

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 14th November, 2013

Present: MR. JUSTICE KARPAGA VINAYAGAM, CHAIRPERSON
MR. V J TALWAR, TECHNICAL MEMBER,

Appeal No. 147 of 2012

IN THE MATTER OF:

The Tata Power Company Limited
Bombay House, Homi Mody Street, Fort,
Mumbai 400 001

... Appellant

Versus

Jharkhand State Electricity Regulatory Commission
2nd floor, Rajendra Jawan Bhawan-cum-Sainik Bazar
Main Road, Ranchi-834001

Counsel for the Appellant : Mr Amit Kapur

Counsel for the Respondent : Mr C K Rai

JUDGMENT

Per Mr.V J Talwar, Technical Member

1. Tata Power Company is the Appellant herein. It is a company which is engaged in generation, transmission and distribution of electricity. The Appellant operates two units (Unit 2 and Unit 3) of Jojobera Power Plant having capacity of 120 MW each.
2. The Jharkhand State Electricity Regulatory Commission (State Commission) is the Respondent. The State Commission has been

entrusted with the function of determining tariff for supply of electricity by a generating company to a distribution licensee.

3. The Appellant filed Multi Year Tariff (MYT) petition for (i) Multi-Year Tariff for control period FY 2012-13 to FY 2015-16, (ii) Truing-up for FY 2010-11 and (iii) Annual Performance Review for FY 2011-12 for Jojobera Power Plant, Jamshedpur before the State Commission. In the said MYT Petition, The Appellant considered Normative Transit Loss in Coal at 0.8% as specified under the Regulation 8.19 of Generation Tariff Regulations. Since the actual Transit Loss in coal during FY 2011-12 was coming out to be higher than the specified normative loss of 0.8%, the Appellant sought relaxation of the norms and sought higher allowance of transit loss in coal as per actual.
4. The State Commission, after hearing the parties, proceeded to pass the impugned order on 31.5.2012. The Appellant is mainly aggrieved by the order of the State Commission on its refusal to relax the norms and allowed only normative loss of coal on transit at 0.8% instead of actual loss at 1.8%. Hence this Appeal.
5. Assailing the Impugned Order, the learned Counsel for the Appellant has made elaborate submissions on this issue. The gist of submissions made by the learned counsel for the Appellant are as under:
 - a. The only issue raised in the Appeal for consideration by this Tribunal pertains to disallowance the actual transit loss in washed coal of 1.8% by the State Commission,. The estimated financial impact on account of the disallowance of 1.8% transit loss in washed coal is approximately Rs. 2.12

Crores for FY 2011-12 and Rs. 9.19 Crores for the Control Period FY 2012-13 to FY 2015-16.

- b. The State Commission has ignored the fact that during transportation of washed coal, the moisture in the coal is evaporated and the weight of coal is accordingly reduced. This results in higher transit loss in coal than normative 0.8% as per Regulation 8.19 of Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2010 ("**Generation Tariff Regulations**").
- c. The State Commission has failed to consider the distinction between washed and unwashed coal as upheld by this Tribunal in its judgment dated 07.04.2011 in the matter of *Indraprastha Power Generation Company Limited v. Delhi Electricity Regulatory Commission* [2011 ELR (APTEL) 0669] and insisted on allowing only allowed 0.8% Transit Loss for coal in terms of Regulation 8.19 of Generation Tariff Regulations.
- d. The State Commission failed to exercise its power to relax the norms under Generation Tariff Regulations when the Appellant established reasons and circumstances for exercising the same, contrary to the settled position of law that in case application of any Regulation causes hardship or injustice to a party, the Regulation may be relaxed.
- e. The State Commission has failed to give any reason/explanation for not allowing the claim made by the Appellant with regard to transit loss in washed coal and has

not dealt with the submissions made by Tata Power in this regard.

