CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 184/2009

Coram **Dr. Pramod Deo, Chairperson**
Shri S. Jayaraman, Member
Shri V.S.Verma, Member

DATE OF HEARING: 9.6.2011 **DATE OF ORDER: 3.9.2012**

IN THE MATTER OF

Approval of revised fixed charges for the period 2004-09, due to additional capital expenditure incurred during 2007-08 and 2008–09 for Talcher STPS (460 MW).

AND IN THE MATTER OF

NTPC Ltd, New Delhi ……**Petitioner**

Vs

Grid Corporation of Orissa, Bhubaneswar **…..Respondent**

Parties present:
1. Shri V.K.Padha, NTPC
2. Shri Vivek Kumar, NTPC
3. Shri G.K.Dua, NTPC
4. Shri Shyam Kumar, NTPC
5. Shri R.B.Sharma, Advocate, GRIDCO
6. Shri S.R.Sarangi, GRIDCO

ORDER

The petitioner, NTPC has made this application for approval of the revised fixed charges due to capital expenditure incurred during the years 2007-08 and 2008-09 for Talcher STPS (460 MW), (hereinafter referred to as "the generating station") based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (hereinafter referred to as "the 2004 regulations"). The petitioner has made the following specific prayers:

(a) Approve the impact of revised fixed charges for 2004-09 (Annexure-I) for this station due to:

(i) Inclusion of disallowed capital liabilities of Rs.146.88 lakh, (-) Rs.15.61 lakh and (-) Rs.72.09 lakh for the years 2004-05, 2005-06 and 2006-07, respectively in CERC order

dated 3.2.2009 in petition no. 31/2008 into capital base for the respective years as per Hon'ble ATE judgment as brought out in para 6 above.

(ii) Additional capital expenditure incurred during 2007-08 and 2008-09.

(b) Allow the recovery of filing fees from the beneficiary respondents.

(c) Allow recovery of income tax from the respondents on account of nay additional billing arising out of the determination of revised tariff for the period 2004-09 and being billed after March'2009.

(d) Pass any other order in this regard as the Hon'ble Commission may find appropriate in the circumstances pleaded above.

Preliminary

2. The Commission in the Record of Proceeding for the hearing on 7.9.2010 had directed the petitioner to clarify the following:

(i) Whether the sale of power from the generating station to the respondent constitutes sale to a distribution company in terms of Section 62 (1) (a) of the Electricity Act, 2003 (the Act).

(ii) Whether PPAs signed by the petitioner with the OSEB has been assigned to one or more of the distribution companies of Odisha and if so, documentary evidence to be submitted.

3. NTPC in its reply vide affidavit dated 1.11.2010 has submitted as under:

(a) The power of the Commission under Section 79 (1)(a) of the Act relates to tariff determined in terms of 62(1)(a) of the Act. The both provisions cannot operate independently. The Appellate Tribunal has reiterated its decision in Gajendra

Haldea case in its judgment dated 21.10.2008 in Appeal No 71/2008 (Lanco Amarkantak Power Pvt. Ltd. V/s MPERC).

(b) The scheme of Section 62(1)(a) and 79(1)(a) would not automatically bring every sale to a trading licensee out of the purview of the jurisdiction of the Commission which would depend on there being a nexus between the electricity sold by the generating company to a trading licensee and eventually to a distribution licensee. Where the generating company is selling electricity to an intermediary trading company with a clear linkage of sale by the trading company to an identified distribution licensee and the generating company is fully aware of the linkage, there exists a nexus between the generating company and distribution licensee and the tariff in such cases would be determined by the appropriate Commission in this case the Central Commission.

(c) In case of trading companies formed as a result of a transfer scheme notified under Section 131 of the Act providing for reorganization of the State Electricity Boards, such trading companies have been formed by way of transitory arrangements to enable pooling of all power purchase and making the same available to the distribution licensees. The creation of such intermediary trading companies cannot deprive the consumers of electricity at regulatory tariff. A harmonious construction of the various provisions of the Act would be that in terms of Section 62(1)(a), the contracting parties need not necessarily be the generating company and the distribution licensees but the sale of electricity must be meant for the distribution licensees in the contract between generating company and the trading licensee.

(d) The principle of nexus has been noted by the Appellate Tribunal in Lanco Amarkantak Power Pvt. Ltd. V/s MPERC. In that case, the Appellate Tribunal has held that there was absence of nexus between the generating company and distribution licensee as the power purchased by the intermediary trading licensee, namely, PTC, could be sold to any person, and not necessarily to MP TRADECO/MPSEB as per the provisions of the PPA between LANCO and PTC.

(e) In case of GRIDCO, the Government of Odisha has issued a Government Notification dated 17.8.2006 which provides that GRIDCO shall be the State designated entity for execution of Power Purchase Agreements with the developer generating companies like hydro power, wind power, power from agriculture waste etc. along with thermal power. This establishes a clear nexus on the purchase of power by GRIDCO as being for the purposes of onward sale to the identified distribution licensees for maintaining the supply to consumers within the State at large. In the agreements entered into by NTPC with GRIDCO, the distribution licensees are clearly identified and set out therein and, therefore, the Commission would have the jurisdiction to determine the tariff applicable on such sale by NTPC.

4. GRIDCO in its response dated 6.6.2011 has submitted as under:

(a) GRIDCO is an organization not only working as an intra-state trader in the State of Odisha but also as the bulk supplier of electricity to all the distribution companies in

the State of Odisha. This means that GRIDCO is required to undertake all the co-coordinating activities in technical and commercial aspects including all monetary transactions needed for supply of electricity by generating company to distribution licensees.

(b) Supply of electricity by a generating company in physical terms is to the distribution licensees in the State of Odisha by their very existence of T&D network but for the purpose of monetary transactions, these are supervised and supported by GRIDCO.

(c) GRIDCO is a statutory body and carrying out the statutory functions assigned to it under various Codes/Regulations of the Odisha Electricity Regulatory Commission (OERC).

(d) Government of Odisha has issued Notification dated 17.8.2006 which provides that GRIDCO will be the State designated entity for execution of Power Purchase Agreements with the developers generating energy like hydro power, wind power, power from agriculture waste etc. along with thermal power.

(e) GRIDCO endorses the contentions of NTPC on this issue and the nexus principle and the role of GRIDCO as an intermediary is limited to monetary transactions and other coordinating aspects.

(f) Neither NTPC nor GRIDCO had raised this issue before the Commission. The matter has attained finality in view of the various orders of the Commission determining the

tariff of the generating station for supply of power from NTPC. Raising the issue now would put the 2004 and 2009 Tariff Regulations incorporating the parameters for the generating station in jeopardy.

(g) Raising of this issue in the present petition is barred by the principle of '***Res judicata'*** which bars the trial of the suit or issue, if the matter in the suit was directly or substantially in issue and was finally decided in previous suit between the same parties litigating under the same title in a court competent to try the subsequent suit in which the issue has been raised. *In other words, Res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered final judgment on the merits in a previous action involving the same parties and claims*.

5. The matter was further heard on 9.6.2011. During the hearing the learned counsel for the petitioner reiterated the submission made in the affidavit dated 1.11.2010 and submitted that the jurisdiction of the Commission cannot be ousted because of GRIDCO being a trading licensees since the ultimate beneficiaries of the electricity supplied by NTPC from the generating station are the distribution companies of Odisha. The Learned Counsel relied upon the judgment of the Appellate Tribunal in Appeal No. 121/2007 (Uttar Pradesh Power Corporation of India vs. NOIDA Power Company & Ors) in support of his contention. The learned counsel for the Respondent, GRIDCO, submitted that as the Commission has determined the tariff of the generating station since 2001, the question of jurisdiction of the Commission stands determined and the said issue cannot be revisited in the present petition as it is barred by the principle of *res-judicata*. In response to our query regarding 'bulk supply', the learned counsel submitted that though the term 'bulk supply' has not been

defined in the Act, the Odisha Grid Code(OGC) which is statutory in nature and has been framed under the Act provides that GRIDCO shall comply with the provisions of the OGC as a bulk supplier. The learned counsel further submitted that GRIDCO does not have its own network and the power directly flows from the generator to the distribution licensees and only the supervisory activity for effecting the said transaction is undertaken by GRIDCO. After hearing the parties, the order in the petition was reserved.

6. Subsequently, the petitioner vide its letter dated 19.6.2012 has placed on record a copy of the judgment of the High Court of Delhi dated 15.2.2012 in the matter of PTC India Ltd v/s JP Power Ventures Ltd and the judgment of the Appellate Tribunal for Electricity dated 1.3.2012 in Appeal No. 106/2010. The petitioner has submitted that in view of the said judgments, the Central Commission has jurisdiction to determine the tariff of the generating station, since the power is ultimately supplied to the distribution companies of Odisha through GRIDCO.

7. We have examined the submissions of the petitioner and the respondent, GRIDCO and have gone through the available documents and the judgments on record. The following issues arise for our consideration:

(a) Whether the issues regarding jurisdiction raised in the petition by the Commission suo motu is barred by the principle of res judicata?

(b) What is the legal status of GRIDCO under the Electricity Act, 2003?

(c) Whether the Commission should determine the tariff of Talcher TPS under the provisions of the Electricity Act, 2003 when the power is supplied to GRIDCO which is not a distribution licensees?

8. First issue is whether the Commission is barred by the principle of *res judicata* to go into the question of jurisdiction to determine the tariff for supply of power from Talcher TPS to GRIDCO in view of the fact that the Commission has been determining the tariff of the said generating station since the year 2000. As per the submission of GRIDCO, the claim of NTPC for tariff in respect of Talcher TPS has been decided by the Central Commission by determining the tariff from time to time and therefore, the issue of jurisdiction cannot be raised at this stage being barred by the principle of *res judicata*. *Res judicata* is a plea available in civil proceedings in accordance with section 11 of the Code of Civil Procedure, 1908 (Code). It is a doctrine applied to give finality to the 'lis' in original or appellate proceedings. The doctrine in substance means that an issue or a point decided and attaining finality cannot be allowed to be reopened or re-agitated twice over. Section 11 of the Code reads as under:

> **"11. Res judicata.-**
>
> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised' and has been heard and finally decided by such Court.
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> **Explanation I.** The expression " former suit " shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
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> **Explanation II.** For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III. The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V. Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

9. Hon'ble Supreme Court in Escorts Farms Limited v. Commissioner, Kumaon Division, Nainital {AIR 2004 S.C.2186} has observed that section 11 of the Code engrafts this doctrine with the purpose that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action". In the present case, the issue whether the Commission has the jurisdiction to determine the tariff for supply of electricity by NTPC Ltd to GRIDCO was neither raised nor decided by this Commission in any of the earlier petitions for tariff determination. In fact, the condition laid down in Explanation III is not satisfied in this case as neither of the parties raised or denied the issue of jurisdiction in any of the earlier petitions. Only because the Commission has determined the tariff of the generating stations in the earlier petitions would not constitute a bar of res judicata to consider the issue whether it is permissible under the Act for the Commission to determine the tariff when power is being supplied by a generating company to an entity other than a distribution licensee.

