

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 40 OF 2017**

**Dated : 05<sup>th</sup> August, 2019**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. S.D. Dubey, Technical Member**

**IN THE MATTER OF :**

NTPC Limited  
NTPC Bhavan,  
Core – 7, Institutional Area, Lodhi Road,  
New Delhi - 110003

**...APPELLANT**

**VERSUS**

1. Central Electricity Regulatory Commission  
3<sup>rd</sup>& 4<sup>th</sup>Floor, Chanderlok Building,  
36, Janpath,  
New Delhi- 110001

2. Kerala State Electricity Board Limited,  
Vaidyuthi Bhavanam, Pattom  
Thiruvananthapuram-695004

**...RESPONDENT(S)**

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.  
Mr. Pratiksha Chaturvedi

Counsel for the Respondent(s) : Mr. Manu Seshadri  
Mr. Samarth Chowdhary for R-1  
  
Mr. Mukund P. Unny  
Mr. P.V. Dinesh  
Ms. Sreeja for R-2

**J U D G M E N T**

**PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

1. The present Appeal has been filed by M/s NTPC Limited, a generating company (hereinafter referred to as the “Appellant”) under Section 111 of the Electricity Act, 2003 and the Appellant is challenging the legality, validity and propriety of the Order dated 27.10.2016 (herein referred to as the “Impugned Order”) passed by the Respondent Commission in Petition No. 269/GT/2014. Vide the impugned order the Respondent Commission while observing that the scheme for supply of gas is uncertain disallowed the additional capital expenditure of Rs. 30 crores claimed for the Multi fuel firing system by the Appellant. Further the Respondent Commission also disallowed Rs. 161 Lakhs claimed towards inert gas fire-fighting system in 2014-15 on the ground that the same has been claimed after much efflux of time.

**2. Brief facts of the case :-**

- 2.1 The Appellant, NTPC is a ‘Generating Company’ as defined under Section 2(28) of the Electricity Act, 2003 (hereinafter referred to as the “Act”), having power stations/ projects at different regions and

places in the country. The Rajiv Gandhi Combined Cycle Power Project (RGCCPP), Kayamkulam (hereinafter referred to as “RGCCPP”) is one such station located in the State of Kerala having an approved installed capacity of 359.58 MW (2GTs of 116.6 MW + 1 ST of 126.38 MW). The tariff determination of said project is the subject matter of the instant appeal.

**2.2** Respondent No. 1 is the Central Electricity Regulatory Commission, a statutory body functioning in accordance with Section 76 of the Electricity Act 2003.

**2.3** Respondent No. 2 is the Kerala State Electricity Board Ltd., is the successor entity of Kerala State Electricity Board which was constituted by the Government of Kerala, as per order no. EL1-6475/56/PW dated 7-3-1957 of the Kerala State Government, under the Electricity (Supply) Act, 1948 for carrying out the business of Generation, Transmission and Distribution of electricity in the state of Kerala.

**3. Questions of law :-**

The Appellant has raised following questions of law for our consideration :-

**3.1** Whether the Impugned Order has been passed in violation of the

provisions of the Electricity Act, 2003 and the CERC Tariff Regulations of 2009 and 2014?

- 3.2** Whether the Respondent Commission erred in not allowing the expenditure towards inert gas firefighting system under Regulation 14(3)(ii) of the Tariff Regulations, 2014?
- 3.3** Whether the Impugned Order violates the principles enumerated under the Montreal Protocol Treaty and Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014?
- 3.4** Whether the Respondent Commission failed to appreciate that replacement of CO<sub>2</sub> was ascertained only after checking the availability of the proper substitute for inert gas?
- 3.5** Whether the Respondent Commission has failed to appreciate that the work for installing the inert gas fire fighting system was further awarded and was completed and is in use since 2014-2015?
- 3.6** Whether the Respondent Commission has failed to appreciate that the Appellant has signed a Supplementary PPA dated 15.02.2013 with KSEB?

**3.7** Whether the Respondent Commission erred in not appreciating that permission to lay pipeline is still under consideration with Government of Kerala and the same has not been rejected till date?

**4. Shri Sanjay Sen, learned senior counsel appearing for the Appellant has filed the written submissions for our consideration as under:-**

**4.1** The present appeal relates to Rajiv Gandhi Combined Cycle Power Project, Kayakulam ("RGCCPP"), Stage-1 ) located in the State of Kerala having an approved installed capacity of 359.58 MW (2GTs of 116.6 MW + 1 ST of 126.38 MW). The power generated from RGCCPP is being supplied to the Respondent No. 2 under a Power Purchase Agreement (PPA) dated 06.01.1995 extended from time to time.

**4.2** The Appellant preferred the petition being Petition No. 269/GT/2014 for determination of tariff for RGCCPP for the period from 01.04.2014 to 31.03.2019 as per the CERC (Terms and Conditions of Tariff) Regulations, 2014 ("Tariff Regulations 2014") wherein the Central Electricity Regulatory Commission ("Respondent Commission"), vide the order dated 27.10.2016 erroneously disallowed the following:

- a. additional capital expenditure of Rs. 30 crore claimed for the Multi fuel firing facility for GTs by the Appellant; and
- b. expenditure of Rs. 161 Lakhs claimed towards inert gas fire-fighting system for the control room in 2014-15.

Being aggrieved by the said order dated 27.10.2016 ("Impugned Order"), the Appellant is preferring the present appeal qua the following issues:

**DISALLOWANCE OF ADDITIONAL CAPITAL EXPENDITURE OF RS. 30 CRORES FOR THE PERIOD 2018-19 TOWARDS MULTI FUEL FIRING FACILITY FOR GT'S**

**4.3** The Respondent Commission vide Record of the Proceedings (ROP) dated 24.05.2016 directed the Appellant to furnish brief note on the balance life of the plant after 2018-19 as per the supplementary PPA signed with respondent KSEB in 2013 and detailed note giving the reasons and proper justification for converting from Naphtha fuel firing mode to multi-fuel firing facility at the fag end of the life of the plant along with cost benefit analysis.

