CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 9/RP/2015
in
Petition No. 68/MP/2013

Coram:
Shri Jishnu Barua, Chairperson
Shri Ramesh Babu V, Member
Shri Harish Dudani, Member
Shri Ravinder Singh Dhillon, Member

Date of Order: 29th March, 2025

In the matter of

Review of the Commission's order dated 7.5.2015 in Petition No. 68/MP/2013 pertaining to the revision of the Pooled lignite price on account of inclusion of Mine-II Expansion lignite cost for the period from 2010-11 to 2013-14.

And

In the matter of

Implementation of the judgment dated 3.7.2024 of the Appellate Tribunal for Electricity in Appeal No.49/2016 (NLC v TANGEDCO & ors)

And

In the matter of

NLC India Limited,
135/73, EVR Periyar High Road, Kilpauk,
Chennai-600 010, Tamil Nadu ..... **Review Petitioner**

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited, 7th Floor, Eastern Wing,144,
Anna Salai, Chennai-600 002

2. Kerala State Electricity Board Limited,
9th Floor, Vidyuth Bhavanam, Pattom,
Thiruvananthapuram-695 004

3. Power Company of Karnataka Limited,
Kavery Bhavan, Bangalore-560 009

4. Andhra Pradesh Power-Co-ordination Committee,
Vidhyuti Soudha, Khairatabad, Hyderabad-500 082

5. Puducherry Electricity Department,
Beach Road, Puducherry-605 001 …. **Respondents**

Parties present:

Ms. Swapna Seshadri, Advocate, NLCIL
Ms. Ritu Apurva, Advocate, NLCIL
Shri Karthikeyan Murugan, Advocate, NLCIL
Shri Duthala Tulasi Kumar, NLCIL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Ms. Aakansha Bhola, Advocate, TANGEDCO

ORDER

Background

The Review Petitioner is an integrated mining-cum-power company, with core activities of lignite excavation and power generation, using lignite from the captive mines. The lignite mined from the NLC mines is utilized for the generation of power from the thermal generating Stations of NLC. All Southern States, including the Union Territory of Puducherry and the State of Rajasthan, are the beneficiaries of the power generated from the NLC plants. The Government of India, vide its letter dated 18.10.2004, sanctioned an integrated project consisting of NLC Mine-II (Expansion) with a capacity of 4.5 million tonnes per annum and Thermal Power Station-II (Expansion) with two units of 250 MW each

2. Petition No. 68/MP/2013 was filed by the Review Petitioner for revision of the Pooled lignite prices for the period from 2010-11 to 2013-14 by pooling the expenditure of Mine-II Expansion, with the existing pooled expenditure of Mine-I Expansion, Mine- IA and Mine-II, in terms of the Ministry of Coal, GOI guidelines dated 2.2.1998 and the Commission disposed of the same vide its order dated 7.5.2015, holding as under:

> "*25. …. In our view, in the light of the basic principle approved by the Cabinet and conveyed through the MoC letter dated 2.2.1998, NLC Mines II Expansion as and when it goes into production shall be included in the pooled lignite price since the lignite produced from Mine II Expansion is also used in the TPS II and other generating stations of NLC.*

26…. We are of the view that production of lignite from Mine-II (Expansion) and commissioning of TPS-II (Expansion) should have been matched for the purpose for which Mine-II (Expansion) has been developed. However, the generation project TPS-II (Expansion) has been delayed due to certain unforeseen problems and Mine-II (Expansion), having achieved COD in March, 2010, started production of lignite. The lignite produced from Mine II expansion is supplied to the existing generating stations of NLC and to other users of lignite. In other words, the lignite production from Mine-II (Expansion) is meeting the additional fuel requirements of the existing generating stations of NLC and in the absence of such supply from NLC-II Expansion, the additional fuels would have been sourced from alternative sources for generation of power and the cost of fuel would have been included in the energy cost. Looked at from this angle, inclusion of the cost of Mine II Expansion in the pooled lignite price is in the interest of beneficiaries. If the pooling of the lignite price from the date of commissioning of Mine II Expansion is not allowed from the date of its commissioning, it would give adverse signal for further investment as the project developer would not be able to earn adequate return during the period of delay in the commissioning of the integrated generating station. Considering the above factors, the pooling of lignite price of Mine-II (Expansion) is allowed from the date of commissioning of NLC Mines II Expansion.

31. In order to balance the interest of beneficiaries on account of inclusion of the cost of Mines II Expansion in the pooled price without commissioning of TPS II Expansion, we direct that any incentive earned corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage-I and Stage-II stations shall be refunded to the beneficiaries corresponding to their allocation from TPS-II Stage-I and Stage-II. Further, the revenue earned by selling lignite to outside agencies shall be apportioned to the beneficiaries corresponding to their share of power in the stations where pooled lignite price approved by the Commission is applicable for computation of energy charges."

3. Aggrieved by the abovesaid order dated 7.5.2015 (in short, 'the impugned order'), Review Petition (Petition No. 9/RP/2015) was filed by the Review Petitioner, seeking review, on the ground of error apparent on the face of the impugned order, on the following issues:

(a) The incentive earned by NLC corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage I and Stage-2 generating stations shall be refunded to the beneficiaries; and

(b) The revenue earned by selling lignite to outside agencies shall also be accounted for the benefit of the beneficiaries.

4. The Commission, vide its order dated 21.1.2016, disposed of the Review Petition rejecting the issue (a) above. However, with regard to issue (b), the prayer of the Review Petitioner was allowed, and the impugned order dated 7.5.2015 was modified as under:

"18. ……Accordingly, in terms of Regulation 103A of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, as amended on 12.11.2013, the prayer of the petitioner for review of order on the second aspect i.e. regarding revenue earned

by sale of surplus lignite to outside agencies is considered and allowed. Therefore, the impugned order is modified to this extent that any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilization Factor of 85% of Mine-II Expansion up to the commissioning of first unit of TPS-II Expansion shall be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges."

5. The Review Petitioner challenged the order dated 21.1.2016 before the Appellate Tribunal for Electricity (APTEL) in Appeal No.49/2016 (NLC v TANGEDCO & ors) on the following issues:

A) *Non-entitlement of any incentive beyond 75% of the Normative Annual Plant Availability Factor (NAPAF); and*

B) *Passing on the entire profit on sale of lignite by NLC to third parties.*

6. The APTEL, vide its judgment dated 3.7.2024, while allowing the appeal on the issue (A) above, rejected the prayer of the Review Petitioner with regard to the issue (B) and remanded the matter (Review Petition 9/2015) to this Commission for passing the order afresh. The relevant portions of the judgment are extracted below:

"119. Therefore, we agree with the submission of the Appellant that there is no requirement for a Review Order to have a finding of merger, the moment any issue is allowed in a Review the original decree gets modified/reversed/vacated and especially since both the main and the Review Order are passed in tariff proceedings
xxx
121. Let us first take up the issue of Incentive
Xxx
125. Further, pooling of cost is also to be governed by the MoC guidelines, however, the CERC, considering the benefits for the beneficiaries, has allowed pooling of cost, which is in compliance with MoC guidelines.
126. Despite it, such pooling of cost has not been challenged by the beneficiaries nor by the Appellant, therefore, the decision of the CERC to such an extent is in force as on date.
xxx
130. Once the Regulations are framed, the CERC cannot deviate from the Regulations, so long the Regulations are in force, the same are binding and ought to be followed
Xxx
135. The CERC should have dealt the issue of pooling of cost more prudently within the provisions of the applicable Regulations
xxx
141. Additionally, the Appellant submitted that Regulation 25(3) of Tariff Regulations, 2009 provides for sharing in gains from secondary fuel oil to be shared by the parties in the ratio of 50:50, wherever any gains are to be shared, it is specifically provided for and there is no such provision for incentive, it needs to be considered by the CERC whether Regulation 25(3) is applicable in case of incentive.

142. Thus, Impugned Order deserves to be set aside as contrary to the CERC Regulations.

143. The second is issue is regarding the sharing of profit from sale of lignite.

xxx

150. We find such an argument totally unacceptable, any Government controlled company is bound by certain norms and need to perform for the benefit of the country, it cannot merely perform for earning profits only, such submissions are unnecessary and are strongly condemned

xxx

155. Accordingly, we are satisfied that the CERC has rightly adjudged the issue and deserves to be upheld.

156. As already noted, on the first issue, we agree with the submission of the Appellant for setting-aside the Review Order on the ground that the Impugned Order is contrary to settled principle of law in the light of the judgment of the Supreme Court in PTC India Limited V. Central Electricity Regulatory Commission (2010) 4 SCC 603, para 54 to 56, the Central Commission is bound by its own Regulations, the Review Order is set aside.