6. Per-contra the learned Counsel for the State Commission has made detailed submissions in support of findings of the Commission and has also raised issue of maintainability of this Appeal on the ground of '*res judicata*'. The submissions made by the learned Counsel for the State Commission are summarised below:

- a) The transit loss on the quantity of coal is allowed *on normative basis as specified in Regulation 8.19 of the Generation Tariff Regulations 2010.*
- b) In Annual Revenue Requirement (ARR) and tariff petition for FY 2011-12 (in short Tariff Petition for FY 2011-12) the Appellant had originally claimed the normative transit and handling loss of 0.8% on the quantity of coal as per the *Generation Tariff Regulations 2010.*
- c) Therefore, the Appellant having once claimed transit loss at the normative rate at 0.8% for the FY 2011-2012 in the Tariff Petition for FY 2011-12 and the State Commission allowed such claim in the tariff order for FY 2011-12 dt20.08.2011, the Appellant cannot be permitted to reagitate the issue once again in the tariff petition for 2012-13 to 2015-16.
- d) Hence, the claim of the Appellant before the State Commission to allow the actual coal handling and transit loss is hit by the principle of *resjudicata*. Once the Appellant had

claimed 0.8% transit loss in the tariff petition for FY 2011-12 as per the Generation tariff Regulations, 2010 and requested approval of the same by the State Commission, which the State Commission duly allowed in the Tariff Order for FY 2011-12 dt. 20.08.2011, the Appellant cannot now claim the approval of transit loss on actual basis by claiming relaxation in the Tariff Petition for the FY 12-13 to 15-16.

- e) In other words, the normative transit loss once claimed and allowed as per the applicable regulations, the Appellant may not be allowed to claim again in the Annual performance Review Petition of that year, when admittedly Coal Transit Loss is allowed on normative basis as specified in Generation Tariff Regulations, 2010.
- f) Such claim of the Appellant is not permissible in view of the ratio of this Tribunal held in M/s. Indian Oil Corporation Ltd. Vs. Gujarat Electricity Regulatory Commission & Ors. In Appeal No. 124 of 2012.
- g) The Appellant for the first time before this Tribunal has raised the claim of actual transit loss of Rs. 9.19 Crores for Control Period 2012-13 to 2015-2016 without having raised the same before the State Commission.
- h) The Appellant's claim for relaxation, before the State Commission was confined only to the FY 2011-2012. Therefore the claim of the Appellant for Rs. 9.19 Crores transit loss for Control Period 2012-13 to 2015-2016 directly before this Appellate Tribunal is not maintainable and therefore liable to be rejected.

- i) As per Regulation 17.4 of the Generation Tariff Regulations 2010 the discretion to relax the provisions of the Regulations is given to the State Commission on satisfaction of two conditions: -
- (i) *'Public interest'* and
 - (ii) *'Reasons to be recorded in writing'*.
- j) Appellant has failed to raise any element of public interest involved in relaxation of the norms of Coal Transit loss as specified in the Generation Tariff Regulations, 2010. On the contrary, the State Commission has given a detail reasoning for disallowing the claim of relaxation of the Appellant.
- k) This Tribunal in the catena of Judgments held that the power of relaxation of the provisions of the regulations must be exercised sparingly and with circumspection, consistent with justice, equity and good conscience. Relaxation to be exercised in exceptions to the general rule and there has to be sufficient reason to justify relaxation.
- l) The Appellant has not raised any exceptional ground for relaxation of 0.8% transit loss in the Regulations on account of moisture loss only. This Tribunal in the case of Haryana Power Generation Corporation Ltd. Vs. Haryana Electricity Regulatory Commission & Another in Appeal No. 42 and 43 of 2008 has disallowed the claim of moisture loss in addition to normative allowed transit loss of 0.8%.
- m) The reliance of the Appellant upon the judgments of (a) Premium Granites & Anr. Vs. State of Tamil Nadu (1994) 2

SCC 691, (b) Ashok Kumar Uppal Vs. State of Jammu & Kashmir (1998) 4 SCC 179, (c) NTPC Limited Vs. Madhya Pradesh State Electricity Board (2007) ELR (APTEL) 7, (d) NTPC Limited Vs. Central Electricity Regulatory Commission 2001 ELR (APTEL) 224 is misplaced and not applicable to the distinguish facts and circumstances of the present case.