10. The next question is about the legal status of GRIDCO - whether it is a trader or an aggregator on behalf of the distribution licensees of the State of Odisha. GRIDCO was incorporated as a Government Company under the Companies Act, 1956 on 20.4.1995. Its main objects as per its Memorandum of Association were to carry on the business of procurement, transmission and bulk supply of electric energy. The Orissa Electricity Reforms Act, 1995 (Reforms Act) came into force from 1.4.1996. Section 13 of the said Act provided for the constitution and functions of the GRIDCO as under:

> "13. Constitution and functions of the GRIDCO - (1) The Grid Corporation of Orissa Limited incorporated under the provisions of the Companies Act, 1956 with effect from the 20th day of April, 1995 with the main objects of engaging in the business of procurement, transmission and bulk supply of electric energy, shall subject to the powers of the State Government under Section 12, be the principal company to undertake planning and coordination in regard to transmission and to determine the electricity requirements in the State in coordination with the Generating Companies, State-Government, contiguous States, the Commission, the Regional Electricity Board and the Central Electricity Authority.
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> (2) GRIDCO shall own the extra high voltage transmission system, shall be responsible for transmission system operations and shall operate the power system in an efficient manner.
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> (3) GRIDCO shall undertake the functions specified in this Section and such other functions as may be required under the licence to be granted to it by the Commission under this Act.
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> (4) Upon the grant of licence to GRIDCO under Section 15, GRIDCO shall discharge such powers, duties and functions of the Board including those under the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or the rules framed thereunder as the Commission may specify in the licence and it shall undertake and duly discharge the powers, duties and functions so assigned.
>
> (5) Subject to Sub-section (1) and the overall supervision and control of GRIDCO, subsidiary or associated Grid companies may be established in the State and the Commission may grant licenses under the terms of this Act to such grid companies, in consultation with GRIDCO."

11. Thus the Reforms Act vested in GRIDCO the functions of planning and coordination with regard to transmission, determination of electricity requirement in the State, ownership and operation of the transmission systems and power systems, and such other powers of the Board as the State Commission may specify in the licence to be granted to GRIDCO. GRIDCO was issued two licences, one for distribution, and another for bulk supply and transmission by Orissa Electricity Regulatory Commission (OERC) under Section 15(1) of the Orissa Reforms Act with effect from 1.4.1997. The words 'supply' or 'bulk supply' have not been defined in the Orissa Reforms Act. However, as per the Bulk Supply and Transmission Licence, 1997 issued to GRIDCO, its business apart from transmission consisted of procuring electricity in bulk and supplying the same to the consumers, retail as well as bulk. Under Orissa Electricity Reforms (Transfer of Assets, Liabilities, Proceedings and Personnel of GRIDCO to Distribution Companies) Rules, 1998 framed under Section 23(5) of the Orissa Reforms Act, the distribution functions of GRIDCO were hived off and vested in four distribution companies, who were granted distribution licences by OERC. GRIDCO was left with transmission and bulk supply of electricity. For undertaking the bulk supply business, GRIDCO entered into long term PPAs with generators and long term BSAs with the distribution companies.

12. As per Orissa Electricity Reforms (Transfer of Transmission Related Activities) Scheme, 2005, issued under Section 131(4) of the Electricity Act, 2003, GRIDCO was bifurcated into 'transmission undertaking' and 'trading undertaking'. The business of the 'transmission undertaking' was transferred to a newly formed company, OPTCL, retaining 'trading undertaking' with GRIDCO. Clause 2(1)(l) of the Transfer Scheme defines 'trading undertaking' to mean the 'undertaking related to activities of bulk purchase and bulk sale of

energy presently being undertaken by the transferor (GRIDCO) and acts incidental and ancillary thereto'. Thus, after the 2005 transfer scheme was implemented, GRIDCO is left with the function of bulk purchase and bulk sale of electricity. However, under clause 5.1 of the licence granted to GRIDCO, it could sell surplus power to the needs of the State of Orissa to State Electricity Boards/licensees of other States with the prior approval of the Orissa State Electricity Regulatory Commission and in consonance with the conditions of its licence.

13. The Commission in its order dated 1.5.2006 in Petition No.15/2006 (Shri Gajendra Haldea V Grid Corporation of Orissa) had the occasion to examine the legal status of GRIDCO. Relevant portion of the order is extracted as under:

> "21. GRIDCO was created under the Orissa Act, passed by the Orissa State legislature, which extends only to the State of Orissa, and cannot have any extraterritorial operation. Its activities are regulated by the Orissa Commission under the State Act. It was granted licence for undertaking different activities from time to time under the State Act. The operations of GRIDCO are, therefore, by operation of law confined within the State of Orissa and not outside."

Further, in para 31 of the said order, the Commission had observed that "in our considered view, GRIDCO, though deemed to be an electricity trader, is an intra-State trader and is amenable to the jurisdiction of the Orissa Commission."

14. The Commission's order dated 1.5.2006 was challenged before the Appellate Tribunal for Electricity (Appellate Tribunal) in Appeal No.81/2006. The Appellate Tribunal in its judgment dated 16.11.2006 in the said appeal observed on the status of GRIDCO as under:

"54……But the question is whether the Commission has wrongly decided that the GRIDCO is a trader. We do not find any reason to hold that the Commission was wrong in holding that GRIDCO was an electricity trader. According to sub-section (26) of Section 2 of the Electricity Act, 'electricity trader' means a person who has been granted a licence to undertake trading in electricity under Section 12. As per sub-section (71) of Section 2 of the Electricity Act, "trading" means purchase of electricity for resale thereof and the expression "trade" is to be construed accordingly. It is not in dispute that licence was granted to GRIDCO for bulk purchase and supply of electricity. As per para 2(1) (l) of the Orissa Electricity Reforms (Transfer of Transmission and Related Activities) Scheme, 2005, framed by the Government of Orissa under Sections 39, 131, 133 and 134 of the Electricity Act, 2003 read with Sections 23 & 24 of the Orissa Electricity Reforms Act, 1995, 'trading undertaking' "means the undertaking relating to the bulk purchase and bulk sale of energy presently being undertaken by transferor and acts incidental and ancillary thereto". The word 'transferor' as defined in para 2(1) (m) of the aforesaid scheme means the Grid Corporation of Orissa, a wholly owned undertaking of the State Government. Since the GRIDCO undertakes bulk purchase and bulk sale of energy, it is clearly a trading undertaking as envisaged by para 2(1)(l) of the Scheme. Moreover, activities of GRIDCO are trading activities within the meaning of Section 2(71) of the Electricity Act, 2003 since GRIDCO purchases electricity in bulk and resells the same. It is an electricity trader within the meaning of Section 12 of the Electricity Act, 2003. As per Section 12 of the Electricity Act,2003, no person can transmit, distribute or undertake trading of electricity unless he is authorized to do so by a licence issued under Section 14, or is exempt under Section 13. As per the fifth proviso to Section 14 of the Electricity Act, "the Government company or the company referred to in sub-section (2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule shall be deemed to be a licensee" under the Act. There is no dispute that GRIDCO is covered by the said proviso and is deemed to be a licensee for undertaking trading in electricity under the Electricity Act, 2003. ……."

15. The above judgment of the Appellate Tribunal was challenged by GRIDCO in Civil Appeal No. 5722 of 2006 (GRIDCO v Gajendra Haldea). Hon'ble Supreme Court in order dated 13.8.2008 in the said appeal has set aside the judgment of Appellate Tribunal on the ground that Shri Gajendra Haldea had no locus standi to file the petition before the Commission or appeal before the Appellate Tribunal and the transaction between GRIDCO

and PTC was not an inter-State trade and upheld the order of the Commission. Therefore, the status of GRIDCO as an intra-State trader stands established.

16. The third question is whether sale of electricity by NTPC Ltd from its generating station, Talcher TPS, to GRIDCO is amenable to tariff determination by the Commission under the Act. Section 79 of the Act vests the functions in the Commission to regulate the tariff of the generating company as under:

> " 79. Functions of the Central Commission.- The Central Commission shall discharge the following functions, namely:-
> (a) To regulate the tariff of generating companies owned or controlled by the Central Government;
> (b) To regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State; ….."

17. Further section 62(1) (a) of the Act provides for determination of tariff by the Commission as under:

> "62. Determination of Tariff.- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for-
> (a) Supply of electricity by a generating company to a distribution licensee:
>
> Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

18. A combined reading of the provisions of Section 62 (1) (a) and Section 79 (1) (a) as extracted above leads to the conclusion that the tariff of a generating company owned or controlled by the Central Government shall be determined by the Central Commission for supply of power to a distribution licensee. Section 62 (1)(a) of the Act does not provide for

determination of tariff for sale of electricity by a generating company to other licensees or consumers. Section 10 (2) of the Act provides that “a generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of Section 42, supply electricity to any consumer”. The term “licensee” has been defined as “a person who has been granted a licence under Section 14 of the Act”. Section 14 of the Act provides for three types of licensees i.e. transmission, distribution and trading licensees. However, when it comes to determination of tariff, Section 62(1)(a) provides for determination of tariff for supply of electricity to distribution licensees only. Therefore, supply of electricity by a generating company to a transmission licensee or trading licensee or consumers is not required to be determined by the Appropriate Commission and the generating company has the freedom to sell power to these licensees in accordance with the provisions of the Act, rules or regulations framed thereunder and to any consumer subject to the regulations made under section 42(2) of the Act.