**4.4** The Appellant accordingly submitted the affidavit dated 28.06.2016. It is evident from para 3 (iii) (b) of the said Affidavit that after the conversion of Kayamkulam from Naphtha fuel to multi

fuel firing facility will bring down the cost of generation from Kayamkulam. Further, Respondent No. 2, KSEB would have agreed to enter into a supplementary agreement dated 15.02.2013 only after ascertaining the benefit of conversion from Naphtha to multi fuel firing system. However, the Respondent Commission failed to appreciate the same and disallowed the additional expenditure towards multi fuel firing system.

**4.5** The Appellant in compliance of the directions contained in ROP dated 12.07.2016 furnished additional information vide an affidavit in August 2016 of which Extracts are reproduced herein below:

(A) Para 5 (i): It is submitted that the Petitioner is making all efforts for arranging RLNG for Kayamkulam Station. The following options are discussed with PSUs viz GAIL, IOCL and BPCL for supply and transportation of LNG/RLNG from Kochi terminal of PLL to Kayamkulam Station:

- Laying of sub-sea pipeline
- Laying of underground pipeline
- Through Barges
- Floating Storage Re-gasification Unit (FSRU).

The supplementary PPA dated 15.2.2013 signed with KSEB provides that Gas Transportation Agreement (GTA) & Gas Supply Agreement (GSA) shall be signed with prior approval of KSEB. Accordingly, presentations were made to KSEB in this regard. KSEB rejected pipeline option (sub- sea/ underground) due to environmental concerns/ Right of Way issues and other options were considered as costlier.

The transportation of LNG/ RLNG to Kayamkulam remains an issue as the permission to lay sub-sea/ underground pipeline is still under consideration with Govt. of Kerala.

(B) Para S(ii): Detailed break-up of projected expenditure of Rs. 30.00 Cr. on multi fuel firing system is as below:

Sr. No.	Breakup of Projected Expenditure	Amount (Rs. Cr.)
1.	Supply Package: which mainly includes Gas Valve Module, Fuel Nozzles, Fire Protection System, Gas conditioning skid, Control /Ball valves, Drain tank, PLC, software, spares and other miscellaneous items.	26.0



2.	Erection Package: Site services for installation & commissioning.	3.2
3.	Civil works	0.8
	<b>Total</b>	<b>30.0</b>

These figures are excluding taxes, duties, cess etc.

**4.6** Even Respondent No. 2 in its reply has not objected against the prayer of the Appellant seeking additional expenditure for Multi fuel firing system. The relevant extract from the reply filed by the Respondent No. 2 is reproduced herein under:

**(iv) Multi fuel firing system for GT's**

(1) The petitioner has claimed an additional capitalization amount of Rs. 3000 Lakhs in the financial year 2018-19 for multi fuel firing facility for GT's under regulation 14(3)(vii) of the CERC (Terms and Conditions of Tariff) Regulations, 2014.

(2) In this matter, KSEBL may submit the following:

- The petitioner has stated that a supplementary PPA is signed with KSEBL in February 2013 extending PPA. validity for balance life of plant with a provision of technological conversion of Kayamkulam station from

Naphtha firing to Multi fuel firing. The petitioner has further stated that the technological conversion works are in full swing.

- However, the petitioner has not provided the details of the claim substantiated with the technical justification duly supported by the documentary evidence like details of the cost of implementation, approval for the same etc.

- Hence, the petitioner may be directed to furnish the details of the expenditure including approval of the competent authority for implementing the scheme. Further, it is requested that Hon'ble Commission may admit the same only after detailed prudence check including the reasonableness of the expenditure, cost-benefit and the benefits accruing out of the expenditure.

**4.7** Further, the Respondent No. 2 vide its letters dated 20.06.2013 and 04.07.2013 has appreciated the decision of the Appellant Board for the approval of technological conversion of the existing

RGCCPP station Kayakulam from Naphtha firing to multi fuel firing mode. The Respondent No. 2 also agreed to bear the increase in fixed charges due to conversion, once the plant commences its commercial operation on LNG on approval of GSA and GTA.

**4.8** From the above, it is abundantly clear that the Respondent No. 2 is also in line with the view that the conversion of Kayamkalam plant from Naphtha fuel to Multi fuel firing system was necessary and beneficial for the project. It is submitted that Respondent Commission by disallowing the Appellant for the additional expenditure towards multi fuel firing system has resulted into double jeopardy to the Appellant as the cost of generation will be high which in case of multi fuel firing system is low and secondly, the Appellant will not get the benefit of the Supplementary PPA dated 15.02.2013 signed with KSEBL. Such an approach of the Respondent Commission runs contrary to the intent and purpose behind the 2014 Tariff Regulations as well as the principles enumerated under the Electricity Act, 2003.

**4.9** The Respondent Commission under para 29 of the Impugned Order has proceeded on the wrong presumption that the Scheme placed before Government of Kerala is not viable to be allowed.

The Respondent Commission has proceeded on baseless and meritless presumption. With respect to the reply of Respondent No.2 as quoted above and para 29 of Impugned Order, it is submitted that in Kerala, there is not a single pipeline and there is a high probability that the Government of Kerala may consider the Scheme of the Appellant for laying pipelines for transportation of gas. The proposal to lay pipeline is still under consideration before the Government of Kerala and no negative remarks have been passed by the Government of Kerala. The Respondent Commission failed to appreciate that the Appellant as well as Respondent No. 2 both are in a consonance as the Respondent No. 2 has not put any objection before the Respondent Commission against the additional expenditure claimed by the Appellant towards Multi fuel firing system.

