

BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION AT NEW
DELHI

PETITION NO. 121/MP/2011

IN THE MATTER OF:

Petition under Regulation 44 of the CERC (Terms and Conditions of Tariff) Regulations, 2009 read with Regulation 111 and other related Regulations of CERC (Conduct of Business) Regulations, 1999 for recovery of additional cost incurred due to abnormal increased in water charges at NTPC stations.

AND

IN THE MATTER OF:

NTPC Ltd - Petitioner
Versus
Uttar Pradesh Power Corporation Ltd & Others - Respondents

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PLACE : NEW DELHI
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WRITTEN SUBMISSIONS ON BEHALF OF NTPC LIMITED, THE PETITIONER

MOST RESPECTFULLY SHOWETH:

1. The matter in issue relates to additional cost and expenses incurred by NTPC Ltd at its generating stations on account of increase in water charges in consequence of the statutory Notifications/Orders issued by the State Governments providing for substantial increase in the water charges payable. All such Notifications were issued after the Hon'ble Commission had determined the Operation and Maintenance norms for the generating stations under the Tariff Regulations, 2009 for the period from 1.4.2009 to 31.3.2014. Regulation 19 of the Tariff Regulations, 2009 provides for the Operation and Maintenance Expenses.
2. The Tariff Regulations, 2009 were notified on 19.1.2009 effective from 1.4.2009. Subsequent to the above, by Notifications issued by the State Governments of Orissa, Chhattisgarh, Madhya Pradesh, Uttar Pradesh etc, the existing water charges have been substantially revised with an increase ranging from 94% for Korba & Sipat, 718% for Talchar and 126% for Vindhyachal. Similar Notifications are also being issued by the State Governments such as Uttar Pradesh.
3. As stated in Para 8 of the Petition No. 121 of 2011, the details of the increase are as under:

Sl. No.	Station	Increase effective from	Existing Water Charges	Revised Charges	Water % In-	Annual
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			Rate in Rs/m3	In RsCrS / annum	Rate in Rs/m3	In RsCrS/ annum	crease	
1	Korba-I&II	01.05.2010	3.60	22.32	7.00	43.40	94%	21.08
2	Sipat-II	01.05.2010	3.60	12.96	7.00	25.20	94%	12.24
3	Talcher-I	01.10.2010	0.55	1.96	4.50	16.07	718%	14.11
4	Talcher-II	01.10.2010	0.55	3.93	4.50	32.14	718%	28.21
5	TTPS	01.10.2010	0.55	0.77	4.50	6.54	718%	5.77
6	Vindhya chat	01.10.2010 & 01.01.2011	2.00	28.56	4.5	64.26	125%	35.70

Based on allocated quantity of 120 cusec (for the year 2012-13) for combined Station (Talcher-I & Talcher-II). For the year 2010-12, this amount is Rs. 29.98 for 85 cusec for combined station.

** For Stage-I, II & III as a whole.

The copies of the Notifications issued by the State Governments is attached hereto for ready reference.

4. Regulation 44 of the Tariff Regulations, 2009 provides for power to relax in the Hon'ble Commission. By the above petition, the petitioner is praying for relaxation of the O & M Expenditure to enable the Petitioner to recover the increased water charges payable by the Petitioner to the State Government Authorities in pursuance to the above Notifications.
5. The Petitioner has filed a common written submission in regard to similar aspects of increase in the salary and wages forming part of the Operation and Maintenance Expenses of the Generating Stations of NTPC for the period from 1.1.2007 to 31.3.2009 in Petition No. 60/MP/2011. The above written submissions deals with exercise of powers of the Hon'ble Commission to remove difficulties as provided for in Regulations 12 and 13 of the Tariff Regulations, 2004. The present case involves similar issue relating to Regulation 44 of the Tariff Regulations, 2009 and with respect to water charges.
6. The submissions of NTPC contained in the written submissions filed in Petition No. 60/MP/2011 are reiterated and it is submitted that it squarely apply to the present case of increase for the water charges also. Briefly stated, the following aspects are relevant:
 - (a) While framing the Tariff Regulations, 2009, the Hon'ble Commission had no occasion to deal with the present substantial increase in the water charges affected by the State Government by Notifications which have been brought into force in the years

2010, 2011, 2012 etc. The O & M Expenses inclusive of water charges were finalized and the normative O & M expenditure to be allowed was determined and incorporated in Regulation 19 based on the pre-existing water charges;

- (b) The increase in water charges effected during 2010, 2011 and 2012 are as a result of the statutory directions issued by the State Government. The increase is not on account of any reason attributable to NTPC. The increase is beyond the control of NTPC. NTPC had no option but to legally pay such increased charges. Such increase is also on account of the change in law brought about by the Notifications issued by the concerned State Governments;
- (c) Had the increase in the water charges to be effected from the year 2010 onwards as mentioned above, was known at the time when the Tariff Regulations, 2009 was finalized, the same would have been duly factored in the norms determined under the Regulation 19 in regard to the respective period after the increase.