19. The question whether the appropriate Commission can determine tariff of a generating company for supply of power to a trading licensee has received judicial attention from time to time. We consider it appropriate to discuss the judgments on the subject as under:

(a) Petition No.1/2005 (Gajendra Haldea v Central Electricity Regulatory Commission and others): On a petition filed by Shri Gajendra Haldea under section 121 of the Act, the Appellate Tribunal considered the scope of section 62(1)(a), section 79(1)(a)(b) and section 86(1)(a) and framed the issue whether Electricity Regulatory Commissions can fix tariff for sale of electricity by ; (i) a generator to a trader or an intermediary; (ii) a distributor to a trader, and (iii) by a trader to any other person. The Appellate Tribunal after examining the

various provisions of the Act came to the following conclusion in its judgment dated 22.12.2006:

> *"34. It appears to us that the general words in Sections 79 (1) (a) & (b) and 86(1) (a) must take colour from the words used in Section 62 (1), particularly Section 62 (1) (a). Otherwise, it is not possible to reconcile the provisions of Section 62(1) on the one hand and Section 79 (1) (a) & (b) and Section 86(1) (a) on the other. It is well established principle of construction of statutes that as far as possible the provisions of a statute on the same subject must be harmonized. Sections 79(1) (a) & (b) require regulation of tariff for generation. They must be construed in the context of Section 62(1) (a), which provides for determination of tariff by the Appropriate Commission for supply of electricity by a generating company to a distribution licensee…."*

Further the Appellate Tribunal concluded as under:

> *"In this view of the matter, we hold that the Appropriate Commission under Section 62 (1) (a) read with Sections 79 (1) (a) & (b) and Section 86 (1) (a) of the Act has been empowered to determine tariff for sale of electricity by a generating company to a distributor and it does not impose any restriction of tariff on the generating company or the distribution licensee to sell electricity to a trader or an intermediatory or on the trader to sell electricity to any person. This leaves the generator free to have a direct commercial relationship with a trader or an intermediatory, a vital factor for encouraging competition, which is extremely important for securing power for the consumers at reasonable rates."*

(b) The above judgment of the Appellate Tribunal was set aside by the Supreme Court in appeal on 9.4.2009 on the ground that Gajendra Haldea did not have the *locus standi* to file petition before the Appellate Tribunal under Section 121 of the Act. The Supreme Court did not consider on merit the judgement of the Appellate Tribunal.

(c) Appeal No.71/2008 (Lanco Amarkantak Power Private Ltd v Madya Pradesh Electricity Regulatory Commission): In this appeal, the order of the Madhya Pradesh Electricity Regulatory Commission was challenged whereunder Lanco was directed to file tariff petition on the basis of the PPA of Lanco with PTC Ltd, a trading licensee. The Appellate Tribunal in its judgment dated 21.10.2008 placing reliance on its earlier judgment dated 22.12.2006 in Petition No.1/2005 came to the conclusion that the

Commission had exceeded its jurisdiction in asking Lanco to submit to its jurisdiction for the purpose of determination of tariff under the PPA and to file a tariff petition. The judgment has also been challenged by MPPTCL before Supreme Court in Civil Appeal No. 6676 of 2008 which has been admitted but prayer for interim relief has been rejected. The said judgment has also been challenged by MPERC in the Supreme Court in Civil Appeal No. 1335 of 2009 which has been admitted.

(d) Appeal No. 121/2007 (Uttar Pradesh Power Corporation Ltd. is NOIDA Power Company and another): The Appellate Tribunal in its judgment dated 15.12.2010 in Appeal No.121/2007 has decided that the Uttar Pradesh Electricity Regulatory Commission is empowered to determine the bulk supply tariff for supply of power by Uttar Pradesh Power Corporation Ltd. (UPPCL) to the distribution licensees of Uttar Pradesh. The relevant portions of the judgment are re-produced below:

"18. Learned Counsel for Appellant has argued that the State Commission does not have jurisdiction to determine the tariff of a trader, which is the present status of the Appellant. It is true that Section 86 (1) (j) empowers the State Commission to fix the trading margin, if considered necessary. The Tariff Policy in Section 9.0 stipulates that the Appropriate Commission should monitor the trading transaction continuously and ensure that electricity traders do not indulge in profiteering in situation of power shortage and fixing of trading margin should be resorted to for achieving this objective. Thus, a trader is also not free to sell power at any rate as its trading margin may be fixed by the Appropriate Commission. However, this is not a case of promotion of market development in the state or procurement of power by the Respondent Company from a trading licensee through competitive bidding. The power is being supplied by the Appellant to the Respondent as a successor of UPSEB against the Power Purchase Agreement with the Respondent distribution licensee. Admittedly, the procedure for determination of tariff has not been specified in the agreement. According to the PPA, the tariff is to be determined by an independent authority. The Hon'ble High Court had directed the State Commission to determine the tariff and since then the State Commission has been determining the tariff.

19. As stated above, the power supply by the Appellant to the Respondent distribution licensee cannot be categorized as a trading transaction. The supply by the Appellant is against the PPA as successor of UPSEB having control over all the PPAs with central

and state sector generating companies and others. The State Commission has not determined the purchase price of the Appellant and has ensured that the full cost of the Appellant is recovered. As stated above, the Appellant is aggregating the requirements of the distribution companies and procuring power on their behalf against the PPAs of central and state sector power stations resting with it as a successor of UPSEB. Thus the bulk supply tariff of the supply to the Respondent distribution licensee has to be regulated and determined by the State Commission under Section 86(1) (a) & (b) of the Electricity Act, 2003."

(e) Appeal No.15/2011 (Lanco Power Limited v Haryana Electricity Regulatory Commission) & Appeal No.52/2011 (Chhatisgarh State Power Trading Corporation Limited v Haryana Electricity Regulatory Commission): In Appeal No.15/2011, Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The Appellate Tribunal after considering the provisions of sections 79, 86 and 66 of the Act has in its judgment dated 4.11.2011 has observed as under:

"21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licencee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

.....

61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licencee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created."

(f) OMP No.677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited) : In this petition, PTC India Limited had challenged the Arbitral Award dated 28.4.2011

in the dispute between PTC India Limited and Jai Prakash Power Ventures Limited under section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble High Court of Delhi was whether the decision of the majority of the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:

"52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under:

"(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.
(x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated."

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the
consumer then the tariff would not be subject to regulation. However, where a trader or trading licencee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.

54. Next the relevant provisions of the EA have to be examined. Sections 62, 79 and 86 read under:
.....

55.The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR.

56.It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amendable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework EA.

……

64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco I in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licencee was outside the purview of regulation by the CERC under Section 79(1)(f) read with Section 62 of the Act."

(g) FAO (OS) No. 244/2012 (Jaiprakash Power Venture Pvt Limited v PTC India Limited) : The judgment dated 15.5.2012 has been challenged before the Division Bench of the Delhi High Court. The appeal is still under consideration of the High Court and no stay has been granted in the matter.

20. The issue of jurisdiction of the Commission to determine the tariff of the generating companies for supply of power to the traders and from the traders to the distribution

licensees has received judicial attention from time to time as noted above. We notice that the Appellate Tribunal in Noida Power Company Ltd v Uttar Pradesh Power Corporation Ltd and in Lanco Power Ltd v Haryana Electricity Regulatory Commission has taken the view that when power is supplied to a trading licensee which has back to back arrangement for supply of the same power to the distribution licensees, the appropriate Commission has the power to determine the tariff. The High Court of Delhi in PTC India Ltd v Jai Prakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution licensees for eventual supply to the consumers. The appeal against the said judgment is pending and therefore, the issue has not attained finality. However, considering the fact that the present petition has been filed in 2009 for determination of additional capital expenditure for the years 2007-08 and 2008-09, we propose to dispose of the petition in the light of the judgment of the High Court dated 15.5.2012. We intend to clarify that if the issue decided in the said judgment is modified in appeal, the Commission will reopen issue and decide the question of jurisdiction in accordance with law.

21. Next we consider the issue of determination of tariff for supply of power by NTPC from its generating station Talcher TPS to GRIDCO, a trading licensee in the light of the decisions of the Appellate Tribunal and High Court of Delhi. The ratio of the said judgments is that when power is supplied by a generating company to a trading licensee which is meant for supply to the distribution licensees to be eventually supplied to the consumers, the tariff

will be determined by the appropriate Commission. In this case, power is supplied by NTPC Ltd to GRIDCO, a trading licensee based on the PPA signed by NTPC with GRIDCO in accordance with the provisions of the Reforms Act and the transfer scheme. GRIDCO has entered into back to back PSAs with the distribution licensees of Odisha. It is to be noted that GRIDCO cannot sell power outside the State without the approval of the OERC in accordance with para 5.1 of the licence. Therefore, GRIDCO's sale of power to the Electricity Boards or the licensees in other States is regulated by OERC. It follows that the power supplied by NTPC Ltd to GRIDCO from Talcher TPS is meant for supply to the distribution licensees of Odisha for eventual consumption by the consumers except to the extent allowed by OERC to be supplied to the Electricity Boards or licensees in other States. GRIDCO has entered into PPAs with generators like OHPC,OPGC and NTPC and Bulk Supply Power Agreements with the four distribution companies of Odisha under which GRIDCO is obliged to supply power to the distribution companies to meet their full requirements and the distribution companies are obliged to buy power only from GRIDCO.

22. As regards the price at which GRIDCO is selling power to the distribution companies, it would be pertinent to extract hereunder para 291 of the order dated 20.3.2010 in Petition No. 144/2010 passed by the OERC approving the ARR of GRIDCO for the year 2010-11:

> "291. GRIDCO has filed application under S.86(1)(b) of the Act and prayed for fixation of its selling price qua the present distribution companies by virtue of the subsisting Bulk Supply Agreement and has filed its ARR along with the application. The DISCOMs in their tariff application vide Case Nos.140,141,142 & 143 of 2009 have not prayed for fixation of their power procurement price but such fixation being fundamental determinant of tariff is implicit in their prayer for determination of tariff. In the circumstances GRIDCO's application is not being treated as a tariff application but as material for the Commission to proceed for fixation of a regulatory price for power procurement by the present DISCOMs under the existing Bulk Supply Agreements. In this context GRIDCO has been heard at length on its ARR because under the prevailing single buyer model, the procurement price of the present DISCOMs coincides

with the selling price of GRIDCO. Therefore GRIDCO ought to have a say in the matter and ought to be heard even though the Commission is essentially fixing the procurement price for the present DISCOMs. No meaningful hearing can be given to GRIDCO in this `context unless its ARR is considered and approved. It is in this context that ARR of GRIDCO was considered and analyzed and not in the context of fixing a general tariff for GRIDCO."

23. Thus as per the above order of OERC, the procurement price of the present distribution companies in Odisha coincides with the selling price of GRIDCO which is approved by the OERC as the ARR of GRIDCO. Therefore, GRIDCO is not charging any trading margin over the purchase price while supplying power to the distribution companies. GRIDCO is also trading in power surplus to the requirements of the distribution companies of Odisha with the prior approval of the OERC. It cannot be said with certainty that GRIDCO is not trading the power received from Talcher TPS of NTPC Ltd. Since as per the judgment of **the Delhi High Court in PTC India Limited supra, the jurisdiction of the Central Commission to determine the tariff can be invoked only when the power is supplied by the generating company to the distribution licensees through the traders for ultimate consumption of the said power by the consumers of the distribution companies, we direct that the power from Talcher TPS at regulated tariff determined by the Commission shall not be traded by GRIDCO and shall be supplied to the distribution licensees of Odisha for consumption of their consumers. Subject to compliance with this condition, we proceed to determine the tariff of Talcher TPS after taking into consideration the additional capital expenditure for the year 2007-08 and 2008-09.**

24. We now proceed to revise the tariff of the generating station on account of the additional capital expenditure incurred during the years 2007-08 and 2008-09, as discussed in the subsequent paragraphs.

