount have been considered for rationalisation after deducting amount of incentive and ex-gratia for arriving at normalised O&M expenses for the purpose of tariff on 3 year average basis:

(Rs. in lakh)

Year	1997-98	1998-99	1999-2000
Employee Cost	2179	2629	3304
Incentive & Ex-gratia	68	258	258
<i>Employee Cost excluding Incentive & Ex-gratia</i>	2111	2372	3046

17. From the above it would be seen that the Commission through its conscious decisions had excluded certain expenses actually incurred during 1995-96 to 1999-2000 for the purpose of normalisation. The matter cannot be re-agitated by initiating fresh proceedings, as it will be barred by application of principle of res judicata.

18. It 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.

19. 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.37/2001.

20. The expenses under the head “employee cost” cannot be said to be falling in the category of “abnormal” since the revision of salary of the employees was a known fact and could be included in the actual expenses for the years 1.1.1997 to 31.3.2000. In the earlier cases, the petitioner had sought revision of base O&M expenses under the head “employee cost” whereas in the present case, it has attempted to seek reimbursement of actual expenses and has thus sought to follow an indirect path for achieving the object which it could not achieve directly in earlier cases. But it is well-settled that which cannot be achieved directly, can also not be achieved indirectly.

Result

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

Sd/-
(A.H. JUNG)
MEMBER
New Delhi dated the 19th January 2006

Sd/-
(BHANU BHUSHAN)
MEMBER

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRPERSON