

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 369/MP/2022

Coram:

**Shri Jishnu Barua, Chairperson
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 11th May, 2024

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 for direction to NHDCL to refund the incentive realised for the period 1.4.2009 to 31.3.2021 in respect of the Omkareshwar Hydroelectric Project along with interest to the Petitioner, until full maximum output of 65 MW per machine is achieved by Omkareshwar Hydroelectric Project.

And

In the matter of

Madhya Pradesh Power Management Company Limited,
Block No. 11, Shakti Bhawan, Rampur
Jabalpur (MP)- 482008

..... **Petitioner**

Vs

NHDC Limited,
(A JV of NHPC Limited & GoMP)
NHDCL Parisar, Shyamla Hills,
Bhopal - 462013 (M.P)

.....**Respondent**

Parties Present:

Shri Aditya Singh, Advocate, MPPMCL
Shri Ravindra Khare, MPPMCL
Ms. Suparna Srivastava, Advocate, NHDCL
Shri Tushar Mathur, Advocate, NHDCL
Shri N. K. Chellani, NHDCL
Shri Y. N. Rao, NHDC

ORDER

The Petitioner, Madhya Pradesh Power Management Company Limited (in short 'MPPMCL'), has filed the present petition under Section 79 of the Electricity Act, 2003 ('the 2003 Act') seeking the following reliefs:

“(i) Direct the NHDCL to make the refund of Rs. 183.52 crore (which were paid by Petitioner as incentive during the period 2009-10 till 31.3.2021) along with the



applicable interest as per Tariff Regulations notified by this Commission from time to time.

(i) Pass such other and further orders as are deemed fit and proper in the facts and circumstances of the case.”

Background

2. The Petitioner MPPMCL, is a Government owned company vested with all the functions, properties, interests, rights and obligations of the erstwhile Madhya Pradesh State Electricity Board (MPSEB), relating to the bulk purchase and supply of electricity, along with all related agreements/arrangements including the re-transfer and re-vesting thereof by the State Government in MP Power Trading Company Limited (MPTRADECO), in accordance with the Government of Madhya Pradesh (GOMP) vide extraordinary Government notification dated 3.6.2006 and subsequent amendment dated 29.3.2012. Further, the name of MPTRADECO was changed to MPPMCL vide certificate dated 20.4.2012 of the Registrar of Companies, Ministry of Corporate Affairs, GOI.

3. Respondent NHDC Limited (in short 'NHDCL'), is a Joint Venture Company of NHPC Limited and the GOMP, with an equity participation of 51% and 49%, respectively. NHDCL was established on 1.8.2000 and is a Central 'Generating Company' as defined under section 2 (28) of the 2003 Act. The Omkareshwar Hydroelectric Project of NHDCL was set up under the Narmada Sagar Multipurpose Project (Irrigation & Power) in the Narmada Basin in the State of Madhya Pradesh. The capacity of the generating station is 520 MW (8 x 65 MW). The Indira Sagar Project of NHDCL is the mother project for the downstream projects and also contributes to the Omkareshwar and Sardar Sarovar Projects through its regulated water releases. The date of commercial operation (COD) of the Omkareshwar HEP is 15.11.2007, and the Central Government has allocated 100% of the power generated from the Project to the State of Madhya Pradesh at the tariff determined by this



Commission. The Commission, vide its order dated 30.10.2007 in Petition No. 56/2007, granted a provisional tariff for the said Project for the period 2007-09. Subsequently, vide order dated 16.1.2012 in Petition No.265/2010, the final tariff of the Project was determined for the period from 20.8.2007 to 31.3.2009.

Submissions of MPPMCL

4. In the above background and in support of the prayers above, MPPMCL's submissions are as under:

(a) The Commission in its order dated 30.10.2007 in Petition No.56/2007, had specifically directed that NHDCL is entitled to recover full annual fixed charges on a provisional basis. However, NHDCL was held not entitled to the claim for incentive on account of the capacity index until the full maximum output of 65 MW per machine was achieved.

(b) Thereafter, by order dated 16.1.2012 in Petition No. 265/2010, the Commission, while permitting NHDCL to recover the full fixed charges corresponding to an output of 50 MW, as against the installed capacity of 65 MW per machine, held that NHDCL was not entitled to claim incentive on account of the capacity index (until full maximum output of 65 MW was achieved).

(c) Subsequent to the above orders dated 30.10.2007 (Petition No. 56/2007) and order dated. 16.1.2012 (Petition No. 265/2010), this Commission issued the 2009, 2014, and 2019 Tariff Regulations, wherein a proviso towards the payment of capacity charges (inclusive of incentive) to the hydro stations was provided under Regulation 22(2) of the 2009 Tariff Regulations, Regulation 31(2) of the 2014 Tariff Regulations and Regulation 44 (2) of the 2019 Tariff Regulations. The capacity charge inclusive of incentive, payable in proportion to PAFM/NAPAF was provided. Therefore, when PAFM is greater than NAPAF, the hydro stations can realise the incentive in the capacity charge.

(d) The tariff of Omkareshwar HEP for the period 2009-14 was approved vide order dated 9.5.2013 in Petition No. 248/GT/2012 and was also trued-up vide order dated 10.5.2016 in Petition No. 460/GT/2014, for the period 2009-14. Further, the tariff for the generating station was approved vide order dated



26.5.2016 in Petition No. 264/GT/2014 for the period 2014-19 in accordance with 2014 Tariff Regulations, which was later corrected vide corrigendum order dated 17.8.2016, in with regard to the formula for Design Energy.

(e) On account of the above provisions in the Tariff Regulations and the tariff orders issued by this Commission, NHDCL had realised the following incentive from MPPMCL:

(Rs.in crore)

| Sl No. | Financial Year | % NAPAF (tariff period wise) | % PAFM | 50% of AFC as per respective tariff order | Capacity charges claimed | Incentive (5-6) |
|--------|----------------|------------------------------|--------|---|--------------------------|-----------------|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 1 | 2009-10 | 90.00 | 99.83 | 215.23 | 238.74 | 23.51 |
| 2 | 2010-11 | | 96.40 | 213.64 | 228.83 | 15.19 |
| 3 | 2011-12 | | 97.58 | 205.87 | 223.21 | 17.34 |
| 4 | 2012-13 | | 97.26 | 198.04 | 214.02 | 15.98 |
| 5 | 2013-14 | | 98.05 | 212.94 | 231.98 | 19.05 |
| 6 | 2014-15 | 90.00 | 94.35 | 210.14 | 220.30 | 10.16 |
| 7 | 2015-16 | | 97.13 | 206.50 | 222.86 | 16.36 |
| 8 | 2016-17 | | 96.39 | 203.84 | 218.31 | 14.47 |
| 9 | 2017-18 | | 96.08 | 202.79 | 216.49 | 13.70 |
| 10 | 2018-19 | | 96.71 | 201.51 | 216.53 | 15.02 |
| 11 | 2019-20 | 90.00 | 94.85 | 205.30 | 216.36 | 11.06 |
| 12 | 2020-21 | | 96.29 | 167.26 | 178.95 | 11.69 |
| | TOTAL | | | 2443.05 | 2626.57 | 183.52 |

(f) Thus, despite non-achieving the full output of 65 MW per machine, NHDCL has claimed and realised the incentive of Rs.183 crore during the period from 1.4.2009 to 31.3.2021 from MPPMCL, which is contrary to the directions of this Commission in an order dated 30.10.2007 in Petition No. 56/2007 and order dated 16.1.2012 in Petition No. 265/2010 issued prior to 2009, 2014 and the 2019 Tariff Regulations. This Commission in the above Tariff Orders, specifically mentioned that until a full capacity of 65 MW per machine is achieved by the project, Respondent cannot claim the incentive of Omkareshwar Hydro Electric Project. As per proviso 142 of the Electricity Act, 2003, every licensee has to comply with the directions issued by the Appropriate commission, therefore, NHDCL is yet to comply with the directions contained in the above orders until the full output of 65 MW per machine is achieved by the project.

(g) NHDCL, vide its letter dated 26.3.2021, informed MPPMCL that the generating station achieved a full reservoir level of EI 196.60 meter on 1.4.2021,



thus, delivering an output of 65 MW per machine from 1.4.2021. Thus, NHDCL is liable to refund the incentive amount along with interest to MPPMCL.