7. Having regard to the rival contentions urged by the parties and the records placed before us, the following questions may arise for consideration:
 - i) Whether the Appeal is barred by the *resjudicata* and accordingly liable to be dismissed as not maintainable.
 - ii) Whether the generator would suffer any loss due to loss of moisture in wet coal due to transportation?
 - iii) Whether transit loss in washed coal would be higher than the transit loss in unwashed coal?
8. We shall now deal with each of the above questions one by one. The first question before us for consideration is related to maintainability of the Appeal.
9. The learned counsel for the State Commission contended that the Appellant had originally claimed the normative transit and handling loss of 0.8% on the quantity of coal as per the Generation Tariff Regulations 2010 in the Tariff Petition for FY 2011-12 filed before the Commission for determination of Annual Revenue Requirement (ARR) and Tariff for FY 2011-12 and once the Appellant claimed transit loss at the normative rate at 0.8% for the FY 2011-2012 in the Tariff Petition for FY 2011-12 and the State

Commission having allowed such claim in the tariff order for FY 2011-12 dt 20.08.2011, the Appellant cannot now be permitted to re-agitate the issue once again in the Multi Year Tariff petition for 2012-13 to 2015-16 before the State Commission. It is further stated that since the claim of the Appellant to allow the actual coal handling and transit loss is hit by the principle of *res judicata*, such a claim of the Appellant is not permissible in view of the ratio of this Tribunal's judgment in Appeal No. 124 of 2012 in the matter of M/s. Indian Oil Corporation Ltd. Vs. Gujarat Electricity Regulatory Commission & Ors.

10. Refuting the submissions of the Respondent on the plea of *res judicata*, the learned counsel for the Appellant has made the following submissions:

- I. The Appellant did not raise the issue of maintainability of Appeal at the time of admission or during the proceedings before this Tribunal. It is for the first time, in its Written Submissions, the Commission has contended that the present Appeal was barred by *res judicata/ issue estoppel*. It is settled law that objections regarding maintainability of the appeal, like *res judicata* can only be raised as preliminary objections at the time of admission of the appeal. Once the appeal was admitted without reserving the issue of maintainability, such a preliminary objection does not survive and accordingly, the Tribunal cannot permit the objection raised by the Commission regarding maintainability at this stage.
- II. The present Appeal was not barred by *res judicata/issue*

estoppel. The Petition filed by Tata Power on which the Impugned Order has been passed was:

- “(a) Multi-Year Tariff Petition for FY 2012-13 to FY 2015-16 (“Control Period”)
- (b) Truing-up for FY 2010-11 and
- (c) Annual Performance Review for FY 2011-12

The Appellant had filed the Tariff Petition for FY 2011-12 on 01.04.2011 on the basis of projections of operational and financial performance. In the said Petition the Appellant, in terms of Generation Tariff Regulations, claimed 0.8% Transit Loss in coal and the same was allowed by the Commission. Though 0.8% transit loss in coal was allowed by the Commission for FY 2011-12, the actual transit loss in coal was more than 0.8%. Therefore, while filing the Annual Performance Review for FY 2011-12 along with Multi-Year Tariff Petition for the Control Period, the Appellant had sought relaxation of the norms and claimed the actual transit loss in coal being suffered by the Appellant. If the Commission’s objection is allowed, the very purpose of annual performance review of a financial year and truing-up the actual expenses and revenues incurred by the Appellant after the financial year is over, against projected expenses and revenues for the said financial year would become a futile exercise.”

11. We have carefully considered the submissions of both parties. The contention of the State Commission regarding maintainability of the Appeal is untenable. The ARR of a utility is fixed in advance i.e. before the beginning of the year, based on certain projections.

Annual Performance Review and Truing up exercise is taken up after the end of the year. In the truing up exercise, the uncontrollable factors are trued up based on actuals subjected to prudence check by the Commission. To illustrate, approved power purchase costs are based on projected sales during the year. If at the end of the year the sale of power is higher or lower than the projected quantity, the power purchase costs would have to be trued up accordingly. The State Commission is not expected to take the plea that since it had approved the power purchase projected by the utility, it cannot claim higher or lower actual power purchase and the utility is barred on making such claim on the principle of *res judicata*.

12. In view of the above, we hold that the Appeal is maintainable and accordingly we would now decide the other issues on merits.
13. Next question before us for our consideration is as to whether the generator would suffer any loss on account of reduction of moisture in wet coal due to transportation?
14. During hearings, we raised a query that for what quantity of coal the payment is made and where the GCV of the Coal is measured. It was replied that the quantity of the coal is measured at the mine and the payment is made accordingly. The Regulations provide that for the tariff purpose the GCV of coal 'as fired' would be considered. Accordingly, the GCV of the coal is measured at the generating station.
15. The learned Counsel for the Appellant submitted a detailed calculation showing that the Appellant suffered loss due to evaporation of moisture, on the other hand the learned Counsel for

the Respondent has submitted detailed calculation to show that the Appellant has actually gained from loss of moisture.