157. The Central Commission is directed to pass order afresh for pooling of lignite cost under the provisions of law"

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 49 of 2016 has merit and is allowed to the extent as concluded herein above.

The Impugned Order dated 21.01.2016 passed by the Central Electricity Regulatory Commission in Review Petition No. 9 of 2015 filed in Petition No 68 of 2013 is set-aside and remanded to the Central Electricity Regulatory Commission for passing the Order afresh.

Hearing dated 27.9.2024

7. Pursuant to the directions of APTEL as above, the Review Petition was listed on 27.9.2024 and the Commission, after hearing the submissions of the learned counsel for the Review Petitioner and the learned counsel for the Respondent TANGEDCO, at length on the findings of the APTEL in its judgment, directed both, the Petitioner and Respondent TANGEDCO, to 'frame the issues' for adjudication in terms of the said judgment and to file the same vide separate affidavits, along with their written submissions. In compliance with the above directions, Reply has been filed by the Respondent TANGEDCO vide affidavit dated 8.10.2024/18.10.2024 along with the Note of issues, and the Review Petitioner has also filed its Note of issues dated 18.10.2024. Respondent KSEBL has filed its reply affidavit dated 13.11.2024.

Reply of the Respondent TANGEDCO

8. The Respondent TANGEDCO in its reply affidavits, mainly submitted the following:

TANGEDCO's contentions before APTEL

(a) The excess generation beyond NAPAF of 75% in respect of TPS-II (Stage-I and Stage-II) and TPS-I expansion is achieved only by the utilization of lignite excavated from Mine-II expansion, which is not meant for TPS-II (Stage-I and Stage-II) and TPS-I expansion.

(b) The Commission, upon considering the above facts, issued an order directing the refund of incentive earned beyond NAPAF of 75% level, as there is no loss on the part of the appellant (NLC) since it is getting the full capacity charges for the generation beyond 75%.

(c) In respect of the sale of lignite to outside agencies from Mine-II expansion, any additional profit earned by sale of lignite to outside agencies over and above the capacity utilization factor of 85% of Mine-II Expansion up to the commissioning of the first unit of TPS-II Expansion, shall be apportioned to the beneficiaries.

APTEL's observation and directions

(d) With regard to the issue of sharing of incentive earned in TPS-II, APTEL observed that there is no approval either for the pooling of Mine-II expansion with the existing mines or diversion of lignite from the said integrated project to the other project. The observations and directions of APTEL are extracted below:

> *"123. Further, entire capacity of 4.5 million tonne per annum of lignite to be mined from Mine-II expansion is allocated to the beneficiaries' project i.e. TPS-II expansion, therefore, any sale from such mine or diversion to other projects of NLC has to be governed by the guidelines of MoC.*
>
> *124. On being asked, we could not find any reply on the issue of diversion of lignite from the said integrated project.*
>
> *133. Even, if we agree with the argument of the CERC that there were shortages in the availability of lignite for the projects of NLC and thus would not have achieved higher NAPAF resulting into extra incentive to it, the prevailing Regulations cannot be ignored, in fact, if the CERC had not allowed pooling of price for Mine-II expansion and utilization of lignite from this mine in other projects, there would not have extra enrichment to NLC at the cost of end consumers.*
>
> *135. The CERC should have dealt the issue of pooling of cost more prudently within the provisions of the applicable Regulations.*
>
> *142. Thus, Impugned Order deserves to be set aside as contrary to the CERC Regulations.*
> *157. The Central Commission is directed to pass order afresh for pooling of lignite cost under the provisions of law.*

(e) Thus, the Commission's order in respect of pooling the lignite price of Mine-II Expansion from 2010 has been set aside and has to be revisited afresh. As per the judgment dated 5.7.2024 of APTEL in Appeal No. 95/2024 (MSEDCL v MERC & ors), consideration of any parameter that is not available as per the regulation cannot be admitted.

(f) With regard to the issue of sharing of sale proceeds (over 85% CUF) with beneficiaries, APTEL concurred with the decision of the Commission to share the profit earned from the sale of lignite to the third parties extracted from Mine-II Expansion. The same shall be shared on a pro-rata basis with the beneficiaries of the TPS-II Expansion.

TANGEDCO's submission on 'issues for adjudication'

(g) The capital cost of a mine is recovered through the energy charges of the integrated station to be commissioned along with the commissioning of the Mine. Further, the capital costs of the existing mines are recovered through the energy charges of the existing power plants linked to the corresponding mines. Under such circumstances, the pooling of LTP of Mine-II Expansion by combining with the existing mines, without commissioning the integrated station, will impose additional tariff liability for the same quantum of energy from the existing stations.

(h) Moreover, only at the behest of the Review Petitioner, the NAPAF of TPS-II station was fixed as 75% as against the 85% norms, as the Review Petitioner reported difficulty in the availability of lignite for the station.

(i) As per the APTEL's judgment, the pooling of tariff shall be done afresh under the provisions of law. Hence, fresh orders are to be issued by the Commission with respect to the pooling of tariffs, taking into consideration the applicable rules and notifications. Since there are no notifications/guidelines for pooling the lignite price of Mine-II expansion, as observed by APTEL, the cost of Mine-II expansion in the pooled cost, without commissioning of the TPS-II Expansion for the period from 12.3.2010 till the commissioning of the Station on 5.7.2015 shall be excluded from the pooled cost.

(j) Regarding the lignite used from Mine-II Expansion in other stations, the lignite cost as applicable for the linked mines of such stations may be calculated.

(k)After commissioning of the TPS-II Expansion, pooled cost shall be calculated by arriving at LTP of each mine, based on the CUF achieved each year. If the CUF is more than 85% in any of the mines, the LTP will be calculated as per the actual CUF achieved, and if the CUF is less than 85%, the same shall be restricted to the actual CUF achieved. This is as stipulated in the MoC guidelines dated 11.6.2009, applicable for the period.

(l) After arriving at the LTP of each mine, the pooled LTP shall be arrived at by taking an average of the LTP so arrived mine-wise. NLCIL may be directed to rework the LTP based on the judgment and furnish the necessary details.

Reply of the Respondent KSEBL

9. The Respondent KSEBL, in its reply, has narrated the issues raised by it before the Commission in Petition No 9/RP/2015 and before APTEL in Appeal No.49/2016. However, with regard to the judgment of APTEL (on remand), the submissions of the

Respondent are the same as those raised by the Respondent TANGEDCO above, and therefore, the same are not mentioned herein for the sake of brevity.

Note of Issues filed by the Review Petitioner, NLC

10. The Review Petitioner, in its 'Note of Issues' dated 18.10.2024, submitted the following:

(a) The APTEL has allowed the Appeal on the issue of incentive and rejected the issue of profit sharing on the sale of lignite.

(b) The present proceedings are only for determining and approving the consequential quantum of incentive that is to accrue in favour of NLCIL, pursuant to the decision of the APTEL.

(c) The contention of the Respondent TANGEDCO that the Commission is required to examine the issue of whether the cost of the mines of NLCIL is to be pooled or not, is grossly erroneous. In this regard, the following are relevant:

i. The Commission in its order dated 7.5.2015 in Petition No. 68/MP/2013, decided that in the light of the basic principle approved by the Cabinet and conveyed through the Ministry of Coal letter dated 2.2.1998, the NLC Mines II Expansion shall be included in the pooled lignite price, as the lignite is being used in the TPS II at the generating stations of NLC. In addition, the Commission also came to the conclusion that the availability of lignite from the Mines II Expansion and use for generation in the existing generating stations was to the benefit of the beneficiaries;

ii. NLCIL would be entitled to incentives in terms of the Tariff Regulations for TPS-II Stage-I and Stage-II for achieving higher availability than what was provided in the Tariff Regulations of the Commission;

(d) NLCIL filed a Review Petition on the above two issues, which were not allowed by the Commission in its order dated 21.1.2016. The said order also identifies the above two issues that were raised. This order was the subject matter of challenge before the APTEL.

(e) The issue of including the Mine-II Expansion for the use of the generating stations of NLCIL was fully accepted by both NLCIL as well as the beneficiaries, including TANGEDCO. There was no dispute with regard to the same. In any event, the Commission has been following the *Guidelines* of the Ministry of Coal as issued from time to time with regard to the pricing and use of lignite. The principle of pooling also flows from the *Guidelines* of the Ministry of Coal and had been followed by the Commission in the above order.

(f) An appeal was filed by NLCIL on the issue of the denial of incentive to NLC in terms of the Tariff Regulations framed by the Commission for achieving higher availability, higher than the norms, as provided for in the Tariff Regulations.

(g) The APTEL vide judgement dated 3.7.2024 decided the appeal. The issue identified by APTEL in Paragraph 120 is the *non-entitlement of any incentive over and above the*

75% normative availability. There was no issue raised or otherwise framed by APTEL on whether pooling is to be undertaken or not.

(h) In the said issue, in Paragraph 125, the APTEL specifically noted that the finding that the Commission had allowed the pooling of costs was considering the benefit of the beneficiaries, which was also in compliance with the *Guidelines* of the Ministry of Coal.

(i) Further, in Paragraph 126, the APTEL also specifically noted that the pooling of cost has not been challenged by the beneficiaries or NLCIL, and the order of the Commission to the said extent is in force.

(j) The APTEL in Paragraphs 128, 129 and 130 held that once the Regulations are framed, the same is binding on all, the Regulations cannot be deviated from and that NLCIL is entitled to incentive in accordance with the applicable Regulations, and therefore the order of the Commission was liable to be set aside.

(k) Paragraphs 131 to 138 of the decision of APTEL was in relation to the submissions raised by the Commission on the pooling of Mine II Expansion resulting in higher availability of lignite and consequently higher availability of the generating station. The contentions raised were, in fact, rejected.

(l) In any event, in Paragraph 139, the APTEL expressly held that all such contentions cannot be agreed to at this stage due to the applicability of the prevailing Regulations and that incentive ought to be granted to NLCIL.

(m) There is no ambiguity whatsoever in the above decision of APTEL, namely that in terms of the Tariff Regulations of the Commission, once the NAPAF has been determined, any availability over and above NAPAF is automatically entitled to incentive, which cannot be denied to NLCIL.

(n) The reliance on Paragraphs 134 to 138 by TANGEDCO, to contend that the APTEL has directed that pooling itself is to be reversed is wholly baseless, a thorough misreading of the decision of APTEL, and is liable to be rejected.

(o) Similarly, the reliance on Paragraph 157 of the decision, is also completely misplaced. Paragraphs 156 and 157 only reiterate the decision already taken on the 1st issue i.e, incentive, before the APTEL and the applicability of the decision in the case of *PTC India* that Regulations, once framed, are binding and cannot be deviated from. The direction in Paragraph 157 is in relation to the issues decided by the APTEL and cannot be misconstrued as opening the very issue of pooling.

(p) It is a well-settled principle of law that a judgement has to be read in the context of what was the issue raised and what has been decided. Reliance placed on *Fida Hussain & Ors vs Moradabad Dev. Authority & Anr 2011 (12) SCC 615*

(q) The contention of TANGEDCO that the very concept of pooling has to be reversed in the present remand proceedings, in terms of the decision of the APTEL, is misplaced for the following reasons:

(i) The APTEL has specifically held that the issue of pooling was not challenged by either of the parties. The pooling was in compliance with the *Guidelines* of the Ministry of Coal.

(ii) The issue raised was for incentive being denied in terms of the Tariff Regulations. Once the Regulations have been framed, the same are binding and cannot be deviated from.

(iii) In any event, the Commission does not determine the terms and conditions for lignite mining and its use but has been strictly following the *Guidelines* of the Ministry of Coal. The pooling is a stipulation of the said *Guidelines* of Ministry of Coal and in any case cannot be deviated from.

(iv) The appeal was against the Commission's order dated 21.1.2016 in Review Petition No.9/RP/2015, and the issue of incentive was the only subject matter of the said judgment and not the principle of pooling itself.

(r) The contention of TANGEDCO, if accepted, would result in a situation wherein the decision of the Commission on pooling, not challenged by TANGEDCO, is sought to be reopened in a proceeding initiated for implementing the decision of the APTEL in the appeal filed by NLCIL and was successful. TANGEDCO is seeking to place NLCIL in a position much worse than if NLCIL had not filed an appeal and succeeded. This is contrary to the basic principles of law and is liable to be rejected.

(s) The only issue that arises on the determination and approval of the incentive is that NLCIL is entitled to declaring availability over and above the NAPAF of 75%, in terms of the Tariff Regulations. The said computations are being filed by NLCIL by way of a separate affidavit, which can be taken on record by the Commission, and consequential orders can be passed.

Hearing dated 6.2.2025

11. The matters were listed on 28.11.2024 and 14.1.2025, but the parties could not be heard on account of the change in the counsel for the Respondent TANGEDCO and due to adjournment based on the consent of the parties. However, the Review Petition was heard on 6.2.2025 through virtual conferencing, wherein the learned counsel for the Respondent TANGEDCO, while pointing out that the APTEL judgement is an 'open remand,' made detailed oral arguments in support of the same. However, due to paucity of time, the learned counsel for the Petitioner could not make his rejoinder submissions. Accordingly, the Commission adjourned the matter. The matter was part-heard**.**

Hearing dated 25.2.2025

12. After hearing the learned counsels appearing for both the parties, at length, the Commission reserved its order in the matter. However, at the request of the learned

counsels, the Commission, permitted both the parties to file their written submissions along with the judgments relied upon by them. Subject to this, order in the Petition was reserved.

Written Submissions of the Review Petitioner, NLC

13. The Review Petitioner, in its written submissions dated 14.3.2025, mainly submitted as under:

(a) The present proceedings arising out of the APTEL judgment dated 3.7.2024, allowing the appeal of NLCIL on the issue of its entitlement to receive incentive for higher NAPAF, have been completely misdirected by the submissions of the Respondent TANGEDCO on the scope of remand.

(b) TANGEDCO accepted the order dated 21.1.2016 (without filing any appeal). Only NLCIL had challenged the above order before the APTEL, and TANGEDCO had not even filed any cross objections.

(c) The issue raised in the appeal was the non-grant of incentive for higher availability. TANGEDCO had only sought to defend the view taken by this Commission with regard to the entitlement of incentive of NLCIL before the APTEL. TANGEDCO cannot contend that the entire issue of the pooling of lignite cost has to be reopened. This is an ex-facie erroneous submission and is being made to defeat the judgment passed by APTEL in favor of NLCIL on the issue of incentive.

(d) Such submissions are also being made to avoid the adjustment of money that had been made by TANGEDCO (incentive of Rs. 72.69 crores + interest of Rs. 95.45 crores) totaling to Rs.168.14 crores from the bills of NLCIL, without giving any workings in six installments, from October 2022. These will now have to be reversed and paid to NLCIL along with interest/carrying costs.

Re: Plain reading of the APTEL judgment

(e) The submissions under para 10 above have been reiterated by the Review Petitioner and hence not mentioned herein, for the sake of brevity.

Re: Applicability of Order 41, Rules 4 & 33

(f) Though the judgment does not state that it had been passed in exercise of the powers under Order 41 Rule 4 and Rule 33 of the CPC, TANGEDCO contends that such powers have been exercised by the APTEL directing this Commission to relook at the concept of pooling.

(g) TANGEDCO relies on the judgment of the Hon'ble Supreme Court in Fisheries

Department, State of Uttar Pradesh vs. Charan Singh, (2015) 8 SCC 150, wherein the Hon'ble Court confirmed the exercise of powers under Order 41 Rule 33 of CPC to give relief to similarly placed Respondents on the issue of back wages even though he had not assailed the Order or made such a claim by filing a separate Writ Petition. The Respondents were similarly placed as the Plaintiff, and therefore, the Appellate Court exercised its power under Order 41 Rule 33 of CPC. Quite apart from the fact that the APTEL has not exercised its such powers in the present case, TANGEDCO was not similarly placed to NLCIL in any manner to have received such relief from APTEL.

(h) Firstly, the APTEL has clearly held that the appeal of NLCIL has been allowed. The APTEL has not held that the objections of TANGEDCO are allowed, applying the principles of Order 41 Rule 33. When the appeal of NLCIL is allowed, the grounds of challenge have been accepted to the extent provided for in the judgment. It cannot be the case that NLCIL's appeal is allowed, but TANGEDCO contends that NLCIL is to be placed in a worse off position.

