

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Coram**

- 1. Shri Bhanu Bhushan, Member**
- 2. Shri R. Krishnamoorthy, Member**

**Petition No. 16/2006**

**In the matter of**

Inappropriate levy of capacity charges by NTPC on account of 3 NTPC stations of ER amongst GRIDCO & BSEB for the month of October 1998.

**And in the matter of**

Grid Corporation of Orissa Limited, Bhubaneswar

.....**Petitioner**

Vs

1. National Thermal Power Corporation Limited, Eastern Region, Patna
2. Member-Secretary, Eastern Regional Electricity Board, Kolkata
3. Bihar State Electricity Board, Patna
4. West Bengal State Electricity Board, Kolkata
5. Damodar Valley Corporation, Kolkata
6. Jharkhand State Electricity Board, Ranchi
7. Government of Sikkim, Gangtok

.... **Respondents**

**Petition No. 152/2007**

**In the matter of**

An application challenging the energy bill of GRIDCO for the month of November 1998 in respect of drawl of NTPC power during off-peak hours

**And in the matter of**

M/S Ferro Alloys Corporation Ltd, Bhubaneswar

.....**Petitioner**

Vs

1. Grid Corporation of Orissa Limited, Bhubaneswar
2. National Thermal Power Corporation Limited, Patna
3. Eastern Regional Electricity Board, Kolkata

.... **Respondents**

**In the matter of**

An application challenging the energy bill of GRIDCO for the month of November 1998 in respect of drawl of NTPC power during off-peak hours

**And in the matter of**

M/S Tata Steel Ltd, Mumbai

.....**Petitioner**

Vs

1. Grid Corporation of Orissa Limited, Bhubaneswar
2. National Thermal Power Corporation Limited, Patna
3. Eastern Regional Electricity Board, Kolkata

.... **Respondents**

**The following were present:**

1. Shri Raj Kumar Mehta, Advocate, GRIDCO
2. Shri Mragank, Advocate, GRIDCO
3. Shri S.N. Goel, NTPC
4. Shri S.K. Samvi, NTPC
5. Shri D. Kar, NTPC
6. Shri V. Kumar, NTPC
7. Shri Manoj Saxena, NTPC
8. Shri Ashok K. Parija, Sr. Advocate, Tata Steel Ltd., Ferro-Alloy Corp Ltd.
9. Shri P.P. Mohanty, Advocate, Tata Steel Ltd., Ferro-Alloy Corp Ltd.
10. Shri R.M. Patnaik, Advocate, Tata Steel Ltd., Ferro-Alloy Corp Ltd.
11. Shri Sanjay Patnaik, Tata Steel Ltd.
12. Ms Happy Patnaik, Tata Steel Ltd.

**ORDER**  
**(DATE OF HEARING: 8.4.2008)**

**Petition No 16/2006**

The application has been made under clause (f) of sub-section (1) of Section 79 of the Electricity Act, 2003, (hereinafter referred to as "the Act") for settlement of dispute arising out of recovery of fixed charges by the first respondent, National Thermal Power Corporation Ltd. (NTPC) for supply of electricity during the month of October 1998, seeking directions for refund of the excess amount of Rs. 6.45 crore along with interest.

2. The dispute primarily relates to recovery of fixed charges by NTPC consequent to regulation of power supply to West Bengal State Electricity Board (WBSEB) and Damodar Valley Corporation (DVC) from 11.10.1998 to 31.10.1998.

3. The petitioner is engaged in the business of bulk purchase of electricity from the generating companies within the State of Orissa and also NTPC, for further bulk sale to the distribution companies within the State. NTPC is a generating company owned and controlled by the Central Government and is engaged in the business of generation of electricity. It has its generating stations in Eastern Region. The Central Government has allocated electricity generated at these generating stations to the States in the Region, including the State of Orissa, among others. Respondents Nos 3 to 7 in the normal course of their business purchase electricity from NTPC and supply to the consumers within their jurisdiction.

4. From the facts placed on record, it is noticed that NTPC had entered into a Bulk Power Supply Agreement dated 25.5.1993 (hereinafter referred to as "the BPSA") with the petitioner and the respondents Nos. 3 to 7, (collectively referred to as "the Bulk Power Customers"), for sale/purchase of electricity generated at its generating stations in Eastern Region, namely, Farakka Super Thermal Power Station (Farakka STPS), Kahalgaon Super Thermal Power Station (Kahalgaon STPS), and Talcher Super Thermal Power Station (Talcher STPS) (collectively referred to as "the generating stations"). Article 5 of the BPSA *inter alia* provides that the tariff and terms and conditions for the electricity supplied from the generating stations shall be regulated in accordance with the notification issued by the Central Government (Ministry of Power) vide letter No. 3/19/92-US (CT) dated 17.3.1993 (hereinafter

