

**Before the Appellate Tribunal for Electricity**  
**APPELLATE JURISDICTION, NEW DELHI**

**Appeal No. 36 of 2006**

**Dated this 07<sup>th</sup> day of July, 2006**

**Present :**    **Hon'ble Mr. Justice E. Padmanabhan – Judicial Member**  
                  **Hon'ble Mr. H. L. Bajaj – Technical member**

U. P. Power Corporation Ltd.

... Appellant

Versus

1. National Thermal Power Corporation Ltd.  
NTPC Bhawan, CORE-7,  
SCOPE Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi through its  
Senior Manager (Commercial).
2. Jaipur Vidyut Vitran Nigam Ltd.  
Vidyut Bhawan, Janpath,  
Jaipur – 302 005.
3. Ajmer Vidyut Vitran Nigam Ltd.  
Old Power House, Hathi Bhata,  
Jaipur Road, Ajmer.
4. Jodhpur Vidyut Vitran Nigam Ltd.  
New Power House, Industrial Area,  
Jodhpur.
5. Delhi Transco Ltd.  
Shakti Sadan, Kotla Road, Near ITO,  
New Delhi.
6. Haryana Vidyut Prasaran Nigam Ltd.  
Shakti Bhawan, Sector-VI, Panchkula,  
Haryana – 134 109
7. Punjab State Electricity Board  
The Mall,  
Patiala – 147 001.
8. Himachal Pradesh State Electricity Board... Respondents  
Kumar Housing Complex Building-II,

No. of Corrections :

SH

Vidyut Bhawan,  
Shimla – 171 004.

9. Power Development Department  
Govt. of J&K,  
Secretariat, Srinagar,

10. Power Department, (Chandigarh)  
Union Territory of Chandigarh,  
Addl. Office Building,  
Sector-9 D,  
Chandigarh.

11. Uttaranchal Power Corporation Ltd.  
Urja Bhavan, Kanwali Road,  
Dehradun – 248 001.

12. Central Electricity Regulatory Commission  
CORE-3, 6<sup>th</sup> Floor,  
SCOPE Complex,  
New Delhi – 110 003.

... Respondents

Counsel for the Appellant : Mr. Pradeep Misra, Advocate

Counsel for the Respondents : Mr. M. G. Ramachandran, Advocate,  
Ms. Taruna Singh Baghel, Advocate,  
Ms. Saumya Sharma, Advocate for  
Respondent No.1,  
Mr. Rohit Rishi, Advocate for PSEB  
Mr. Keshav Mohan, Advocate for HVPN  
Mr. M. L. Gupta, AM(Legal) for DTL  
Mr. T. Rout, Jt. Ch. (Legal)- Resp.No.12  
Ms. Shaista Siddiqui, Advocate for  
Mr. Sumeet Pushkarna, Advocate for  
Resp.No.5

## **J U D G M E N T**

1. The U.P. Power Corporation, the appellant here in, has come forward with this appeal seeking to set aside the order dated 31.03.2005, passed by Central Electricity Regulatory Commission in Petition No.139 of 2004, by which Order, the said Regulatory Commission has allowed capitalisation of

Rs.4.521 crores to the first respondent M/s National Thermal Power Corporation Ltd. (NTPC).

2. Heard Mr. Pradeep Misra, Advocate appearing for the appellant, Mr.M.G.Ramachandran, Advocate along with Ms. Taruna Singh Baghel for the first respondent, Mr. Sumeet Pushkarna for the 5<sup>th</sup> respondent, Mr.Keshav Mohan for 6<sup>th</sup> respondent, Mr. Rohit Rishi for the 7<sup>th</sup> respondent and Mr. T. Rout for the 12<sup>th</sup> respondent and the other respondents remaining absent despite service of notice. It is to be pointed out that respondents 2 to 11 though were parties before CERC they have not chosen to come forward with an appeal while the present appeal has been preferred by U.P. Power Corporation alone.