- 4.10** Vide its letter dated 04.07.2013, KSEB appreciated the decision of the board to convert from Naphtha firing to multi fuel firing mode for the Kayamkulam power station. In the said letter, KSEB has also agreed to bear the increased fixed charges due to such conversion once the plant commences its operation on LNG on approval of GSA and GTA. At the cost of repetition, it is stated that KSEB has also supported the Appellant during the proceedings

before the Respondent Commission, which is part of the record and extracted in the impugned order.

**4.11** The counsel appearing for KSEB while arguing before this Tribunal, has referred to the reply filed by KSEB to the appeal of the Appellant, whereby a departure was made by KSEB from its earlier stand, both in the aforementioned letter as well as before the Respondent Commission. Under the para 14 of the reply filed by KSEB, it is seeking for disallowing the capital expenditure of Rs. 30 crores, since the scheme of gas transportation for RGCCPP is not yet finalized. This argument does not stand in the light of the understanding between KSEB and the Appellant, and also the supplementary PPA.

**4.12** It is wrong to suggest that the execution of supplementary PPA was conditional on the conversion of RGCCPP to gas to reduce the cost of scheduling. On the contrary, it was mutually agreed under the supplementary PPA to go ahead with the proposed of technology conversion of the existing Kayamkulam station from Naphtha to multi fuel firing mode i.e. Naphtha/ RLNG/ Natural gas using the most optimal technology, for which concurrence of KSEB shall be obtained. Therefore, there is no denial for the fact that the

scheme of conversion was in principle approved by KSEB and the parties have arrived at a consensus, on the basis of which the capital expenditure of Rs. 30 Crores was made by the Appellant.

**4.13** It was made condition under a supplementary PPA that GSA and GTA shall be made by the Appellant with prior approval of KSEB. Both the Appellant and KSEB shall explore all possible means for risk mitigation. Having agreed on these lines under the supplementary PPA, the Appellant acted upon it and made the expenditure of Rs. 30 crores by installing the technology. Now due to external circumstances peculiar to the State of Kerala for which pipelines are not being able to be laid, KSEB cannot withdraw its in principle approval for the conversion of technology.

**4.14** In the light of the above, it is wrong on the part of the Respondent Commission to disallow the capital expenditure of Rs. 30 crores in principle. Admittedly, the non-implementation of the GTA and GSA are due to external circumstances like the issue of ROW and other local issues which are not disputed by KSEB. Hence, the Appellant is entitled to in principle approval which is in consonance with the supplementary PPA as well as the understanding arrived at, between KSEB and the Appellant.

**DISALLOWANCE OF ADDITIONAL EXPENDITURE OF RS. 161 LAKHS FOR THE INERT GAS FIREFIGHTING SYSTEM**

**4.15** The Respondent Commission erred in not considering the material fact that as per the Montreal Protocol Treaty dated 16.09.1987 where India is also a signatory, the production and consumption of Ozone Depleting Substances (ODS) is to be phased out as per the schedule specified in the protocol. In view of this, Ministry of Environment and Forest has notified the Capital ODS (Regulation & Control) Rules 2000. Till 1991, all NTPC stations were built with halon fire protection system. It is submitted that as per Article 2B of the Montreal Protocol, parties agreed to oust the use of the ozone depleting substances such as Halons .

**4.16** The RGCCPP, Kayamkulam was envisaged after Montreal Protocol and as a stop gap arrangement, CO2 extinguishers were deployed in control room as proper substitute for halon was not available at that point of time of project execution at Kayamkulam.

**4.17** Further, Regulation 12(5)(f)(v) of Central Electricity Authority (Technical Standards for Construction of Electrical Plants and Electric Lines) Regulations, 2010 was notified on 20.08.2010

mandating the installation of inert gas firefighting system. Accordingly, for safety of equipment as well as working personnel in control room, the Appellant proceeded to award the work for installation of the inert gas based fire extinguisher system in accordance with Regulation 12(5)(f)(v) of Central Electricity Authority Regulations of 2010 as CO2 system was not suitable for Control Room due to human presence. Thereafter, the work towards installation of such system took considerable time and the inert gas system for control room at Kayamkulam was commissioned in the year 2014. In this regard, the Appellant also submitted an affidavit dated 28.06.2016 which was completely ignored by the Respondent Commission.

**4.18** In view of the Montreal Protocol and Central Electricity Authority Regulations of 2010, the Appellant complied with the mandate provided therein in the year 2014 hence the Appellant is entitled to claim the expenditure of Rs. 161 lakhs incurred towards installation of inert gas firefighting system. Therefore, the observations made by the Respondent Commission under para 19 of Impugned Order is liable to be set aside.



**Re: Violation of Regulation 14(3)(ii) of the Tariff Regulations, 2014**

**4.19** Further, the Regulation 14 of the Tariff Regulations, 2014 lays down that additional expenditure in a new or existing project may be admitted by the Respondent Commission. Relevant part of regulation 14 is extracted here under:

"14. Additional Capitalisation and De-capitalisation:  
(3) The capital expenditure, in respect of existing generating station or the transmission system including communication system, incurred or projected to be incurred on the following counts after the cut-off date, may be admitted by the Commission, subject to prudence check:  
(i) .....  
(ii) Change in law or compliance of any existing law;  
..."

**4.20** It is evident that any capital expenditure, which is incurred after the cut-off date, may be admitted by the Respondent Commission in the event that the same has been incurred due to "change in law" or "in compliance of existing law". As stated above, earlier CO2 fire extinguishers were used and it was only after the notification of the CEA Regulations, 2010 on 20.08.2010, inert gas firefighting system was installed at Kayamkulam. Hence, in view of Regulation 14(3)(ii) of the Tariff Regulations, 2014, the Appellant has complied with the existing law and therefore, the Respondent Commission ought to have allowed the projected additional

expenditure of Rs. 161 Lakhs for the inert gas firefighting system.