referred to as “the said notification”) or as may be determined by that Government from time to time under Section 43A of the Electricity (Supply) Act, 1948 (hereinafter referred to as “the Electricity Supply Act”), which form an integral part of the BPSA. Article 5 of the BPSA further provides that in case of any difference between the terms and conditions of the BPSA and the said notification, the provisions contained in the said notification shall be applicable. Article 7 of the BPSA lays down that all charges under the BPSA shall be billed by NTPC and shall be paid by the Bulk Power Customers in accordance with the provisions of clause A.7 of Appendix to the BPSA, (hereinafter referred to as “the Appendix”). Article 9 of the BPSA contains the *force majeure* provisions. It enjoins upon the parties to ensure due compliance with the terms of the BPSA but exonerates them of any liability for any loss or damage arising out of failure to carry out the terms of the BPSA to the extent that such failure is due to *force majeure* events, including for any reason beyond the control of the concerned party.

5. Clause A.7 of the Appendix contains elaborate provisions with regard to billing and payment. The salient features of these provisions are summarized as under:

(a) NTPC presents a bill for the electricity supplied to the Bulk Power Customers as per the Regional Energy Accounts prepared by the second respondent, Member-Secretary, Eastern Regional Electricity Board (EREB).

(b) The bills are deemed to have been accepted in full by a Bulk Power Customer unless it files written objections with NTPC within one month of receipt of the bills. The objections, if any, raised may be resolved in the

specified manner, but the Bulk Power Customer raising the dispute is required to pay the bills, in full, pending settlement of the objections.

(c) The bills raised by NTPC are payable either through LC or directly.

(d) The Bulk Power Customers are entitled to certain rebates where payments are made through LC immediately on presentation of the bills or subsequently before the last date of payment, through LC or otherwise.

(e) Clause A.7.5 of the Appendix which is relevant for our purpose, provides for the consequences of non-payment of the bills and non-establishment of LC. It provides that in the event of any bill remaining unpaid for a continuous period exceeding two months, NTPC may discontinue supply of electricity to the defaulting Bulk Power Customer. Further, when supply of electricity to a defaulting Bulk Power Customer is discontinued for the reason of its default in making payment for a continuous period exceeding two months, NTPC is authorized to advise the EREB (the second respondent) to exclude allocation made to such defaulting Bulk Power Customer from scheduling and energy accounting and the share of the defaulting Bulk Power Customer is treated in the same manner as unallocated power. Under this clause, the Central Government and NTPC are authorized to issue necessary directions for reallocating the share of the defaulting Bulk Power Customer among other Bulk Power Customers.

6. The said notification is issued under Section 43A (2) of the Electricity Supply Act, 1948 for the electricity generated and supplied from Farakka STPS, valid up to 31.12.1994. From the reply filed by NTPC it is noticed that Ministry of Power extended the said notification beyond 31.12.1994 from time to time and up to 31.3.2000. NTPC has further brought out that Ministry of Power issued similar notifications in respect of Kahalgaon STPS (valid up to 31.3.2000) and Talcher STPS (valid up to 31.3.2002). Therefore, for the purpose of this order, hereafter we are collectively referring to all these notifications as “the notifications”. According to the notifications, the tariff comprises the fixed charges (expressed in Rs in crore) payable yearly and the variable charges (expressed in paise/kWh); the fixed charges being recoverable on monthly basis (from each beneficiary) in the accordance with the following formula, namely -

$$\text{Fixed Charges} = \frac{\mathbf{FC}}{12} \times \frac{\mathbf{EB}}{\mathbf{ES}}$$

Where

- FC** = Annual Fixed Charges payable by Beneficiaries at 400 kV bus bar of STPS,
- EB** = Monthly energy sale from STPS at 400 kV bus of STPS to each beneficiary individually as per Regional Energy Account, and
- ES** = Total monthly energy sale from STPS at 400 kV bus bar of STPS.

7. The notifications also provide that the payment of bills by the beneficiaries (the Bulk Power Customers) shall be made through the revolving Letter of Credit (LC), for an amount equivalent to one month’s average billing based on past three months billing in favour of NTPC. The notifications further provide for rebates at different rates on payment of bills through LC on presentation or when payment is made within one month, whether through LC or otherwise. As per the notifications, late payment

surcharge is payable when payment is made after expiry of one month from the presentation of the bills by NTPC.