(i) Apart from the above, TANGEDCO has also placed reliance on several other Judgements, which are all distinguishable. A table distinguishing the judgements relied upon by TANGEDCO on the issue of applicability of Order 41 Rules 4 & 33 are attached hereto and marked as **Appendix-A**

(j) TANGEDCO had also relied on Order 41 Rule 4 of CPC to trace the power of the APTEL to pass an order favorable to it in an Appeal filed by NLCIL. It is now well settled that not in every case, an order passed by APTEL can be justified by adverting to Order 41 Rule 4 and Rule 33 of CPC. The judgment of the Hon'ble Supreme Court in Banarsi and Ors. vs. Ram Phal (2003) 9 SCC 606 (**Appendix-B**), refers to all earlier judgments and lays down the following principles:

(i) The objective to be achieved by Rule 4 and Rule 33 is to avoid a situation of conflicting decrees coming into existence in the same suit;

(ii) The objective is to avoid inconsistency, inequity, and inequality in reliefs granted to similarly placed parties;

(iii) To avoid an unworkable decree coming into existence;

(iv) The power under the Rule cannot be used to reverse a part of the decree which essentially ought to have been appealed against or objected to by a party, which that party has permitted to achieve finality

(k) The Rule does not confer an unrestricted right to reopen decrees which have become final merely because the APTEL does not agree with the opinion of the Court below. (Reliance placed on the judgment of the Hon'ble Supreme Court in Nirmala Bala Ghose & anr V Balai Chand Ghose (1965 SCC Online SC 281)

(l) Obviously, if the intention of APTEL was to pass an order under any of these Rules, the least it would have done is to refer to the said Rules. Even otherwise,

the conditions laid down by the Hon'ble Supreme Court for the application of either Rule 4 or Rule 33 of CPC are not made out.

Re: Scope of Remand

(m) The second limb of submissions made by TANGEDCO was that it is an open remand made by APTEL, which would enable this Commission to do anything and everything. This submission is also erroneous.

(n) The Appeal filed by NLCIL was allowed on one issue, i.e., its entitlement to recover incentive as per the Regulations of this Commission. The matter has been remanded for passing an order afresh only on this issue. Nothing further needs to be done.

(o) Often at times, courts of first instance to whom matters are remanded back by the Appellate Court have to deal with the contentions of parties on the nature of the remand. Parties that fail to file appeals also seek to read the orders of APTEL in a manner favorable to them to confuse the court, which is deciding the remand. However, the simple test to be applied is to read the APTEL's judgment itself, which has remanded the matter. The issue framed, the discussion, and the decree have to be read in their entirety, and when done, there is one conclusion possible. The issue of incentive has been decided favorably by APTEL, reversing the view of this Commission denying the same.

(p) There are innumerable judgments on the scope of remand. APTEL, vide its judgment dated 10.5.2010 in Appeal No. 146 of 2009 (DVC vs. CERC & ors), has passed a detailed judgment that sets out the principles of remand. Viewed from the principles laid down above, there is no requirement to reopen the issue of the pooling of lignite cost of NLCIL mines as is being contended by TANGEDCO.

(q) In the above background, TANGEDCO's reliance on the judgments to argue that the remand by APTEL is an open remand is unfounded. A table distinguishing the Judgements relied upon by TANGEDCO on the scope of remand is attached hereto and marked as Appendix-C.

Re: Even if the issue is to be reconsidered, it would make no difference

(r) The Pooling has been taken advantage of by TANGEDCO. The lignite from the Mine II Expansion has been used by NLCIL, the electricity scheduled by TANGEDCO, supplied by NLCIL, and consumed by TANGEDCO. The price of the fuel, namely, lignite, is to be paid for.

(s) The issue is whether the lignite cost is to be separately computed in the variable cost or pooled with the existing pooled cost of lignite and computed in the tariff. The mandate of pooling does not flow from the Regulations of the Hon'ble Commission or the Orders passed but from the directives of the Ministry of Coal.

(t) Mine II Expansion is physically not segregated from Mine-II; it is only the

additional capacity of 4.5 MPTA that has come into operation, with the aggregate now being 15 MPTA. Above all, APTEL has concluded in Paragraph 126 of the impugned order that none of the beneficiaries nor NLCIL have questioned the issue of the pooling of lignite costs, and, therefore, the decision of this Commission is in force as on date.

(u) The Commission has merely followed the Ministry of Coal's mandate for considering the pooled cost. In fact, the Mine II Expansion is physically not segregated from Mine II; it is only the additional capacity of 4.5 MPTA that has come into operation, with the aggregate now being 15 MPTA. The segregation between Mine II and Mine II Expansion is only notional. Therefore, whether the cost is paid separately or on the basis of pooled cost, NLCIL only recovers the actual cost of the lignite used in the generation and supply of electricity.

(v) When the electricity has been generated and supplied using the lignite from the Mine II Expansion, accepted by TANGEDCO, the actual cost is to be paid. The pooled cost is only in terms of the Ministry of Coal's policy decision and is being adopted by the Commission.

(w) Above all, the APTEL has concluded in Paragraph 126 of the impugned order that none of the beneficiaries nor NLCIL have questioned the issue of the pooling of lignite costs, and therefore, the decision of this Commission is in force as on date. Surely, TANGEDCO cannot invite this Commission to commit, contend, and ignore the findings in Paragraphs 125 and 126 of the impugned order by inviting a fresh consideration on the issue of the pooling of lignite cost.

Written Submissions of the Respondent, TANGEDCO

14. The Respondent TANGEDCO, in its written submissions dated 14.3.2025, has submitted the following:

(a) APTEL held that Ministry of Coal guidelines are not applicable to Mine II Expansion, which is linked exclusively to TPS II project, and therefore, the price of lignite for this mine cannot be pooled with the price of lignite from the other mines:

"106. The Government of India vide Letter No. 43011/3/2004.Lig/CPAM dated 18.10.2004, sanctioned the integrated project consisting of Mine-II (Expansion) with capacity of 4.5 million tonne per annum and Thermal Power Station (TPS)- II (Expansion) with two units of 250 MW each.
107. Therefore, it cannot be denied that the entire capacity of 4.5 million tonne per annum of lignite is allocated to the TPS-II project and as such the beneficiaries of the integrated project are entitled to any benefit to be accrued from the integrated project.
xxx

110. It is seen from above, that the guidelines are specific to Mine-I expansion and Mine-IA, on being asked none of the contesting parties could place before any modified guidelines including the impugned Mine-II expansion.

111. Further, the above guidelines are not applicable in the instant case as the Mine-II expansion is linked exclusively to TPS-II expansion project, and therefore, the price of lignite for this mine ***cannot be pooled with the price of lignite from other mines, or otherwise, there is a specific directive by MoC****.*

xxx

114. Therefore, all the issues are to be dealt in accordance with the above."

(b) On the issue of sharing of incentive with the beneficiaries, the APTEL held that incentive ought to have been allowed only as per the prevailing Regulations. APTEL also expressly observed that NLC would not have achieved the NAPAF if this Commission had not allowed the pooling of the Mine II Expansion project at the cost of end consumers:

"*132. In terms of the Statement of Reasons of the 2009 Tariff Regulations, it is clearly stated that the NAPAF for Neyveli's plants were reduced on an express representation from Neyveli that there would be difficulties in relation to availability of lignite.*

133. Even, if we agree with the argument of the CERC that there were shortages in the availability of lignite for the projects of NLC and thus would not have achieved higher NAPAF resulting into extra incentive to it, the prevailing Regulations cannot be ignored, in fact, if the CERC had not allowed pooling of price for Mine-II expansion and utilisation of lignite from this mine in other projects, there would not have extra enrichment to NLC at the cost of end consumers.

134. Certainly, NLC would not have achieved the NAPAF as claimed now, such a situation is contrary to guiding norms under section 61 of the Electricity Act, 2003 as this is an additional burden on the consumers/ beneficiaries as they are already paying higher tariff due to lower performance norms.

135. The ***CERC should have dealt the issue of pooling of cost more prudently within the provisions of the applicable Regulations****.*

xxx

138. It also cannot be disputed that the excess lignite is available only due to delay in commissioning of the generating unit, in fact failure on the part of the Appellant to commission the TPS-II expansion in time has resulted into extra benefit to it in the form of additional lignite becoming available and so incentivizing for default, that to when the end consumers are paying for such a mine cost as part of the integrated project.

xxx

141. Additionally, the Appellant submitted that Regulation 25(3) of Tariff Regulations, 2009 provides for sharing in gains from secondary fuel oil to be shared by the parties in the ratio of 50:50, wherever any gains are to be shared, it is specifically provided for and there is no such provision for incentive, it needs to be considered by the CERC whether Regulation 25(3) is applicable in case of incentive.

xxx

142. Thus, Impugned Order deserves to be set aside as contrary to the CERC Regulations."

(c) APTEL further approved this Commission's direction on the issue of sharing of revenue with beneficiaries. It rejected NLC's contention that its mining activities cannot be controlled by this Commission. The APTEL also noted if NLC does not share revenue from sale of lignite, it will benefit at the cost of beneficiaries, as the cost of Mine II Expansion has been pooled and borne by beneficiaries:

"145. The Appellant also argued that the Central Commission is not even the regulator for the mining activities of the Appellant and cannot control the sale of lignite by the Appellant to any person, including the price at which it is sold, with regard to the mining and supply of lignite by

the Appellant to any third party, the Appellant acts purely as a fuel supplier and it is not subject to the regulatory jurisdiction of the Central Commission.