- 7. In the circumstances mentioned above, there is clearly a case for considering and allowing the increased water charges resulting from the statutory Notifications as a part of the tariff by exercise of the powers to relax. The scope of the powers to relax and power to remove difficulties contained in the Tariff Regulations, 2004 has been dealt extensively in the written submissions filed by NTPC in Petition No. 60/MP/2011. A copy of the said written submission is attached hereto and marked as Annexure A. The same would apply to the scope of the powers to relax contained in Regulation 44 of the Tariff Regulations, 2009. NTPC reiterates the same submissions in the present case.
- 8. Similarly, the nature of the regulatory powers exercised by the Hon'ble Commission as decided by the Hon'ble Supreme Court in number of cases has been dealt in the written submissions filed in Petition No. 60/MP/2011. The same is reiterated. NTPC also reiterates the submissions of NTPC in regard to the decision of the Hon'ble Supreme Court in the case of Uttar Pradesh Power Corporation Limited v National Thermal Power Corporation Limited (2009) 6 SCC 235 is contained in the above written submissions filed in Petition No. 60/MP/2011 and the same may be read as a part of the present written submission.

9. In the circumstances mentioned above, there is no merit in the objections raised by the Respondent beneficiaries on the admissibility of the claim of NTPC for the increased water charges as per the subsequent Notifications of the State Governments.
10. The Respondent beneficiaries have referred to the decisions of the Hon'ble Appellate Tribunal for Electricity dated 3.6.2010 in Appeal Nos. 134, 140 etc of 2008 (Para 29) dealing with the claim of NTPC for additional water charges for the period upto 2001 and have stated that in the above decision the Hon'ble Appellate Tribunal has held that the tariff is a package and normative water charges allowed should not be changed.
11. NTPC submits that the above contentions raised by the Respondent beneficiaries is devoid of any merit and is misconceived.
12. The legal position in regard to the normative parameters is clear. Once the normative parameters is set, the functioning of the Utility qua such normative parameters would amount to efficient functioning if the utility is able to save on the normative parameters and inefficient or imprudent functioning if the utility incurs more than the normative parameters. The gains or loss on account of the above efficiency or inefficiency is completely to the account of the utilities. Neither the utility can claim loss on account of the functioning under the normative parameters nor the beneficiaries or the Hon'ble Commission can claim adjustment on the efficiency gain of the utilities in the working of the normative parameters. Such a course of adjusting normative parameters to actual is completely contrary to the basic tariff principles. In the following judgments, the Hon'ble Appellate Tribunal has considered the above aspect and has held as under:

(a) Judgment dated 31.7.2009 of the Hon'ble Appellate Tribunal for Electricity in Appeal No 42 & 43 2008, Haryana Power Generation Corpn. Limited v. Haryana Electricity Regulatory Commission:

"34. In submissions before this Tribunal, the State Commission submitted that 10% was the rate at which HPGCL had been borrowing on short-term basis. As regards interest on working capital, the State Commission has adopted the normative approach adopted by the CERC. In our opinion, once the State Commission adopts normative approach, it is neither in the interest of the long term development of the electricity industry in the State nor is a fair play to the appellant to deny the benefits of the

normative approach to the appellant. The very purpose of normative approach is that the parties are informed of the benchmarks beforehand and that if they are in a position to better the benchmarks, they are entitled to the benefits unless there is some unhealthy practice adopted by them. In the case before us, if the appellant is able to raise resources below the benchmark rates, it indicates efficiency on the part of the appellant for which it should be allowed benefit in terms of the norms. Otherwise, the purpose of normative approach would get defeated and the appellant may not remain adequately motivated to work with the desired efficiency. It is true that the consumers should not be burdened with unnecessary costs, but the same is equally applicable to the appellant when it is denied recovery of costs incurred by it if the same is not in line with the norms.

35. In view of the above, we decide the issue in favor of the appellant. The appellant may approach the State Commission for re-determination of its tariff after allowing for interest rate on working capital requirements as per the applicable norms."

(b) Judgment dated 14.11.2006 of the Hon'ble Appellate Tribunal for Electricity in Appeals No. 94 and 96 of 2006 NTPC v CERC & Ors

13. As mentioned earlier the servicing of the capital (equity or debt) is financed by the recovery of interest on debt capital and through earning of return on equity capital. The actual loan repayment has been normalized to 50% of the total capital by the formula in para 22 of the impugned order given in para 11 above. Once it has been decided and agreed that the financing plan would be based on normative debt-equity ratio of 50:50 and not the actual debt-equity ratio, the same normative basis should be adopted for recovery of cost of servicing the capital.

14. In the instant case since the normative debt-equity ratio of 50:50 has been adopted in the financing plan, the loan repayment should be computed based on normative debt. This is to ensure that whatever normative debt has been considered, tariff should ensure the recovery of the same normative debt and interest thereon.

15. The impugned order of the Central Commission in its para 23 provides that:

"23. the amount of annul repayment for calculation of interest on loan is considered as worked out by the above formula or as given in the petition, whichever is higher"....