16. The learned Counsel for the State Commission explained that GCV of coal improves with the loss of water content. Accordingly less coal would be required to produce same amount of heat and resultant electrical energy. Therefore, the Appellant would gain from loss of water content in coal due to evaporation during transit.
17. The contention of the Respondent is misconceived. In every tariff process for generation, the quantity of coal consumed in power station is computed from the energy generated by back calculations using GCV of the coal used and Station Heat Rate. The generator is paid for this computed quantity of coal at the rate it has procured coal from the supplier. Thus, any loss of weight in transit is to account of the generator. This aspect can be understood by considering the following illustration.
18. A generating station has SHR equal to 3000 kcal/kWh and uses coal of GCV of 3000 kcal/kg. It produces 1 MU during a period. The quantity of coal consumed for tariff purpose would be equal to $3000/3000 = 1$ kg/kWh. Or 1000 Tonnes of coal would be required to produce 1MU of energy. The generator procures coal at Rs 1000/MT. Thus, the generator would get Rs 1 Million as cost of coal. Assuming moisture loss during transit as 3%, the generator will have to make payment for 1031 MT of coal to the supplier at Rs 1000 per MT. Thus the generator would suffer a loss of Rs 31000. In view of the above, the 2nd question is answered accordingly.

19. The third question for consideration is this – “whether transit loss in washed coal would be higher than the transit loss in unwashed coal ?”
20. The learned Counsel for the Appellant has relied on this Tribunal’s judgment dated 7.4.2011 in Appeal No. 26 of 2008 in the matter of Indraprastha Power Generation Company Limited versus DERC wherein, the Tribunal has held that the transit loss in washed coal cannot be same as transit loss in unwashed coal and has allowed higher transit loss as against normative loss of 0.8% specified in DERC’s MYT Regulations.
21. The learned Counsel for the State Commission contended that the judgment in Appeal No. 26 of 2008 would not be applicable to the facts of present case as the issue in Delhi case was the applicability of CERC norms and the Regulations of the Delhi State Commission were not in question. The learned Counsel for the Commission relied on the Tribunal’s judgment dated 29.3.2010 in the matter of Torrent Power Limited versus GERC where in the Tribunal agreed with the contention of the TPL that the transit loss in unwashed coal would be higher than the transit loss in washed coal. The learned Counsel for the State Commission also relied on the Tribunal’s judgment dated 31.7.2009 in Appeal No. 42 and 43 of 2008 in the matter of Haryana Power Generation Company Limited versus HERC wherein the Tribunal did not allow higher transit loss of coal.
22. In view of the rival contentions of the parties relying upon the ‘conflicting’ findings of this Tribunal it has become necessary for us to examine the facts and the issues before the Tribunal in these

Appeals to come to conclusion as to whether the findings of these or any of these Appeals would be applicable to the present case or not. The first judgment in chronological order is the judgment dated 31.7.2009 in Appeal NO 42 & 43 of 2008 in the Haryana matter. The relevant portion of the judgment is quoted below:

“B. Transit Loss on Coal Transportation

18. The appellant has submitted that its actual transit loss on coal transportation is 3.02% in the case of Panipat TPS and 3.54% for Faridabad TPS. Despite its best efforts, the appellant could reduce transit loss from 6.58% in FY 2001-02 to 3.02% in 2006-07. Hence, the transit loss of 2% for Panipat and Yamuna Nagar TPSs and 2.5% for Faridabad TPS allowed by the State Commission are not achievable. The appellant has further submitted that dispatch and transportation of coal is an inter-agency involvement, namely Railway and Coal Companies on which the appellant has no control and could not have any claim against them for such transit loss in terms of the agreements entered into by the appellant and therefore the norms for transit loss of coal set by the State Commission are not achievable. The appellant has prayed that actual transit loss should be allowed for determination of its tariff. The appellant has also submitted that ‘there is no national norm for loss of coal in transit’ and that CERC in one of its order has stated that ‘loss of coal in transit is to be decided by the SERCs’.

19. Per contra, the State Commission has submitted that as per CERC norms, transit loss of coal allowed for non-pit head stations is 0.8% and that considering this the State Commission has set a transit loss reduction trajectory. The State Commission feels that the transit loss allowed by it is much higher than the national norms to allow for some cushion during the transition period. The State Commission further submitted that anything above 0.8% is nothing but theft en route and at other locations, to which the State

Commission can not be a party. During 2008-09, the transit loss for PTPS and DCR TPS came down to below 1.95%, but for FTPS increased to 11.66% as against 3.54% during 2006-07. Therefore, the State Commission is justified in allowing transit loss at 2% for PTPS & DCR TPS and 2.5% for FTPS.