8. It has been stated that West Bengal Electricity Board (WBSEB) (the fourth respondent) and Damodar Valley Corporation (DVC) (the fifth respondent) defaulted in making payments of bills of NTPC. Therefore, NTPC discontinued (regulated) power supply to these entities from the generating stations during October 1998, the exact period is stated to be 22 days from 11.10.1998 to 31.10.1998, ostensibly by virtue of power under clause A.7.5 of the Appendix. NTPC billed the petitioner and other Bulk Power Customers for the fixed charges in accordance with the formula given in the notifications. The charges billed by NTPC to the petitioner for the month of October 1998 are as under:

Generating Station	Amount Billed (Rs. In crore)		
	Fixed Charges	Energy Charges	Total
Farakka STPS	2.75	0.48	3.23
Kahalgaon STPS	5.26	2.82	8.08
Talcher STPS	2.05	0.36	2.41
<b>Total</b>	<b>10.06</b>	<b>3.66</b>	<b>13.72</b>

9. The petitioner has alleged that because of regulation (discontinuance) of power supply by NTPC to WBSEB and DVC, the unit cost of power supplied became abnormally high. The petitioner worked out that against the amount of Rs. 13.72 crore billed by NTPC, only an amount of Rs. 7.27 crore was payable. Thus, according to the petitioner, there was an excess billing of an amount of Rs. 6.45 crore, which is the disputed amount for the present proceedings. The petitioner vide its letter dated 2.12.1998 addressed to NTPC returned the bills and requested for their revision,

supporting its contention of excess billing of Rs.6.45 crore through the detailed calculations enclosed with the letter. However, the petitioner was advised by NTPC by its letter dated 20.1.1999 to admit the bills pending resolution of the issue at appropriate forum since an appropriate methodology for apportionment of the fixed charges for the month of October 1998 was being deliberated. The dispute remained outstanding despite numerous discussions at EREB forum.

10. Meanwhile, the Central Government formulated a scheme for settlement of outstanding dues of SEBs. Under this scheme, a Tripartite Agreement was signed in March 2003 between the Central Government, the State Government of Orissa and the Reserve Bank of India for securitization of past dues payable by the petitioner. According to the petitioner, while signing the Tripartite Agreement it agreed to include the disputed amount of Rs. 6.45 crore as outstanding, under protest to avail the benefit of the scheme of securitization of past dues. The petitioner has also placed on record some correspondence exchanged between the petitioner and NTPC pertaining to the period subsequent to the signing of the Tripartite Agreement to show that the dispute still remains unresolved.

11. The petitioner has denied its liability to pay the fixed charges for the month of October 1998, in the manner claimed by NTPC on the ground that as a result of regulation of power supply by the latter to WBSEB and DVC, the cost per unit of the energy supplied to it had increased exorbitantly, for no fault on its part. The petitioner has sought refund of the disputed amount together with interest thereon.

12 On merits, the case of the first respondent, NTPC is that it was entitled to claim the disputed amount in accordance with the notifications. According to NTPC, supply of electricity from the generating stations during October 1998 in Eastern Region was as under:

(In MU)				
SEB	Farakka STPS	Kahalgaon STPS	Talcher STPS	Total
WBSEB	0	15.42	0	<b>15.42</b>
BSEB	48.58	127.49	128.32	<b>304.39</b>
GRIDCO	6.50	38.68	8.85	<b>54.03</b>
DVC	0	22.21	16.90	<b>39.11</b>
Sikkim	0	1.37	0	<b>1.37</b>
Others	33.24	73.10	102.67	<b>209.01</b>
<b>Total</b>	<b>88.32</b>	<b>278.27</b>	<b>256.74</b>	<b>623.33</b>

13. The total charges (Fixed + Variable Charges) which were recoverable from the Bulk Power Customers for the month of October 1998 calculated by NTPC in accordance with the notifications were as under:

SEB	Amount (Rs. In crore)
WBSEB	22.86
BSEB	124.64
GRIDCO	60.88
DVC	19.57
Sikkim	0.53

14. NTPC in its reply has pointed out that the dispute relating to recovery of fixed charges for the month of October 1998 was the subject matter of Petition No. 27/2004

(NTPC Vs Bihar State Electricity Board and others) wherein the present petitioner was impleaded as a respondent. The said petition was withdrawn after a settlement was arrived at with the third respondent, Bihar State Electricity Board (BSEB). NTPC has averred that the present petitioner did not raise any claim or objection to the methodology adopted for billing of the fixed charges for the month of October 1998 in those proceedings.

15. In the background of above facts, NTPC has raised the preliminary objections, as under:

- (a) The present petition is barred by limitation and suffers from delay and laches as the dispute has been raised after a lapse of 8 years.
- (b) After disposal of Petition No. 27/2004, the present petition is barred by *res judicata* or constructive *res judicata*.
- (c) After signing of the Tripartite Agreement, the initial dispute raised by the petitioner vide its letter dated 2.12.1998 does not survive since prior to signing of the Tripartite Agreement, the petitioner vide its letter dated 22.11.2002 advised the State Government that the outstanding dues of NTPC as on 30.9.2001 stood reconciled unconditionally, and without any reference to the dispute now raised. The petitioner thus waived its rights, if any, by agreeing to the reconciliation of the outstanding dues.