146. If, we agree with the above contention of the Appellant then the Central Commission, in the absence of any express provision or directive of MoC, could not have decided the price pooling of Mine-II expansion with other mines and diversion of lignite from this mine to other projects under pooled cost, thus, the CERC is bound to determine the cost of lignite from this mine separately, if it is to be used in other power projects, that to after considering that this mine is integrated to TPS-II expansion project and the entire capacity is allocated to TPS-II expansion project operating at 100% CUF.
xxx

153. We agree with the submissions of the Respondents that the CUF of Mine- II Expansion is 85% and the lignite transfer price of mines is arrived at in consideration of the said CUF, therefore, the Appellant recovers the entire cost of Mine-II expansion through the lignite transfer prices from the beneficiaries of Neyveli's power stations at a CUF of 85%, therefore, any additional sale of lignite above CUF of 85% would mean additional benefit to the Appellant at the cost of the beneficiaries, the Mine-II Expansion cost is included in the pooled lignite price and is collected from the beneficiaries and the Appellant does not incur any extra cost in mining and selling more lignite, as such, the beneficiaries bear the cost of mining, therefore the revenue generated from excess generation of lignite ought to be shared with the beneficiaries."

(d) Based on the above findings, APTEL directed this Commission to pass an order afresh

Commission can re-consider the issue of Pooling.

(e) It is clear from the above, that APTEL, by holding that the expenditure of Mine II Expansion cannot be pooled with the expenditure of other mines, and by proceeding to consider all issues in this light, has directed this Commission to consider all issues, including that of pooling, raised in Petition No.68/MP/2013 and 9/RP/2015 afresh.

(f) In this regard, it is necessary to appreciate that when an appellate court disposes of an appeal without retaining it on its own file, the matter is in the same position as it was before the passing of the judgment and decree by the lower court. In this regard, Reliance is placed upon *Karan Singh Ninayak v. State of West Bengal*, 1999 SCC OnLine Cal 90:

(g) Further, when the entire order is set aside, it is open for the court of first instance to consider all issues, including the issues that were not before the appellate court. In this regard, reliance is placed upon the judgment of the Hon'ble Supreme Court in *Orient Papers v. Tahsildar* (1998) 7 SCC 303:

(h) NLC has averred that the issue of pooling cannot be considered afresh, and only the issue of incentive is open for re-examination. The said contention is premised on a very narrow and self-serving reading of the judgment of the Hon'ble APTEL and falls foul to the express findings of the APTEL and the settled law on the issue of remand.

(i) Further, in its Note dated 18.10.2024, NLC has placed selective reliance on certain paragraphs of the APTEL judgment – being paras 125, 126, 128-130, and

139 – to contend that only the issue of incentive remains for consideration. This is incorrect. While this Commission has held that the incentive issue has to be decided as per the prevailing Regulations, it has set aside the order dated 21.1.2016 and remanded the matter back to this Commission. This is apparent from a comprehensive reading of all issues considered by the APTEL.

(j) NLC has also averred that paras. 131-138 are submissions relating to pooling. It is apparent from a plain reading of the said paras that these are findings of the APTEL. Nevertheless, the APTEL's findings on the pooling of Mine II Expansion expenditure being impermissible are not contained in the said paras and are apparent from a reading of the whole judgment dated 3.7.2024, particularly from the paras extracted above.

Pooling can be considered afresh, even if TANGEDCO did not challenge the orders in 68/MP/2013 and 9/RP/2015 on this aspect.

(k) NLC has also submitted that as TANGEDCO did not challenge the issue of pooling before APTEL, the APTEL could not have passed any directions on that aspect; thus, the remand is limited to the reconsideration of the issue of incentive alone. The submission is erroneous. APTEL, being the court of first appeal, could have passed any order that ought to have been passed, even if the said issue was not before the appellate court. This is apparent from Order 41 Rule 33 of the Code of Civil Procedure, 1908 (CPC)

(l) The above provision has been clarified by the Hon'ble Supreme Court in Fisheries Dept., State of U.P. v. Charan Singh, (2015) 8 SCC 150, wherein, the Hon'ble Supreme Court not only dismissed an appeal against the re-instatement of an employee, but also directed payment of back wages to the employee. Reliance is also placed upon *Koksingh v. Deokabai*, (1976) 1 SCC 383

(m) Thus, it is clear that even though TANGEDCO had not challenged the finding on the aspect of pooling before the APTEL, it was open for APTEL to consider this issue and remand it to this Commission for consideration afresh.

Mine II Expansion expenditure cannot be pooled for the calculation of LTP

(n) From the above findings of APTEL, it is clear that Mine-II Expansion expenditure cannot be pooled for the calculation of LTP. The said pooling was not based on any guidelines of the Ministry of Coal. The letter dated 2.2.1998 of the Ministry of Coal did not pertain to Mine-II Expansion at all and was only concerned with Mine I Expansion and Mine IA.

(o) Further, the Government of India, by way of its letter dated 18.10.2004 had sanctioned Mine II Expansion and TPS II expansion as an integrated project- only because NLC delayed the commissioning of TPS II expansion, the expenditure of Mine II Expansion could not have been pooled into the LTP of existing mines, at the cost of the beneficiaries such as TANGEDCO, and eventually the end

consumer. APTEL's judgment dated 3.7.2024 has clear findings on this aspect. NLC ought to be directed to rework the LTP in terms of the above.

Analysis and Decision

15. As stated, Petition No. 68/MP/ 2013 was filed by the Review Petitioner for revision of the pooled lignite price on account of the inclusion of Mine-II expansion lignite cost for the period 2011-2014. The Respondent TANGEDCO, in its reply, submitted that since Mine-II Expansion and TPS-II Expansion are integrated projects, Mine-II Expansion can be included in the Pooled price only when TPS-II Expansion is commissioned and put to use. It also submitted that in case the Mine-II Expansion is to be included before the commissioning of TPS-II Expansion, then concurrence of the MOC, GOI is required. However, the Commission, vide its order dated 7.5.2015, allowed the pooling, in the interest of beneficiaries, as under:

> *"26) The lignite produced from Mine II expansion is supplied to the existing generating stations of NLC and to other users of lignite. In other words, the lignite production from Mine-II (Expansion) is meeting the additional fuel requirements of the existing generating stations of NLC and in the absence of such supply from NLC-II Expansion, the additional fuels would have been sourced from alternative sources for generation of power and the cost of fuel would have been included in the energy cost. Looked at from this angle, inclusion of the cost of Mine II Expansion in the pooled lignite price is in the interest of beneficiaries. If the pooling of the lignite price from the date of commissioning of Mine II Expansion is not allowed from the date of its commissioning, it would give adverse signal for further investment as the project developer would not be able to earn adequate return during the period of delay in the commissioning of the integrated generating station. Considering the above factors, the pooling of lignite price of Mine-II (Expansion) is allowed from the date of commissioning of NLC Mines II Expansion "*

16. Also, in order to balance the interest of the beneficiaries on account of the inclusion of the cost of Mine-II Expansion in the Pooled lignite price, the Commission, in the said order, directed that any incentive earned corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage-I and Stage-II stations shall be refunded to the beneficiaries corresponding to their allocation from TPS-II Stage-I and Stage-II. It was also directed that the revenue earned by selling lignite to outside agencies shall be apportioned to the beneficiaries corresponding to their share of power in the stations. The

relevant portion of the order is extracted below:

> *"31. In order to balance the interest of beneficiaries on account of inclusion of the cost of Mines II Expansion in the pooled price without commissioning of TPS II Expansion, we direct that any incentive earned corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage-I and Stage-II stations shall be refunded to the beneficiaries corresponding to their allocation from TPS-II Stage-I and Stage-II. Further, the revenue earned by selling lignite to outside agencies shall be apportioned to the beneficiaries corresponding to their share of power in the stations where pooled lignite price approved by the Commission is applicable for computation of energy charges."*

17. In the Review Petition (Petition No.9/RP/2015), it was contended by the Review Petitioner that the 'incentive' on NAPAF between 75% and 80% should alone have been subjected to adjustment, and the denial of incentive earned corresponding to the enhanced availability above the NAPF of 80% is an error apparent on the face of the record. On the issue of the revenue earned by selling lignite to outside agencies to the apportioned to the beneficiaries, the Review Petitioner argued that expenditure incurred on the above had already been considered and does not form part of the energy charges claimed by the Review Petitioner. The Respondent, TANGEDCO, submitted that the Review Petitioner cannot be permitted to reargue the case on merits. The Commission, vide its order dated 21.1.2016, while rejecting the submissions of the Review Petitioner with regards to the refund of incentive earned, modified the order dated 7.5.2015, as quoted under para 4 above. Aggrieved by the said order, the Review Petitioner filed Appeal No.49/2016, wherein the APTEL, vide its judgment dated 3.7.2024, allowed the appeal on the issue of incentive and rejected the same on the issue of profit sharing on the sale of lignite to outside agencies. The relevant portions of the APTEL judgment are extracted in para 6 above. Accordingly, the APTEL set aside the order dated 21.1.2016 and remanded the matter to this Commission for passing the order afresh.