Therefore, the observations made by the Respondent Commission under para 19 of Impugned Order is liable to be set aside.

**4.21** In view of the aforesaid facts and submissions, it is most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to allow the present appeal.

**5. Mr. Mukund P. Unny, learned counsel appearing for the Respondent No.2 has filed the written submissions for our consideration as under:-**

**5.1** The aforesaid petition was filed by the appellant-NTPC before Respondent No.1-CERC for approval of tariff of Rajiv Gandhi Combined Cycle Power Project, Kayamkulam Stage-I ("Kayamkulam plant") having a scheduled capacity of 359.58 MW. The Respondent No.2 herein has a power purchase agreement with the appellant-NTPC. The said power generating station of the appellant-NTPC is a combined cycle station operating with indigenous and imported naphtha as its fuel. The contentions of the Appellant are denied unless specifically admitted.

**ISSUES CONCERNING THE PRESENT APPEAL**

**5.2** The present appeal is filed by the Appellant-NTPC raising substantially the following two issues:

- a) Disallowance by the Respondent No.1-CERC of Rs. 161 Lakhs claimed by the appellant towards establishment of inert gas firefighting system for control room in Rajiv Gandhi Combined Cycle Power Project (hereinafter “Kayankulam generating station”) of the appellant during 2014-2015.
- b) Disallowance by the Respondent No.1-CERC of Rs. 30 crore claimed by the appellant for Multi Fuel Firing system in Kayankulam generating station.

**FACTS IN ISSUE**

- a) For the purposes of addressing the first issue mentioned above, the Respondent No.2-KSEB, no facts are reproduced herein as the same is purely a question of law.
- b) For making submissions regarding the second question mentioned above, it is submitted that the Respondent No.2-KSEB had entered into a Power Purchase Agreement with the Appellant-NTPC on 06.01.1995 for purchase of entire power from Kayankulam generating station. The term of the agreement was initially for 5 years from the commercial operation date which was

extended for two more years from 01.03.2005 (the date of expiry of original PPA) and further extended upto 28.02.2013 on mutual agreement. Subsequent to the expiry of the same on 28.02.2013, the Respondent No.2-KSEB entered into a supplementary PPA with the Appellant-NTPC on 15.02.2013, for extending the validity of the PPA for a further period of 12 years from 01.03.2013 with the certain conditions mentioned in the Supplementary Agreement.

- c) Due to the excessive cost of Naphtha and resultant variable cost, most often the Respondent-KSEB has not been scheduling power from the plant. Even with pooling of 180MW of power from Talcher- II station, the cost of power from Kayamkulam does not come under the merit order of dispatch. The plant is being scheduled only when there is a contingent requirement of power in the state and this arrangement has been continuing since 01.03.2013.

**DISALLOWANCE OF RS.161 LAKHS FOR INERT GAS FIRE FIGHTING**

- 5.3** The Appellant-NTPC had claimed projected additional capital expenditure of Rs.161 Lakh in 2014-15 towards inert gas fire-fighting system for control room basing their expenditure on Regulation 14(3)(ii) of the CERC (Terms and conditions of Tariff) Regulations, 2014. The claim was made citing the Montreal

Protocol dated 16.09.1987 as well as the Central Electricity Authority (Technical Standards for construction of Electrical Plants and Electric Lines) Regulations, 2010.

Regulation 14(3) of the 2014 Tariff Regulations provides as under:

*“14 (3) The capital expenditure, in respect of existing generating station or the transmission system including communication system, incurred or projected to be incurred on the following counts after the cut-off date, may be admitted by the Commission, subject to prudence check:*

*(i) Liabilities to meet award of arbitration or for compliance of the order or decree of a court of law;*

*(ii) Change in law or compliance of any existing law.*

*xxxxx”*

**5.4** As extracted above, Regulation 14(3)(ii) stipulates capital expenditure, in respect of existing generating station or the transmission system including communication system, incurred or projected to be incurred after the cut-off date, consequent to change in law or compliance of any existing law.

Change in law stipulated in Regulation 14(3)(ii) of the CERC(Terms and Conditions of Tariff)Regulations,2014 is defined in Regulation 9 of the Tariff Regulations,2014 as extracted below:

*“(9) “Change In Law” means occurrence of any of the following events:*

*(a) enactment, bringing into effect or promulgation of any new Indian law; or*

*(b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or*

*(c) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or*  
*(d) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or licence available or obtained for the project; or*  
*(e) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station or the transmission system regulated under these Regulations.”*

Therefore, it is clear that regulation brought out by CERC itself will prove that the CEA regulation relied on by the Appellant-NTPC is neither a new law nor a re-enactment or adoption or change in interpretation or application and thus do not come under any of the clauses under the definition of ‘Change in Law’ as extracted above.

**5.5** Further, the projected expenditure claimed for this asset in 2014-15 is rightly disallowed by CERC and the Appellant may be directed to account such expenditure, if any, in the O&M cost.

**DISALLOWANCE OF RS. 30 CRORE CLAIMED BY THE APPELLANT FOR MULTI FUEL FIRING SYSTEM**

**5.6** The Appellant - NTPC had claimed projected capital expenditure of Rs. 30 Cr in 2018-19 towards conversion of the project from a Naphtha firing to a multi-fuel firing facility for GT's under Regulation 14(3)(vii) of the 2014 Tariff Regulations. It was deemed

to be necessary by both the parties to effect a change in the technology of the Kayamkulam Plant because the respondent-KSEB was not regularly scheduling power from the Appellant because of the high price of power as Naptha, which is the input fuel, was costly. Irrespective of scheduling power from the plant, respondent-KSEB has been promptly paying the annual fixed cost commitment since the CoD. This includes interest on working capital, O&M cost, Interest expenses, RoE and depreciation. With very less or nil scheduling of power from the plant, KSEB is paying annual fixed cost of around Rs.300 Crores.