16. A reply has also been filed on behalf of the second respondent, Member-Secretary, Eastern Regional Electricity Board (EREB) who has catalogued the attempts made at EREB level to resolve the dispute. Member-Secretary, EREB has summed up the position by stating that in the deliberations held at various levels it

was realized that the constituents not undergoing regulation should not suffer commercially, but for want of any guidelines from CEA/ Ministry of Power the dispute remained unsettled, However, Member-Secretary, EREB has opined that the dispute raised needs to be resolved by apportioning the fixed charges for the period of regulation to the regulated utilities (WBSEB and DVC).

17. West Bengal Electricity Distribution Company Ltd, the successor of WBSEB, in its reply has taken the pleas similar to those taken by NTPC on merits. It has stated that during the period of regulation, fixed charges for the generating stations were not payable by the regulated entity since no electricity was not drawn during that period.

18. M/S Ferro Alloys Corporation Ltd and M/S Tata Steel Ltd the petitioners in Petitions No. 152/2007 and 153/2007 respectively have been permitted to intervene in the present petition. We are not referring to their submissions here in detail since the separate petitions filed by them raise the same issues and are being disposed of through this order after taking note of their submissions.

19. We heard Shri R.K. Mehta, Advocate for the petitioner and Shri S.N. Goel for NTPC. We also heard Shri Ashok K. Parija, Sr. Advocate for the interveners. It was argued on behalf of the petitioner as also the interveners that regulation of power supply by NTPC was on account of the default committed by WBSEB and DVC and was to the ultimate benefit of NTPC. Therefore, the fixed charges for the period in question should either be borne by the defaulting respondents or NTPC itself. They argued that they dutifully complied with the provisions of the BPSA and the notifications and made timely payments of all the dues, and could not be penalized for

faults of other Bulk Power Customers in the Region. Per contra, Shri Goel supported the bills raised on the petitioner and the amount securitized under the Tripartite Agreement. The Commission had given opportunities to the parties to resolve the dispute amicably, through mutual discussions. They have, however, not been able to arrive at any amicable settlement.

20. The following issues arise for our consideration:

- (a) Whether the petition is barred by limitation or suffers from delay and laches?
- (b) Whether the principle of *res judicata* or constructive *res judicata* is applicable to the present proceedings?
- (c) Whether the petitioner has waived its right to recover an amount of Rs.6.45 crore by securitizing the amount along with late payment surcharge as payable while signing the Tripartite Agreement?
- (d) Whether NTPC had correctly applied the provisions of the tariff notifications read with the BPSA?
- (e) Relief?

### **Bar of Limitation**

21. The bills for the month of October 1998 were raised by NTPC in November 1998. It is, however, seen that the petitioner through its letter dated 2.12.1998 returned the bills to NTPC for its reconsideration on the ground that it could not be made to bear the burden of the entire fixed cost of the generating stations for the period of regulation of power supply to WBSEB and DVC and furnished its own calculations of fixed charges payable. NTPC, however, as seen from its letter dated

20.1.1999 sought to persuade the petitioner to admit the bills, pointing out that the issue was being deliberated at EREB level and the bills could be revised based on the agreed/acceptable solution on the issue of apportionment of fixed charges. From the reply filed by Member-Secretary, EREB, it is seen that the matter was deliberated at 91<sup>st</sup>, 92<sup>nd</sup> and 93<sup>rd</sup> EREB meetings held on 29.5.1999, 24.8.1999 and 17.12.1999 respectively. Similarly, the issue was also discussed at 93<sup>rd</sup> and 94<sup>th</sup> TCC meetings preceding the EREB meetings held during August 1999 and December 1999. The consensus in these meetings was that NTPC should absorb the resultant abnormal cost hike since it was difficult for the beneficiaries (Bulk Power Customers) to realise that extra cost from their consumers. However, no definite view could be taken in those meetings since NTPC was not agreeable to the consensual view. The issue was also discussed subsequently in the special meetings of TCC members of Eastern Region in January 2000 and September 2000 but no satisfactory solution could be found. It also transpires that the issue was deliberated between the petitioner and NTPC on 9.9.2000 and also on 29/30.5.2001 when it was decided to discuss the matter further for settlement, as noticed from its letter dated 16.11.2005. The records indicate that the petitioner took up the matter with NTPC by its letter 11.8.2005 for settlement of the dispute arising out of payment of bills for October 1998. NTPC, however, declined to give any relief to the petitioner, by pointing out that billing was done as per the notifications issued by the Central Government. NTPC, while relying upon the petitioner's letter 22.11.2002 addressed to the State Government of Orissa also pointed out that the petitioner itself had verified the bills at the time of securitization of the past outstanding dues as on 30.9.2001. Therefore, according to NTPC, the issue stood settled. The present petition was initially filed on 13.3.2006,

within 4 months of the reply from NTPC and refiled on 11.9.2006 after settling office objections.

22. In the light of these facts we have to see whether the petition is barred by limitation or suffers from delay and laches.

