

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 72 of 2008

Dated: 31st March 2010

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member**

Appeal No. 72 of 2008

In the matter of:

NTPC Ltd.

**Core-7, Floor-6, Scope Complex
Lodhi Road, New Delhi-110 003**

... Appellant

Versus

- 1. Central Electricity Regulatory Commission
Chanderlok Building,
36, Janpath, New Delhi-110 001.**
- 2. Madhya Pradesh State Electricity Board
Shakti Bhawan, Vidyut Nagar
Jabalpur-482 008**
- 3. Maharashtra State Electricity Distribution Company Ltd.
Pradashgad, Bandra (East)
Mumbai-400 051**
- 4. Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhawan
Race Course Road
Vadodara, Gujarat – 390 007**
- 5. Chhattisgarh State Electricity Board
P.O. Sundar Nagar, Danganiya
Raipur-492 913.**

6. **Electricity Department,
Govt. of Goa
Vidyut Bhawan
Panaji, Goa-403 001**
7. **Electricity Department
Administration of Daman & Dui-396 210**
8. **Electricity Department
Administration of Dadra and Nagar Haveli
Silvassa-396 230**

Counsel for the Appellant.

Mr. M.G. Ramachandran
Mr. Anand K. Ganesan &
Ms. Swapna Seshadri

Counsel for the Respondent(s)

Mr. Pradeep Misra for MPPTGCL

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

1. NTPC Limited is the Appellant herein. Challenging the order impugned dated 02.11.2007 passed by the Central Commission, this Appeal has been filed. The short facts of the case are as follows:

2. NTPC Limited, Appellant herein, is engaged in the business of generation and sale of electricity. One of the generating stations owned by the NTPC Limited is Kawas Gas

Power Station. The electricity generated from Kawas Gas Power Station is sold by the Appellant to the Madhya Pradesh State Electricity Board (R-2) and the other respondents (R-3 to R-9). The tariff for the electricity generated is regulated by the Central Commission. Up to 2001 the cumulative repayment of loans was worked out to Rs. 39262 lakhs, which was calculated on normative basis as per the Notification dated 30th April 1984 issued by the Ministry of Power.

3. On 19.04.2002, the Central Commission directed the Appellant to file a petition for determination of tariff for the claims towards revised fixed charges for the period prior to 01.04.2001. Accordingly, NTPC Limited filed a petition for approval of the tariff in Petition No. 99 of 2002 claiming the tariff on the basis of actual loan repayment. The Central Commission decided the tariff in the order dated 18.05.2004 adopting the basis of actual loan repayment or normative loan repayment whichever is higher. Against this order, the NTPC filed an Appeal before this Tribunal in Appeal No. 96 of 2005.

On 14.11.2006 the Tribunal allowed the Appeal and set aside the said order dated 18.05.2004 holding that the cumulative loan repayment has to be considered on normative basis only and not on actual basis.

4. On the strength of this order, the Appellant approached the Central Commission to revise the fixed charges for the period from 01.04.1998 to 31.03.2001, requesting for the re-determination of the tariff on normative basis. Though the Central Commission passed an order on 02.11.2007 on the basis of this Tribunal's order dated 14.11.2006 adopting the cumulative repayment of loan up to 31.03.1998 on normative basis but for the subsequent period determined on actual basis fixing the same as Rs. 477.50 crores instead of the amount on normative basis of Rs. 392.62 crores.

5. Since the Appellant felt that the Central Commission made an arithmetical mistake in not making a uniform calculation for all these years, the Appellant sent a letter to the Central

Commission on 18.07.2007 requesting for the correction of the above mistake. There was no response. Therefore, the Appellant has filed this Appeal, as against the order dated 02.11.2007.