**5.7** A supplementary PPA was executed by the Appellant and Respondent no.2-KSEB for the conversion which was expected to result in reasonable reduction in tariff.

**5.8** The change in technology of the plant was however subject to certain conditions mutually agreed upon between the parties executed in the aforesaid PPA. The said conditions are available in page no 47-48 of the Counter Affidavit filed by the Respondent No.2-KSEB. The said conditions are as follows:

1. *“As mutually agreed, NTPC shall go ahead with the proposal of technology conversion of the existing Kayamkulam Station(360 MW) from existing mode of firing “Naptha Fuel” to multi fuel firing mode i.e “Naptha/RLNG/Natural Gas” using the most*

*optimal technology **for which concurrence of KSEB shall also be obtained.***

2. *That the implementation cost of the above proposed conversion of 360MW station shall be capitalized as per CERC norms.*
3. ***That for transportation of Gas to Kayamkulam Station, M/S Gail shall lay pipeline from Kochi to Kyamkulam for which a 'Gas Transportation Agreement', shall be signed with GAIL with prior approval of KSEB.*** KSEB shall bear all applicable charges for the same initially and the charges shall be reworked in a proportionate manner depending on KSEB's actual usage of the pipeline once other customers also start using the transported gas.
4. ***That NTPC and KSEB shall approach Govt. of India for priority allocation of 'Domestic Gas' after signing of 'Gas Transportation Agreement' for existing Kayamkulam Station (360 MW).***
5. *That till such time the domestic gas is allocated, RLNG shall be tied up for quantity as mutually agreed with KSEB.*
6. *While finalizing the Gas Supply/ transportation contracts, NTPC jointly with KSEB shall explore all possible means for risk mitigation. **GSA and GTA shall have prior approval of KSEB.** The terms and conditions of the finalized contracts as above shall be applicable to KSEB on back to back basis."*

**5.9** It is very clear from the aforesaid conditions enumerated in the supplementary PPA dated 15.02.2013 that the change in technology is to be undertaken with the prior approval of KSEB. It is also very clear that the parties had to reach a prior agreement



with respect to Gas Supply Agreement (“GSA”) and Gas Transportation Agreement (“GTA”).

**5.10** The Appellant had vide letter dated 18.02.2013 assured KSEB that at the end of 5 years from signing of the supplementary PPA, the Appellant shall make all efforts on its part to keep Kayamkulam power viable for Respondent No. 2. This will include technology-change that will go along with cheaper gas. On 03.09.2013, the Appellant made a presentation before KSEB relating to various possible options for transportation of LNG. However, the Appellant itself found the proposal to be impractical and no viable proposals were forthcoming from the Appellant-NTPC with respect to a workable GSA and GTA.

**5.11** It was also made clear by the Respondent No 2-KSEB vide letter dated 04.07.2013 that mutual agreement between the parties is important with respect to finalizing GSA and GTA for making available gas at the Kayamkulam plant. It was specifically made clear by the KSEB in the letter dated 04.07.2013 as follows:

**“As such GSA and GTA for ensuring fuel availability at site at an affordable rate may be finalized at the earliest and concurrence of KSEB may be obtained for the same. KSEB is agreeable to bear the increase in fixed charges due to conversion, once the plant commences its commercial operation on LNG on**

*approval of GSA and GTA. **You may hence kindly proceed for the conversion on the above lines.***

**5.12** It was always made clear that the conversion of technology is subject to a workable GSA and GTA whereby it can be ensured that the multi fuel firing system installed at the plant is viable for KSEB in terms of its financials. This letter dated 04.07.2013 was also filed by the Appellant before this Tribunal on 09.04.2019 during the hearing.

**5.13** Vide affidavit dated 05.08.2016 which the Appellant submitted before CERC to report the latest status of gas transportation pipeline work to bring gas from Kochi LNG terminal to Kayamkulam station, the Appellant stated that it had made efforts for arranging RLNG for Kayamkulam Station. The Appellant further stated therein that it had also entered into discussions with GAIL, IOCL and BPCL for supply and transportation of LNG/RLNG from Kochi terminal to Kayamkulam station.

- Laying of sub-sea pipelines
- Laying of underground pipelines
- Through Barges/ Inland Waterways
- Floating Storage Re-gassification Unit (FSRU)

The Appellant further stated in the said affidavit that the supplementary PPA dated 15.02.2013 signed with KSEB provides that Gas Transportation Agreement (GTA) & Gas Supply Agreement (GSA) should be signed with prior approval of KSEB and that KSEB is yet to accept any of the above options due to various concerns.

**5.14** It is necessary to point out that the Appellant had made a presentation before KSEB on 03.09.2013 relating to various possible options of transportation of LNG highlighting the issues/constraints related to them and the support required from KSEB/Government of Kerala for waiver of VAT & custom duty as well as for obtaining various state level statutory clearances. Subsequent to the presentation, it was opined that considering the issues involved and the time required, transportation by road tankers is the most workable option and for that the Appellant sought consent of KSEB to proceed further with the IOCL for the same. However, the proposal was found impractical by the Appellant itself and vide letter dated 13-8-2014, the Appellant intimated that as part of technological conversion of existing Kayamkulam station, the Appellant had issued global EOI for supply cum transportation of RLNG to the existing Kayamkulam

station on long term basis and requested KSEB to indicate power requirement from Kayamkulam on continual basis round the year.

**5.15** The Appellant had made a detailed presentation on the offers received in the EOI before KSEB on 04.11.2014. However, as per the offers received from various firms in the EOI invited, the landed price of gas at plant was found to be exorbitantly high. As per the offer of the Appellant, the cost of power from plant even after conversion was around Rs.9.20/unit on long term basis, even after pooling with cheaper ER power and exemption of VAT and customs duty. It is submitted that in the State of Kerala, laying inland pipeline is not possible due to severe RoW issues. Further, laying submarine pipeline will also be difficult due to issues of getting clearances from various agencies. Also, laying pipeline from Kochi to Kayamkulam (100 kms) was found to be not feasible on cost economic basis and hence, the proposal was ruled out by KSEB.