(h) MPPMCL, vide affidavit dated 26.7.2021 in Petition No 107/GT/2020, had filed an additional submission addressing the matter relating to the refund of incentive with interest and had prayed before this Commission as under:

“Direct the Respondent (NHDC) to refund the incentive amount paid by the Petitioner from 2009-10 till 31.03.2021 along with interest as per Regulations.”

(i) However, this Commission passed an order dated 11.3.2022 in Petition No 107/ GT/2020 without expressing any views on MPPMCL’s prayer vide affidavit 26.7.2021 as above. Therefore, the present Petition has been filed for MPPMCL for recover of incentive along with interest b from NHDCL.

Hearing dated 23.3.2023

5. During the hearing of the Petition on 23.3.2023, the learned counsel for MPPMCL made detailed oral submissions in the matter and prayed that the Petition may be admitted and the relief(s) prayed for may be granted. The learned counsel for NHDCL raised objections on the ‘maintainability’ of the Petition and submitted that MPPMCL has sought to challenge the tariff regulations notified by the Commission. She further submitted that the issue had attained finality, as MPPMCL had not challenged the Commission’s order dated 11.3.2020 in Petition No.107/GT/2020. The learned counsel for NHDCL, however, sought time to file its reply on the ‘maintainability’ of the Petition. The Commission, after hearing the parties, directed NHDCL to file its reply on ‘maintainability’ and for the completion of pleadings in the matter. In compliance with the said directions, NHDCL, vide affidavit dated 14.4.2023, has filed its reply and MPPMCL has filed its rejoinder to the same, vide affidavit dated 5.5.2023.

Reply of NHDCL

6. NHDCL, vide affidavit dated 14.4.2023, in its preliminary reply on maintainability, has submitted the following:



- (a) In the year 2000, a Memorandum of Understanding (MoU) was signed between NHPC and the GOMP for the formation of NHDCL, which came into existence on 1.8.2000. The GOMP assigned the Power component of the Indira Sagar HEP and this Project (OSP) in the Narmada Basin to NHDC on an ownership basis, with the right to release water from the reservoir for power generation. The Project is a multipurpose project which consists of three units:

“Unit I consist of Dam and appurtenant works, Unit-II consists of irrigation system of canals and distributaries being executed by the Government of Madhya Pradesh, Unit III includes Power house and water conductor system along with allied works in power generation. Thus, Units I and III are essentially for power generation, named as power component and Unit II for irrigation system named as irrigation component.”

- (b) In Petition No.56/2007 filed by NHDCL before this Commission, it had submitted the following:

“As regards the reasons for delay in Rehabilitation & Resettlement (R&R) works causing loss of peak power, the petitioner has submitted that under R & R cost being charged to the project, they have provided sufficient funds to the Govt. of Madhya Pradesh, for making necessary payments to the affected families. It has been urged by the petitioner that the Govt. of Madhya Pradesh is responsible for implementing the various activities relating to the R & R and the petitioner should not be held responsible for the restricted filling of reservoir and consequent loss of peak power from the generating station”.

- (c) Due to the delay in shifting the Project-affected families, the reservoir of the Project could be filled up to EL 189.0M only [the FRL being at EL 196.60 M] as a result of which, the maximum output achieved on a continuous basis had been 50 MW per machine after conducting the requisite tests, as against the installed capacity of 65 MW per machine.

- (d) Under the 2004 Tariff Regulations, the Capacity Index was provided as a performance parameter based on the availability of water and machines during the designated peaking hours. Regulation 40 of the 2004 Tariff Regulations provided that a generating company was entitled to the payment of incentive on account of the Capacity Index.

- (e) Keeping in view the above, this Commission, vide its order dated 30.10.2007 in Petition No.56/2007, approved the provisional tariff of the Project, recognizing the entitlement of NHDCL to recover the full annual fixed charges under the 2004 Tariff Regulations. This was done owing to the fact that FRL could not be achieved by NHDCL on account of the delay in the Relief & Rehabilitation (R&R) work not for its own fault, as recorded in the above order. However, in the said order, the incentive on account of the Capacity Index was not allowed by this Commission till a full maximum of 65 MW was achieved.



(f) Thereafter, the Commission vide its order dated 16.1.2012 in Petition No.265/2010, while approving the final generation tariff for the Project for the period from 20.8.2007 to 31.3.2009, approved the COD of the last unit of the Project as 15.11.2007, and also held that NHDCL was not entitled to the claim for incentive on account of capacity index until the full maximum output of 65 MW per machine was achieved. A perusal of the said order shows that this Commission has explicitly not allowed NHDCL the incentive claim on account of the capacity Index in accordance with the then prevailing 2004 Tariff Regulations.

(g) From 2009 onwards, i.e., from the subsequent tariff period, there was a change in the regulatory regime as regards the payment of incentives. Accordingly, the 2009 Tariff Regulations framed by this Commission for the period from 2009-14 onwards dispensed with the concept of Capacity Index and introduced the concept of Plant Availability Factor (PAF), wherein PAF was the Load Factor with respect to the Declared capabilities/installed or peaking capacity of the generating station. This shift from the Capacity Index to PAF is mentioned in the Statement of Objects and Reasons (SOR) to the 2009 Tariff Regulations (applicable for the period 2009-14) as under:

“26. Compensation for loss of generation from hydro generating station (Regulation 22(6))

26.1 The draft regulation had done away with capacity index and introduced the concept of normative annual plant availability factor (NAPAF). The new formulation also provided for bifurcating fixed charges into capacity and energy charge. However, the provision relating to any shortfall in energy charge due to hydrology failure resulting in actual energy available being less than design energy was not made pass-through.

xxx

26.4 Further, Commission has provided for recovery of capacity charges as a function of NAPAF. NAPAF is set by the Commission with due regard to the operating conditions of each station like variation in FRL, MDDL and silt level. In case of new stations also, Commission has provided for due consideration of factors like MDDL and rated head. As such the chances of short recovery of fixed charges on account of factors beyond the control of the generating company are remote. Apart from above, a generator can earn extra revenue as capacity charge for declaring availability more than the NAPAF during peak hours. As such, generator is encouraged to provide more peaking support. In order to give comfort to developers for new hydroelectric projects, the Commission has given the option of approaching the Commission in advance for fixation of NAPAF.”

(h) As per the 2004 Tariff Regulations, there were two generic categorizations of hydropower generating stations for the purpose of claiming incentives on account of the Capacity Index, which is as under:

(a) Purely Run-Off-River with normative Capacity Index as 90%; and

(b) Run-Off-River with Pondage or Storage type with normative value of Capacity Index as 85%.

(i) As the Project fell under the category of Run-Off-River with Pondage, its corresponding normative Capacity Index was 85% as per the 2004 Tariff Regulations. This Commission while determining the tariff for the period from



20.8.2007 to 31.3.2009 for the said Project, disallowed the incentive on account of the Capacity Index, despite the Project demonstrating the Capacity Index over and above the normative value of 85%.

- (j) However, under the 2009 Tariff Regulations, instead of bifurcating the Hydropower generating stations into two broad categories, as done earlier, this Commission notified the new concept of Incentive Parameter, i.e., Normative Annual Plant Availability Factor (NAPAF) specific to Projects, and for this Project, it was notified as 90%, as compared to the normative value of Capacity Index of 85%, under the 2004 Tariff Regulations. The term 'Capacity Index' was abolished and was no longer valid with effect from 2009, as per the 2009 Tariff Regulations, and in the subsequent Tariff Regulations for the periods 2014-19 and 2019-24, respectively. The NAPAF of 90% was also unchanged under the 2014 and 2019 Tariff Regulations.
- (k) In terms of the 2009 Tariff Regulations, the recovery of the annual fixed charges (AFC) was divided on a 50:50 basis into Capacity Charges and Energy Charges. Moreover, the incentive or disincentive, on account of achieving PAF more than NAPAF or shortfall in NAPAF, as the case may be, was made an integral part of the Capacity Charges by virtue of grossing up or grossing down of 50% AFC i.e. Capacity Charges.
- (l) Similarly, Regulations 22 and 23 of the 2009 Tariff Regulations, which provided the formula for calculating the capacity charges and payment of transmission charges, respectively, were also inclusive of the incentive. Thus, incentive became a part of the AFC recovery, instead of a separate head (as was under the 2004 Tariff Regulations).
- (m) The concept of NAPAF was also continued under the 2014 Tariff Regulations and the 2019 Tariff Regulations; both the said Regulations also contained similar provisions with respect to the Capacity Charges being inclusive of the 'incentive', similar to the position under the 2009 Tariff Regulations, as mentioned below:
- (n) Thus, it was only under the 2004 Tariff Regulations that the incentive did not form a part of the capacity charges and was payable in addition to the same. However, from 2009 onwards, the incentive became payable as part of the capacity charges, under the approved tariff.
- (o) For the period 2009-14, NHDCL filed Petition No.248/GT/2012, and the Commission vide its order dated 9.5.2013, determined the annual fixed charges for the period 2009-14, based on the projected additional capital expenditure during



the respective years of the tariff period. Thereafter, in Petition No.460/GT/2014 filed by the NHDCL, the Commission vide its order dated 10.5.2016 trued-up the tariff of the Project based on the same methodology as adopted in an order dated 9.5.2013.