14. The generating station with a capacity of 460 MW comprises of four units of 60 MW each and two units of 110 MW each. The tariff of the generating station for the period 1.4.2004 to 31.3.2009 was approved by the Commission vide its order dated 23.3.2007 in Petition No.91/2004 based on capital cost of ₹69601.00 lakh. Subsequently, the Commission vide its order dated 3.2.2009 in Petition No.31/2008, revised the annual fixed charges for the tariff period 2004-09 on account of additional capital expenditure incurred during the years 2004-05, 2005-06 and 2006-07. Accordingly, the Commission approved the capital cost amounting to ₹77498.57 lakh (after deducting un-discharged liabilities amounting to ₹146.88 lakh, (-) ₹15.61 lakh and (-) `72.09 lakh for the year 2004-05, 2005-06 and 2006-07, respectively) as on 31.3.2007, for the generating station. Subsequently, the Commission vide its orders dated 11.1.2010 (in R.P. 67/2009) and 9.2.2010 (in Petition No.31/2008) revised the annual fixed charges on account of change in interest on working capital component due to revision of operational norms for the generating station. The capital cost, as approved by the Commission, is as under:

(₹in lakh)

	2004-05	**2005-06**	**2006-07**	**2007-08**	**2008-09**
Opening Capital Cost	69601.00	74757.64	76020.41	77498.57	77498.57
Additional Capital Expenditure	5156.64	1262.77	1478.16	-	-
Closing Capital Cost	**74757.64**	**76020.41**	**77498.57**	**77498.57**	**77498.57**

15. The annual fixed charges allowed by the Commission by order dated 9.2.2010 is as stated under:

(` in lakh)

	2004-05	**2005-06**	**2006-07**	**2007-08**	**2008-09**
Interest on loan	876.70	901.53	662.28	525.13	228.22
Interest on Working Capital	881.91	900.15	911.66	993.91	1070.23
Depreciation	3248.07	3392.51	3454.18	3487.44	3487.44
Advance Against Depreciation	0.00	0.00	0.00	0.00	0.00
Return on Equity	4980.36	5115.17	5172.73	5203.77	5203.77
O & M Expenses	8700.00	9029.00	9372.00	9728.00	10098.00
TOTAL	**18687.03**	**19338.36**	**19572.84**	**19938.25**	**20087.65**

16. Against the Commission's order dated 23.3.2007 determining tariff for the generating station for the period 2004-09 in Petition No.91/2004, the petitioner has filed Appeal No. 88/2007

before the Appellate Tribunal for Electricity (the Tribunal) and the **matter is pending**. Against the order dated 3.2.2009 in Petition No.31/2008 revising the annual fixed charges on account of additional capital expenditure incurred during the years 2004-07, the petitioner filed Appeal No.82/2009 before the Tribunal and the Tribunal by its judgment dated 27.7.2010 allowed the prayers of the petitioner as regards the non-inclusion of un-discharged liabilities and Interest During Construction (IDC) in the light of its earlier judgments dated 10.12.2008 in Appeal Nos. 151 & 152/2007 and 16.3.2009 in Appeal Nos.133,135,136 and 148/2008 and directed implementation of the same. Similarly, the respondent also filed Appeal No.81/2009 before the Tribunal against the said order on the issue of restoration of lost capacity/re-rating of units, non-sharing of benefits of efficiency improvement, capitalization of R&M works allowed by the Commission etc and the Tribunal by its judgment dated 12.1.2011 has dismissed the appeal.

17. Before proceeding to revise the tariff based on the additional capital expenditure, we examine the submissions of the petitioner for determination of tariff based on the judgment dated 16.3.2009 of the Tribunal in Appeal Nos.133, 135 etc of 2008 pertaining to un- discharged liabilities and on the principles laid down in the judgment of the Tribunal dated 13.6.2007 in Appeal Nos.139 to142 etc of 2006, 10,11 and 23/2007, and in the subsequent paragraphs.

18. Appeal Nos.139,140 etc of 2006,10,11 and 23/2007 was filed by the petitioner before the Tribunal challenging the various tariff orders of the Commission for the period 2004-09 for the different generating stations of the petitioner. The Tribunal by its judgment dated 13.6.2007 in Appeal Nos.139, 140 etc. of 2006, 10, 11 and 23/2007 allowed the prayers of the petitioner and remanded the matters to the Commission for re-determination of the issues as directed therein. Against the said judgment the Commission has filed 20 appeals before the Hon'ble Supreme Court (in C.A. Nos. 5434/2007 to 5452/2007 and 5622/2007) on issues namely:

(a) Consequences of refinancing of loan;
(b) Treating of depreciation as deemed repayment of loan;
(c) Cost of maintenance spares related to additional capitalization;

(d) Depreciation availability up to 90% in the event of disincentive; and
(e) Impact of de-capitalization of assets on cumulative repayment of loan

19. The Hon'ble Supreme Court on 26.11.2007 granted an interim order of stay of the operation of the order dated 13.6.2007 of the Appellate Tribunal. However, on 10.12.2007, the Hon'ble Supreme Court passed an interim order as under**:**

"Learned Solicitor General appearing on behalf of the National Thermal Power Corporation stated that pursuant to the remand order, following five issues shall not be pressed for fresh determination:
(a) Consequences of refinancing of loan;
(b) Treating of depreciation as deemed repayment of loan;
(c) Cost of maintenance spares related to additional capitalization;
(d) Depreciation availability up to 90% in the event of disincentive; and
(e) Impact of de-capitalization of assets on cumulative repayment of loan

The Commission may, however, proceed to determine other issues.
It is clarified that this order shall apply to other cases also.

In view of this, the interim order passed by the Court on 26th November, 2007, is vacated. The interlocutory applications are, accordingly, disposed of."

20. The petitioner has submitted that it has been advised that the statement of the Solicitor General of India (SGI) before the Hon'ble Supreme Court resulting in the interim order dated 10.12.2007 does not restrict it from claiming additional capitalization based on the principles laid down by the Tribunal in its judgment dated 13.6.2007 and that the effect of the statement of SGI was that it would not seek fresh determination pursuant to the remand order. The petitioner has also submitted that the Hon'ble Supreme Court has not stayed further proceedings before the Commission for determination of additional capitalization and even if it was construed as stay, the decision of the court (Appellate Tribunal) does not become *non est*.

21. The undertaking given by the petitioner before the Hon'ble Supreme Court to the effect that "the five issues shall not be pressed for fresh determination" is binding on the petitioner and the petitioner cannot seek fresh determination of these issues by creating a distinction between the main tariff petition and the petition for additional capitalization on the ground that the undertaking was confined only to the remand order pertaining to the main petition. It was for this

reason that the prayer of the petitioner for determination of tariff based on additional capital expenditure for the period 2004-09 for some of the generating stations of the petitioner was deferred by the Commission by its various orders, subject to the final decision of the Hon'ble Supreme Court in the said Civil Appeals.

22. One more aspect for consideration is the prayer of the petitioner in Clause (i) of para 1 above for consideration of the un-discharged liabilities as stated therein, in terms of the judgment of the Tribunal dated 16.3.2009 in Appeal Nos.133,135,136 and 148/2008 pertaining to some other generating stations of the petitioner. The same is examined in the subsequent paragraphs:

23. The Commission in some of the petitions filed by the petitioner (Rihand and Ramagundam generating stations) revised the tariff for the period 2004-09 based on additional capital expenditure incurred, after deducting undischarged liabilities, on the ground that "the expenditure for the liability incurred for which payment was not made would not come under the category 'actual expenditure incurred". Against the orders, appeals were filed by the petitioner before the Appellate Tribunal (Appeal No 151&152/2007) and the Appellate Tribunal by its judgment dated 10.12.2008 held as under:

> *"25. Accordingly, we allow both the appeals in part. We direct that the appellant be allowed to recover capital cost incurred including the portion of such cost which has been retained or has not yet been paid for. We also direct that in case the Commission attributes any loan taken at the corporate level to a particular project under construction and considers any repayment out of it before the date of commercial operation the sum deployed for such repayment would earn interest as pass through in tariff.*
>
> *26. The Commission is directed to give effect to the directions given herein in the truing up exercise and consequent subsequent tariff orders."*

24. Similar appeals (Appeal Nos.133, 135,136 and 148/2008) were also filed by the petitioner before the Tribunal against the orders of the Commission in respect of other generating stations by the petitioner on the question of deduction of undischarged liabilities, IDC etc. The Tribunal, following its judgment dated 10.12.2008 *ibid*, allowed the claim of the petitioner by its judgment

dated 16.3.2009 and directed the Commission to give effect to the directions contained in the said judgments.

25. Against the judgments of the Tribunal dated 10.12.2008 and 16.3.2009 above, the Commission has filed Civil Appeal Nos. 4112-4113/2009 and Civil Appeal Nos. 6286 to 6288/2009 before the Hon'ble Supreme Court. These Civil Appeals are pending and there is no stay of the operation of the judgments of the Appellate Tribunal.

26. Keeping in view that the distinction between the main tariff petition and the petition for additional capitalization could not be made since tariff for 2004-09 was a composite package which needs to be determined on the same principle, it has been decided to revise the tariff for the generating station by this order after considering the issues raised in the petition, subject to the final outcome of the said Civil Appeals pending before the Hon'ble Supreme Court and the appeal pending before the Tribunal.

27. Consequent on the above, the un-discharged liabilities which were disallowed in order dated 3.2.2009 in Petition No.31/2008 has been allowed for the purpose of tariff. Also, in terms of the directions contained in the judgment of the Tribunal dated 13.6.2007, the adjustment of cumulative repayment of loan has been made proportionate to 70% of the de-capitalized value of asset. In respect of the adjustment of `29 lakh as disincentive for depreciation in the cumulative depreciation recovered as on 1.4.2004, no adjustments have been made at this stage. However, the unrecovered depreciation would be allowed in tariff after the designated useful life of the generating station, in terms of the directions of the Tribunal.

28. We now proceed to examine the additional capital expenditure claimed by the petitioner.

Additional Capital Expenditure

29. Regulation 18 of the 2004 regulations provides for considering the additional capital expenditure for tariff as under:

"18. (1) The following capital expenditure within the original scope of work actually incurred after the date of commercial operation and up to the cut-off date may be admitted by the Commission, subject to prudence check:

(i) Deferred liabilities;
(ii) Works deferred for execution;
(iii) Procurement of initial capital spares in the original scope of work, subject to ceiling specified in regulation 17;
(iv) Liabilities to meet award of arbitration or for compliance of the order or decree of a court; and
(v) On account of change in law.

Provided that original scope of work along with estimates of expenditure shall be submitted along with the application for provisional tariff.

