CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram:

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

Petition No. 136/2005

In the matter of

Revision of O&M expenses for the period 1.4.2001 to 31.3.2004 in respect of Kawas Gas Power Station (656.20 MW).

And in the matter of

National Thermal Power Corporation Ltd. …. **Petitioner**

Vs

Madhya Pradesh State Electricity Board & others ….. **Respondents**

The following were present:

1. Shri V.B.K. Jain, NTPC
2. Shri I.J. Kapoor, NTPC
3. Shri Guryog Singh, NTPC
4. Shri S.K. Samvi, NTPC
5. Shri S.K. Sharma, NTPC
6. Shri Balaji Dubey, Dy. Manager (Law), NTPC
7. Shri S.D. Jha, NTPC
8. Shri A.S. Pandey, NTPC
9. Shri Surendra, NTPC
10. Shri G.K. Dua, NTPC
11. Shri R. Mazumdar, NTPC

ORDER
(DATE OF HEARING: 27.12.2005)

Introductory Remarks

The application is made by the petitioner, National Thermal Power Corporation Ltd. (NTPC) to seek revision of O&M expenses for the period 1.4.2001 to 31.3.2004 in respect of Kawas Gas Power Station (Kawas GPS).

2. The petitioner had filed Petition No.31/2001 for approval of tariff for Kawas GPS for the period 1.4.2001 to 31.3.2004 on 28.5.2001. This petition was based on the terms and conditions for determination of tariff contained in Ministry of Power notification dated 30.3.1992. Subsequently, the petitioner filed an amended petition on 7.2.2002, based on the terms and conditions notified by the Commission under Section 28 of the Electricity Regulatory Commissions Act, 1998. The application was disposed of by order dated 7.4.2005 by applying the terms and conditions notified by the Commission, for the period 1.4.2001 to 31.3.2004. The petitioner has now pleaded that it had actually incurred an expenditure of Rs. 20073 lakh under O&M during the period 1.4.2001 to 31.3.2004, though the Commission had approved O&M expenses amounting to Rs. 12331 lakh, leaving an uncovered gap of Rs. 7742 lakh. Accordingly, the petitioner has sought revision of O &M expenses allowed by the Commission, since according to the petitioner, less recovery of O&M expenses will be a cause of great hardship and large amounts will remain unrecovered.

3. According to the petitioner, the difference between the expenses actually incurred and those allowed is on account of the fact that the base “employee cost” considered for the generating station and the corporate office was inadequate. The petitioner has also pointed out that the actual expenses under the head “Repairs and Maintenance” far exceed the expenses allowed by the Commission. The petitioner has submitted that the actual expenses were necessary for sustaining the operating performance of the generating station.

4. The petitioner in support of its claim for revision of O&M expenses has relied upon the observations made in the Commission’s order dated 21.12.2000, which

according to the petitioner granted it liberty to approach the Commission for reimbursement of actual expenses with proper justification.

5. The petitioner has stated that salary revision of the public sector employees was made with effect from 1.1.1997, though actually implemented in July 2000 and thereafter. It has been submitted that when the application for approval of tariff was made, the salary revision arrears paid for the years 1997-98, 1998-99 and 1999-2000 were not added to the data submitted before the Commission. Therefore, the petitioner has suggested that the normalized cost arrived at by the Commission under head 'employee expenses" should have excluded the actual employee cost data for the years 1995-96 and 1996-97 as it did not represent the normal employee cost by reason of revision with effect from 1.1.1997 and the actual employee cost indicated in the present application for the years 1997-98, 1998-99 and 1999-2000 should be considered for the purpose of normalization.