- (p) In Petition No. 264/GT/2014 filed by the NHDCL, the Commission vide order dated 26.5.2016, had approved the tariff of the Project for the period 2014-19, in terms of the 2014 Tariff Regulations; and in Petition No. 107/GT/2020 filed by NHDCL, the Commission vide its order dated 11.3.2022 had approved the tariff of the Project for the period 2019-24 and also trued-up the tariff for the period 2014-19. In these orders, no explicit direction on account of incentive and/or disincentive was contained in respect of achieving PAF (more than or less than NAPAF as the case may be), which was an integral part of 50% annual fixed charges, i.e., capacity charges, by virtue of grossing up or grossing down.
- (q) In the above background, it is by virtue of 'operation of law' that NHDCL is entitled to and has received the incentive based on the NAPAF value forming a part of the capacity charges from 2009 onwards, in consonance with the applicable Tariff Regulations read with the tariff orders of this Commission. As such, no question of any refund of the same can arise. Any claim seeking a refund of the same is tantamount to a challenge to the prevailing Tariff Regulations which cannot be permitted by this Commission. Further, the regulatory regime with respect to incentives being a part of the capacity charges was changed way back in the year 2009, and the issue regarding the refund of such incentive was never raised by the Petitioner in the past 12 years (i.e. from 2009 to 2021). It is settled law that if an issue could have been raised but was not raised, it would be deemed to have been raised and decided and, as such, MPPMCL cannot be permitted to now raise an issue regarding the refund of the incentive and request for a revision in the tariff orders.
- (r) Further, before 2009, neither any incentive was claimed by NHDCL nor was the same granted by this Commission, as under the 2004 Tariff Regulations, the incentive was over and above the annual fixed charges. However, from 2009 onwards, NHDCL has claimed recovery of incentive as part of 50% of the annual fixed charges, i.e., capacity charges, in accordance with the Regulations notified by this Commission from time to time and the formula given therein.
- (s) Under each of the tariff orders, the annual fixed charges determined by this Commission, from time to time, in accordance with the prevailing Regulations, was duly paid to NHDCL by MPPMCL. Using the same methodology as arrived at under



the tariff orders, true-up orders were also passed by this Commission. Further, no challenge has ever been made to any of the tariff orders by MPPMCL in the form of a review or an appeal, and as such, all the tariff orders have attained finality. MPPMCL has also recovered the said annual fixed charges from its consumers; taxes have been paid, and dividends have also been disbursed by NHDCL, wherein 49% stake-holding is vested with the GOMP. Thus, the parties have settled their affairs for the respective periods. The relief sought by the Petitioner in the present Petition is not only against the settled principles of law but would also lead to a bundle of complications which would destabilize the entire working of the project of NHDCL. As such, the claims made by MPPMCL in the present Petition are untenable and, thus, not maintainable.

- (t) In each of the tariff filings, the status of the reservoir level and machine output was placed on record by the NHDCL before this Commission, and the same was taken note of by this Commission in each of the tariff orders as under:

Order dated 9.5.2013 in Petition No. 248/GT/2012:

“56. The design energy as approved by CEA for the project is 1167 MUs corresponding to FRL of EL 196.60 MUs. However, due to R&R issues, the reservoir could only be filled up to EL 189.0 M. As such, during 2007-09, the machines were operating under the reduced head with capacity reduction from 65 MW to 50 MW. The Commission vide its order dated 16.1.2012 in Petition No. 265/2010 had allowed design energy of 896.44 MUs corresponding to EL 189 M, based on CEA letter dated 19.3.2009.

60. The figures of modified design energy, as calculated by the petitioner above have been verified and are found to be in order. The petitioner has not, in categorical terms submitted as to when the reservoir level will reach its FRL level of EL 196.60 M. From Form-2 annexed to the petition, it appears that full reservoir operation shall commence from the year 2012-13. However, in order to avoid any uncertainty in this regard, the following design energy corresponding to both reservoir levels and consumptive water requirement of 6.624 BM3 have been allowed, for billing purpose, as the base figures are to be true-up depending upon the permitted level of reservoir filling and actual consumptive water utilization to be certified by Narmada Control Authority at the end of each year...”

Order dated 10.5.2016 in Petition No.460/GT/2014:

“12. The petitioner in the present petition has claimed gross expenditure of Rs 6759.20 lakh during 2009-14 towards balance R&R works under Regulation 9(2)(i) of the 2009 Tariff Regulations., i.e. Liabilities to meet award of arbitration or for compliance of order or decree of court. The petitioner, in justification of the said claim has submitted as under:

“In this regard, it is respectfully submitted that in order to harness the full capacity of 520 MW from OSP, the Petitioner as well as GOMP (NHDCL No. 2) have been endeavoring for filling the reservoir above the existing permissible level of EL 189.0 M. In such endeavors, after due compliance to the verdict dated 11.5.2011 of Apex Court in respect of construction of Bridges at 5 locations, the NHDCL No. 2 vide their order No. 2012/109 dated 01.8.2012 had allowed the raising of water level in Omkareshwar Reservoir beyond EL 189.0 M, in a gradual manner and the level of EL 190.50 M was attained as on 31.8.2012. However, consequent to acute agitation by the PAFs in the form of “Jal Satyagrah”, the Group of Ministers (GoM) of GoMP visited the agitation areas and recommended for receding of water level in Omkareshwar Reservoir back to EL 189.0 M. Accordingly, NHDCL No. 2 vide letter No.156/NVDA/R/LA/2012/944 dated 10-09-2012 directed to maintain the water level of Omkareshwar Reservoir at EL 189.0 M. Further, vide order No. F/19-



77/2012/1/4 dated 10-09- 2012, the NHDCL No. 2 constituted a High-Level Committee comprising of a group of three numbers Ministers of GoMP to hear and resolve the problems of PAFs.

64. The petitioner has submitted that the NCA has notified the Water Accounting for the years 2011-12 & 2012-13 and provided the value of utilization of water by the State of MP and based on the above formula has claimed the firm power corresponding to Restricted Reservoir Level at EL 189.0 M and Design Energy for the year 2011-12 and 2012-13...

xx

65. We have examined the matter and the figures of modified design energy, as calculated by the petitioner above are found to be in order. Accordingly, the details of month-wise design energy corresponding to the above two design energy, is approved....”

Order dated 26.5.2016 in Petition No.264/GT/2014:

“50. The petitioner has submitted that the NCA has notified the Water Accounting for the years 2011-12 and 2012-13 and has provided the Water Utilization quantity by GOMP. The Commission in order dated 13.6.2012 has worked out the following formula corresponding to Restricted Reservoir Level at EL 189.0 M and Design Energy for the year 2011-12 and 2012-13...

51. Accordingly, the modified design energy for the year 2012-13 i.e. 788.76 MU has been provisionally allowed for the period 2014-19, subject to submission of actual consumptive water utilization by GOMP for the said period duly certified by Narmada Control Authority. However, the Design Energy shall be calculated based on water utilization certification by NCA and shall be tried up at the end of each year based on the actual water utilization certified.”