Provided further that a list of the deferred liabilities and works deferred for execution shall be submitted along with the application for final tariff after the date of commercial operation of the generating station.

(2) Subject to the provisions of clause (3) of this regulation, the capital expenditure of the following nature actually incurred after cutoff date may be admitted by the commission, subject to prudence check:

(i) Deferred liabilities relating to works/services within the original scope of work;

(ii) Liabilities to meet award of arbitration or for compliance of the order or decree of a court;
(iii) On account of change in law;

(iv) Any additional works/services which have become necessary for efficient and successful operation of the generating station, but not included in the original project cost; and

(v) Deferred works relating to ash pond or ash handling system in the original scope of work.

(3) Any expenditure on minor items/assets like normal tools and tackles, personal computers, furniture, air-conditioners, voltage stabilizers, refrigerators, fans, coolers, TV, washing machine, heat-convectors, carpets, mattresses etc. brought after the cutoff date shall not be considered for additional capitalization for determination of tariff with effect from 1.4.2004.

(4) Impact of additional capitalization in tariff revision may be considered by the Commission twice in a tariff period, including revision of tariff after the cut off date.

Note 1
Any expenditure admitted on account of committed liabilities within original scope of work and the expenditure deferred on techno-economic grounds but falling within the original scope of work shall be serviced in the normative debt equity ratio specified in regulation 20.

Note 2
Any expenditure on replacement of old assets shall be considered after writing off the gross value of the original assets from the original project cost, except such items as are listed in clause (3) of this regulation."

Note 3

Any expenditure admitted by the Commission for determination of tariff on account of new works not in the original scope of work shall be serviced in the normative debt-equity ratio specified in regulation 20.

Note 4
Any expenditure admitted by the Commission for determination of tariff on renovation and modernization and life extension shall be serviced on normative debt-equity ratio specified in regulation 20 after writing off the original amount of the replaced assets from the original capital cost."

30. The additional capital expenditure claimed as per books of accounts is as under:

(` in lakh)

Particulars	**2007-08**	**2008-09**
Total additional expenditure of the generating station as per books of accounts (A)	4921.74	4280.53
Exclusions for additional capitalization vis-à-vis books of accounts (B)	(-) 48.93	(-) 646.91
Total additional capitalization (A-B)	**4970.67**	**4927.43**

31. The summary of exclusions from the books of accounts claimed is as under:

(` in lakh)

Description	**2007-08**	**2008-09**
De-capitalization of Hot Duct of CT, Stage-I	(-) 48.93	(-) 339.79
De-capitalisation for the years 2004-05, 2005-06 & 2006-07 estimated in the Additional Capitalisation for 2004-07, considered in books of accounts for 2008-09	-	(-) 446.68
Estimated de-capitalisation for the year 2008-09 to be considered in the books of accounts of 2009-10	-	34.39
FERV	-	105.17
Total Exclusions	**(-) 48.93**	**(-) 646.91**

32**.** Reply to the petition has been filed by the respondent**.**

Exclusions

33. In the first instance, we consider the exclusions under different heads in the claim.

De-capitalization of Hot Duct of Cooling Tower of Stage-I:

34**.** The petitioner has sought exclusion of negative entries amounting to `48.93 lakh and `339.79 lakh for the year 2007-08 and 2008-09 respectively, under this head. The petitioner, in its petition has submitted that the basis of valuation of de-capitalized assets is as per the actual gross block value, except where part of the original asset was de-capitalized. In case of part replacement, it was done through technical assessment. In the case of R&M of Cooling Towers of

Stage-I during the year 2007-08 and 2008-09, it was noticed that while the R&M has been undertaken for Cooling Towers of Stage-I, the amount of de-capitalization has been done considering the R&M of the entire Cooling Water System. This error has now been rectified in the books of accounts for the year 2009-10 and accordingly, the excess de-capitalization of `48,93,107 and `3,39,78,853 during the years 2007-08 and 2008-09,respectively has been shown as exclusions. In addition, the petitioner has submitted as under:

"1.Cooling Water System of TTPS comprises of Stage-I and Stage-II CW System. The technical details of the same are given in Annexure-I. As per Technical Assessment (considering year of installations, size of units of Stage-I & Stage-II, type of Cooling Towers i.e. wooden in Stage-I & concrete in Stage-II and increased number of equipments in Stage-II compared to Stage-I), the ratio of value of Cooling Water System of Stage-I and Stage-II is 35% & 65% respectively of the Total CW System which has a Book Value of Rs. 11,35,61,000/-. Accordingly Book Value of CW System Stage-I works out to Rs.39746350/- (i.e. 35% of Rs.113561000/-).

2. The complete Cooling water System consists of Cooling Tower, CW Pumping System and CW Make-up System. The technical details of the same are given in the Annexure-II. On technical assessment, the value of Cooling Tower Stage-I works out to 40% of the total value of Cooling Water System Stage-I. Accordingly the Gross Value of Cooling Tower Stage-I works out to Rs.15898540/- (i.e. 40% of Rs.39746350/-).

3. Component wise break up of Cooling Tower Stage-I and components replaced thereof due to R&M are given in Annexure-III.

4. The value of component replaced due to modification of Hot Duct during 2007-08 works out to 6.49% of the total value of Cooling Tower, Stage-I i.e. Rs.1031815/- of Rs.15898540/- Further, the value of components replaced (i.e. Timber structure, ACB sheets, Torque Tube Assy., Fan Cylinder Assy. & Drive Shaft etc) due to R&M of Cooling Tower during the year 2008-09 works out to 65.78% of the total value of Cooling Tower, Stage-I i.e. Rs.10458060/-.

29. Accordingly, the correct amount of Rs.1031815 and Rs.10458060 in respect of R&M of hot duct cooling tower, Stage-I (Sl.no.12) has been considered as de-capitalized and the incorrect amount of de-capitalization in respect of the above two items have been shown as exclusion in Annexure-4. Hon'ble Commission is requested to consider the above amount accordingly.

35. From the justification submitted by the petitioner, it appears that the petitioner has wrongly de-capitalized excess amount in the books of accounts for the year 2007-08 and 2008-09, which it has now rectified in the books of accounts for 2009-10. Accordingly, the exclusion of excess de-capitalisation amounting to (-) `48.93 lakh and (-)`339.79 lakh, for the years 2007-08 and 2008-09 respectively, is allowed for the purpose of tariff.

Assets de-capitalized in books of accounts

36. The petitioner has sought exclusion of negative entry of `446.68 lakh during 2008-09 on account of de-capitalization of assets. The petitioner has further submitted that the estimated de-capitalized value has already been considered by the Commission vide its order dated 3.2.2009 in Petition No.31/2008. As such, the exclusion of negative entries is allowed as the de-capitalization has already been effected for the purpose of tariff while dealing with the additional capital expenditure for the years 2004-05, 2005-06 and 2006-07.

Estimated de-capitalization against capitalization claimed during 2008-09

37. The petitioner has excluded an amount of `34.39 lakh (`24.01 lakh against Sl.nos. 5, 6 & 7 and `10.38 lakh against Sl.nos. 13 & 14) as de-capitalization against the capitalization at Sl.nos.5, 6,7,13 and 14 under this head, which have been considered for the purpose of tariff for the year 2008-09, but would be considered in the books of accounts of 2009-10. In view of the justification submitted by the petitioner, the said amount is allowed.

FERV

38. The claim for exclusion of an amount of `105.17 lakh for the period 2008-09 on account of FERV is allowed. The petitioner shall recover the FERV amounts directly from the beneficiaries in terms of the 2004 Regulations.

39. In view of the above discussions, the claim for exclusion amounting to (-) `48.93 lakh and (-) `646.91 lakh for the years 2007-08 and 2008-09 respectively, has been allowed.

40. The year-wise and category-wise break-up of the additional expenditure claimed is as under:

(` in lakh)

Particulars	2007-08	2008-09
(a) Deferred Liabilities relating to works within original scope of work-**Regulation[18(2)(i)]**	3.67	0.00
(b) Award of arbitration or for compliance of the order or decree of a court-**Regulation [18(2)(ii)]**	0.00	0.00
(c) On account of change in law-**Regulation [18(2) (iii)]**	14.18	462.59
(d) For efficient and successful operation of generating	4933.11	2947.63

station, but not included in original project cost-**Regulation [18(2) (iv)]**		
(e) Deferred works relating to Ash pond or Ash handling system, in original scope of work-**Regulation [18(2)(v)]**	19.71	1517.22
Net Additional capital expenditure claimed	**4970.67**	**4927.43**

41. The respondent in its reply has submitted that the total amount of `1536.93 lakh for 2007-09 towards deferred works for ash pond or ash handling system should not be considered as these works were pending for a long time and it is presumed that these works were not necessary. Even if raising of ash dyke is considered as a continuous process during the operational life of the generating station, the expenditure on these works should be considered as O&M expense and is not to be claimed under additional capitalization, it was submitted. The respondent has also submitted that the capitalization of `1466 lakh for turbine rotor which is in the nature of spares cannot be capitalized under Regulation 18(2)(iv of the 2004 regulations. The respondent has further submitted that if the expenses under R&M do not bring in higher efficiency or sustenance of higher levels of performance then such expenses cannot be treated as R&M expenses and in case of improvement in efficiency, the benefits of the same shall be shared with the beneficiary. The petitioner, in its rejoinder has submitted that the work of ash dyke was required to be done on an ongoing basis over the period of plant operation. It has also submitted that the capitalization of `1536.93 lakh for 2007-09 was in respect of land for ash pond which was already admitted by the Commission by order dated 25.9.2006 in Petition No. 35/2004. As regards turbine rotor, the petitioner has submitted that the capital work form part of the R&M phase-III proposal which has been agreed to by the respondent./ The petitioner has further submitted that there has been remarkable improvement in the PLF/TA of the generating station from 29% during 1995-96 to 92% during 2008-09 and the respondent being the sole beneficiary has fully availed the availability of higher energy as a result of R&M.

42. The submissions of the parties and the documents on record have been examined. After applying prudence check on the asset-wise details and justification of additional capital expenditure submitted by the petitioner under various categories and the submissions of the

respondents, the admissibility of additional capital expenditure on prudence check, is discussed in the succeeding paragraphs:

Deferred liabilities relating to works/services within original scope of work- [Regulation 18(2)(i)]

43. The petitioner's claim for an expenditure of `3.67 lakh towards balance payment and final payment adjustment against the assets/works already allowed by the Commission vide order dated 3.2.2009 in Petition No. 31/2008 has been allowed.