6. The Learned Counsel for the Appellant would raise the following main contention while challenging the order impugned.

7. The Central Commission in its impugned order dated 02.11.2007 has considered the cumulative loan repayment as Rs. 477.50 crores, which was based on the principle adopted by the Central Commission earlier, on actual loan repayment basis. As per order of the Tribunal dated 14.11.2006, the cumulative loan repayment figure should be determined based on the normative loan repayment only and not on actual basis. Despite this, the Central Commission in the impugned order dated 02.11.2007 has not followed the said principle. Though the Central Commission has considered loan repayment during the tariff period on normative repayment basis, the cumulative loan

repayment has been still considered on actual or normative basis whichever is higher. As such this is inconsistent with the order of the Appellate Tribunal. Therefore the order impugned is liable to be set aside.

8. The Learned Counsel for the Respondent, in justification of the impugned order would make the following reply.

(i) The question of cumulative repayment of loan was neither raised before the Central Commission nor before this Tribunal in the Appeal No. 96 of 2005 earlier which was disposed by the Tribunal on 14.11.2006. Hence the same cannot be challenged at this stage, that too after the tariff for the year 1998-2001, 2001-2004 and 2004-2009 has been finalized.

(ii) In the tariff petition No. 99 of 2002 filed by the Appellant, they themselves stated that the repayment of loan till 31.03.1998 was to be Rs. 477.50 crores. The said amount has been considered by the Central Commission for computation of repayment loan and interest thereon. In the Appeal No. 96 of 2005 filed before this Tribunal the said outstanding loan of Rs.

477.50 crores as on 01.04.1998 has never been challenged. Having not challenged the outstanding amount in Appeal No. 96 of 2005, the Appellant cannot challenge the same at this stage especially when this claim being made by the Appellant is barred on principles of res judicata.

9. In the light of rival contentions of the parties referred to above, the following questions would arise for consideration.

10. Whether the Central Commission has implemented the order dated 14.11.2006 passed by the Tribunal in computation of the accumulative repayment of loan up to the previous year.

11. We have heard the Counsel for the parties and considered their respective submissions.

12. The main ground raised by the Appellant in the present Appeal is that the cumulative repayment of loan considered by the Central Commission as on 01.04.1998 is Rs. 477.50 crores

but the Central Commission ought to have fixed accumulated repayment of loan up to 01.04.1998 as Rs. 392.62 crores on normative basis.

13. While dealing with this issue, it is appropriate to refer to the relevant facts leading to the filing of the Appeal. On 30.04.1994, the Government of India issued notification determining the tariff and the terms and conditions for supply of power from Kawas Gas Power Station for the period from 01.09.1993 to 31.03.1998. On 19.04.2002 the Central Commission directed the Appellant to file a petition for determination of tariff for Kawas Gas Power Station for the period from 01.04.1998 to 31.03.2001 based on the said Notification dated 30.04.1994. Accordingly, in 2002 the Appellant filed a tariff petition No. 99 of 2002 mentioning the cumulative repayment of loan up to the previous year as Rs. 477.50 crores for the purpose of calculation for interest on the outstanding loan. It is clear from the said petition that the Appellant had shown in the said petition that the cumulative

repayment of loan up to the previous year was Rs. 477.50 crores. Accordingly on 18.05.2004, the Central Commission determined the tariff for the period from 01.04.1998 to 31.03.2001 accepting the figure of cumulative repayment of loan as Rs. 477.50 crores. Not fully satisfied with this order, the Appellant has filed an appeal in No. 96 of 2005 before the Tribunal challenging the said order only on the issue of the criteria adopted by the Commission for repayment of loan to the extent that repayment during the year made on normative basis or on actual basis, whichever is higher. The Tribunal by the order dated 14.11.2006 ultimately allowed the Appeal by holding that the repayment of loan during the tariff period from 01.04.1998 to 31.03.2001 will be considered on normative basis and not on actual basis. It is noticed from the order that the cumulative repayment of loan prior to 01.04.1998 was neither the issue before the Tribunal nor the same had been decided. As a matter of fact, the Tribunal in the said order dated 14.11.2006 directed that the Central Commission shall adopt the normative

debt repayment methodology for working out the interest on loan liability for the period from 01.04.1998 to 31.03.2001.