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

Sr. No.	**Particulars**	**Details**	
(a)	Date on which revision of salary of the employees was notified	(i) Executives	6.7.2000
		(ii) Supervisor	19.4.2001
		(iii) Workmen	2.3.2001
(b)	Date on which the payment of arrears was made	(i) Executives	July'2000
		(ii) Supervisor	April'2001
		(iii) Workmen	March'2001
(c)	Month from which the revised salary was paid to the employees	(i) Executives	July'2000
		(ii) Supervisor	April'2001
		(iii) Workmen	March'2001

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

Analysis

8. The tariff for the period 1.4.2001 to 31.3.2004 was regulated in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 notified on 26.3.2001 (hereinafter referred to as "the notification"). As per the notification, O&M expenses for the generating stations in operation for five years or more in the base year of 1999-2000 were to be derived on the basis of actual O&M expenses, excluding abnormal O&M expenses, if any, for the years 1995-96 to 1999-2000 duly certified by the statutory auditors. The average of actual O&M expenses for the years 1995-96 to 1999-2000 was considered as O&M expenses for the year 1997-98. The expenses for 1997-98 were escalated twice @ 10% per annum to arrive on O&M expenses for the base year 1999-2000. Thereafter, the base O&M expenses for the year 1999-2000 are further escalated @ 6% per annum to arrive at permissible O&M expenses for the relevant year. The notification further provides for adjustment of O&M expenses based on actual escalation factor, which is not relevant for the present proceedings and accordingly, the provision relating to adjustment of actual expenses is not being referred to.

9. The notification was preceded by the Commission's order dated 21.12.2000 in Petition No.4/2000 and other petitions. In the said order dated 21.12.2000 it was provided that any abnormal expenses incurred by the utilities in operating and maintaining their plants should not get reflected in the norms but should be dealt with separately on case to case basis through separate petitions. The Commission felt that this would provide an opportunity to the stakeholders to assess the merit of claims and to ensure transparency.

10. It needs to be noted that the particular observation relied upon by the petitioner had not been incorporated in the notification.

11. From the details extracted at para 7 above, it can be seen that revision of salary of the employees, executives, supervisors and other workmen was notified during July 2000 to April 2001 and the arrears on that account were also paid during the same period. Therefore, the complete employee cost data on account of revision of pay and allowances was available with the petitioner during April 2001. During pendency of the application for determination of tariff filed on 28.5.2001 and revised on 7.2.2002, the data to the extent available in this regard could be placed before the Commission by the petitioner in the petition itself. Further, the petitioner could have taken steps for amendment of the petition during its pendency to place on record the actual data under the head "employee cost" till the issue of the tariff order. Thus, there were ample opportunities available to the petitioner to seek revision of employee cost under O&M expenses for the years 1997-98 to 1999-2000 which it did not avail of. The petitioner is, thus, deemed to have relinquished its claim for determination of normative O&M charges based on actual data for 1995-96 to 1999-2000 as regards the employee cost.

12. The petitioner filed petition No. 56/2005 to claim revision of O&M expenses for Korba Super Thermal Power Station for the period 1.4.2001 to 31.3.2004 under similar circumstances. This petition was dismissed by the order dated 11.8.2005. While ordering dismissal of the petition, the Commission observed:

> "11. Under Order 2 Rule 2 of the Code of Civil Procedure (the Code) every suit is to include the whole of the claim to which the party is entitled to make in respect of the cause of action but a party may relinquish any portion of his claim. However, where the party omits to sue in respect of any claim or

intentionally relinquishes any portion of his claim, he cannot afterwards sue in respect of the portion so omitted or relinquished. Further, under Section 11 of the Code, no court can try any suit in which the matter directly and substantially in issue was directly and substantially in issue in a former suit between the same parties in a court of competent jurisdiction and had been heard and finally decided by such court. Explanation IV below Section 11 of the Code further lays down that any matter, which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The provisions of the Code referred to above are not limited to civil suits but are based on public policy that there should be finality to litigation and that no person should be vexed twice for the same cause of action. These principles have been applied by the Hon'ble Supreme Court and High Courts to the proceedings before the quasi-judicial authorities.

12. By extending the principles contained in Order 2 Rule 2 of the Code to the present case, the petitioner cannot now be permitted to claim revision of O&M expenses by filing a fresh application based on the actual O&M cost under the head "employee cost" for the purpose of normalisation. The present petition is also barred by the principle of constructive res judicata because approval of O&M expenses on the basis of actual employee cost for the years 1997-98, 1998-99 and 1999-2000 was deemed to have been decided by the order dated 6.8.2003 since the petitioner is deemed to have made it a ground for claim for O&M expenses as it could and ought to have placed before the Commission actual "employee cost" data for the years 1997-98 to 1999-2000."