**5.16** In view of the uncertainties as explained above and non finalization of the Gas Transportation Agreement, the Respondent, KSEB was unable to give an unconditional consent for technological conversion of Kayamkulam plant. Further, Government of Kerala

has not given approval till date for laying pipelines (sub-sea/underground) for gas transportation and the scheme is not under the active consideration of Government of Kerala.

**5.17** The CERC has disallowed the expenditure proposed by the Appellant in exercise of its powers under Regulation 14(3)(vii) of CERC(Terms and Conditions of Tariff) Regulations,2014. According to a composite reading of the said Regulation it can be found out that additional capital expenditure will be allowed by the CERC only upon its due prudence check. It is necessary to see that the term “prudence check” is defined by the CERC in the aforesaid Regulations as follows:

***“Regulation 3 (48) ‘Prudence Check’ means scrutiny of reasonableness of capital expenditure incurred or proposed to be incurred, financing plan, use of efficient technology, cost and time over-run and such other factors as may be considered appropriate by the Commission for determination of tariff. While carrying out the Prudence Check, the Commission shall look into whether the generating company or transmission licensee has been careful in its judgments and decisions for executing the project or has been careful and vigilant in executing the project”***

**5.18** The prudence check has thus been defined correctly as scrutiny of reasonableness of capital expenditure incurred or proposed to be incurred. It is further stated that while carrying out the prudence check, the Commission shall look into whether the generating company or transmission licensee has been careful in its

judgments and decisions. It can be concluded that the Appellant has not been careful in its judgment to go ahead with the upgradation or technology-change of the plant without having a GSA or GTA. It has been correctly held by the CERC that in the backdrop of GTA and GSA not been approved by the KSEB and the permission of the Government of Kerala for laying the underground/sub-sea pipeline not been received till date, there is no reason to allow the expenditure claimed on a scheme with so many uncertainties and where the balance life of the generation, as on the year projected additional capitalization, shall be six years.

**5.19** Since no scheme is finalized for gas transportation for RGCCPP, the capital expenditure proposed by the Appellant for multi fuel firing facility for Rs.30 Cr in the year 2018-19 is not justifiable and ought to be disallowed.

**5.20** In view of the above facts and position of law, the instant appeal deserves to be dismissed

**6. We have heard learned counsel appearing for the Appellant, learned counsel for the Respondents at considerable length of time and have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the**

**basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeal for our consideration:-**

**Issue No.1:** Whether the Central Commission has correctly disallowed Rs.161 lakhs claimed by the Appellant towards establishment of inert gas firefighting system for the control room of the generating station?

**Issue No.2:** Whether the Central Commission has correctly disallowed Rs. 30 crores claimed by the Appellant for multiple fuel firing system for the generating station?

**OUR ANALYSIS AND FINDINGS:**

**7. ISSUE NO.1:-**

7.1 Learned counsel for the Appellant/NTPC submitted that the Central Commission has erred not considering the various facts which led to installation of inert gas firefighting system in the control room of Kayamkulam generating station. He vehemently submitted as per Montreal Protocol Treaty dated 16.09.1987 where India is also a signatory, the production and consumption of Ozone Depleting Substances (ODS) is to be phased out as per the schedule specified in the protocol. In pursuance of the said treaty, Ministry of Environment and Forest notified the Capital ODS (Regulation & Control) Rules 2000 for implementation of Article 2B of the Montreal Protocol. Further, Regulation 12(5)(f)(v) of Central Electricity Authority (Technical Standards for Construction of

Electrical Plants and Electric Lines) Regulations, 2010 was notified on 20.08.2010 mandating the installation of inert gas firefighting system in generating stations. Accordingly, for safety of equipment as well as working personnel in control room, NTPC proceeded to award the work for installation of the inert gas based fire fighting system in accordance with Central Electricity Authority Regulations, 2010. The Appellant complied with mandate provided thereafter in the year 2014 and accordingly Appellant is entitled to claim the expenditure of Rs.161 lakhs incurred towards installation of inert gas firefighting system. Learned counsel contended that in view of these facts, the observation made by the Central Commission under Para 19 of the impugned order is liable to be set aside.

- 7.2** Learned counsel for the Appellant was quick to submit that the Regulation 14 of the Tariff Regulations, 2014 lays down that additional expenditure in a new or existing project may be admitted by the Respondent Commission for capitalisation. The relevant portion of regulation 14 is extracted below:-

*"14. Additional Capitalisation and De-capitalisation:  
(3) The capital expenditure, in respect of existing generating station or the transmission system including communication system, incurred or projected to be incurred on the following counts after the cut-off date,*



*may be admitted by the Commission, subject to prudence check:*

*(i) .....*

*(ii) Change in law or compliance of any existing law;*

*...”*

**7.3** Learned counsel further contended that It is thus evident from the above, that any capital expenditure, which is incurred after the cut-off date, may be allowed by the Respondent Commission in the event that the same has been incurred due to "change in law" or "in compliance of existing law". He further submitted that in view of these provisions, the Appellant is duly entitled to claim the reference expenditure towards installation of inert gas firefighting system as earlier CO2 fire extinguishers was provided and only after the notification of the CEA Regulations, 2010, the same has been replaced by inert gas base firefighting system and thus clarified under change in law. Learned counsel contended that as per CERC Regulations, the expenditure of Rs. 161 Lakhs ought to have been allowed by the Central Commission.