16. After normalizing the repayment of debt on the basis of debt equity ratio of 50:50, it appears unfair to compare it with the actual repayment and taking either normative debt repayment or actual debt repayment 'whichever is higher' for computing the interest. This will render a part of debt unserved to the disadvantage of the appellant as demonstrated in the succeeding paragraphs.

13. The normative parameters are set based on specific tariff elements. For example, the Plant Load Factor is set on the basis of expected prudent performance of the generating stations. Similarly, the factors such as

station heat rate, secondary oil consumption, auxiliary consumption, interest on working capital and so on and so forth are set with specific reference to such tariff elements and not on overlapping basis. The Tariff Regulations does not provide that if a higher PLF is achieved and higher secondary fuel oil consumption is incurred, then the two should be adjusted. Such a course would lead to anomalous result.

14. The basic feature of the Tariff Regulations, 2004 and 2009 is that it does not provide for actual or norms whichever is lower. Accordingly, there is no truing up of the normative parameters to determine whether such norms are lower or higher than the actual in the case and if the actual are lower than the normative, the same need to be adjusted to actuals.
15. The basic principles to be adopted in such case is with reference to a specific tariff element. The test is if the increase had been implemented when the time the Tariff Regulations were notified specifying the norms would it have taken into account such increase. There should be no other consideration while deciding on the impact of the subsequent developments, either as alleged by the Respondent beneficiaries or otherwise.
16. The contention that the tariff is a package made with reference to the decision dated 3.6.2010 in Appeals No. 134, 140 etc of 2008 at Para 29 dealing, inter alia with the claim of NTPC for additional water charges [2010 ELR (APTEL) 833]. In the above case, the normative water charges were fixed based on actual expenditure of NTPC for the base year. NTPC did not at the relevant time claim that there would be an impact of additional water charges on account of the settlement of pending disputes with the State Authorities. After the norms had been fixed, during the control period NTPC claimed that it had settled the dispute with the State Authorities and had to pay higher water charges. In such circumstances, the water charges forming part of the normative O & M expenditure was held to be a package and, therefore, ought not to be interfered with in the increase in water charges claimed by NTPC. This was not a case where either there was any further Notification during the control period increasing the water charges or increase in the water charges was clearly envisaged at the time of fixation of norms and brought to the notice of the Regulator while determining the norms. The facts of the above case are squarely distinguishable and have no application to the present case.

17. As against the above, the Hon'ble Commission allowed additional O & M expenses to Gas Power Stations of NTPC relaxing the provisions of the Tariff Regulations, 2004. In the appeal filed by UPPCL against the above Orders, the Hon'ble Tribunal in the Judgment dated 24.5.2011 in Appeals No. 100, 103 of 2009 etc has clearly held that the theory of tariff as a package cannot be applied in a case where the O & M Expenses of Gas Power Stations are being considered based on the requirements of the Gas Power Stations. The Hon'ble Appellate Tribunal held as under:

"10. The next issue is regarding revision of single component of tariff without considering ROE of the respondent no.2/NTPC.

10.1. The Central Commission in its Regulations has determined norms for the various components of the tariff. Thus, the regulations provide for a normative tariff.

10.2. The relevant provisions of the Section 61 of the 2003 Act are reproduced below:

61. "Tariff Regulations- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a)

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance."

Thus, each element of the tariff has to be determined on the norms following commercial principles, encouraging competition and safeguarding the consumer interest and at the same time ensure recovery of the cost of electricity in a reasonable manner. Accordingly, the Central Commission by a reasoned order has decided to allow O&M expenses to the four gas stations of NTPC as applicable to Gas power stations without warranty spares. It is expected that if NTPC performs better than the operational norms it will be rewarded for efficiency and if it performs at lower than normative parameters it will have to bear the consequential loss. Thus, there is no force in the argument of the Appellant that before allowing the enhanced O&M expenses, the Central Commission shall check whether the actual ROE is less than the normative ROE and then only allow the enhanced O&M expenses. This is not as per the scheme of the Regulations. Accordingly, this issue is also decided against the Appellant."

18. For the reasons mentioned above, there is no merit in denying the claim of NTPC for additional water charges when the same is on account of supervening actions of the State Governments in prescribing through

Notifications additional water charges after the normative O & M Expenses has been determined by the Hon'ble Commission.

19. The plea of the Respondent Beneficiaries that the present day consumers should not be burdened for the increase in the water charges relating to the past and various other miscellaneous pleas in opposition to the grant of relief in the present petition are similar to those raised by the Respondent beneficiaries in the Petition for increase in the salary and wages. NTPC reiterates the submissions contained in the common written submissions filed in Petition No. 60/MP/2011.
20. For the reasons mentioned herein above, there is no merit in the contentions of the Respondent beneficiaries. NTPC is entitled to the relief for the substantial increase in the water charges effected through Notifications of the State Governments.

(M.G. RAMACHANDRAN)
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PLACE: NEW DELHI
DATED: 24TH FEBRUARY 2012