20. The issue of coal transportation loss also caught the attention of the State Advisory Committee (SAC), as is seen from page of the order dated 08.05.2007 of the State Commission. The SAC suggested that HPGCL may appoint a coal agent on Punjab pattern with appropriate incentive and penalty to reduce transit loss of coal to the national non-pithead benchmark of 0.8%. Further, at page 24 of the order the State commission advised the appellant to take up the matter at highest level for reduction in coal transportation losses.

21. Prima facie, the argument of the appellant that it has not control over the coal transportation losses as other agencies such as Railways, Coal companies are involved appears to be attractive. However on analysis, it needs to be borne in mind that the tariff of the appellant is determined on a cost plus basis. Every item of the cost, other than those which are statutory levies, that is to be recovered from the consumers would require scrutiny at some stage. If we accept that coal transportation losses be allowed at levels sought for by the appellant, on the premise that such losses are not within the control of the appellant, we are effectively agreeing that such costs are beyond scrutiny by the State Commission or rather beyond scrutiny by any agency. How will the consumer participate in the due diligence process to determine the justness of such losses. The consumer does not have resources to approach the Railways and Coal companies directly for determination of the justness of the losses incurred. It is only the appellant who is in a position to take up the matter with the Railways and the Coal Companies for more efficient transportation of coal. If need be, it has all

options to take up the matter at highest level as advised by the State Commission also.

22. In view of the above we do not agree with the contention of the appellant in this regard. ”

23. Perusal of the aforesaid would make it clear that issue before the Tribunal was not related to the transit loss in washed coal. The Appellant HPGCL wanted actual transit loss in coal and the Haryana Commission allowed lower transit loss. It is to be noted that the Haryana Commission did not have its own Regulations and had been following CERC Regulations. It, however, relaxed the CERC norms of 0.8% loss in transit of coal and allowed around 2% transit loss. The facts of this case was different from the present case and the findings of this case would not be applicable to the present case.
24. Next Judgment is the judgment dated 29.3.2010 in the matter of Torrent Power Limited versus GERC. The relevant portion of the judgment is quoted below:

“2. The Appellant has challenged the Impugned Tariff Order relating to the following issues:

(a) Identification of variables as controllable and uncontrollable in the Impugned Order and timing of their adjustments.

(b) Not considering mix variance in Fuel Price and Power Purchase Adjustment (FPPA) Charges.

(c) Determination of Wheeling Charges

(d) Specifying Renewable Energy Purchase Obligations discriminately.

(e) Lack of uniformity in principles adopted by the Commission by not incentivizing the Appellant for achieving better distribution loss target but penalizing for not being able to achieve the target transit loss.

(f) Disallowance of Income Tax so as to earn Return on Equity as post tax.

....

(e) Lack of uniformity in principles adopted by the Commission by not incentivising the Appellant for achieving better distribution loss target but penalizing for not being able to achieve the target transit loss.

38. It has been contended by the Appellant that whereas the Commission has considered the approved values of coal transit loss in which the Appellant has under-performed due to factors beyond its control, the Commission has considered the actual values during the truing up of distribution losses where the Appellant has outperformed over and above the approved loss level. Learned counsel for the Appellant argued that the Commission ought to have followed the regulations which require consideration of norms to arrive at incentives where the Appellant has outperformed the approved values.

39. Learned counsel for the Appellant asserted that the coal transit loss of 1.40% for the generating stations at Gandhinagar and Wanakbori power stations cannot be the basis for comparison with the transit losses in respect of the Appellant because whereas the Appellant procures coal directly from the mines, Gandhinagar and Wanakbori power stations are using washed coal. She urged that due consideration should be given on the ground of the type of coal transported in respect of Appellant.

40. ...