**7.4** Learned counsel for the Appellant alleged that the Central Commission is adopting different standard for different projects in the same matter. Learned counsel for the Appellant quoted the reference of another thermal project namely Talchar Super Thermal Power Station Stage-I (1000 MW) wherein by the review

order dated 21.02.2017, the Central Commission has allowed the expenditure on installation of inert gas firefighting system. Accordingly, the instant case is squarely covered by the said order of CERC and needs to be applied in the present case.

**7.5 *Per contra*,** learned counsel for the Respondent No.2/KSEBL submitted that the regulation brought about by CERC itself will prove that the CEA regulation relied on by the Appellant-NTPC is neither a new law nor a re-enactment or adoption or change in interpretation or application and thus do not come under any of the clauses under the definition of 'Change in Law' as notified in the CERC Regulations. Accordingly, the proposed expenditure of Rs.161 lakhs has been rightly disallowed by CERC and the Appellant may be directed to account such expenditure, if any, in the O&M cost.

**Our Findings:-**

**7.5** We have considered the rival contentions of both the parties in the matter and also perused the findings of the Central Commission in its impugned order regarding disallowance of the expenditure towards installation of inert gas firefighting system. It is admitted fact that prior to notification of the referred CEA Regulations,

2010, the generating stations were provided with CO<sub>2</sub> gas based firefighting system and after the notifications, the system was required to be augmented with fire fighting system based on inert gas. The Appellant in pursuance of the Montreal Protocol & CEA Regulations, 2010 went ahead for installation of inert gas firefighting system and incurred an expenditure of Rs.161 lakh. While referring to the order dated 21.02.2017 of the Central Commission in respect of another thermal station namely Talchar Super Thermal Power Station Stage-I (1000 MW) relating to identical issue, we note that the Central Commission has acknowledged that CEA Regulations, 2010 for augmentation of firefighting system constitutes change in law in terms of Regulation 14 (3)(ii) i.e. compliance of any existing laws and accordingly has allowed the claim of NTPC for capitalisation of expenditures towards augmentation of firefighting system. We, therefore, opine that the claim of NTPC regarding augmentation of firefighting system is duly covered by the referred order of CERC. Accordingly, the claim of NTPC - Rs. 161 lakh for installation of inert gas firefighting system would need to be appraised by the Central Commission afresh in accordance with law.

**8. ISSUE NO.2:-**

**8.1** Learned counsel for the Appellant submitted that Multi fuel firing system facility was considered and installed by the Appellant with an objective of bringing down the cost of generation from Kayamkulam generating station. He further submitted that considering the aforesaid benefit, the Respondent No.2/KSEBL agreed for the same while entering into a supplementary agreement dated 15.02.2013. Learned counsel was quick to point out that notwithstanding the benefit and agreement between the parties, the Central Commission failed to appreciate the same and disallowed the additional expenditure towards Multi fuel firing system amending to Rs.30 crores. The supplementary PPA dated 15.02.2013 signed between NTPC and KSEBL provides that Gas Transportation Agreement (GTA) and Gas Supply Agreement (GSA) shall be signed with prior approval of KSEB. Learned counsel for the Appellant contended that even Respondent/KSEBL in its reply has not objected against the prayer of the Appellant seeking additional expenditure for Multi fuel firing system. Additionally, Respondent No.2 vide its letter dated 20.06.2013 & 04.07.2013 has appreciated the decision of the Appellant / Board for the approval of technological conversion of the existing Kayamkulam station from Naptha Fuel” to multi fuel firing mode.

Further Respondent No.2 also agreed to bear the increase in the fixed charges due to conversion once the plant commences its commercial operation on LNG on approval of GSA & GTA.

- 8.2** Learned counsel for the Appellant alleged that the Respondent Commission by disallowing the Appellant for the additional expenditure towards Multi fuel firing system has resulted to total jeopardy to the Appellant as the cost of generation will be high which in case of Multi fuel firing system is low and secondly the Appellant will not get the benefit of the supplementary PPA dated 15.02.2013. Learned counsel was quick to point out that such an approach of the Central Commission runs contrary to the intent of purpose behind 2014 Regulations as well as the principles enumerated under the Electricity Act, 2003. Learned counsel for the Appellant further submitted that the Respondent Commission has proceeded on baseless and meritless presumptions that the scheme placed by the Appellant before Govt. of Kerala is not viable to be allowed. Learned counsel vehemently submitted that under the supplementary PPA, it was mutually agreed to go ahead with the proposal of technology conversion from Naptha to Multi fuel firing mode using the most optimal technology for which concurrence of KSEBL shall be obtained. Therefore, there is no

denial to the fact that the scheme of conversion was in principally approved by KSEB and the parties had arrived at a consensus on the basis of which the capital expenditure of Rs.30 crore was made by the Appellant. Under the supplementary PPA, it was made a condition that GSA & GTA shall be made by the Appellant with prior approval of the KSEB.

**8.3** Learned counsel contended that having agreed on these lines under the supplementary PPA, the Appellant acted upon it and incurred the expenditure of Rs.30 crore by installing the new technology. However, due to external circumstances peculiar to the State of Kerala for which pipelines are not being able to be laid, the Respondent/KSEBL cannot take a different stand in the in principal approval for the conversion of technology. Learned counsel summed up his submissions and reiterated that the Central Commission has wrongly disallowed the capital expenditure of Rs. 30 crore.