23. The Act does not lay down any period of limitation for adjudication of disputes under clause (f) of sub-section (1) of Section 79 thereof. In the absence of any period of limitation in the Act, the provisions of the Limitation Act, 1963 cannot be applied to the proceedings before the Commission since, as held by the Hon'ble Supreme Court in Nityananda M. Joshi Vs LIC [(1969) 2 SCC 199], Limitation Act deals with applications before the "courts", and not quasi judicial bodies. Further, in Sakuru Vs Tanaji [(1985) 3 SCC 590], the Hon'ble Supreme Court categorically held that Limitation Act does not apply to the appeals or applications before quasi judicial tribunals, notwithstanding the fact that such bodies may be vested with certain specified powers conferred on courts under Code of Civil Procedure or Criminal Procedure Code, as extracted below:

".....the provisions of the Limitation Act, 1963 apply only to proceedings in "courts" and not to appeals or applications before bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a court, the Limitation Act, as such, had no applicability to the proceedings before him. ...."

24. Taking note of the law laid down by the Hon'ble Supreme Court in above cases, the Commission, in its order dated 31.7.2008 in Petition 32/2006 (NTPC Vs UPPCL and others) has held that in the absence of any period of limitation prescribed

under the Act, the Limitation Act is not applicable to cases before it. By applying the same principle, present petition cannot be said to be barred by limitation.

25. It is further noticed that the dispute raised by the petitioner remained under discussion between the petitioner and NTPC for a long time since December 1998 either at EREB forum or mutually. From the record it becomes clear that only in November 2002 the petitioner accepted the liability to pay the fixed charges claimed by NTPC while reconciling the outstanding dues with NTPC for the purpose of securitisation, and that too by showing this as “the disputed amount”. Later on, the petitioner under its letter dated 11.8.2005 approached NTPC for a settlement. In reply, in its letter dated 16.11.2005, NTPC categorically rejected the petitioner’s claim stating that the dispute stood settled. NTPC has not shown any evidence that prior to its letter dated 16.11.2005, any categorical rejection of the claim was conveyed to the petitioner. The present petition has been filed after receipt of categorical reply from NTPC. We do not find any unreasonable delay on the part of the petitioner to approach the Commission for settlement of its claim. It is, therefore, difficult to hold that the petitioner has sought to revive an issue after lapse of 8 years.

26. In the light of preceding discussion, we hold that the present petition is neither barred by limitation nor does it suffer from undue delay and laches.

**Res judicata/Constructive Res judicata**

27. NTPC has further pointed out that the issue similar to the one raised in the present petition was raised in Petition No.27/2004 wherein the present petitioner was impleaded as a respondent. After disposal of the said petition, the present petition is

barred by application of the principle of *res judicata* or constructive *res judicata*, it has been contended.

28. Petition No.27/2004 was filed by NTPC complaining non-payment of its dues by BSEB for the energy supplied during October 1998. NTPC sought arbitration/adjudication of the dispute, claiming an amount of Rs.90.09 crore against BSEB. Subsequently, NTPC settled the dispute with BSEB through negotiation and withdrew the petition. NTPC has invoked the principle of *res judicata*/constructive *res judicata* under these circumstances.

29. It is settled law that the principle of *res judicata*/constructive *res judicata* is applicable only where the previous decision has been arrived at on merits after hearing. This principle of law follows from the decision of Hon'ble Supreme Court in Ram Gobinda Dawan v. Bhaktabala, [(1971) 1 SCC 387] wherein the Hon'ble Supreme Court held that:

“25. It will be seen from the above reasoning that in order to operate as *res judicata*, the previous decision must have been given after the matter was heard and finally decided on merits. This Court has further held that the High Court, in that case, when it dismissed the two appeals in question, though on a preliminary ground of limitation or default in printing, must be considered to have heard and finally decided on merits. Far from supporting Mr Mukherjee's contention that a decision given in default of appearance under any circumstance, operates as *res judicata*, the above decision lays down clearly that previous decision to operate as *res judicata* must be one in a case heard and finally decided on merits.”

30. A similar view was expressed by the Hon'ble Supreme Court in Ferro Alloys Corpn. Ltd. v. Union of India, [(1999) 4 SCC 149] as noticed from the observation that:

“Now it has to be kept in view that before any issue is said to be heard and finally decided, the court considering it has to be shown to have expressly considered such an issue and to have decided it one way or the other and such decision should have obtained finality in the hierarchy of proceedings. Then

only such an issue can be said to be heard and finally decided between the parties.”

31. In the light of facts narrated above, it is difficult to agree with the contention of NTPC that the present petition is barred by the principle of *res judicata*/constructive *res judicata* on withdrawal of the petition by NTPC. The Commission neither adjudicated upon the dispute in the petition nor did it express any opinion on merits of the case. Therefore, it cannot be held that the controversy raised in the present petition was finally concluded by the Commission in its order in Petition No.27/2004, a condition precedent to invoke the principle of *res judicata* or constructive *res judicata*. Therefore, principle of *res judicata*/constructive *res judicata* cannot be pressed by NTPC in the facts and circumstances of the present case.