41. Per contra the Commission has pleaded that the GERC terms and conditions of Tariff Regulations, 2005 stipulate

that the coal transit losses in case of non pit head stations is 0.8% and that the Regulations provide certain conditions for which the Commission made deviation from the norm specified in the Regulations. Learned counsel for the Commission submitted that the transit coal losses of 3.88% for the year 2005-06, 1.95% for FY 2006-07 and projected loss at 2.58% for the year 2007-08 is much less than 3.39% claimed by the Appellant for the year 2007-08. The Commission has approved the transit losses of coal as 1.4% in Petition No. 915 of 2007 which is much higher than normative loss of 0.8%. In petition No. 939 of 2008 the Appellant had claimed transit loss as 3.39% which is much higher than the approved transit loss and, therefore, the Commission limited the same to 1.4% as approved in petition No. 915 of 2007. Any further deviation from the norm will affect the consumers adversely and hence has not been allowed.

...

Analysis and decision

1. Coal Transit Losses:

43. Main plea of the Appellant in case of Transit Coal Losses is that the coal transit losses of 1.4% for the generating stations at Gandhinagar and Wanakbori power stations cannot be the basis of comparison with that of the transit losses in respect of the Appellant because it procures coal directly from the mines unlike in the case of Gandhinagar and Wanakbori which are procuring washed coal. We find force in the plea of the Appellant. Unfortunately, the transit losses in the Railway transportation do occur as there is no control of the generators. Coal transportation in open wagons of unwashed coal procured directly from the mines which has much larger lumps of coal are more prone to pilferage unlike the washed coal which cannot be easily pilfered. In view of this ground reality some consideration in coal transit losses for the washed and unwashed mined coal

deserves to be given. However, we leave it to the State Commission to decide increased percentage of allowable coal transit losses for the Appellant. We order accordingly.

...”

25. Plain reading of the above reproduced extracts of the Tribunal’s judgment would clearly establish that the issue before the Tribunal was lack of uniformity in principles adopted by the Gujarat Commission by not incentivising the TPL for achieving better distribution loss target and simultaneously penalizing for not being able to achieve the target transit loss. In fact, in this case also the Gujarat Commission had relaxed the norms for transit loss in coal. It allowed 1.4% transit loss as against the norms at 0.8% in its Regulations. The Tribunal has dealt with the loss due pilferage during transit in open coal wagons. It did not deal with the issue of loss of moisture in transit.
26. Next Judgment for consideration is the judgment dated 7.4.2011 in Appeal No. 26 of 2008 in the matter of Indraprastha Power Generation Company Limited versus DERC. The findings of the Delhi Commission in its MYT order dated 14.12.2007 impugned in the appeal no. 26 of 2008 is quoted below for better understanding of the issue:

“Coal Transit Loss

Objections

2.30 BRPL and BYPL have requested the Commission to analyse the coal transit loss of 3.80% proposed for the Control Period. They have stated that reasons mentioned for the loss such as weightment error, theft, pilferage, etc are controllable and should be curtailed by the Petitioner.

Petitioner’s Response

2.31 The Petitioner submitted that it is using washed coal in compliance with the directive given by the Honourable Supreme Court to use coal with a maximum of 34% ash content. The coal is procured from Bina collieries and transported through Indian Railways, thereby leading to evaporation, windage losses, etc. It submits that CERC has specified norms of 0.80% for transportation losses for normal coal. Since, the Petitioner is using washed coal, the surface moisture content increases to approximately 4%. The Petitioner therefore requests the Commission to approve the proposed transit losses due to the requirement of washed coal for its plants.

Commission's Observations

2.32 The Commission noted the reasons for the coal transit loss and directed the Petitioner to improve its coal stock management and monitor the transit losses regularly to reduce the same. Using washed coal at the plant is likely to improve the functioning of coal handling plant and the coal mills and also results in better availability of the boiler with consequent improvement in PLF and reduction in auxiliary power consumption.

2.33 The NTPC plants at Dadri and Badarpur are using washed coal and have been provided with a transit loss of 0.8% as specified in the Regulations issued by the CERC. **The Commission has maintained the coal transit loss at 0.8% as per the norms specified in the MYT Regulations.**

....

3.30 The Commission has calculated the net coal requirement for generation after factoring the generation from the fuel oil consumed in the plant. The total coal requirement for IP Station was obtained after considering the effect of 0.80% losses on account of transit loss

...