Order dated 11.3.2022 passed in Petition No. 107/GT/2020:

‘130. The NHDCL has submitted that the Commission may consider the above minutes as regards the reservoir level already achieved and DC of 58 MW corresponding to the reservoir level EL 191.0 M and compute the firm power and DC at other reservoir levels, for the 2019-24 tariff period also. In response, the Petitioner has clarified that GoMP had allowed to raise the level of OSP Reservoir up to FRL in the month of November 2019 and the Reservoir attained FRL on 4.11.2019. On attainment of FRL, the powerhouse had already started injecting power corresponding to the rated capacity of machines i.e. 65 MW per machine and with total injection of 520 MW, when all 8 machines were scheduled for generation. Accordingly, the Petitioner has complied with all the provisions of the Grid Code by exhibiting peaking capabilities of the generating station, equal to the installed capacity i.e. 520 MW, although DC continued at 55 MW per machine with total DC of 440 MW, on availability of all 8 machines. In terms of the meeting between the Petitioner and MPLSDC on 8.3.2021, the project commenced DC at 65 MW per machine, with a total declared capacity of 520 MW w.e.f. 1.4.2021. Accordingly, the Petitioner has prayed to consider fixing notional DC of 65 MW per machine, corresponding to FRL, with a total output of 520 MW, to regularize DE for the period from 5.11.2019 to 31.3.2021.

131. The submissions of the parties have been considered. The Petitioner, in terms of the directions of the Commission, has submitted the details of the annual water consumption by the State of Madhya Pradesh for the respective year(s), duly certified by NCA, based on the published water accounts as shown under....

132. The Petitioner has submitted the annual water utilization account for the 2014- 19 tariff period, as ‘the value of ‘Q’ shall be irreversible and shall not be reduced once attained. Accordingly, the latest annual design energy, corresponding to water utilization of 10.402 BMC by the State of Madhya Pradesh during year 2019-20 (as applicable for 2018-19) has been considered.”



- (u) Thus, in all the tariff proceedings, this Commission was aware of the reservoir level and the machine output, and it was after duly considering the same that the annual fixed charges were allowed to NHDCL as per the prevailing Regulations.
- (v) MPPMCL, by way of the present Petition, is, in effect, seeking a review of the tariff orders for the periods 2009-14, 2014-19 and 2019-24. It is settled law that a tariff order cannot be revisited after all the parties have arranged their affairs in order and therefore, a revision in the tariff orders as sought by the Petitioner is not permissible in law. The judgment of the Hon'ble Supreme Court in UPPCL v NTPC Ltd., (2009) 6 SCC 235 has been relied upon.
- (w) The above-mentioned tariff orders dated 9.5.2013 (in 248/GT/2012), 10.5.2016 (in 460/GT/2014), 26.5.2016 (in 264/GT/2014) and the order dated 11.3.2022 (in 107/GT/2020) have attained finality, as the affairs of all the parties have been settled for the said periods and as such, the same are not liable to be reviewed by this Commission, more so when MPPMCL had been a party in all the tariff proceedings.
- (x) Even otherwise, the review of the said tariff orders, to the extent of the adjudication by this Commission with respect to the incentive realized by NHDCL from 2009 onwards, is impermissible in law for the reason of being highly belated and hopelessly time-barred, more so, when MPPMCL has been a party in all the tariff proceedings and a privy to all the documents on record. None of the ingredients, as laid down in Order 47 Rule 1 of the Code of Civil Procedure, 1908, exist in the present case, thereby disentitling MPPMCL from the reliefs prayed for in the present Petition. The present Petition, for review of the above tariff orders by way of this miscellaneous Petition, is, therefore, not maintainable and is liable to be dismissed at its threshold.
- (y) MPPMCL has contended that it had also raised the same issue regarding incentives in Petition No.107/GT/2020, but the same was not addressed by this Commission in its order dated 11.3.2022. If MPPMCL was aggrieved by the said order, it ought to have challenged the same by way of an Appeal or a Review Petition before this Commission. However, the Petitioner chose not to do the above but has instead filed the present Petition, which clearly is not maintainable.
- (z) MPPMCL has also filed a Miscellaneous Petition [Petition No. 220/MP/2022] before this Commission, wherein it has also, in effect, sought a review of the abovementioned tariff orders with respect to reducing stage-wise Firm Power and Design Energy for this Project, from 2009 onwards. In this manner, MPPMCL has



sought the review of the same tariff orders in two different proceedings, which are pending adjudication before this Commission, leading to a multiplicity of proceedings at the behest of MPMCL. MPPMCL has neither approached this Commission for amendment/revision of the abovementioned orders within the prescribed period nor has it filed any appeal against any of the tariff orders of this Commission (to the best of the knowledge of NHDCL) but has instead preferred to file this Petition which is also not maintainable on this ground.

- (aa) Tariff is determined by the Appropriate Commission in terms of the provisions contained in Section 62 of the 2003 Act, by following the procedure envisaged in Section 64 of the said Act. In terms of Section 62(4) of the said Act, a tariff order becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or is set aside by the Appellate Authority. Each of the above tariff orders of this Commission have not been a subject matter of appeal and, as such, has become final and is binding upon the parties, including MPPMCL. As such, any 'review' thereof, as sought by MPMCL, is impermissible.
- (bb) The Commission vide its order dated 11.3.2022 in Petition No.107/GT/2020, had determined the tariff of this Project for the period 2019-24. Any trueing-up of the said tariff is necessarily to be based on the same rules/methodology used in the initial tariff determination. The Hon'ble Supreme Court, in its judgment dated 18.10.2022 in *BSES-BRPL v DERC (Civil Appeal No. 4324/2015)*, has held that the 'trueing up' exercise cannot be done to retrospectively change the methodology/principles of tariff determination and re-opening the original tariff determination order thereby setting the tariff determination process to a naught at 'true-up' stage."
- (cc) The same principle has also been adopted by the Appellate Tribunal in its judgment dated 31.10.2022 in *Jaigad Power Transco Limited Vs. Maharashtra Electricity Regulatory Commission [Appeal No.108 of 2022]*, Judgment dated 14.11.2022 in *GIFT Power Company Limited vs GERC [Appeal No. 258 of 2021]*:
- (dd) Under the scheme of tariff determination, any retrospective application so as to reopen the original tariff determination is not envisaged at the true-up stage. Furthermore, even the true-up proceedings are limited in their scope so as not to change the basic premise or methodology on the basis of which the tariff has been determined. As such, the tariff orders (along with the true-up orders) of this Commission, in respect of this Project and forming the subject matter of the present Petition, cannot be revisited and re-opened.



Accordingly, the NHDCL has submitted that the present Petition filed by MPPMCL is not maintainable and is liable to be dismissed.

Rejoinder of MPPMCL

7. MPPMCL, vide rejoinder affidavit dated 5.5.2023, has mainly submitted as under.

Re. Continuing cause of action

(a) It is denied that the present Petition is time-barred, as the same is a continuing cause of action since NHDCL was taking the benefit of incentive every year without delivering the output of 65 MW/per machine, which was only achieved with effect from 1.4.2021, as communicated vide letter dated 26.3.2021. The said communication inter-alia reads as under:

"With reference to above cited subject and record of meeting held on 08.03.2021 at SLDC Jabalpur wherein it has been decided that OSP shall start furnishing Declared Capacity considering 65 MW of each machines from 01.04.2021. The installed capacity at Omkareshwar Power Station is 520 MW (8X65MW) and after deducting 1% Auxiliary Energy Consumption (AUX) the Ex-Bus capacity will be 514.8 MW (520 MW - 01% of 520 MW)."

(b) NHDCL's contention that the Petition is barred by limitation is unsustainable. The present petition is within time. The limitation, which is continuing, is calculated from the date of the communication. NHDCL was bound by the Commission's order dated 16.1.2012 regarding the claim for incentive, which is available only for fulfilling the requirement of 65 MW per machine.