13. The above observations squarely apply to the facts of the case in hand as regards the "employee cost". After deciding the tariff, the Commission cannot revisit the matters covered in the earlier order dated 7.4.2005, which has otherwise acquired finalty, unless otherwise authorized by law. The petitioner has not brought to our notice any provision of law to support its claim for revision of O&M charges based on actuals, under the head "employee cost" under the present circumstances. The expenses under the head "employee cost" cannot be said to be falling in the category of "abnormal" since the revision of salary of the employees was a known fact and could be included in the actual expenses for the period 1.1.1997 to 31.3.2000. In the earlier cases, the petitioner had sought revision of base O&M expenses under the head "employee cost" whereas in the present case, it has attempted to seek

reimbursement of actual expenses and has thus sought to follow an indirect path for achieving the object which it could not achieve directly in earlier cases. But it is well-settled that which cannot be achieved directly, can also not be achieved indirectly.

14. The revision of O&M expenses under the head “employee cost” on the ground of hardship is not maintainable since O&M expenses were computed in the tariff order in accordance with the methodology prescribed under the notification, and based on the information placed on record by the petitioner in the proceedings in Petition No.31/2001.

15. For the amounts indicated under the head “employee cost”, the petitioner had given increase of more then 20% in the years 1997-98 and 1998-99. The petitioner on affidavit explained that increases were on account of provision for pay revision of employees. On consideration of this, the employee cost indicated by the petitioner for the years 1997-98 and 1998-99 (excluding incentive and ex-gratia), even though beyond the admissible limit of 20% was considered for normalization. Against this background, the petitioner has contended that revision of O &M expenses is warranted in any case since O & M expenses approved by the Commission are provisional, based as they are on anticipated “employee cost” which is less than the actual expenses. No one else but the petitioner is responsible for this state of affairs. The petitioner gave certain details, which were accepted in toto. It is only the petitioner who is to own up the consequences for its actions. Therefore, no fault can be found with the tariff orders on this count and the case for revision of O&M charges is not made out.

16. The notification does not guarantee reimbursement of actual expenses in every case, but has specified the norms for computation of different components of tariff. There are situations where the petitioner has been paid in excess of the actual expenses, based on the norms specified in the notification. Thus, the tariff approved is the complete package.

17. The petitioner has submitted the following details of Repairs and Maintenance expenses incurred during the period 2001-02 to 2003-04:

Year	Allowed by the Commission	Actually incurred by NTPC@	Difference
2001-02	1127	1527	400
2002-03	1158	2052	394
2003-04	1211	3342	2131
Total (2001-04	3496	6921	3425

@ including capital spares consumed at zero value

18. It has been stated that warranty period for supply of free spares was over in October 2002 and, therefore, the petitioner had to incur additional expenditure on procurement of spares. According to the petitioner, Repairs and Maintenance expenses for the years 1995-96 to 1999-2000 considered in the order dated 7.4.2005 for the purpose of normalization were not the representative expenses and, therefore, the petitioner submits that the expenditure incurred after October 2002 on procurement of the spares need to be allowed over and above Repairs and Maintenance expenses allowed by order dated 7.4.2005.

19. The Commission in its order dated 7.4.2005 has taken a view that the cost of warranty spares was included in the capital cost. The petitioner will continue to earn return on equity at the enhanced cost. Accordingly, case for review of repair and

maintenance expenses for the reason of the petitioner incurring additional expenditure after October 2002, cannot be entertained.

20. For the foregoing reasons, the application for review is dismissed at admission stage.

Sd/-	Sd/-	Sd/-	Sd/-
(A.H. JUNG)	**(BHANU BHUSHAN)**	**(K.N. SINHA)**	**(ASHOK BASU)**
MEMBER	**MEMBER**	**MEMBER**	**CHAIRPERSON**

New Delhi dated the 25th January 2006