On account of change in law-[Regulation 18 (2) (iii)]

44. The petitioner has incurred expenditure of `14.18 lakh and `462.59 lakh for the years 2007-08 and 2008-09, respectively under this head on account of balance payments for assets/work already allowed by Commission vide order dated 3.2.2009, towards extension of power supply system from generating station to mine and for arrangement of power supply for mine back filling with ash slurry (as per MOEF guidelines), erection of ash disposal line from generating station to mine end (as per the directive from Ministry of Environment, TTPS to meet 100% ash utilization by 2014), AAQMS rooms for installation of AAQMS (as per the requirement of Pollution Control Board to monitor the environmental parameters) and supply & erection of township metering package (to meet the requirements under the Electricity Act,2003). The petitioner's claim for `14.18 lakh and `462.59 lakh for the years 2007-08 and 2008-09 towards expenditure incurred to meet the statutory obligations as above is allowed.

Additional works/services necessary for efficient and successful operation of the generating station, but not included in the original project cost {Regulation 18 (2)(iv)}

45. The petitioner has claimed an expenditure of `4933.11 lakh and `2947.63 lakh under this head, for the years 2007-08 and 2008-09. The assets/works and the expenditure claimed on these assets during the year 2007-08 along with our findings on the admissibility of the claim, after prudence check, is furnished as under:

2007-08

Sl. No.	Nature of Work	Amount claimed (`in lakh)	Findings
1	R&M of Air pre-heater (Sl.no.14)	**278.12**	**Allowed** in terms of Note-4 under Regulation 18 along with corresponding de-capitalization.
2	De-capitalization against R&M of Air Pre Heater as at sl. No.14 (Sl.no.15)	**(-) 68.19**	
3	Refurbishment of SG & Auxiliary equipments under R&M (Sl.no.16)	**335.69**	**Net value allowed** in terms of Note-4 under Regulation 18 after de-capitalizing gross value of old asset amounting to `20,96,152 in this year (as the same has been de-capitalized by the petitioner at Sl.no.33 of its additional capitalization claim for the year 2008-09).
4	Re-bucketing of 17th stage blades (Sl.no.17)	**60.05**	
5	Supply installation & Commissioning of turbine rotor (Sl.no.18, 19)	**1466.39**	**Allowed**. The respondent vide its letter dated 1.9.2004 has given specific approval for R&M Ph-III, which covers procurement of a new (spare) Rotor for Stage-I units. Further, the capitalization of additional rotor is justified keeping in view that the petitioner as well as the respondent has not envisaged unit shut down over and above the overhauling shut downs for carrying out the R&M works.
6	R&M of Condenser tubes (Sl.no.20)	**740.90**	**Allowed** in terms of Note-4 under Regulation 18 after de-capitalizing gross value of old asset amounting to `5329985 (as the same has been de-capitalized by the petitioner at Sl.no.34 of its additional capitalization claim for the year 2008-09.
7	R&M of equipment in TG Area (Sl.no.21)	**1206.30**	
8	R&M of Hot Duct of Cooling Towers-Stage-I (Sl.no.22)	**98.59**	**Allowed** in terms of Note-4 under Regulation 18 along with corresponding de-capitalization.
9	De-capitalization against R&M of Hot Duct of Cooling Towers - Stage-I (Sl.no.23)	**(-) 10.32**	
10	Supply installation & Commissioning of 240kv 800 AH station battery (Sl.no.24)	**50.13**	**Not allowed**, since replacement of batteries is a routine feature which is covered under O&M expenses.
11	Augmentation of existing auxiliary power supply system under R&M (Sl.no.25)	**31.21**	**Allowed**. The submission of the petitioner that under phase-III R&M, the augmentation of power supply system mainly for unit-4, 5 &6 emergency drivers were taken up, is in order.
12	Augmentation of C&I systems	**25.81**	**Allowed.**The petitioner's submission

	under R&M (Sl.no.26)		that under R&M, test gauges were procured and installed for proper calibration of field mounted gauges, transmitters & pressure switches to ensure safe & reliable operation of the generating station, is justified
13	Augmentation of Communication system (Sl.no.27)	**8.27**	**Allowed**.The petitioner's submission that the said work/asset will improve the communication network and will contribute to faster decision making is justified.
14	Addition of class rooms in DAV Public school (Sl.no.28)	**197.99**	**Allowed,** since the expenditure incurred for these assets benefits the employees working in remote areas.
15	Extension of hospital building and employee development centre (Sl.no.29)	**99.98**	
16	Underground cable laying in township(Sl.no.30)	**33.57**	This expenditure on augmentation of township electrical system under R&M **is allowed**.
17	Jeep fire tender, inter slot arrangement between Talcher generating station & TTPS siding under R&M, Battery operated platform truck, electronic weighing machine, portable flue gas analyzer (Sl.no.31, 32, 33, 34, 35)	**18.79**	**Allowed** as the justification submitted by the petitioner is in order.
18	Motor cycles – 03 nos. (Sl. no.36)	**0.91**	**Allowed** in terms of Note-4 under Regulation 18 along with corresponding de-capitalization.
19	De-capitalization of Motor cycles – 05 nos. (Sl.no.37)	**(-) 2.43**	
20	Document management system (Sl.no.38)	**31.23**	**Allowed** as the expenditure incurred on DMS is required to monitor the O&M jobs at the generating station.
21	Surgical ENT/Eye Microscope, anaesthesia machine with TOP TE, Vaporiser SELECTA TEC BAR, Vaporiser with SELECTA, Mobile OT Light, Masks Proseal, Multipurpose ICU Monitor, Computerized ECG machine, Station multigym (Sl.no. 39, 40, 41, 42)	**23.24**	**Allowed** as the expenditure incurred is for the benefit of employees, (except an expenditure of `50701 towards multigym, being assets of a minor nature).
22	Capitalization of expenditure on minor assets (Sl.no.43)	**77.03**	**Not allowed,** since capitalization of minor assets is not permissible in terms of Note-3 under Regulation 18**.**
23	Capital Spares of Steam Generator, Capital Spares of Steam Turbine, Capital Spares of Coal Handling Plant,	**460.65**	Commission vide its order dated 3.2.2009 in Petition No.31/2008 has de-capitalized spares amounting to `1297.36 lakh against the

	complete assembly of SAM make ash slurry pump, Capital Spares of Cooling Water System, Capital Spares of C & I System, Capital Spares of electrical and Aux. equipments (Sl.no. 44 to 50)		capitalization of `680.33 lakh, and the petitioner has stated the balance value of spares amounting to `617.03 lakh shall be purchased and capitalized in subsequent years. The justification that the spares procured was against the balance spares, is in order and the expenditure is **allowed.**
24	De-capitalization of capital spares (Sl.no.51)	**(-) 230.81**	**Allowed** as the assets do not render any useful service to the generating station.

46. Based on the above findings, only an expenditure of `4731.18 lakh has been allowed (against the claim for `4933.11 lakh) as above, under this head for the year 2007-08.

47. The assets/works and the expenditure claimed on these assets during the year 2008-09 along with our findings on the admissibility of the claim after prudence check, is furnished as under:

2008-09

Sl. No.	Name of Work	Amount (` in lakh)	Findings
1	Refurbishment of Aux. Equipments, under R&M of SG, Stage-II –Refurbishment of expansion joints (Sl.no.4)	1.68	**Allowed**, as the expenditure is in the nature of O&M expenses, the same is disallowed.
2	R&M of condenser tubes (Sl.no.5, 6)	54.46	**Allowed** in terms of Note-4 under Regulation 18 along with corresponding de-capitalization. The justification submitted by the petitioner that "During the RLA study, considerable thinning of condenser tubes in Unit-1,2 &6 were observed and replacements recommended and the same job was partly carried out in 2006-07 (Sl.no.5) and allowed by the Commission vide order dated 3.2.09 in Petition No.31/2008 and the balance work was completed in 2008-09.", is in order.
3	Refurbishment & R&M of TG & aux. equipments (Sl.no.7)	175.66	**Allowed** in terms of Note-4 under Regulation 18 along with corresponding de-capitalization. The justification submitted by the petitioner that "Based upon the

			RLA study recommendations, these equipments were refurbished in TG area such as turbine lube oil system (unit 1&2), control valves (unit 1&2), PRDS (St-II), Voith coupling in BFP and GSEB of Unit-2".is in order.
4	De-capitalization due to R&M of Condenser tubes & TG AUX. at sl. No.5, 6 &7. (Sl.no.8)	(-) 24.01	Allowed. Out of de-capitalization amounting to `24,00,666 against the expenditure claimed for capitalization at Sl.no.1, 2 & 3 above, the proportionate de-capitalization amounting to `23,83,310 against the capitalization allowed at Sl.no.2 & 3 above, is in order.
5	R&M ash handling system (Sl.no.9)	1452.98	**Allowed** as the expenditure incurred under this head is in terms of Note-4 under Regulation 18, along with corresponding de-capitalization.
6	De-capitalization due to R&M of Ash Handling System (Sl.no.10)	(-) 94.14	
7	R&M of Cooling Towers-Stage-I (Sl.no.11)	996.99	
8	De-capitalization due to R&M of Cooling Towers as at sl. No.11 (Sl.no.12)	(-) 104.58	
9	Refurbishment & R&M of Electrical & aux equipments (Sl.no.13)	109.05	
10	Renovation of Plant Lighting (Sl.no.14)	21.17	
11	De-capitalization due to R&M of Elect. & Aux. equipments at sl. No.13&14 (Sl.no.15)	(-) 10.38	
12	Auto Fire Protection system for FOH system (Sl.no.16)	41.28	**Allowed,** as the expenditure on new assets is considered necessary for the efficient and safe operation of the generating station.
13	Electrification of TTPS Railway siding (Sl.no.17)	153.75	
14	SAP roll out (Sl.no.18 to 21)	146.69	**Allowed** in view of the fact that modern facilities do help in the efficient operation of the generating station. The justification submitted by the petitioner that "to integrate & implement uniform solution in all Stations in all areas including Material Management, O&M, Project Management, Billing & record keeping etc., ERP (Enterprise Resource Planning) System has been launched in NTPC. Implementation of ERP has necessitated the up-gradation of IT

			infrastructure to maintain compatibility with new system. It has resulted in faster data retrieval, manpower rationalization & quicker decision making." is in order.
15	Construction of switch gear Room at Brahamani pump house (Sl.no.22)	16.66	**Allowed** as the expenditure based on capital addition/ expenditure to augment the supply of power.
16	Battery operated platform truck, capacity -2000KG, Electronic Analytical Balance (Sl.no.23, 24)	3.83	
17	Construction and electrification of club & Bal Bhawan Building (Sl.no.25)	38.71	**Allowed**, since the generating station is located in a remote area and the expenditure incurred is for the benefit of employees working in remote areas.
18	Surgical Diathermy Unit with 3 blends mono-BIPOP Multipurpose O/T table with Radiolucent TOP (Sl.no.26, 27)	5.17	
19	Capitalization of expenditure on minor assets (Sl.no.28)	61.32	**Not allowed**, in view of the fact that capitalization of minor assets is not allowed in terms of Note-3 under Regulation 18.
20	Capital Spares of Steam Generator, Capital Spares of CHP, Capital Spares of Electrical & Aux. (Sl.no.29, 30, 31)	71.07	**Allowed**. Commission vide its order dated 3.2.2009 in Petition No.31/2008 has de-capitalized spares amounting to `1297.36 lakh against capitalization of `680.33 lakh, and the petitioner has stated that the balance value of spares amounting to `617.03 lakh would be purchased and capitalized in the subsequent years. The justification that the spares procured was against the balance spares is in order.
21	Spares De-capitalization (Sl.no.32)	(-) 90.23	**Allowed**, as the asset does not render any useful service to the generating station.
22	De-capitalization against replacement of Stage-I blades in turbine and R&M of SG & Aux as at Sl. No. 16 & 17 of Add cap during 2007-08 (Sl.no.33)	(-) 20.96	**Not allowed**, since the de-capitalization has been already adjusted against corresponding capitalization during 2007-08.
23	De-capitalization of condenser tubes in unit 1,2 & 6 and other equipment in TG area against R&M as at Sl. No.20 & 21 of add cap during 2007-08 (Sl.no.34)	(-) 53.30	
24	De-capitalization against replacement of Station Battery	(-) 5.24	**Not allowed**, since capitalization of corresponding asset has not

	as at Sl. No.24 of Additional capitalization during 2007-08 (Sl.no.35)		been allowed during 2007-08, the de-capitalization is also ignored.