#### **Waiver of Right of recovery by the Petitioner**

32. NTPC in its reply has submitted that the petitioner, after entering into one time settlement of the past dues abandoned all its claims, including the claim arising out of alleged excess billing of fixed charges for the month of October 1998. In support of its contention, NTPC has relied upon the petitioner’s letter dated 22.11.2002 addressed to the State Government of Orissa, according to which, the outstanding dues of NTPC as on 30.9.2001 stood reconciled and an amount of Rs.1102.86 crore was shown as payable to NTPC. According to NTPC, silence of the petitioner about the disputed amount in its report to the State Government amounts to waiver of its right to raise the dispute.

33. The petitioner has contested the correctness of the contention of NTPC. It has placed on record certain documents which reveal that the petitioner had been insisting upon the dispute while seeking reconciliation of the outstanding dues.

34. In its letter dated 13.11.2002, the petitioner informed NTPC that it had provisionally accepted an amount of Rs.7.267 crore (appears to include late payment surcharge against the disputed amount of Rs.6.45 crore) against the bill of Rs.16.02 crore for the month of October 1998, giving full details of the provisionally accepted amounts, the generating station-wise. It is further observed that the petitioner's letter dated 22.11.2002 was preceded by joint reconciliation of the outstanding dues. The joint reconciliation statement has been signed on 15.11.2002 by the representatives of the petitioner and NTPC. In the signed statement the amount claimed by NTPC on account of regulation of power supply during October 1998 though admitted, has been shown as "the disputed amount". In these circumstances, the petitioner cannot be said to have waived or abandoned its claim at the time of settlement of past outstanding dues.

#### **Applicability of Ministry of Power notifications**

35. NTPC has contended that fixed charges for the month of October 1998 were recovered based on the notifications, the relevant part of which is extracted above. At first blush, the interpretation adopted by NTPC appears to be convincing. However, as we delve deeper into the argument, it falls flat. The interpretation ignores the age-old principle that application of law should be consistent with justice, equity and good conscience. The purpose of law is to mete out justice or, in other words, to prevent injustice or miscarriage of justice. This principle is emphasized in the judgment of the

Hon'ble Supreme Court in Narashimaha Murthy v. Susheelabai (Smt), [(1996) 3 SCC 644] wherein the Hon'ble Supreme Court declared that:

“20. ....Singular includes plural under Section 13(2) of the General Clauses Act, 1897 and may be applied to Section 23 as it is not inconsistent with the context or subject. Even without resorting to it or having its aid for interpretation, by applying common sense, equity, justice and good conscience, injustice would be mitigated. After all, as said earlier, the purpose of law is to prevent brooding sense of injustice. It is not the words of the law but the spirit and internal sense of it that makes the law meaningful. The letter of the law is the body but the sense and reason of the law is the soul. Therefore, pragmatic approach would further the ends of justice and relieve the male or female heir from hardship and prevent unfair advantage to each other. It would, therefore, be just and proper for the court to adopt common sense approach keeping at the back of its mind, justice, equity and good conscience and consider the facts and circumstances of the case on hand.....” (Emphasis added)

36. It has been held by the Hon'ble Supreme Court in M. Subba Reddy v. A.P.S.R.T.C. [(2004) 6 SCC 729] when two interpretations are possible, the one which promotes justice and equity should be preferred. In this judgment it was held by the Hon'ble Supreme Court that although hardship cannot be a ground for striking down a law but when two views are possible, it is permissible in law that the court shall interpret the statutory provisions in such a manner so that possible hardship is avoided.

37. The notifications are to be interpreted and applied by extending the golden rules laid down by the Hon'ble Supreme Court. The straight application of the formula for recovery of fixed charges, employed by NTPC, is opposed to the principle of justice and equity and visits the petitioner with penal consequences. NTPC had resorted to regulation of power supply to WBSEB and DVC for its own benefit, to put pressure on them to extract recovery of its dues. In the process, unwarranted burden could not have been put on the petitioner. Interpretation and application of the notifications in the manner made by NTPC was not contemplated for the reason that none of the notifications, even those issued after signing of the BPSA, specifically

cover regulation of power supply by NTPC. Therefore, in our view, NTPC has misconstrued the relevant provisions of the notifications providing for monthly recovery of fixed charges. The formula for apportionment of fixed charges given in the notifications in the event of regulation of power supply to one or more Bulk Power Customers was not intended to be applied. The notifications which have over-riding effect, as per the BPSA, provide for levy of late payment surcharge but do not contain any provision for regulations of power supply. Thus, the notifications cover recovery of fixed charges in the normal circumstances. Therefore, in our opinion, the formula for recovery of fixed charges specified under the notifications cannot be pressed into service in abnormal situations, such as regulation of power supply of some of the beneficiaries and not all of them.