(c) The settled position of law is that the limitation period commences when the dispute between the parties arises, which can no longer be settled amicably. In the present case, the limitation period would begin from the date NHDCL issued the letter dated 26.3.2021, intimating the compliance of the order dated 16.1.2012. Even assuming, without admitting, that the said letter is beyond the period of limitation, still, the present petition still falls under the scope and ambit of a continuing cause of action since every time a tariff order was passed, MPPMCL became entitled to receive the refund of the excess incentive earned by NHDC and the letter dated 26.3.2021 ultimately materialized that till 65 MW is achieved, incentive cannot be claimed as such. Judgments of the Hon'ble Supreme Court in Lata Construction v. Ramesh Chandra Ramniklal Shah (Dr), (2000) 1 SCC 586, CWT v. Suresh Seth, (1981) 2 SCC 790 and Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneswar Maharaj Sansthan, AIR 1959 SC 798 relied upon.

Re. Commission order dated 16.1.2012 regarding the claim of Incentive

(d) The contention of NHDCL that the Commission, in its order dated 16.1.2012 in



Petition No.265/2010, explicitly ordered that the incentive on account of Capacity Index is not allowed in accordance with the then prevailing 2004 Tariff Regulations is wholly untenable and unsustainable. A perusal of the said order clearly shows that NHDCL was not entitled in law to claim the benefit of the incentive unless 65 MW per unit was achieved. The realization of the incentive by NHDCL is clearly contrary to the order dated 16.1.2012. The Petitioner has rightly raised the issue of refund of incentive after the issuance of the letter dated 24.3.2021, when NHDCL achieved 65 MW on 1.4.2021. This Commission, even after the issuance of the 2009 Tariff Regulations, had directed NHDCL not to claim incentives till achieving 65 MW/ unit.

- (e) This Commission, in its order dated 16.1.2012, clearly held that the entitlement to incentive is conditioned upon each unit achieving 65 MW, and till that time, NHDCL was not entitled in law to claim the incentive. The said direction is irrespective of the formula provided in the 2004 Tariff Regulations. Therefore, the contention of the NHDCL that the order dated 16.1.2012 is not applicable for the tariff regulations in respect of the other control periods is beyond the finding of this Commission in Petition No. 265/2010.
- (f) The premise of NHDCL's submission that MPPMCL is challenging the Regulations and the tariff orders is totally incorrect. MPMCL has not challenged the Regulations or the methodology stipulated therein. Challenging the claim for incentive by NHDCL does not tantamount to challenging the Tariff Regulations, as the claim of incentive is in terms of the order dated 16.1.2012.
- (g) The various Tariff Regulations notified by this Commission do not take away the effect of the order dated 16.1.2012, as the claim for incentive was not dependent on any formula, as portrayed by NHDCL; but was a condition to be fulfilled for enjoying the benefit of incentive and in the absence of which, NHDCL could have not claimed Incentive, it had already factored into. The formula, as stipulated under the 2009, 2014, and 2019 Tariff Regulations, is restricted to the calculation of PAFM and NAPAF, and in the case where the PAFM is greater than NAPAF, the generator can enjoy the benefit of incentive. However, it does not take away the stipulation that 65 MW has to be achieved to claim an incentive on account of the capacity index.
- (h) Clause 24.0 of the Explanatory Memorandum to the 2009 Tariff Regulations provides the rationale for the introduction of NAPAF and PAFM. In clause 24.3, the PAF of each station has been assessed as under:

"24.3 Based on the information made available by the generating companies regarding weighted average of daily peaking capability/ declared capacities of their hydro plants during the last 4-5 years, the average 'Plant Availability Factor' of each station has been assessed."



- (i) In view of the above, it can be clearly stated that the 2009, 2014, and the 2019 Tariff Regulations, do not provide for a change in the claim for incentive, as contended by NHDCL. The introduction of the concept of PAF instead of Capacity Index, does not entitle NHDCL to claim the benefit of incentive without adhering to the requirement of achievement of 65 MW per machine. The question is not whether incentive became a part of the capacity charge or not, but the realization of incentive, which cannot be done unless 65 MW is achieved.
- (j) The contention of NHDCL that by virtue of the operation of law, it is entitled to and has received incentive on NAPAF value forming part of the capacity charges from 2009 onwards is completely contrary to facts. In fact, this Commission, while deciding the tariff of the Project for the period from 1.5.2007 to 31.3.2008 onwards in Petition No. 56/2007, had observed that the Project has not achieved FRL 196.60M, which resulted in the reduced output of 50 MW in place of 65 MW. In view of this, the Commission, by its order dated 30.10.2007, explicitly mentioned that “*the Petitioner is not entitled to claim incentive on account of capacity index until full maximum output of 65 MW per machine is achieved.*” It is clear that the direction of the Commission mandated that the impact of the direction would continue until the above condition is fulfilled, viz full maximum output of 65 MW per machine is achieved, and that NHDCL would not be allowed to claim the incentive.

Re. No challenge to the Tariff Regulations

- (k) The contention of NHDCL that MPPMCL has not challenged the Tariff Regulations or the methodology enumerated in the Regulations is misplaced. The case of MPPMCL is that NHDCL has earned the incentive without any entitlement. MPPMCL is bound by the orders of this Commission. As the entitlement to the incentive is linked to achieving 65 MW capacity, it is not open to NHDCL to contend that the Petitioner is not entitled to the relief. Thus, NHDCL is liable to refund the incentive along with interest to the Petitioner.
- (l) Despite non-achieving full output of 65 MW, NHDCL has claimed and realized the incentive of Rs.183 crore during the period from 1.4.2009 to 31.3.2021, which is impermissible and contrary to the Commission’s order dated 30.10.2007 in Petition No. 56/2007 and order dated 16.1.2012 in Petition No.265/2010 issued prior to the 2009 Tariff Regulations, the 2014 and 2019 Tariff Regulations. As per proviso to Section 142 of the Electricity Act, 2003, every licensee has to comply with the directions issued by the Appropriate Commission.



Re. Reopening of the Tariff Orders

- (m) NHDCL's contention that MPPMCL is seeking to reopen all the previous tariff orders is not correct and no such prayer has been made in the Petition. The entire case is regarding the refund of the incentive claimed by NHDCL, which is legally impermissible. In this regard, the Commission's order dated 18.3.2023 in Petition No. 84/MP/2021 is noteworthy, wherein this Commission had allowed the additional O&M expenses for the previous tariff periods, even after the passing of various tariff orders and regulations.
- (n) The contention of NHDCL that from 2009 onwards, there was a change in the regulatory regime, as regards the payment of incentive is completely incorrect. In fact, this Commission in the 2009 Tariff Regulations, decided to refine the basis for more accurate calculation of incentive and capacity charges. Thus, there has been no difference in the parameters.
- (o) The submission of NHDCL that the incentive was an integral part of the capacity charge is not a sufficient and just ground to claim incentive without achieving the maximum output of 65 MW per machine. In fact, in the light of the direction given in orders dated 30.10.2007 and 16.1.2012, it was the obligation and duty of the NHDCL to build the requirements in the formula given under Regulation 22(2) of the 2009 Tariff Regulations and the subsequent Regulations, so that the direction of this Commission is adhered to by NHDCL.
- (p) The submissions made, and the case law relied upon by NHDCL for the proposition that the orders have attained finality and that the Petitioner, by the present petition, is seeking to review the orders passed from time to time is wholly incorrect and denied. The case laws relied upon have no application to the facts of the present case. The issues raised in the present case do not require a revisit of the tariff orders but seek to enforce a binding obligation on NHDCL for compliance with the Commission's order dated 30.10.2007 and 16.1.2012. NHDCL has fulfilled the mandatory obligation of achieving 65 MW only in 2021 and has derived the benefit of incentive, which, on the face of it, is contrary to law, viz., the binding orders of the Commission, as referred above.
- (q) MPPMCL has not sought any review of the orders of this Commission. MPPMCL has filed a separate petition (Petition No.220/MP/2022) aggrieved by the wrong consideration of formula. This Petition is not a review of the order dated 11.3.2022, and the linkage of the present petition with the said Petition, is not relevant to the facts and circumstances of the present case.



Accordingly, MPPMCL has submitted that the reliefs sought in the petition may be allowed.

Hearing on 16.5.2023

8. During the hearing, the learned Senior counsel for the Petitioner, MPPMCL, and the learned counsel for NHDCL made detailed oral submissions, mainly on the lines of their submissions in the reply/rejoinder, as above. The learned Senior counsel for MPPMCL added that the present Petition is maintainable since the Commission, in its order dated 11.3.2022 in Petition No. 107/GT/2020, had 'not decided' the reliefs sought by MPPMCL vide affidavit dated 26.7.2021, for refund of the incentive amount. The Commission, after permitting MPPMCL and NHDCL to file their written submissions, reserved its order on the 'maintainability' of the petition.