3. The first respondent, National Thermal Power Corporation (NTPC for brevity) moved the 12<sup>th</sup> respondent CERC seeking approval for the revised fixed charges in respect of Firoz Gandhi Unchahar Thermal Power Station-I (FGUTPS-I) for the period 01.04.2000 to 31.03.2004 after considering the impact of additional capital expenditure incurred during the said period. It is the claim of the first respondent; the said generating plant was taken over from the erstwhile U.P. State Electricity Board on 13.02.1992 and the Ministry of Power, Government of India by letter dated 02.05.1993 accorded approval for taking over the said generating plant at a cost of Rs. 925 crores. Subsequently, for R&M under Environment Action Plan, as approved by Central Electricity Authority, Rs. 2.85 crores were spent and total approved project cost comes to Rs. 927.85 crores.

4. The terms and conditions of tariff determination for the period 01.04.2001 to 31.03.2004 were notified by The Central Electricity Regulatory Commission, here in after referred as CERC, for brevity in accordance with CERC (terms and conditions of tariff) Regulations 2001. By its notification dated 26.03.2001, on 24.10.2003 CERC determined the tariff of the said generating plant while taking the capital cost of the generating

plant at Rs. 940.70 crores as on 01.04.2001. The first respondent claiming that it had invested further capital sought for additional capitalisation but the same was not allowed during the said tariff determination since the additional capital was only estimated capital expenditure and no certificate of auditor was made available to establish the investment.

5. Subsequently, on 05.10.2004 the first respondent moved a petition to determine the additional capitalisation in terms of the order of the CERC 21.12.2000 and its tariff Regulations. In the said petition the first respondent claimed that it had incurred additional capital expenditure amounting to Rs. 6.101 crores in all under five heads. On that basis, the first respondent claimed revision of fixed charges. The said application was contested by Haryana Vidyut Prasaran Nigam Ltd., U.P. Power Corporation and Punjab State Electricity Board. In opposition, the said three contended that the tariff revision sought for by the first respondent consequent to additional capital expenditure claimed to have been incurred during the tariff period 01.04.2001 to 31.03.2004 cannot be entertained in view of CERC (terms and conditions of tariff) Regulations 2001 as additional capital expenditure claim to have been incurred is less than 20% of the approved cost. That apart some of the objectors disputed the claim of additional capital expenditure and also questioned the manner of computation of revised fixed charges. The appellant herein who is also an objector contended that the claim of additional capitalisation of Rs. 6.101 crores is not a capital investment at all nor it could be claimed under head of capitalisation as they fall under the category of Operation and Maintenance Expenses. Certain other objections were also raised by objectors.

6. After hearing the parties, the CERC by its order dated 31.03.2005 while holding that the first respondent has incurred a capital expenditure to the tune of Rs. 4.521 crores as approved while disallowing Rs. 1.580 Crores. It was held that the first respondent is not entitled to revision of tariff for the

period 01.04.2001 to 31.03.2004 in view of Regulations 1.10, which reads thus :

"1.10 Tariff revisions during the tariff period on account of capital expenditure within the approved project cost incurred during the tariff period may be entertained by the Commission only if such expenditure exceeds 20% of the approved cost. In all cases, where such expenditure is less than 20%, tariff revision shall be considered in the next tariff period."

7. However, the authority, namely CERC, on the view that there is nothing in the Regulation to deny reasonable return to serve the capital expenditure incurred by NTPC, directed that NTPC shall also be entitled to return on equity at 16% on the equity portion of the capital approved and besides it shall also be entitled to interest on loan with effect from 01<sup>st</sup> April of the financial year following the financial year to which additional capital expenditure relates to and upto 31.03.2004.