18. The Respondent TANGEDCO mainly contended that the APTEL judgment dated 3.7.2024 remanding the matter is an open remand i.e., open to consider all issues and

contentions raised in Petition 68/MP/2023 and Petition No.9/RP/2015, including the issue of pooling of expenditure of the Mine-II Expansion afresh. Referring to the findings of APTEL on the issue of sharing of incentive with the beneficiaries, in various paragraphs of the judgments viz., Paras 132, 133, 134, 138, 141, 142, 145, 146, 153 and 157, the Respondent submitted that the Commission has been directed to pass an order afresh. The Respondent has placed reliance on the judgment of the Hon'ble Supreme Court in Karan Singh Ninayak v State of West Bengal (1999 SCC Online Cal 90) and Orient Papers v Tahsildar (1998) SCC 303 to justify its stand that this Commission can re-consider the issue of Pooling, as apparent from a comprehensive reading of all issues considered by the APTEL. Arguing that Pooling can be considered afresh even if the Respondent did not challenge the orders dated 7.5.2015/21.1.2016 on this aspect, the Respondent has relied on Order 41 Rule 33 of the CPC read with the orders of the Hon'ble Supreme Court in Fisheries Dept State of UP v Charan Singh (2015) 8 SCC 150 and Koksingh v Deokabai (1976) 1 SCC 383 to contend that it was open for APTEL to consider the issue and remand the matter to the Commission for consideration afresh. Respondent has added that Mine-II expenditure cannot be pooled for the calculation of the Lignite Tranter Price in view of APTEL's clear findings on this aspect. *Per contra*, the Review Petitioner, NLC, has pointed out that the submissions of the Respondent are erroneous and are being made to defeat the APTEL judgment passed in favour of the Review Petitioner on the issue of incentive. Referring to the various paras of the judgment viz., Para 120, 125, 126, 128-130 and 139, the Review Petitioner contended that the only issue identified by APTEL is the 'non-entitlement of any incentive over and above the 75% normative availability', and there was no issue raised or otherwise framed by APTEL on whether pooling is to be undertaken or not. Referring to the judgments of the Hon'ble Supreme Court in Banarsi & ors V Ram Phal (2003) 9 SCC 606 and Nirmala Bala Ghose

and anr v Balai Chand Ghose (1965) SCC Online SC 281, the Review Petitioner, argued that the conditions laid down by the Hon'ble Court for the application of Order 41 Rule 4 or Rule 33 of CPC has not been made out in the present case. Distinguishing the judgments relied upon by the respondent TANGEDCO on the scope of remand, the Review Petitioner has argued that there is no requirement to reopen the issue of the pooling of lignite cost and that the remand by APTEL is not an open remand.

19. We have examined the rival contentions and considered the documents on record, including the findings in the APTEL judgment dated 3.7.2024. As regards the scope of remand, the APTEL has, in its judgment dated 10.5.2010 in Appeal No.146/2009 (DVC v CERC & ors), referred to the various judgments of the Hon'ble Supreme Court, wherein the following principles have been laid down:

(i) When a matter is remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgment, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or de novo hearing.

(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit.
(iii) When the matter comes back to the superior court again- on appeal after the final order upon remand is passed by the Court below, the matter/issues finally disposed of by order of remand, cannot be reopened.

(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court can set aside the entire judgment of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.

(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded nor before the superior court where the order passed upon remand is challenged in the Appeal.

(vi) In the following cases, the finality is reached:
(a) The issue being not challenged before the superior court, or
(b) The issue challenged but not interfered by the superior court, or
(c) The issue decided by the superior court from which no further appeal is preferred.
These issues cannot be re-agitated either before the court below or the superior court.

20. Accordingly, we examine, if the APTEL judgment dated 3.7.2024 is an 'Open remand' as contended by the Respondent TANGEDCO or is a 'Limited Remand'. Accordingly, some of the findings of APTEL in its judgment dated 3.7.2024 are extracted hereunder.

> *"104. The issues raised in the captioned appeal are limited to TPS-II expansion power project and the Mine-II expansion, the linked mine, the power project and the linked mine have been notified as part of an integrated project.*
>
> *105. It is, therefore, important to note certain details for the two limbs of the integrated project.*
>
> *xxxx*
>
> *111. Further, the above guidelines are not applicable in the instant case as the Mine-II expansion is linked exclusively to TPS-II expansion project, and therefore, the price of lignite for this mine cannot be pooled with the price of lignite from other mines, or otherwise, there is a specific directive by MoC.*
>
> *112. It cannot be denied that MoC has not issued any directive for pooling the cost of lignite mined from Mine -II expansion, however, the CERC allowed the pooling, in the absence of any MoC directive, for the benefit of the beneficiaries*
>
> *xxx*
>
> *114. Therefore, all the issues are to be dealt in accordance with the above.*
>
> *xxxx*
>
> *119. Therefore, we agree with the submission of the Appellant that there is no requirement for a Review Order to have a finding of merger, the moment any issue is allowed in a Review the original decree gets modified/reversed/vacated and especially since both the main and the Review Order are passed in tariff proceedings.*
>
> ***Merit of the case***
>
> *120. Considering the Appeal on merit, the Appellant has challenged the Order on two issues- i) the Appellant is not entitled to any incentive over and above 75% of NAPAF and ii) sharing of profit earned by NLC by selling lignite over and above 85% to third parties.*
>
> *121.* ***Let us first take up the issue of Incentive***
>
> *xxx*
>
> *125. Further, pooling of cost is also to be governed by the MoC guidelines, however, the CERC, considering the benefits for the beneficiaries, has allowed pooling of cost, which is in compliance with MoC guidelines.*
>
> *126. Despite it, such pooling of cost has not been challenged by the beneficiaries nor by the Appellant, therefore, the decision of the CERC to such an extent is in force as on date.*
>
> *127. Therefore, the issue of entitlement of incentive has to be considered in the light of the prevailing Regulations, and the submissions made before us, the relevant extract of the Regulations is reproduced hereunder:*
>
> *xxx*
>
> *130. Once the Regulations are framed, the CERC cannot deviate from the Regulations, so long the Regulations are in force, the same are binding and ought to be followed*
>
> *Xxx*
>
> *133. Even, if we agree with the argument of the CERC that there were shortages in the availability of lignite for the projects of NLC and thus would not have achieved higher*

NAPAF resulting into extra incentive to it, the prevailing Regulations cannot be ignored, in fact, if the CERC had not allowed pooling of price for Mine-II expansion and utilisation of lignite from this mine in other projects, there would not have extra enrichment to NLC at the cost of end consumers.

134. Certainly, NLC would not have achieved the NAPAF as claimed now, such a situation is contrary to guiding norms under section 61 of the Electricity Act, 2003 as this is an additional burden on the consumers/ beneficiaries as they are already paying higher tariff due to lower performance norms.

135. The CERC should have dealt the issue of pooling of cost more prudently within the provisions of the applicable Regulations.

136. The submission of the CERC cannot be denied that the entire fixed cost of the appellant is covered by annual fixed charges up to 75% NAPAF level, any earning on incentive beyond 75% would result in excess profits at the cost of the end consumers, however, it is in line with the relevant Regulations.
xxx

137. The argument of the Central Commission holds no merit that the Appellant cannot be permitted to blow hot and cold and choose the operational parameters as per its convenience, the lower NAPAF in the applicable Tariff Regulations was fixed at the express representation of the Appellant as confirmed by other stakeholders and such lower NAPAF has resulted in higher tariff for the beneficiaries, the Central Commission should have allowed pooling only after considering the relevant Regulations.

138. It also cannot be disputed that the excess lignite is available only due to delay in commissioning of the generating unit, in fact failure on the part of the Appellant to commission the TPS-II expansion in time has resulted into extra benefit to it in the form of additional lignite becoming available and so incentivizing for default, that to when the end consumers are paying for such a mine cost as part of the integrated project.