38. Article 9 of the BPSA, which contains the *force majeure* provisions, mandates the parties to enforce due compliance of the terms of the BPSA. However, it is also provided that a party shall not be liable for any claim for any loss or damage, etc, for the specified reasons, including for any reason beyond control of concerned party. The regulation of power supply by NTPC to WBSEB and DVC was not for any reason attributable to the petitioner. On the contrary, it was beyond its control, and was resorted to because of default committed by WBSEB and DVC in payment of dues of NTPC. By virtue of *force majeure* provisions contained in Article 9 of the BPSA, the petitioner cannot be made to pay for the loss or damage of fixed charges suffered by NTPC for regulation of power supply to WBSEB and DVC. The *force majeure* provisions in the BPSA exonerate the petitioner from applicability of the provisions of clause A.7.5 of the Appendix. This is another reason on account of which the petitioner is not liable to share the excess fixed charges for the period of regulation.

39. Now we consider the scope of clause A.7.5 of the Appendix. This clause authorizes NTPC to resort to regulation of power supply in case its dues remain unpaid for a continuous period exceeding two months. In such a situation, NTPC was empowered to advise EREB (the second respondent) to exclude the allocation of defaulting entity from scheduling and energy accounting and treat its share as unallocated power. The clause vests authority in the Central Government or NTPC to issue necessary directions for reallocating the share of the defaulting entity to other Bulk Power Customers. Nothing has been placed on record to show that any effort was made by the Central Government or NTPC to reallocate the share of WBSEB and DVC whose power supply was being regulated, to the petitioner or any other Bulk Power Customer in terms of clause 2.7.5 or clause 2.4 of the Appendix applicable to allocation of unallocated capacity. On the contrary it has been found that NTPC altogether stopped generation of power at the generating stations during the period of regulation and yet has claimed the fixed charges from the petitioner and the Bulk Power Customers, other than the regulated entities. For the reason that the procedure laid down under the BPSA was not complied with, NTPC cannot resort to recovery of fixed charges for the period of regulation from the petitioner.

40. Thus, on merits on analysis of the provisions of the notifications and the BPSA our conclusion is that the petitioner had no liability to pay for the fixed charges, except for its own legitimate share. In this view of the matter, billing of fixed charges by NTPC to the petitioner on account of regulation of power supply to WBSEB and DVC was not authorized.

## **Relief**

41. The petitioner has claimed refund of the disputed amount along with interest. The petitioner's claim for excess billing is contained in its letter dated 2.12.1998 addressed to NTPC. The petitioner furnished the detailed calculations in support of its contention. NTPC has not contested the correctness of the amount either in response to the petitioner's letter dated 2.12.1998 or in the proceedings before the Commission. Therefore, the correctness of the amount claimed is beyond doubt. Further, we find that the scheme for settlement of SEB dues attached as Annexure `A' to the Tripartite Agreement contains provisions for resolution of disputes relating to payments. Clause 10.1 of the Annexure provides as under:

“10.1 Disputes relating to payments dues shall be resolved in accordance with the due process of law. As and when a dispute is settled, the amount awarded shall be payable in the manner specified in paragraph 8, as if the bonds had been issued as on 01.10.2001, with the exception that the rate of interest for the period between 01.10.2001 and the actual date of securitization shall be 12 per cent per annum, to be paid upfront. Similarly, any amounts required to be refunded by the CPSUs shall be adjusted through cancellation of equivalent bonds with retrospective effect as from 01.10.2001, along with refund of interest calculated @ 12% per annum.”

42. Clause 10.2 provides that while determining the dues to be settled under the scheme, no dispute arising from fixation of tariff or coal price is to be reckoned, but when such a dispute is settled separately through the due process of law and any amount is due to be refunded to the SEB, it shall be refunded in the manner specified in clause 10.1

43. The petitioner has claimed interest in accordance with clause 10.1 of the settlement scheme on the disputed amount sought to be refunded. NTPC has opposed the petitioner's claim towards interest on the plea that dispute falls under clause 10.2. In our opinion, the present dispute raised by the petitioner does not fall

within the scope of clause 10.2 since it neither relates to fixation of tariff nor to coal price. The dispute raised seeks settlement of the excess amount securitized in favour of NTPC. The dispute is clearly referable to clause 10.1 of the settlement scheme.

44. To sum up, we direct NTPC to refund the disputed amount claimed by the petitioner, as also the late payment surcharge capitalized and securitized, along with interest @ 12% per annum from 1.10.2001, till the date of payment, in terms of clause 10.1 of the settlement scheme. The amount refundable shall be adjusted through cancellation of equivalent amount of bonds as laid down in clause 10.1.

#### **Concluding Remarks**

45. We make it clear that we have not decided the issue whether or not NTPC can claim this amount from the regulated entities since the issue is considered to be beyond the scope of the present proceedings initiated at the instance of the petitioner. We have, therefore, left this question open and undecided. Similarly, we also make it clear that this order shall not reopen the dispute relating to the payment of fixed charges for the month of October 1998 settled by NTPC with any other Bulk Power Customer through mutual negotiations.