9. In compliance with the directions of the Commission, MPPMCL and NHDCL have filed their written submissions vide affidavits dated 12.6.2023 and 6.6.2023, respectively. In their written submissions, the MPPMCL and NHDCL have reiterated their submissions made in the Petition/reply and rejoinder, and therefore, the same are not mentioned herein for the sake of brevity.

Hearing on 18.3.2024

10. Since the order in the Petition could not be issued prior to one Member of this Commission, who formed part of the coram, demitting office, the Petition was relisted and heard on 18.3.2024. At the outset, the learned counsels for MPPMCL and NHDCL submitted that since the arguments have been completed by the parties, the Commission may reserve its order in the matter. However, the learned counsel for NHDCL circulated a copy of the Commission's order dated 20.1.2024 in Petition No.144/MP/2021 to take the same on record and submitted that in terms of the said order, the present petition is not maintainable. The learned counsel for MPPMCL sought a week's time to file its response to the aforesaid submissions of NHDCL. The



Commission, after hearing the parties, permitted MPPMCL to file its response, as stated above, and for NHDCL to file its response, if need be, to the said submissions. Subject to this, the Commission reserved its order on the 'maintainability' of the Petition.

Written Submissions of MPPMCL

11. In response, MPPMCL on 29.3.2024, has filed its written submissions pertaining to the inapplicability of the order dated 20.1.2024 in Petition No.144/MP/2021, to the present case, as summarized below:

- (a) A perusal of the prayers (in this petition) would clearly show that MPPMCL has not sought any revision of the tariff orders (as claimed in Petition No.144/MP/2021) and rather, its case is limited to the issue of refund, in the present Petition. While pointing out that the contention of the NHDCL (that MPPMCL is seeking the review or reopening of the tariff orders), is wholly untenable, MPPMCL has submitted that the case of the MPPMCL got triggered only when 65 MW was declared by NHDCL (in 2021) and for the period before that, MPPMCL was not entitled in law to take benefit of incentive.
- (b) The Commission, vide its order dated 14.12.2023 in Petition No. 93/MP/2021, had allowed NHDCL to recover the amounts paid towards Electricity Duty and Energy Development Cess. In the said order, the Commission, while recording the fact that the tariff orders had been issued and, therefore, no pass through of ED and EDC in tariff can be allowed, had directed NHDCL to reimburse the said amounts in 10 equal monthly installments. In the present case, the Petitioner has not sought any revision of the tariff order but, on the other hand, has prayed for a refund of the amounts earned by NHDCL as an incentive. Similar directions can be passed by the Commission in the present case.
- (c) The Commission's order dated 18.3.2023 in Petition No. 84/MP/2021 is also noteworthy, wherein this Commission had allowed the additional O&M expenses for the previous tariff periods, even after the passing of the various tariff orders and regulations.

Response of NHDCL

12. NHDCL on 16.4.2024, has filed its response to the above-written submissions of MPPMCL and has mainly submitted the following:

- (i) Under the 2009 Tariff Regulations, the incentive (above the notified normative values of the plant availability factor) has been included as part of the capacity charges under the approved annual fixed cost, and the same is payable to the hydro generating stations, on a monthly basis, as per the formula prescribed in Regulation 22(2) thereto;



(ii) following the provisions in the 2009 Tariff Regulations, once the annual fixed charges for a hydro generating station are approved by the Commission, the capacity charges, under the monthly tariff bills, are computed by including the incentive as per the prescribed formula, and the tariff bills are raised on the beneficiaries accordingly;

(iii) the provision as regards the payment of incentive, which is included in the capacity charges, is also found in Regulation 31 of the 2014 Tariff Regulations and Regulation 44 of the 2019 Tariff Regulations, and the monthly tariff bills inclusive of incentive, are raised on the beneficiaries in accordance with the said regulatory scheme;

(iv) It is by operation of law, as laid down under the 2009 Tariff Regulations, 2014 Tariff Regulations, and the 2019 Tariff Regulations, that NHDCL has been entitled to and has received the incentive based on the NAPAF value forming a part of capacity charges from 2009 onwards, in consonance with the applicable Tariff Regulations read with the tariff orders of this Commission; the regulatory regime with respect to incentive being a part of the capacity charges has been modified in the year 2009 and the issue regarding the refund of such incentive has never been raised by the Petitioner in the past 12 years (i.e. from 2009 to 2021) except in the proceedings under Petition No.107/GT/2020.

(v) This is so even when the cause of action, if any, has accrued in favour of MPPMCL, when the tariff bills, inclusive of incentive, have been raised for the first time under the 2009 Tariff Regulations, and not when the project has achieved its FRL. The AFC, inclusive of incentive paid by the Petitioner in all these years, is without any protest or objection, and the same has also been recovered from its consumers under its approved ARRs, taxes have been paid, and dividends have also been disbursed by NHDCL wherein, 49% stake-holding in the Respondent company is vested with the Government of Madhya Pradesh.

(vi) In view of the findings in the order dated 20.1.2024 in Petition No.144/ MP/ 2021, the submissions of MPPMCL are liable to be rejected. The reliance of MPPMCL on the order dated 14.12.2023 in Petition No. 93/MP/2022 is misplaced since the said petition dealt with the issue of reimbursement of the interest amount paid towards ED and EDC by NHDC. While Petition No.93/MP/2022 addresses the issue regarding a component which has never formed part of the energy tariff, the present Petition deals with an in-built component of the energy tariff; MPPMCL has also challenged the above order before the Appellate Tribunal in Appeal No. 49 of 2024 (the same is pending adjudication) and having challenged the same, it seeks to rely on in the present Petition. the Petitioner undermines its own reliance on it.

(vii) Petition No.84/MP/2021 was filed by SJVNL seeking the recovery of the impact due to pay revision of its employees from 1.1.2007 and 1.1.2017, implementation of 7th Pay Commission of Central Industrial Security Force (CISF) Personnel from 1.1.2016, revision of minimum wages of outsourced manpower (from 1.4.2017) and the GST from 1.7.2017 and given that the impact of the salary/ wage revision had not been '*factored in*' while framing the O&M expense norms under the Tariff Regulations for the periods 2004-09, 2009-14 and 2014-19, the same was allowed to be recovered by this Commission. However, in the



present case, incentives constituted part of the capacity charges and were factored into the Tariff Regulations notified by this Commission for the tariff periods starting from the year 2009. As such, the reliance placed by the Petitioner on the above order is also misplaced, inadmissible and is liable to be rejected by this Commission.

13. Based on the submissions of the parties, the issue which emerges for consideration is:

‘Whether the prayer of MPPMCL for directions to NHDCL for a refund of the incentive on account of the capacity index for the period from 1.4.2009 to 31.3.2021 is maintainable.’