48. Based on the above findings, out of the claim for `2947.63 lakh, an amount of `2964.30 lakh has been allowed for 2008-09 under this head.

Deferred works relating to ash pond or ash handling system in original scope of work. {Regulation 18(2)(v)}

49. The petitioner has claimed an expenditure of `.19.71 lakh and `1517.22 lakh under this head, for the years 2007-08 and 2008-09, respectively. Out of this, the claim for an expenditure of `8.41 lakh and `1515.77 lakh for the years 2007-08 and 2008-09 respectively, towards balance payment in respect of land for ash pond, which was admitted vide Commission's order dated 25.9.2006 in Petition No. 35/2004, has also been allowed.

50. In addition, the petitioner's claim for an expenditure of `11.30 lakh and `1.45 lakh for the years 2007-08 and 2008-09 respectively, towards construction of road approaching ash dyke is in order and has also been allowed.

Un-discharged Liabilities

51. The petitioner was directed to furnish the amount of un-discharged liabilities included in its claim for additional capital expenditure. The petitioner vide affidavit dated 12.1.2010 has furnished the asset-wise details of liabilities amounting to `47.23 lakh ((including liabilities amounting to `0.13 lakh corresponding to "supply, installation & commissioning of 240V 800 AH station battery" not allowed for the purpose of tariff) and `1712.94 lakh, in the additional capital expenditure claim for the years 2007-08 and 2008-09, respectively. By the same affidavit, the petitioner has submitted that out of liabilities disallowed for the period 2004-07 by Commission's order dated 3.2.2009, an amount of `38.78 lakh and `5.71 lakh has been discharged during the years 2007-08 and 2008-09, respectively. The petitioner has also submitted that out of liabilities indicated for the year 2007-08 an amount of `32.59 lakh has been discharged during the year 2008-09.

52. Based on the information submitted by the petitioner and the documents available on record, the net liability amounting to `1742.14 lakh has been included in the approved capital cost of the generating station as on 31.3.2009.

Interest During Construction (IDC)

53. The petitioner has included a claim for `218.53 lakh (includes `10.18 lakh corresponding to assets not allowed above) and `.361.97 lakh (includes `0.02 lakh corresponding to assets not allowed above) towards IDC for the years 2007-08 and 2008-09, respectively. The IDC claimed by the petitioner is based on the FIFO method of repayment of loan. The Commission in its previous orders in respect of the generating station has consistently followed the average method of repayment of loan, since FIFO method results in higher IDC in on-going projects under construction, and higher Advance Against Depreciation (AAD) in case of existing generating stations.

54. In the judgment dated 10.12.2008 in Appeal Nos.151 &152/207 the Tribunal had concurred with the decision of the Commission for not following the FIFO method of repayment of loan. Para 24 of the said judgment is extracted as under:

> *"We, therefore, find that the Commission's decision not to follow the FIFO method does not call for any interference but that repayment assumed for generating station during the period prior to the date of commercial operation be deemed as loan from NTPC and interest during construction be allowed on such loans."*

55. Also, the Tribunal in para 25 of the said judgment had directed to allow IDC as under:

> *".....We also direct that in case the Commission attributes any loan taken at the corporate level to a particular project under construction and considers any repayment out of it before the date of commercial operation the sum deployed for such repayment would earn interest as pas through in tariff.*

56. The above said decision was followed by the Tribunal in its judgment dated 16.3.2009 in Appeal Nos.133, 135,136 and 148/2008. In the light of these judgments, the Tribunal allowed the

capitalization of IDC based on average method of repayment for the generating station, in its judgment dated 27.7.2010 in Appeal No. 82/2009.

57. The petitioner has claimed IDC in respect of the generating station for the additional capital expenditure for 2007-09 on FIFO method. Since average method of repayment followed by the Commission has been upheld by the Tribunal, the IDC claimed by the petitioner has been recalculated by applying the average method of repayment and amounts of `19.52 lakh and `48.07 lakh for the years 2007-08 and 2008-09 respectively has been disallowed.

Assets not in use (and transferred to assets held for disposal category)

58. The petitioner has submitted that all the assets as per gross block provided in the balance sheet, including the assets for which additional capitalization has been claimed for the respective years 2007-08 and 2008-09, were in use. However, the unserviceable assets identified are taken out of service and the assets pending disposal are retained in the gross block at lower of their net book value/ net realizable value. As such, the assets (like furniture, canteen items etc.) amounting to `3.17 lakh has been rendered unserviceable and has been transferred to the head "assets held for disposal category" during the year 2007-08.

59. As unserviceable assets which have been taken out of service could not be allowed to remain in the gross block for purposes of tariff, such assets amounting to `3.17 lakh, for the year 2007-08, has been taken out from the gross block.

60. Based on the above discussions, the additional capital expenditure allowed for the purpose of tariff for the period 2007-09 is as under:

(` in lakh)

Nature of capitalization	**2007-08**	**2008-09**
Deferred Liabilities relating to works within original scope of work **[18(2)(i)]**	3.67	0.00
On account of change in law **[18(2) (iii)]**	14.18	462.59
For efficient and successful operation of generating station, but not included in original project cost **[18(2) (iv)]**	4731.18	2964.30
Deferred works relating to Ash pond or Ash handling system, in original scope of work **[18(2)(v)]**	19.71	1517.22
Add: Exclusions not allowed	0.00	0.00
Less: Unserviceable assets to be de-capitalized	3.17	0.00

Less: IDC	19.52	48.07
Net additional capital expenditure allowed for the purpose of tariff	**4746.05**	**4896.04**

Capital cost

61. As stated above, that the Commission had admitted the capital cost of `69601.00 lakh as on 1.4.2004, for determining tariff for the period 2004-09.

62. Taking into account the capital cost of the generating station as on 1.4.2004, the additional capital expenditure approved for the years 2004-05, 2005-06 and 2006-07 and the additional capital expenditure approved at para 60 above, the capital cost for the period 2004-09 worked out as under:

(` in lakh)

Year	2004-05	2005-06	2006-07	2007-08	2008-09
Opening Capital cost as on 1.4.2004 vide order dated 23.3.2007	69601.00	74904.51	76151.68	77557.75	82303.80
Additional capital expenditure approved for 2004-09	5303.51	1247.17	1406.06	4746.05	4896.04
Closing Capital cost	**74904.51**	**76151.68**	**77557.75**	**82303.80**	**87199.84**
Average Capital cost	**72252.76**	**75528.10**	**76854.72**	**79930.77**	**84751.82**

Debt-Equity Ratio

63. Regulation 20 of the 2004 Regulations provides that:

"(1) In case of the existing project, debt–equity ratio Considered by the Commission for the period ending 31.3.2004 shall be considered for determination of tariff with effect from 1.4.2004.
Provided that in cases where the tariff for the period ending 31.03.2004 has not been determined by the Commission, debt equity ratio shall be as may be decided by the Commission:
Provided further that in case of the existing generating stations where additional capitalization has been completed on or after 1.4.2004 and admitted by the Commission under regulation 18, equity in the additional capitalization to be considered shall be:-,
(a) 30% of the additional capital expenditure admitted by the Commission; or
(b) Equity approved by the competent authority in the financial package, for additional capitalization; or
(c) Actual equity employed,
Whichever is the least:
Provided further that in case of additional capital expenditure admitted under the second proviso, the Commission may consider equity of more than 30% if the generating company is

able to satisfy the Commission that deployment of such equity of more than 30% was in the interest of general public.

64. The petitioner has also submitted that the expenditure on additional capitalization during the years 2007-08 and 2008-09 have been met partly out of debt and partly out of equity. The debt comprises of KFW drawls as shown below:

Name of Drawl	**Interest Rate on date of drawl**	**Drawl date**	**Drawl amount ($)**	**Exchange Rate (Rs./$)**	**2007-08** (Rs. in lakh)	**2008-09** (Rs. in lakh)
Drawl II	5.2500%	8.1.2008	861000	39.2960	338.34	0.00
Drawl III	3.8100%	7.3.2008	1451000	40.6720	590.15	0.00
Drawl IV	3.3100%	2.6.2008	1387100	42.5280	0.00	589.91
Drawl V	3.0600%	9.9.2008	91800	45.0345	0.00	41.34
Drawl VI	1.0600%	2.3.2009	1031000	51.7875	0.00	533.93
Total					**928.49**	**1165.18**

65. Further, the petitioner has considered the debt-equity ratio of 70:30 for the additional capital expenditure in terms of sub-clause (a) of clause (1) of Regulation 20 of 2004 regulations. Accordingly, the additional notional equity of the generating station on account of capitalization approved above, works out as under:

(` in lakh)

	2004-05	**2005-06**	**2006-07**	**2007-08**	**2008-09**
Notional Equity	1591.05	374.15	421.82	1423.82	1468.81

Interest on loan

66. Adjustment of repayment corresponding to de-capitalization of assets**:** In Petition No. 91/2004, the petitioner had sought adjustment of cumulative repayment on account of de-capitalization of assets in such a manner that the net loan opening prior to de-capitalization does not undergo a change. The Appellate Tribunal by its judgment dated 13.6.2007 decided as under:

> *"When asset is not in use it is only logical that the capital base for the purpose of tariff is also proportionately reduced. It follows therefore that the appellant will not earn any depreciation, return on equity and O&M charges. However, despite the de-capitalization, the appellant is required to pay interest on loan. Whereas 10% salvage value of the de-capitalized asset should be non-tariff revenue, the interest on loan has to be borne by the beneficiaries. If the salvage value is more than 10%, amount realized above 10% should be counted as additional revenue. If salvage value is less than 10%, it will be counted as loss in the revenue.*

Therefore, in this view of the matter, the cumulative repayment of the loan proportionate to those assets de-capitalized required to be reduced. The CERC shall act accordingly".