139. However, all such contentions cannot be agreed to at this stage due to the applicability of prevailing Regulations, the contention of the CERC that the beneficiaries and the end consumer are already paying for the pooled price of lignite which includes the new mine, thus, if incentive is not shared with the beneficiaries, it would lead to the Appellant being unjustly enriching the Appellant just because lignite from a new mine was allowed to be used in the Appellant's existing plant without which they wouldn't have been able to better their efficiency in any case, cannot be accepted at this stage.

140. Similar contentions were raised by Respondent No. 2 & 3 and as such are denied

141. Additionally, the Appellant submitted that Regulation 25(3) of Tariff Regulations, 2009 provides for sharing in gains from secondary fuel oil to be shared by the parties in the ratio of 50:50, wherever any gains are to be shared, it is specifically provided for and there is no such provision for incentive, it needs to be considered by the CERC whether Regulation 25(3) is applicable in case of incentive.

142. Thus, Impugned Order deserves to be set aside as contrary to the CERC Regulations.

143. ***The second is issue is regarding the sharing of profit from sale of lignite.***
Xxx

145. The Appellant also argued that the Central Commission is not even the regulator for the mining activities of the Appellant and cannot control the sale of lignite by the Appellant to any person, including the price at which it is sold, with regard to the mining and supply of lignite by the Appellant to any third party, the Appellant acts purely as a fuel supplier and it is not subject to the regulatory jurisdiction of the Central Commission.

146. If, we agree with the above contention of the Appellant then the Central Commission, in the absence of any express provision or directive of MoC, could not have decided the price pooling of Mine-II expansion with other mines and diversion of lignite from this mine to other projects under pooled cost, thus, the CERC is bound to determine the cost of lignite from this mine separately, if it is to be used in other power projects, that to after considering that this mine is integrated to TPS-II expansion project and the entire capacity is allocated to TPS-II expansion project operating at 100% CUF.

xxxx

150. We find such an argument totally unacceptable, any Government controlled company is bound by certain norms and need to perform for the benefit of the country, it cannot merely perform for earning profits only, such submissions are unnecessary and are strongly condemned

Xxx

153. We agree with the submissions of the Respondents that the CUF of Mine-II Expansion is 85% and the lignite transfer price of mines is arrived at in consideration of the said CUF, therefore, the Appellant recovers the entire cost of Mine-II expansion through the lignite transfer prices from the beneficiaries of Neyveli's power stations at a CUF of 85%, therefore, any additional sale of lignite above CUF of 85% would mean additional benefit to the Appellant at the cost of the beneficiaries, the Mine-II Expansion cost is included in the pooled lignite price and is collected from the beneficiaries and the Appellant does not incur any extra cost in mining and selling more lignite, as such, the beneficiaries bear the cost of mining, therefore the revenue generated from excess generation of lignite ought to be shared with the beneficiaries.

xxxx

155. Accordingly, we are satisfied that the CERC has rightly adjudged the issue and deserves to be upheld.

156. As already noted, on the first issue, we agree with the submission of the Appellant for setting-aside the Review Order on the ground that the Impugned Order is contrary to settled principle of law in the light of the judgment of the Supreme Court in PTC India Limited V. Central Electricity Regulatory Commission (2010) 4 SCC 603, para 54 to 56, the Central Commission is bound by its own Regulations, the Review Order is set aside.

157. The Central Commission is directed to pass order afresh for pooling of lignite cost under the provisions of law"

21. It is evident from paras 104 and 105 of the judgment that APTEL, after considering the submissions of the parties in the previous paras, has only taken note of certain details with regard to the integrated Project viz., TPS-II Expansion and Mine-II Expansion from paras 106 to 113 and decided to examine the issues, which is evident from para 114 of the said judgment.

22. The Respondent TANGEDCO submitted that APTEL, in paras 110 and 111 read with para 114 of its judgment, held that the Ministry of Coal guidelines are not applicable

to Mine-II Expansion and, therefore, the price of lignite for this mine cannot be pooled with the price of lignite from other mines. This contention of the Respondent is erroneous and contrary to the plain reading of the judgment, considering the fact that APTEL, in para 112, has taken note of the fact that the Commission, in the absence of any MOC directive, allowed the pooling for the benefit of the beneficiaries. Further, APTEL, in order to examine the merits of the case, identified in para 120, the issues in appeal as (i) Non-entitlement of any incentive over and above 75% of NAPAF and (ii) sharing of profit earned by NLC by selling lignite over and above 85% to third parties. Accordingly, it had, in para 121 and 143, taken up the issue of 'incentive' and also the sharing of profit from the sale of lignite, respectively. Apart from this, no other issues, including the as to whether the pooling of lignite cost is to be undertaken or not, were raised or framed by APTEL. Even otherwise, the Respondent submission is not maintainable, considering the fact that it had not filed any cross objections in the said appeal but only defended the Review Petitioner's entitlement to incentive in terms of the decision of this Commission in its order/submissions. We further note that APTEL, after observing in para 125 that the Commission, allowed the pooling of cost after considering the benefit of the beneficiaries, which is compliance of the MOC Regulations, has, in para 126, indicated that despite this, the beneficiaries nor the Review Petitioner had challenged the same and the order of the Commission to such an extent is in force. Thus, the pooling cost was not an issue for consideration by APTEL separately. It is in this background that APTEL, in para 127 of the judgment, proceeded to consider the issue of entitlement of 'incentive' in the light of the prevailing regulations and the submissions made thereunder. The submissions of the Respondent to the contrary are, therefore, not acceptable.

23. The Respondent TANGEDCO has also referred to the observations of APTEL in

paras 132-135, 138, 141-142 and submitted that though APTEL held that incentive ought to be allowed as per the prevailing regulations, it has expressly observed that the Review Petitioner would not have achieved the NAPAF, if this Commission had not allowed the pooling of Mine-II Expansion, at the cost of end consumers. Accordingly, in terms of these findings, the Commission is required to pass an order afresh. The submission of the Respondent lacks merit for consideration. We note that APTEL, in para 128, after taking note of the submission that the Review Petitioner is entitled to incentive in terms of the Commission's Regulations [Regulation 26(i)(c) read with Regulation 25(1) of the 2009 Tariff Regulations] for the grant of incentive and the judgment of the Hon'ble Supreme Court in PTC v CERC (2010) 4 SCC 603, has, in para 129, observed that the impugned order, being contrary to Regulations, is liable to be set aside. It is in this context that APTEL in paras 130 and 133 held that once Regulations are framed, the same are binding to all; the prevailing regulations cannot be ignored, and so long as the regulations are in force, the same are binding and ought to be followed. Even otherwise, the observations of APTEL in paras 131-138 are in relation to the contentions/submissions of the Commission on the pooling of Mine-II Expansion resulting in higher availability of lignite and consequently higher availability of the generating station, which in fact was expressly rejected by APTEL stating that all such contentions cannot be agreed at this stage, due to the applicability of the prevailing regulations. Similar contention raised by the Respondents TANGEDCO and KSEBL were also denied in para 140 of the judgment. The reliance of the Respondent TANGEDCO on the aforesaid paras, to contend that the pooling of cost has been set aside, is baseless and contrary to the findings in the judgment. APTEL having found that the Review Petitioner was denied incentive vide Commission's order dated 21.1.2016 in deviation of the Tariff Regulations read with the judgment of the Hon'ble Supreme Court in PTC case, set aside the same in para 142 of

its judgment. APTEL having set aside the Commission's order on the question of Review Petitioner's entitlement to incentive, the Respondent cannot, out of context, cherry-pick a portion of the findings, justify it to be a reversal of the Commission's order on the Pooling cost, and seek a fresh order. The submissions of the Respondent are therefore rejected.

24. The other issue raised by the Review Petitioner in the appeal and noted by APTEL in para 143 of the judgment is with regard to the sharing of profit with the beneficiaries from the sale of lignite**.** On this, APTEL held that the Commission had rightly adjudged the issue. The relevant portion of the order is extracted below:

> *"153. We agree with the submissions of the Respondents that the CUF of Mine-II Expansion is 85% and the lignite transfer price of mines is arrived at in consideration of the said CUF, therefore, the Appellant recovers the entire cost of Mine-II expansion through the lignite transfer prices from the beneficiaries of Neyveli's power stations at a CUF of 85%, therefore, any additional sale of lignite above CUF of 85% would mean additional benefit to the Appellant at the cost of the beneficiaries, the Mine-II Expansion cost is included in the pooled lignite price and is collected from the beneficiaries and the Appellant does not incur any extra cost in mining and selling more lignite, as such, the beneficiaries bear the cost of mining, therefore the revenue generated from excess generation of lignite ought to be shared with the beneficiaries*
>
> *154. Additionally, the CERC argued that generating stations having captive mine are generally not allowed to sell the captive production to outside agencies, this is done primarily to ensure that mining does not become a separate business and generation business should not in any manner subside the mining operations, while NLC is entitled to sell lignite produced to other users, since the entire cost of mining is considered in the tariff of the generating station, the revenue therefrom should be accounted for to the beneficiaries only.*
>
> *155. Accordingly, we are satisfied that the CERC has rightly adjudged the issue and deserves to be upheld*.