Analysis and Decision

14. MPPMCL has submitted that though NHDCL, vide its order dated 16.1.2012 in Petition No. 265/2010, was permitted to recover the full fixed charges corresponding to an output of 50 MW (as against the capacity of 65 MW per machine), it had, in the said order held that NHDCL was not entitled to claim incentive on account of the capacity index until the full maximum output of 65 MW was achieved. MPPMCL has also submitted since the generating station of NHDCL had achieved a full reservoir level of EL 196.60 meter only on 1.4.2021 (thereby delivering an output of 65 MW per machine from 1.4.2021) as per letter dated 26.3.2021, MPPMCL is entitled to the refund of Rs 183.52 crore (with interest) towards the incentive paid to NHDCL during the period from 1.4.2009 to 31.3.2021. MPPMCL has also submitted that there is a continuing cause of action due to the claim of incentive by NHDCL every year, and the Petition is therefore not barred by limitation. *Per contra*, NHDCL has submitted that though the Commission, vide its order dated 16.1.2012, had explicitly not allowed the incentive claim on account of the capacity index in terms of the 2004 Tariff Regulations, applicable for the period 2004-09, the concept of the capacity index was dispensed with from the subsequent tariff periods (i.e. 2009 onwards) and a new concept of incentive parameter i.e. ‘NAPAF’ was introduced, which remained unchanged under the 2014 and the 2019 Tariff Regulations. It has stated that since



NHDCL, by virtue of 'operation of law,' is entitled to and has received the incentive based on the NAPAF value forming part of the capacity charges from 2009 onwards, in terms of the prevailing Tariff Regulations and the tariff orders issued in terms thereof, the question of refund of the same does not arise. NHDCL has further submitted that MPPMCL, neither having raised the issue of refund of the incentive during the past 12 years (since 2009) nor having challenged the tariff orders by way of review or appeal and thus having attained finality, cannot be permitted to reopen the tariff orders and seek a refund of the same, being hopelessly time-barred, more so, when MPPMCL has been a party in all the tariff proceedings and also privy to all documents on record. *In response*, MPPMCL has argued that there is a continuing cause of action since NHDCL was taking the benefit of incentive every year without delivering the output of 65 MW per machine, which was achieved only on 1.4.2021. Pointing out that it became entitled to the refund of the excess incentive earned by NHDCL, MPPMCL has submitted that the limitation period would only begin from the date NHDCL issued a letter dated 26.3.2021 intimating its compliance with the order dated 16.1.2012. Refuting the submissions of NHDCL that MPPMCL seeks to challenge the Tariff Regulations and /or reopen the tariff orders, it has been contended that the question is not whether the incentive became part of a capacity charge or not but the realization of the incentive by NHDCL, which cannot be done, unless 65 MW per machine is achieved. Accordingly, MPPMCL has submitted that it has sought to enforce a binding obligation on NHDCL for compliance with the Commission's order dated 16.1.2012, stipulating that 65 MW has to be achieved to claim incentive on account of the capacity index.

15. We have examined the submissions of the parties. Regulation 31 (vi) and (x) of the 2004 Tariff Regulations defined the 'Capacity Index' and 'Daily Capacity Index' as under:



“31. (vi) Capacity Index' means the average of the daily capacity indices over one year; (x) 'Daily Capacity Index' means the declared capacity expressed as a percentage of the maximum available capacity for the day and shall be mathematically expressed as hereunder:

Daily Capacity Index = [Declared Capacity (MW)/ Maximum Available Capacity (MW)] x 100.

Daily capacity index shall be limited to 100%.”

16. Regulation 40 of the 2004 Tariff Regulations provides that a generating company is entitled to the payment of 'incentive' on account of the capacity index, as under:

“40. Incentive:

(1) Incentive shall be payable in case of all the generating stations, including in case of new generating stations in the first year of operation, when the capacity index (CI) exceeds 90% for purely run-of-river power generating stations and 85% for run-of-river power station with pondage or storage type power generating stations and incentive shall accrue up to a maximum capacity index of 100%.

xxx

(4) The total incentive payment calculated on annual basis shall be shared by the beneficiaries based on the saleable allocated capacity.”

17. Thus, under the 2004 Tariff Regulations, incentive did not form part of the capacity charges and was payable in addition to the capacity charges. As stated, the Commission, in its order dated 30.10.2007 in Petition No. 56/2007, while granting provisional tariff for the Omkareshwar Project of NHDCL (which is a run-of-river with pondage) for the period 20.8.2007 to 31.3.2009, had decided that NHDCL was entitled to the full fixed charges, but was not entitled to claim incentive on account of capacity index, until full maximum output of 65 MW per machine was achieved by the station.

The relevant portion of the order is extracted below:

“13. The petitioner is not responsible for loss of peak power from the generating station (on account of delay in R&R work by NHDCL) and therefore we consider this to be a fit case for relaxation of the provision under clause 13 of the 2004 regulations. The petitioner is entitled to recover full annual fixed charges on provisional basis. However, the petitioner is not entitled to claim incentive on account of capacity index until full maximum output of 65 MW per machine is achieved.

14The petitioner may claim incentive at the time of determination of the final tariff for the generating station.”

18. A similar observation was made by the Commission in its order dated 16.1.2012 in Petition No. 265/2010 while determining the final tariff of the project for the said period. In terms of this, NHDCL had not raised any bills on MPPMCL towards the



incentive claim on account of the capacity index. However, it is noticed that a change in the regulatory scheme was brought under the 2009 Tariff Regulations (applicable for the period 2009-14), wherein the concept of 'capacity index' was dispensed with, and the Commission introduced the new concept of NAPAF, whereby, the fixed charges were bifurcated in the form of capacity charges and energy charges (on a 50:50 basis), and the incentive or disincentive (on account of achieving PAF more than NAPAF or shortfall in NAPAF, as the case may be) was made an integral part of the capacity charges. In other words, the provisions of the 2009 Tariff Regulations provided for incentive to be payable by MPPMCL as part of the capacity charges to NHDCL in terms of the tariffs approved by this Commission through various orders. The relevant portion of Regulation 22 of the 2009 Tariff Regulations is extracted below:

Regulation 22 of the 2009 Tariff Regulations

“22. Computation and Payment of Capacity charge and Energy Charge for Hydro Generating Stations:

(1) The fixed cost of a hydro generating station shall be computed on annual basis, based on norms specified under these regulations, and recovered on monthly basis under capacity charge (inclusive of incentive) and energy charge, which shall be payable by the beneficiaries in proportion to their respective allocation in the saleable capacity of the generating station,”

(2) The capacity charge (inclusive of incentive) payable to a hydro generating station for a calendar month shall be:

$$AFC \times 0.5 \times NDM / NDY \times (PAFM / NAPAF) \text{ (in Rupees)}$$

Where,

AFC = Annual fixed cost specified for the year, in Rupees.

NAPAF = Normative plant availability factor in percentage

NDM = Number of days in the month

NDY = Number of days in the year

PAFM = Plant availability factor achieved during the month, in percentage

(3) The PAFM shall be computed in accordance with the following formula:

$$N$$

$$PAFM = 1000 \times \sum_{i=1}^N DCi / (N \times IC \times (100 - AUX)) \%$$

$$i=1$$

Where,

AUX = Normative auxiliary energy consumption in percentage

DCi = Declared capacity (in ex-bus MW) for the ith day of the month

which the station can deliver for at least three (3) hours, as certified by the nodal load dispatch centre after the day is over.



*IC = Installed capacity (in MW) of the complete generating station
N = Number of days in the month"*

19. Further, the concept of incentives forming part of the capacity charges, as stated above, was continued under the 2014 and 2019 Tariff Regulations notified by the Commission, applicable for the periods 2014-19 and 2019-24, respectively. The relevant portion of these regulations are extracted below:

2014 Tariff Regulations

"31. Computation and Payment of Capacity charge and Energy Charge for Hydro Generating Stations:

(1)xxx

(1) The fixed cost of a hydro generating station shall be computed on annual basis, based on norms specified under these regulations, and shall be recovered on monthly basis under capacity charge (inclusive of incentive) and energy charge, which shall be payable by the beneficiaries in proportion to their respective allocation in the saleable capacity of the generating station, i.e., in the capacity excluding the free power to the home State...."

2019 Tariff Regulations

"44. Computation and Payment of Capacity Charge and Energy Charge for Hydro Generating Stations:

(1) The fixed cost of a hydro generating station shall be computed on annual basis, based on norms specified under these regulations, and shall be recovered on monthly basis under capacity charge (inclusive of incentive) and energy charge, which shall be payable by the beneficiaries in proportion to their respective allocation in the saleable capacity of the generating station, i.e., in the capacity excluding the free power to the home State..."