14. In pursuance of the said order, the Appellant approached the Central Commission praying for implementation of the order of the Tribunal dated 14.11.2006. This time, the Appellant has shown in Form No. 12-B mentioning that the cumulative repayment of loan up to 31.03.1998 is Rs. 392.62 crores. The Central Commission ultimately passed the order on 02.11.2007 implementing the directions given by this Tribunal revising the repayment of loan during the tariff period from 01.04.1998 to 31.03.2001 on normative basis for the purpose of computing the interest on outstanding loan during this period. Against the said order this Appeal has been filed mainly contending that the cumulative repayment of loan before the tariff period has to be taken as Rs. 392.62 crores and not Rs. 477.50 crores.

15. As correctly pointed out by the Learned Counsel for Respondent in the tariff petition earlier filed by the Appellant

before the Central Commission along with Form No. 12-B, it has been mentioned that the cumulative repayment of loan up to the previous years as Rs. 477.40 crores. Accordingly, the Central Commission accepted the figure of cumulative repayment of loan as Rs. 477.50 crores. The Appeal filed before this Tribunal in Appeal No. 96 of 2005 would show that the Appellant only challenged the criteria adopted by the Central Commission with reference to the observations made by the Central Commission that the repayment of loan will be considered for the purpose of tariff on normative basis or on actual basis, whichever is higher. In other words, the Appellant has not challenged the cumulative repayment of loan up to the previous year amounting to Rs. 477.40 crores. Further, the perusal of the order dated 14.11.2006 passed by this Tribunal would also make it clear that the Tribunal merely came to the conclusion and gave directions to the Central Commission that the repayment of loan during the tariff period from 01.04.1998 to 31.03.2001 shall be considered on normative basis and not on actual basis. As such, the question of repayment of loan prior to

01.04.1998 fixed as Rs. 392.62 crores as claimed by the Appellant now was never raised before the Tribunal. In other words, the cumulative repayment of loan prior to 01.04.1998 was neither the issue before the Tribunal nor the same has been decided. There is only a mere direction to the Central Commission that the Commission shall adopt normative debt repayment methodology for the period from 01.04.1998 to 31.03.2001.

16. It has been strenuously contended by the Learned Counsel for the Respondent that the claim made by the Appellant for the cumulative repayment of loan before the tariff period has to be taken as Rs. 392.62 crores has been raised for the first time and not earlier either before the Central Commission or before this Tribunal. We find substance in this submission made by the Learned Counsel for the Respondent.

17. It is also pointed out by the Learned Counsel for the Respondent that in respect of other generating stations like

Vindhyachal STPS, Korba STPS , the Central Commission passed earlier orders of 10.10.2002 and 24.10.2002 determining the tariff before the cumulative repayment of loan up to the previous year have been considered on actual basis as requested by the Appellant in the tariff petition. The said order passed by the Central Commission had never been challenged and as such they have become final.

18. Whatever it is, we are concerned with the question raised in the present Appeal with reference to the claim made by the Appellant pleading for the repayment of loan on normative basis fixed as Rs. 392.62 crores which was not an original claim made by the Appellant in the tariff petition No. 98 of 2002 filed before the Central Commission. On the other hand, it was mentioned that the repayment of loan till 31.03.1998 was Rs. 477.50 crores. As held by the Supreme Court in Civil Appeal No. 1110 of 2007 in UPPCL versus NTPC Ltd., the claim of the party for revisiting the tariff that too after the tariff for the years 1998-

2001, 2001-2004 and 2004-2009 had been finally determined and cannot be entertained.

19. In view of the above discussions, we find no merit in the Appeal. Hence the Appeal is liable to be dismissed. Accordingly, the Appeal is dismissed. No costs.

(H.L. Bajaj)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 31st March, 2010.

Reportable/Non-Reportable.