**8.4** *Per contra*, learned counsel for Respondent No.2/KSEBL submitted that it was deemed to be necessary by both the parties to effect a change in the technology of the Kayamkulam Plant because the respondent-KSEB was not regularly scheduling power

from the Appellant due to the fact that the price of Naptha was very high. However, irrespective of scheduling power from the plant, respondent-KSEB has been promptly paying the annual fixed cost commitment since the CoD of the plant and liability of KSEB on this account is around Rs.300 Crores per annum. Learned counsel further submitted that the change in technology of the plant was however subject to certain conditions mutually agreed upon between the parties. Among others, one of the main conditions was that for transportation of Gas to Kayamkulam Station, M/S Gail shall lay pipeline from Kochi to Kyamkulam for which a GTA shall be signed with GAIL with prior approval of KSEB. Additionally, the supplementary PPA envisaged that while finalising gas supply/transportation contracts, NTPC jointly with KSEB shall explore all possible means for risk mitigation and the GSA and GTA shall have prior approval of KSEB. Learned counsel contended that it was always made clear to the Appellant that the conversion of technology is subject to the workable GSA & GTA whereby it can be ensured that the multi fuel firing system installed at the plant is viable for KSEB in terms of its financials. Learned counsel for the Respondent further contended that the Appellant made various presentation before KSEB regarding the supply of gas and its various modes of transportation. However,

no concrete proposal could be finalised and submitted to Respondent / KSEB for its consideration. Learned counsel was quick to submit that after various efforts/proposals and analysis of the Appellant, the cost of power from the plant even after conversion was around Rs.9.20 per unit on long term basis considering pooling with cheaper ER power and exemption of VAT and custom duty.

**8.5** Learned counsel further submitted that in the state of Kerala laying inland pipeline is not possible due to severe RoW issues and similar is the case for submarine pipelines. Learned counsel summing up his arguments vehemently submitted that in view of the uncertainties as explained above and non finalization of the Gas Transportation Agreement, the Respondent, KSEB was unable to give an unconditional consent for technological conversion of Kayamkulam generating station. Further, Government of Kerala has not given approval till date for laying pipelines for gas transportation and the scheme is not under the active consideration of Government of Kerala. In view of these facts, the Central Commission has correctly disallowed the expenditure proposed by the Appellant applying its regulations and prudence check.



**Our Findings:-**

**8.5** We have gone through the submission of the Appellants as well as Respondent and also heard at length the learned counsel for the parties during proceedings. It is not in dispute that Kayamkulam combined cycle generating station using Naptha as input fuel was supplying power to the Respondent/KSEB at exorbitantly higher cost and accordingly, both the parties i.e. NTPC & KSEB through a supplementary PPA dated 15.02.2013 agreed to go ahead for augmenting the station with multi fuel firing system. It is relevant to note that the said understanding was reached between the parties with a sole objective of reducing the cost of generation so that the station could be scheduled for supply of power to Respondent at reduced cost. Admittedly, the supplementary PPA in this regard was executed with an understanding that GSA & GTA shall be finalised with prior approval of KSEB. Based on these facts, the Appellant initiated the follow up on actions for installation of multi fuel fire system along with various options for supply and transportation of LNG/GLNG from Kochi Terminal of PLL and Kayakulam station which, among others, inter-alia envisaged laying up sub-sea pipeline, laying up underground pipeline, through barges, floating storage re-gasification unit etc..

However, the transportation of LNG/RLNG from Kochi terminal to Kayamkulam station remains an issue as the permission to laying of sub-sea pipelines is still under consideration with Govt. of Kerala.

**8.6** While taking note of the observations made by the Central Commission under Para 29 of the impugned order, it is relevant to note that the Respondent Commission has proceeded on the presumption that laying of any kind of pipeline may not be approved by the Govt. of Kerala as there is not a single such pipeline as on date in the state of Kerala. On the other hand, the Appellant has reiterated that the proposal to lay pipeline is still under consideration with the Govt. of Kerala and so for no negative remarks have been received from them. It is the stand of the Appellant that with the clear understanding with the Respondent/KSEB for augmenting the multi fuel firing system from Naptha to LNG/RLNG, it proceeded with requisite follow up actions including tendering and procurement/installation of the multi fuel firing system for the ultimate benefit of the respondent.

**8.7** Contrary to the contentions of the Appellant, the Respondent/KSEB have contended that the Appellant/NTPC went

ahead for incurring expenditure on installation of multi fuel firing system despite knowing that it may not be feasible to enter into GSA/GTA without approval of Kerala Govt.. As a result, KSEB could not get any benefit out of the said proposal of NTPC. Keeping all these aspects in view, we note that the instant case has arrived in a lose-lose situation for both the parties as the claim of Appellant (Rs.30 crores) has been disallowed by the Respondent Commission making them to lose that amount for capitalization and on the other hand, with such an expenditure the beneficiary KSEB does not stand benefitted in any way. While both parties took joint decision to augment the fuel firing system and agreed to explore all possible means for risk mitigation including execution of GSA/GTA, none of the parties can now absolve from the responsibilities and consequences thereof. We also note that pending finalization/execution of GSA/GTA, the Appellant/NTPC went ahead for installation of multi fuel firing system without applying proper prudence in the matter. In such a peculiar situation when the system has been put in place with claimed expenditure but in turn, has not yielded any benefit to the beneficiary / KSEB, we are of the opinion that burden of such an expenditure should be equally shared by both the parties in the ratio of 50 : 50

**Summary of Findings:-**

9. Based on our deliberations and findings in aforesaid paras, we summarise our findings as under:-
- 9.1 The claim of the Appellant regarding inert gas based fire fighting system shall be allowed to the extent reasonably justified after prudence check by the Central Commission.
- 9.2 The claim of the Appellant regarding installation of multi fuel firing system shall be allowed after considering the expenditure to be borne by both the parties in the ratio of 50 : 50.

**ORDER**

In light of the above, we are of the considered opinion that the instant Appeal No.40 of 2017 have merits and accordingly it is allowed.

The impugned order dated 27.10.2016 in Petition No.269/GT/2014 passed by Central Electricity Regulatory Commission is hereby set aside to the extent of our findings and directions indicated under Para No. 9.1 & 9.2

The Central Electricity Regulatory Commission is directed to pass the consequential order at any pace within a period of six months.

No order as to costs.

Pronounced in the Open Court on this **05<sup>th</sup> August, 2019.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / ~~NON-REPORTABLE~~**

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