8. Mr. Pradeep Misra, learned counsel for the appellant, while relying on Regulation 1.10 which provides that there shall be no tariff revision if the capital expenditure is less than 20% of the approved cost of the project contended that there could be no tariff revision at all much less the appellant shall be made liable to pay 16% ROE as well as interest as directed in Para 37 of the Impugned Order under challenge. Mr. Pradeep Misra also contended that the claim of this additional expenditure, under five Heads, are not disputed but they are only maintenance expenditure. It was also contended by the learned counsel that in the absence of approval of expenditure by CEA and there being no proof of such approval, CERC has no authority to hold that NTPC had incurred additional capital expenditure and entitled to additional capitalisation.

9. Per contra, Mr. M.G.Ramachandran learned counsel appearing for NTPC, the contesting respondent, while tracing the history of power station,

as to how it came to be taken over by NTPC contended that no interference is called for with the order under appeal. The learned counsel Mr.M.G.Ramachandran contended that CEA ceased to be approving authority on and after 15.05.1999, on which dated Section 43-A(2) of The Electricity (Supply) Act was amended by Act 14 of 1992. It is also pointed out that CERC is the authority to undertake prudent check of the additional capital expenditure with respect to the project. Mr. M.G.Ramachandran further pointed out that the various capital expenditure enumerated and claimed to have been incurred actually were approved at the commencement of the project but those works remained incomplete and for improvement and effective functioning of the generating station further capital expenditure was incurred by NTPC. It is contended that this claim of NTPC has been accepted by CERC on a prudent check to the tune of Rs. 4.521 crores and in that respect no interference is called for.

10. The points that arise for consideration in this appeal are :

1. Whether the order of CERC allowing additional capitalisation to the tune of Rs. 4.521 crores by NTPC is liable to be interfered ?
2. Whether the first respondent NTPC has substantiated incurring of additional capital to the tune of Rs. 4.521 crores in Firoz Gandhi Unchahar Thermal Power Station-I (FGUTPS-I) ?
3. Whether it is a prerequisite to get the approval of CEA before investment and before claiming capitalisation ?
4. Whether the direction issued in Para 37 of the order by CERC is liable to be modified ?
5. To what relief, if any ?

11. Taking up the first two points, at the out set we have no hesitation in answering these two points in favour of first respondent NTPC and against the appellant. Sufficient and substantial material were placed before the CERC and the CERC has checked the same and was satisfied with respect

to materials placed by the first respondent, NTPC, which came forward with a claim for additional capitalisation in the project.

12. The following are the details of the capital expenditure which the first respondent claimed to have incurred and the first respondent has satisfied CERC by producing materials in proof of such expenditure :

1. Balance internal electrification work of AE Quarters amounting to Rs. 1.065 Lac
2. Balance erection of boiler lifts amounting to Rs. 8.25 lacs
3. Commissioning of CW System – replacement of CW System on safety consideration for the value of Rs. 4.414 crores
4. Replacement of Silica Gel Hydrogen Drier with safe refrigerant type Hydro Drier at a cost of Rs. 0.124 crores

13. In respect of works, CERC has thoroughly satisfied itself as the first respondent NTPC has placed materials in proof of expenditure incurred by way of additional capitalisation and there is no challenge before CERC and no case has been made out for interference.

14. The first respondent disallowed certain of the works claimed and we need not examine the said rejection as there is no appeal by first respondent, NTPC. The Annexures filed by the first respondent, along with the application, and the materials produced to substantiate the terms has been accepted by CERC and we do not find any illegality or error warranting interference in this respect. There is no dispute with these items as they fall within the initial approved cost and admitted work of the project. That apart it is CERC which is the competent authority to approve or undertake prudent check and allow additional capitalisation after the amendment of Section 43-A(2) of The Electricity (Supply) Act by amending 14 of Act of 1998. Section 43A(2) was deleted by Act 14 of 1998 retrospectively with effect from 25.04.1998 in respect of the central generating station such as

NTPC. As a consequence Central Government ceased to be authority to determine tariff for central power generating stations. On a consideration of the findings, as recorded by CERC, we answer both the points against the appellant and in favour of first respondent.