4.33 The Commission has considered coal transit loss of 0.8% to obtain the gross coal requirement for IP Station. The contention of the Petitioner that 0.8% loss in coal on account of transit and handling and **3% loss on account of surface**

moisture due to deshaling of coal have been provided for, by the Commission in its previous Tariff Orders is not correct. Commission has never allowed 3.8% loss in coal on account of transit and surface moisture loss in its previous Tariff Orders. ***It may also be noted that NTPC Dadri Thermal Plant which is running on 100% washed coal is also being allowed only 0.8% loss of coal by CERC. Similarly, NTPC Badarpur Plant which is using substantial quantity of washed coal is being allowed 0.8% fuel loss only.***

4.34 Furthermore, it may also be noted that certain benefits accrue to the generating company on use of washed coal. For instance, the big boulders of coal get broken during washing of coal and stones also get removed. Thus the generating company saves on auxiliary power consumption due to the improvement in the functioning of coal handling plant and the coal mills as well as reduction in ash handled by the ash handling plant. The use of washed coal also results in better availability of the boiler with consequent improvement in PLF and reduction in auxiliary power consumption.”

27. The relevant portion of the Tribunal’s judgment dated 7.4.2011 is quoted below:

“22. According to the Appellant, the State Commission has allowed a normative coal transit loss of 0.8% by holding that the same is nationally accepted loss level as prescribed in the Tariff Regulations of the Central Commission. It is noticed that the State Commission has rejected the claim of the Appellant merely on the ground that NPTC had not challenged the coal transit loss for the Dadri and Badarpur Stations which requires the same washing of coal. As pointed out by the Learned Counsel for the Appellant, the ground that the NTPC had been allowed only 0.8% coal transit loss and the same had not been challenged by the NTPC cannot be the valid ground to deny the claim of the Appellant. ***The important aspect that the State Commission has failed to consider is that the transit***

loss cannot be the same both for unwashed and washed coal. The weight of the coal at the time of loading is significantly increased due to higher moisture content which evaporates during transit and storage. We notice that the State Commission has not given a reasoned order regarding transit loss. Instead of examining the transit loss in case of the Appellant's power station the State Commission has noted that the use of washed coal is likely to improve the functioning of the plant. This matter, therefore, needs reexamination. Therefore, the State Commission is required to determine the actual coal transit loss in respect of the Appellant's Power Station without comparing the coal transit loss with the NTPC. This point is answered accordingly."

28. Conjoint reading of aforesaid findings of the Delhi Commission and this Tribunal would clearly establish that the issue before the Delhi Commission as well as before this Tribunal was related to transit loss in washed coal. The Delhi Commission did not allow higher transit loss in washed coal and permitted 0.8% only as per its own MYT Regulations. This Tribunal took note of the fact that transit loss in washed coal would be higher due to loss of moisture during transport in open wagons and directed the Delhi Commission to reconsider the issue.
29. The facts of the case before us squarely fit in to the facts of Delhi Case in Appeal No. 26 of 2008. Accordingly, the ratio laid down in Appeal No. 26 of 2008 would be applicable to this case. The State Commission is, therefore, directed to reconsider the issue of loss in washed coal transit afresh and issue consequential orders.
30. In the light of our above findings, other issues raised by the parties such as Natural Justice, or case for relaxation of norms etc have become irrelevant.

31. Summary of our Findings:

- a. The contention of the State Commission regarding maintainability of the Appeal is untenable. The ARR of a utility is fixed in advance i.e. before the beginning of the year, based on certain projections. Annual Performance Review and Truing up exercise is taken up after the end of the year. In the truing up exercise, the uncontrollable factors are trued up based on actuals subjected to prudence check by the Commission. To illustrate, approved power purchase costs are based on projected sales during the year. If at the end of the year the sale of power is higher or lower than the projected quantity, the power purchase costs would have to be trued up accordingly. The State Commission is not expected to take the plea that since it had approved the power purchase projected by the utility, it cannot claim higher or lower actual power purchase and the utility is barred on making such claim on the principle of *res judicata*. As such the Appeal is maintainable.**

- b. For generation determination process the quantity of coal consumed in power station is computed from the energy generated by back calculations using GCV of the coal used and Station Heat Rate. The generator is paid for this computed quantity of coal at the rate it has procured coal from the supplier. Thus, any loss of weight in transit is to account of the generator.**

c. The facts of the case before us squarely fit in to the facts of Delhi Case in Appeal No. 26 of 2008. Accordingly, the ratio laid down in Appeal No. 26 of 2008 would be applicable to this case. The State Commission is, therefore, directed to reconsider the issue of loss in washed coal transit afresh and issue consequential orders.

32. In view our summary of findings above, the impugned order is set aside and the Appeal is allowed. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 14th November, 2013

REPORTABLE/~~NOT REPORTABLE~~