67. In the instant petition, the petitioner has claimed adjustments based on the formula as shown below:

$$\text{Repayment to be adjusted} = \frac{\text{Cumulative repayment at the beginning} \times \text{Gross value of de-capitalised asset} \times \text{Debt proportion corresponding to normative debt-equity ratio for the respective period}}{\text{Gross debt at the beginning of the year of de-capitalisation}}$$

68. In terms of the above decision of the Appellate Tribunal, the cumulative repayment adjustment has been worked out proportionate to assets de-capitalized such that the net opening loan prior to de-capitalisation and after de-capitalisation do not change.

69. Interest on loan has been worked out as under:

(a) Gross opening loan on normative basis on 1.4.2004 as considered in order dated 3.2.2009 in Petition No.31/2008 was `34800.50 lakh corresponding to capital cost of `69601.00 lakh.

(b) Cumulative repayment of loan on 1.4.2004 as considered in order dated 3.2.2009 in Petition No.31/2008 was `22360.30 lakh.

(c) Net opening loan on normative basis on 1.4.2004 as considered in order dated 3.2.2009 in Petition No.31/2008 was `12440.20 lakh.

(d) There is addition of notional loan to the tune of `3712.46 lakh, `873.02 lakh, `984.24 lakh, `3322.24 lakh and `3427.23 lakh for the years 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 respectively, on account of additional capital expenditure approved above, in addition to the change in additional capital expenditure approved for the period 2004-07.

(e) Weighted average rate of interest on loan has been worked out after accounting for the rate of interest considered in order dated 3.2.2009 along with addition of loan for the years 2007-08 and 2008-09 as stated above.

(f) Normative repayment of the normative loan has been calculated based on following formula:

$$\text{Normative repayment} = \text{Actual Repayment} \times \frac{\text{Normative Loan}}{\text{Actual Loan}}$$

(g) As stated above, cumulative repayment has been adjusted on account of de-capitalization proportionate to 70% of the value of de-capitalized assets.

70. Interest on loan has been computed as under:

(` in lakh)

Year	2004-05	2005-06	2006-07	2007-08	2008-09
Gross Opening Loan	**34800.50**	38512.96	39385.98	40370.22	43692.46
Cumulative Repayment of Loan upto previous year	22360.30	24337.35	26569.92	28647.25	30341.84
Net Loan Opening	12440.20	14175.61	12816.05	11722.97	13350.62
Net Loan Opening-Notional component	3103.25	944.10	485.85	173.55	30.60
Net Loan Opening-Normative	9336.95	13231.51	12330.20	11549.42	13320.02
Addition of loan due to additional capital expenditure	3712.46	873.02	984.24	3322.24	3427.23
Repayment of notional loan in line with Commission's order dated 4.3.2008	2159.15	458.25	312.30	142.95	30.60
Repayment of Normative loan based on actual loan	936.33	1888.97	1905.12	1821.84	2503.12
Repayment of Loan (Normal)	3095.48	2347.22	2217.42	1964.79	2533.72
Less: Adjustment for de-cap during the period	1118.43	114.64	140.09	270.21	226.22
Repayment of loan during the year (net)	1977.05	2232.58	2077.33	1694.59	2307.50
Net Loan Closing	14175.61	12816.05	11722.97	13350.62	14470.35
Average Loan	13307.91	13495.83	12269.51	12536.80	13910.48
Weighted Average Rate of Interest on Loan	6.9464%	7.8072%	7.2910%	7.4433%	6.2549%
Interest on Loan	**924.42**	**1053.64**	**894.57**	**933.16**	**870.09**

Return on Equity

71. Return on equity is allowed @ 14% on the average normative equity, as under:

(` in lakh)

	2004-05	2005-06	2006-07	2007-08	2008-09
Equity-Opening vide order	34800.50	36391.55	36765.71	37187.52	38611.34

dated 3.2.2009					
Addition of Equity due to additional capital expenditure	1591.05	374.15	421.82	1423.82	1468.81
Equity-Closing	36391.55	36765.71	37187.52	38611.34	40080.15
Average equity	35596.03	36578.63	36976.61	37899.43	39345.75
Return on Equity @ 14%	**4983.44**	**5121.01**	**5176.73**	**5305.92**	**5508.40**

Depreciation

72. The balance depreciable value as on 1.4.2004, as considered vide order dated 3.2.2009 was `39569.43 lakh (i.e. 90% of `69601.00 lakh minus cumulative depreciation amounting to `23071.47 lakh). Thus, the value of land considered to calculate the above figure was 'nil'. However, from the submissions made by the petitioner, it appears that some portion of land formed part of the capital base, allowed for the generating station. This fact could be corroborated from the submissions made by the petitioner in Petition No.304/2009 (pertaining to the approval of tariff of the generating station for the period 2009-14) wherein, the petitioner in Form-11 annexed to the petition, has indicated a freehold land amounting to `2597.63 lakh, as on 31.3.2009. Clarification relating to this value has been called from the petitioner in the petition no. 304/2009, and the petitioner vide affidavit dated 27.04.2010 has submitted the freehold land amounting to `948.21 lakh was existing as on 1.4.2004. Further there were addition of freehold land amounting to `68.79 lakh, `31.72 lakh, `24.74 lakh, `8.41 lakh and `1515.77 for the years 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09, respectively. As such, the balance depreciable value has been calculated by applying the methodology, as adopted in the previous orders for the generating station. Further, weighted average rate of depreciation of 4.5% as mentioned in order dated 3.2.2009 has been used to arrive at the depreciation allowed for the tariff period 2004-09. Adjustment of cumulative depreciation on account of de-capitalization of assets has been considered in the calculations as carried out in the tariff orders for the period 2004-09 for other generating stations of the petitioner. The necessary calculations are as under:

(` in lakh)

	2004-05	**2005-06**	**2006-07**	**2007-08**	**2008-09**
Opening capital cost	69601.00	74904.51	76151.68	77557.75	82303.80

Closing capital cost	74904.51	76151.68	77557.75	82303.80	87199.84
Average capital cost	72252.76	75528.10	76854.72	79930.77	84751.82
Depreciable value @ 90%	64112.18	67059.99	68253.94	71022.40	75361.34
Balance depreciable value	41040.71	41709.23	39611.29	39061.05	40059.93
Depreciation	**3251.37**	**3398.76**	**3458.46**	**3596.88**	**3813.83**

Advance Against Depreciation

73. The petitioner has not claimed Advance Against Depreciation. Therefore, the petitioner's entitlement to Advance Against Depreciation is "nil".

O&M expenses

74. The O&M Expenses as considered in order dated 3.2.2009 has been considered for revision of tariff.

Interest on Working capital

75. For the purpose *of* calculation of working capital the operating parameters including the price of fuel components as considered in the order dated 9.2.2010 have been kept unchanged. The "receivables" component of the working capital has been revised for the reason of revision of return on equity interest on loan etc.

76. The necessary details in support of calculation of interest on working capital are as under:

(` in lakh)

Particulars	**2004-05**	**2005-06**	**2006-07**	**2007-08**		**2008-09**
				1.4.2007 to 30.9.2007	**1.10.2007 to 31.3.2008**	
Coal Stock – 1.1/2 months	1479.42	1479.42	1479.42	741.74	1011.31	2017.10
Oil Stock-2 months	305.71	305.71	305.71	153.28	165.51	330.11

O & M expenses	725.00	752.42	781.00	405.33	405.33	841.50
Spares	1037.15	1110.25	1190.56	654.51	654.51	1435.11
Receivables	5407.79	5535.56	5588.21	2860.43	3232.10	6592.91
Total Working Capital	8955.07	9183.36	9344.89	4815.29	5468.76	11216.73
Rate of Interest (%)	10.25%	10.25%	10.25%	10.25%	10.25%	10.25%
Interest on Working capital	**917.89**	**941.29**	**957.85**	**493.57**	**560.55**	**1054.12**

77. The revised annual fixed charges for the period from 1.4.2004 to 31.3.2009 are summarized as under:

(` in lakh)

Particulars	**2004-05**	**2005-06**	**2006-07**	**2007-08**	**2008-09**
Interest on loan	924.42	1053.64	894.57	933.16	870.09
Interest on Working Capital	917.89	941.29	957.85	1054.12	1149.71
Depreciation	3251.37	3398.76	3458.46	3596.88	3813.83
Advance Against Depreciation	0.00	0.00	0.00	0.00	0.00
Return on Equity	4983.44	5121.01	5176.73	5305.92	5508.40
O & M Expenses	8700.00	9029.00	9372.00	9728.00	10098.00
Total	**18777.13**	**19543.71**	**19859.61**	**20618.08**	**21440.04**

78. The target availability of 75% for the period from 1.4.2004 to 30.9.2007 and 80% from 1.10.2007 to 31.3.2009 as considered by the Commission in the order dated 9.2.2010 remains unchanged. Also, the admitted additional capital expenditure after the date of commercial operation has been considered while computing the maintenance spares for calculating the interest on working capital. Similarly, other parameters viz. specific fuel consumption Auxiliary Power consumption and Station Heat rate etc considered in the order dated 9.2.2010 have been retained for the purpose of calculation of the revised fixed charges.

79. The petitioner shall claim the difference in respect of the tariff determined by order dated 9.2.2010 and the tariff determined by this order from the beneficiaries in three equal monthly installments.

80. In addition to the charges approved above, the petitioner is entitled to recover other charges like incentive, claim for reimbursement of income-tax, other taxes, cess levied by statutory authority, in accordance with the 2004 regulations, as applicable.

81. The petitioner's claim for reimbursement of filing fees is not allowed in terms of the Commission's general order dated 11.9.2008 in Petition No.129/2005 wherein it was directed that filing fee during the period 2004-09 would not be reimbursed, as the same has been factored in the normalized O&M expenses under the 2004 regulations.

82. The tariff determined by this order is also subject to the final decision of the Commission as regards jurisdiction as stated earlier and the Civil Appeals/Appeals pending before the Hon'ble Supreme Court and the Tribunal respectively.

83. Petition No.184/2009 stands disposed of in terms of the above.

Sd/-	**sd/-**	**sd/-**
(V.S. VERMA)	**(S.JAYARAMAN)**	**(DR.PRAMOD DEO)**
MEMBER	**MEMBER**	**CHAIRPERSON**