46. With this order, Petition No.16/2006 stands disposed of. No order as to costs.

#### **Petitions Nos. 152/2007 and 153/2007**

47. The petitioners have established export-oriented ferro alloy units in the State of Orissa. In October 1994, the Central Government, Ministry of Power is said to have decided to allocate 110 MW of off-peak power against its unallocated quota from the

generating stations of NTPC in Eastern Region for supply to export-oriented ferro alloy units, which include the units established by the petitioners. The power was supplied to these units through Orissa State Electricity Board and after re-organisation of electricity sector in the State of Orissa, it is supplied power through the Grid Corporation of Orissa Limited (GRIDCO) at the tariff notified by the Central Government and presently this Commission. It has been averred that when the petitioners received energy bills for the months of October and November 1998 from GRIDCO for drawal of power during off-peak hours, the bills were found to be exorbitantly high. On an inquiry into the reasons for steep hike in energy bills, the petitioners are said to have learnt that it was on account of regulation of power supply by NTPC to WBSEB and DVC for non-payment of NTPC dues. The petitioners reportedly took up the matter with Ministry of Power for its intervention and issuing necessary instructions to CEA and GRIDCO for bringing down the tariff to reasonable rates.

48. The petitioners have submitted that a high level meeting, presided by the Secretary (Power), was held in Ministry of Power on 25.8.1999, to discuss the high tariff for the power specifically allocated from NTPC generating stations to the export-oriented ferro alloy units. In the said meeting, it was agreed that the petitioners deserved relief. It was felt that they should be liable to pay tariff as applicable for the month of September 1998. It was also decided that the proposal in this regard would be worked out by CEA and submitted to Ministry of Power for approval. The petitioners have narrated the other efforts made at EREB fora to sort out the issue. We have already referred to them above in detail while dealing with Petition No. 16/2006. Under these circumstances, the petitioners have sought directions to NTPC

for revision of energy bills for the months of October and November 1998 and to implement the decision dated 25.8.1999 arrived at during the meeting held in Ministry of Power. It appears that only part payments have been made by the petitioners against the bills for the months of October and November 1998 and they feel that after revision of the bills, the question of payment of surcharge for delayed settlement should not arise since the amount payable is likely to be reduced.

49. GRIDCO, in its reply, has submitted that increase in rate of power supplied to the petitioners for the month of October 1998 was on account of regulation of power supply by NTPC to WBSEB and DVC. As regards the month of November 1998, GRIDCO has stated that per unit cost was higher on account of aggregate less drawal by the constituents of Eastern Region, which could not be attributed to regulation of power supply by NTPC as there was no such regulation in the month of November 1998. GRIDCO has opposed the case pleaded by the petitioners regarding payment of delayed payment surcharge.

50. NTPC, in its reply, has denied privity of contract with the petitioners since they were receiving power supply from GRIDCO. It has also pointed out that consequent to the meeting held in Ministry of Power on 25.8.1999, the matter was examined by CEA who, vide its letter dated 10/13.10.2000, conveyed to the petitioners that average tariff of NTPC power supplied during the year 1998-99 as a whole was only marginally higher than the average tariff charged for the previous year, i.e., 1997-98. CEA concluded that the marginal increase in the rate was primarily on account of increase in fuel price component which was 26.57 paise/kWh in 1997-98 and 30.68 paise/kWh in 1998-99. In these circumstances, CEA is said to have advised the petitioners to

make payments to GRIDCO for the energy drawn from NTPC generating stations. From CEA's reply dated 10/13.10.2000 it follows that the decision arrived at in the meeting in Ministry of Power for charging tariff as applicable for September 1998 was no longer implementable.

51. In the earlier part of this order, while dealing with Petition No. 16/2006, we had come to the conclusion that NTPC was not justified to charge fixed charges at the enhanced rate for the period of regulation of power supply from 11.10.1998 to 31.10.1998. We have directed NTPC to refund the excess amount securitized, along with interest @ 12% per annum. With the implementation of the directions, the petitioners will be extended the benefit by GRIDCO for the month of October 1998. So far as the month of November 1998 is concerned, we do not propose to interfere with the tariff billed by GRIDCO for the reasons that the petitioners have not been able to show that the tariff charged was *de hors* the notifications or was invalid on any other ground. We are inclined to accept the view of CEA, that the marginal increase in average cost was on account of increase in fuel cost. It could also be attributed to less drawal of power by the Eastern Region beneficiaries during the month as explained by GRIDCO.

52. With the above directions, these petitions also stand disposed of.

**Sd/-**  
**(R. KRISHNAMOORTHY)**  
**MEMBER**

**Sd/-**  
**(BHANU BHUSHAN)**  
**MEMBER**

**New Delhi, dated 30<sup>th</sup> September 2008**