25. Respondent TANGEDCO has referred to some of the observations of APTEL in paras 146 and 153 of the judgment {that in case NLC does not share the revenue form sale of lignite, it will benefit at the cost of the beneficiaries, as the cost of Mine-II Expansion has been pooled and borne by the beneficiaries} to suggest that APTEL vide its findings, has directed the Commission to pass order afresh. We have examined the submission. It is evident from paras 144 to 154 of the judgment, that APTEL has rejected the relief sought by the Review Petitioner, after agreeing with the submissions of the

Respondents therein, including the Respondent TANGEDCO, who argued in favour of the Commission's order dated 21.1.2016, albeit without raising any issue on the question of inclusion of Mine-II cost or filing any cross objections. Also, the APTEL's observation in para 146, that '*CERC is bound to determine the cost of lignite from this mine separately'* does not also justify the Respondent's claim, since the same is based on the premise that '*if the submissions of NLC are agreed too'*. Even otherwise, APTEL, having made such observations and concluded that the Commission has rightly adjudged the issue, there is no basis for the Respondent to argue to the contrary. In our view, the Respondent appears to have thoroughly misread the decision of APTEL and has put forth in the submissions, which are out of context and devoid of merit and accordingly, liable to be rejected. Since APTEL has rejected the Review Petitioner's prayer and upheld the Commission's order on this issue, the question of 'remand' on this aspect does not arise.

26. Another contention of the Respondent TANGEDCO is that even though it had not challenged the findings of this Commission, on the aspect of pooling before APTEL, it was open for APTEL, in terms of Order 41 Rule 33 of the CPC, to consider this issue and remand the same to the Commission for consideration afresh. In support of this, the Respondent has placed reliance on the judgment of the Hon'ble Supreme Court in Fisheries Department State of UP v Charan Singh (2015) 8 SCC 150 and Koksingh v Deokabai (1976) 1 SCC 383 and similar other judgments. *Per contra*, the Review Petitioner has contended the APTEL judgment does not state that it has been passed in exercise of the powers under Order 41 Rule 33 of the CPC. Pointing out that the Hon'ble Supreme Court in its judgment in the Fisheries Department, State of Uttar Pradesh case had confirmed the exercise of powers under Order 41 Rule 33 of CPC, to give relief to the similarly placed Respondents therein, on the issue of back wages, even though they

had not assailed the order or made such a claim by filing a separate Writ Petition, the Review Petitioner argued that neither has APTEL exercised such powers in the present case nor was TANGEDCO similarly placed to the Review Petitioner in any manner, to have received such relief from APTEL. The Review Petitioner has also relied upon the judgment of the Hon'ble Supreme Court in Banarsi & ors V Ramphal (2003) 9 SCC 206 and also distinguished the several other judgments relied upon by the Respondent on the applicability of Order 41 Rule 33 of the CPC vide Annexure-A. We have examined the matter. The relevant extract of Order 41 Rule 33 is as under:

> *"33. Power of Court of Appeal.*
> *The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:*
>
> *Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to made such order"*

27. Thus, Order 41 Rule 33 empowers the appellate court to do complete justice between the parties by passing such order or decree that ought to have been passed or made, although not all the parties affected by the decree had appealed. However, the reliance placed by the Respondent on this Rule is misconceived. As pointed out by the Review Petitioner the Hon'ble Supreme Court in Banarsi & ors v Ramphal, while laying down few principles for the application of this Rule, has indicated that the power under this Rule cannot be used to reverse a part of the decree which essentially ought to have been appleade against or objected to by a party, which that party has permitted to achieve finality. Also, the Division Bench of the Hon'ble Supreme Court vide its judgment dated 7.4.2022 in the case of Eastern Coalfields Limited & Ors v. Rabindra Kumar Bharti *(Civil*

Appeal No.2794 Of 2022 (Arising out of SLP (C) No.12061/2021) held that although Order 41 Rule 33 of CPC grants extraordinary power to the Appellate Courts, the same has to be exercised only in exceptional cases. As stated earlier, the Respondent, in the present case, had not raised any cross objections but had only supported the Commission's order in the appeal. Moreover, APTEL, in its judgment, never allowed the objections / submissions by applying the said Rule, but has, in fact, denied the contentions in paras 139 & 140 of the judgment. Against this backdrop, the Respondent's reliance on the said Rule to justify its case, more so when APTEL has not exercised its powers under this Rule, is not tenable and deserves to be rejected. Consequently, the several other judgments relied upon by the Respondent are also held as not applicable to the present case.

28. APTEL, in para 156 of the judgment, while agreeing with the submissions of the Review Petitioner, that the Commission's order dated 21.1.2016, is contrary to the principle of law laid down in the PTC case, set aside the said order on the issue of incentive and remanded the same to this Commission for passing orders afresh. To us, the direction in para 157 should be seen and read only in relation to the issues decided by APTEL in the judgment and cannot be construed as reopening the issue of pooling. It can therefore, be safely concluded that the APTEL judgment dated 3.7.2024 is not an 'open remand' as contended by the Respondent, but only a 'limited remand' with directions to pass orders afresh, on the aspect of the Review Petitioners entitlement to 'incentive' over and above 75% normative availability in terms of the Regulations. This view gets strengthened by the decree of APTEL, wherein the appeal filed by the Review Petitioner has been allowed on merit 'to the extent' indicated above (i.e, incentive) and remanded to the Commission to pass orders afresh. The relevant portion is extracted

below:

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 49 of 2016 has merit and is allowed to the extent as concluded herein above.

The Impugned Order dated 21.01.2016 passed by the Central Electricity Regulatory Commission in Review Petition No. 9 of 2015 filed in Petition No 68 of 2013 is set-aside and remanded to the Central Electricity Regulatory Commission for passing the Order afresh.

The Appeal is disposed accordingly, along with pending IAs, if any."

29. As pointed out by the Review Petitioner, a judgment has to be read in the context of the issues raised and what has been decided therein. Also, the Hon'ble Supreme Court in Goan Real Estate & Construction Ltd. & anr. v. Union of India (2010) 5 SCC 388, held that:

"What is more important is to see the issues involved in a given case, and the context wherein the observations were made by the Court while deciding the case. Observation made in a judgment, it is trite, should not be read in isolation and out of context. It is the ratio of the judgment, and not every observation made in the context of the facts of a particular case under consideration of the court, which constitutes a binding precedent."

30. In our view, the contentions of the Respondent TANGEDCO to reopen the pooling cost, if accepted, would result in the Commission's decision on pooling, which was not challenged by the Respondent, being reopened in a proceeding initiated for the implementation of the APTEL judgment on remand. The APTEL judgment passed in favour of the Review Petitioner on the issue of incentive, cannot be permitted to be defeated based on the erroneous objections of the Respondent, as discussed above. Accordingly, the Review Petitioner is entitled to the relief towards incentive, as prayed for and allowed vide APTEL's judgment dated 3.7.2024.

Conclusion

31. As stated, APTEL, vide its judgment dated 3.7.2024, has remanded the matter to this Commission with directions to pass an order afresh. Consequent upon the findings

in the said judgment, the Review Petitioner is entitled to the incentive earned for achieving availability above the NAPAF of 75% for TPS-II Stage-I and Stage-II stations in terms of the 2009 Tariff Regulations. We note from the written submissions of the Review Petitioner that the Respondent TANGEDCO had adjusted a total amount of Rs 168.14 crore (Rs 72.69 crore *plus* interest of Rs 95.45 crore) from the bills of the Review Petitioner in six installments from October 2022. Accordingly, we direct the Respondent TANGEDCO to refund to the Review Petitioner NLC the entire amount of the incentive amount adjusted, along with the applicable interest, in accordance with the prevailing Tariff Regulations for the respective period, within two months from the date of this order.

32. With the above directions, the APTEL judgment dated 3.7.2024 in Appeal No.49/ 2016 stands implemented. Petition No. 9/RP/2015 (in Petition No. 68/MP/2013) stands disposed of in terms of the above.

Sd/-	***Sd/-***	***Sd/-***	***Sd/-***
(Ravinder Singh Dhillon)	**(Harish Dudani)**	**(Ramesh Babu V)**	**(Jishnu Barua)**
Member	**Member**	**Member**	**Chairperson**