20. In terms of the above provisions, the Commission had issued various tariff orders (order dated 9.5.2013 in Petition No. 248/GT/2012, order dated 10.5.2016 in Petition No. 460/GT/2014, order dated 26.5.2016 in Petition No. 264/GT/2014 and order dated 11.3.2022 in Petition No. 107/GT/2020) in respect of this generating station, for the periods from 2009-14 till 2029-24. It is pertinent to mention that MPPMCL was a party to the proceedings in these petitions and was also aware that the annual fixed charges allowed to NHDCL were based on the reservoir level and the machine output details, as furnished by NHDCL in its petitions. Accordingly, in terms of these orders, NHDCL had raised bills on MPPMCL for payment of the capacity charges (inclusive of



incentive), and the same had been paid by MPPMCL. Thus, MPPMCL, having paid the incentive amounts for the period from 1.4.2009 to 31.3.2021, without raising any dispute/objection on this issue, cannot now be permitted to seek a refund of the amount. As rightly pointed out by NHDCL, the tariff orders of this Commission, in respect of the project, have attained finality, and MPPMCL, after making the incentive payments to NHDCL during the said period, cannot be permitted to agitate the said question after passing of many stages. Seen from this angle, the claim of MPPMCL for a refund of the incentive amount for the past 12 years, is time-barred. Also, the submission of MPPMCL that there is a continuous cause of action in the present case, considering the fact that NHDCL was claiming incentives every year, is not acceptable. According to us, the cause of action had accrued to MPPMCL when NHDCL was entitled to receive incentive forming part of the capacity charges (based on the NAPAF value) on account of the change in the regulatory regime (as stated in paragraphs 18 and 19 above) and when NHDCL had raised tariff bills (inclusive of incentive) for the first time, based on the tariff orders issued in terms of the 2009 Tariff Regulations, and not when the project had achieved FRL on 1.4.2021. In case MPPMCL, being the beneficiary of the project, felt that the incentive amounts claimed by NHDCL were contrary to the regulations and/or the Commission's order dated 16.1.2012 (in Petition No.265/2010), it should have challenged the same, at the relevant point in time. Nothing prevented MPPMCL from seeking a review or filing an appeal against the aforesaid tariff orders/truing-up orders issued by this Commission on the issue of incentive claimed by NHDCL. MPPMCL, having not done so, but accepted the tariff orders and made payments thereof to NHDCL, cannot, in our view, seek the refund of the said incentive amount. The prayer of MPPMCL, if entertained, would result in the review of the tariff orders issued by the Commission for the aforesaid period, which is



not permissible. Considering these factors in totality, we hold that the relief sought by MPPMCL in the present Petition is not maintainable.

21. Further, MPPMCL has contended that NHDCL was entitled to recover the incentive only when the full maximum output of 65 MW per machine was achieved by the station, in terms of the Commission's orders dated 30.10.2007 and 16.1.2012. It has also submitted that since the generating station had achieved the same only on 1.4.2021, as communicated vide letter dated 26.3.2021 (as in para 7 (a) above), it was entitled to a refund of the incentive amount paid to NHDCL during the past 12 years (from 1.4.2009 to 31.3.2021). In short, MPPMCL's contention is that the cause of action in the present case was triggered only when 65 MW was declared by NHDCL (in 2021), and for the period prior to that, NHDCL was not entitled in law to take the benefit of incentive. This submission of MPPMCL is misconceived. As stated earlier, MPPMCL was a party to the tariff proceedings in the tariff petitions filed by NHDCL before this Commission, and based on the tariff orders issued during the period from 2009 to 31.3.2021, MPPMCL had paid the capacity charges to NHDCL, which were inclusive of the incentive. In case MPPMCL was of the view that the incentive claim of NHDCL was contrary to the orders dated 30.10.2007 and 16.1.2012, it could have approached the Commission by way of a petition seeking action against NHDCL under Section 142 of the Electricity Act, 2003 for the non-compliance of the said orders, with regard to the incentive claim by NHDCL. This has not been done so by MPPMCL in the present case. However, we notice that MPPMCL, in the tariff proceedings in Petition No.107/GT/2020 (filed by NHDCL for approval of tariff of the generating station for the period 2019-24) had, on the strength of NHDCL's letter dated 26.3.2021, raised the issue of refund of the incentive paid by it to NHDCL for the period from 2009 till 31.3.2021, but the same was not addressed by the Commission in its order dated 11.3.2022. As per the principles of *res judicata* under section 11 of the CPC 1908, any



relief claimed which is not expressly granted is deemed to have been refused. No appeal or review has been filed by MPPMCL against this order. Thus, MPPMCL's prayer having been refused earlier, the present Petition filed by MPPMCL seeking the same relief cannot be entertained. The Petition is, therefore, not maintainable on this count.

22. MPPMCL has relied upon the Commission's order dated 14.12.2023 in Petition No. 93/MP/2022 (NHDC v MPPMCL & ors) and Order dated 18.3.2023 in Petition No. 84/MP/2021 (SJVNL v PSPCL & ors) to contend that the Commission in the present case, can issue directions for the refund of the incentive amount separately, even after the passing of the tariff orders. *Per contra*, NHDCL has objected to the said submissions and has stated that the aforesaid orders are not applicable in the present case. However, NHDCL has relied upon the Commission's order dated 20.1.2024 in Petition No.144/MP/2021 to contend that the tariff orders in respect of the generating station having attained finality, MPPMCL cannot now seek revision of the same retrospectively. We have examined the matter. In our considered view, the reliance placed by MPPMCL on the Commission's orders dated 14.12.2023 and 18.3.2023 is misplaced. As rightly pointed out by NHDCL, Petition No.93/MP/2022 dealt with the issue of the reimbursement of the interest amount paid by NHDC towards Electricity Duty (ED) and Electricity Development Cess (EDC) imposed by the State Government of Madhya Pradesh, which did not form part of the tariff therein, while the present case deals with a component (incentive) forming part of the capacity charges. Interestingly, while MPPMCL has relied upon this order in the present case, it has, on the other hand, challenged the same before the APTEL, which is pending consideration. Similarly, the reliance placed by MPPMCL on the Commission's order dated 18.3.2023 in Petition No.84/MP/2021 is misconceived since SJVNL, in the said case, had sought the recovery of the impact of the wage revision of its employees from 1.1.2007 and



1.1.2017 and for CISF Personnel from 1.1.2016, due to the implementation of the 7th Pay Commission, revision of Minimum wages of outsourced manpower from 1.4.2017 and impact due to the imposition of GST from 1.7.2017, considering the fact that the impact on these counts was not 'factored in' while framing the O&M expense norms under the Tariff Regulations notified for the periods 2009, 2014 and the 2019 Tariff Regulations. However, in the present case, incentive formed part of the capacity charges under the Tariff Regulations notified by the Commission for the aforesaid periods, and accordingly, tariffs, inclusive of incentive, were made by MPPMCL to NHDCL in terms of the tariff orders issued thereunder, during the past 12 years (1.4.2009 to 31.3.2021). Hence, the reliance placed by MPPMCL on the Commission's orders, as aforesaid, is not applicable to the present case. In light of the above discussion, the prayers of MPPMCL, in the present case, are not maintainable.

23. As stated, MPPMCL, based on the tariff bills (inclusive of incentive) raised by NHDCL, had paid the amounts since 2009 without any protest or objection and had also recovered the same from its consumers through the ARRs approved by the State Commission. Further, taxes have been paid, and dividends have been disbursed by NHDCL to the State Government, which has a 49% shareholding in NHDCL. Against this backdrop, when all parties had arranged their affairs during the past period of 12 years (2009 to 2021), the relief sought by MPPMCL cannot be justifiable. In this connection, the observations of the Hon'ble Supreme Court in UPPCL v NTPC Limited (2009) 6 SCC 235 is noteworthy.

"Framing of tariff is made in several stages. The generating companies get enough opportunity not only at the stage of making tariff, but, may be at a later stage also to put forth its case, including the amount it has spent on operation and maintenance expenses as also escalation at the rate of 10% in each of the base year. It cannot, in our opinion be permitted to re-agitate the said question after passing of may stages. Furthermore, the direction of the tribunal that the additional costs may be absorbed in the new tariff, in our opinion, was not correct. Some persons who are consumers during the tariff year in question may not continue to be the consumers of the appellant. Some new consumers might have come in. There is no reason as to why they should bear the brunt."



*Such quick fix attitude, in our opinion, is not contemplated as framing of forthcoming tariff was put subject to fresh regulations and not the old regulations.”
In view of the above, the prayer of the MPPMCL for the revision of tariff orders of other generating stations stands rejected.”*

24. Based on the above discussion and findings, we hold that the prayer of MPPMCL in the present Petition is not maintainable, and it is accordingly disposed of at the admission stage.

25. Petition No. 369/MP/2022 is disposed of in terms of the above.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(Jishnu Barua)
Chairperson