15. Taking up the third point, it has been pointedly argued by Mr. Pradeep Misra, that no approval from CEA has been secured for the additional expenditure and therefore capitalisation is impermissible and the order of CERC is liable to be interfered. Mr. M.G. Ramachandran the learned counsel for the first respondent rightly pointed out that CEA is no longer the authority to approve the project or additional investment on the project with respect to generation and it is the CERC which is competent to undertake a prudent check and allow the capital investment or additional investment for the purpose of determining tariff. It is also rightly pointed out that the project which was originally approved by CEA on 05.08.1986, was taken over when operation of the project remained incomplete on the UP State Legislature passing the Uttar Pradesh Rajya Vidyut Nigam Ltd. (Acquisition and Transfer of undertaking) Act 1992 and as a consequence Firoz Gandhi Unchahar Thermal Power Station-I stood transferred and vested with NTPC, the first respondent herein. The items which remained incomplete had been completed by NTPC after its taking over resulting in investment of additional capital. Therefore, it is pointed out that the investment of additional capital is well within the approved cost of the project which remained unexecuted on the date of vesting. In any event after CEA ceased to be the authority and CERC is in terms of the amended Section 43 A(2) of The Electricity (Supply) Act 1948. It is clear and there is no doubt that CEA ceased to be the authority on the relevant date and it is the CERC which is the authority.

16. On the third point, in the light of the statutory amendment as amended and in force on the date of incurring of expenditure and subsequently also we hold that CERC is the competent authority and CEA



ceased to be the authority to approve capital investments. The third point is also answered against the appellant.

17. As regard to the last point, there is force in the contention advanced by Mr.Pradeep Misra. CERC (terms and conditions of tariff) Regulations 2001 is applicable for the tariff period ending with 31.03.2004 Regulation 1.10 provided for revision of tariff during the tariff period Regulation 1.10 reads thus :

*"1.10 Tariff revisions during the tariff period on account of capital expenditure within the approved project cost incurred during the tariff period may be entertained by the Commission only if such expenditure exceeds 20% of the approved cost. In all cases, where such expenditure is less than 20%, tariff revision shall be considered in the next tariff period."*

18. While placing heavy reliance on the said regulations Mr. Pradeep Misra pointed out that, there could be no revision of tariff during the tariff period whatever be the reason if the capital expenditure incurred is less than 20% of the approved project. We find there is force in this submission. The Regulation, which is statutory in nature provides so and during the tariff period if the additional capitalisation is less than 20% of approved cost there could be no increase in tariff what so ever. Mr. M.G.Ramachandran appearing for first respondent sought to explain the contents of Para 37 of the order appealed against and printed out that it will be included in the next tariff period, which is being settled by CERC.

19. When the regulation bars revision of tariff during the tariff period ending with 31.03.2004 it follows that there could be no revision of the tariff during the tariff period whatever may be the reason or justification when the additional expenditure is less than 20% of the approved project cost. There is no controversy in this respect. In the circumstances, the direction issued by CERC as set out in Para 37 calls for modification. In fixing the tariff for the tariff period commencing 01.04.2004, the element of interest and

investment of return on equity requires to be examined by CERC and included for the purpose of determining the tariff as rightly highlighted by Mr. Ramachandran on behalf of the appellant but there is no warrant to issue such a direction now. In the circumstances, we order deletion of Para 37 of the order appealed against, while making it clear that it is well open CERC to consider the element, namely additional capitalisation return on equity, interest on borrowing, while determining the tariff for the next tariff period. The appeal is dismissed but with the above modification.

Pronounced in open court on this 07<sup>th</sup> day of July 2006.

**(Mr. H. L. Bajaj)**  
**Technical Member**

**(Mr. Justice E Padmanabhan)**  
**Judicial Member**

The last Page

No. of Corrections :

10

SH