

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY**  
**(APPELLATE JURISDICTION)**  
**Appeal No. 145 of 2010**

**Dated : 5<sup>th</sup> April, 2011**

**Coram; Hon'ble Mr. Rakesh Nath, Technical Member**  
**Hon'ble Mr. Justice P.S. Datta, Judicial member**

**In the matter:**

U.P.Power Corporation Ltd.  
Shakti Bhawan,  
14, Ashok Marg,  
Lucknow, U.P.

...Appellant

Versus

1. National Thermal Power Corporation Ltd.  
NTPC Bhawan, Core 7, Scope Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi

2. Central Electricity Regulatory Commission,  
Core-3, 6<sup>th</sup> floor, Scope Complex,  
New Delhi-110003.

...Respondents

Counsel for the Appellant : Mr. Pradeep Misra  
Mr. Daleep Kumar Dhayani  
Mr. M.K. Sharma.

Counsel for the Respondent: Mr. M.G. Ramachandran  
Mr. Anand K Ganesan  
Ms. Swapna Seshadri  
Ms. Sneha Venkaramani  
Ms. Ranjitha Ramachandran  
Mr. Balakrishna

## **JUDGMENT**

**HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER**

### **APPEAL NO. 145 OF 2010**

This appeal at the instance of U.P. Power Corporation Limited is directed against the order dated 14<sup>th</sup> December, 2007 passed by the Central Electricity Regulatory Commission (for short, CERC), respondent No. 2 herein whereby it revised the tariff in respect of Tanda Thermal Power Station, now owned by NTPC Limited (for short NTPC) the respondent No. 1 herein for the period from 1.4.2007 to 31.3.2009.

2. Tanda Thermal Power Station was originally owned by Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited, a generating company belonging to the State of Uttar Pradesh and following reform scheme of the year 2000, it stood transferred to the respondent No.1 namely NTPC on 14<sup>th</sup> January, 2000. But on 7<sup>th</sup> January, 2000 which was shortly before the transfer of the plant to NTPC, a power purchase

agreement was signed by the U.P Electricity Board with NTPC. After take over of the power station, NTPC filed a petition for determination of tariff, being petition No. 77 of 2001 for the period from 15<sup>th</sup> January, 2000 to 31<sup>st</sup> March 2004. Meanwhile, CERC on 26<sup>th</sup> March, 2001 notified the CERC (Terms and Conditions of Tariff) Regulations, 2001 (for short, Regulations, 2001). Though at the time of transfer the book value of the power station was determined at Rs.607 crores, it was transferred to NTPC for Rs.1000 crores for the purpose of liquidation and discharge of liabilities of Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. The CERC, however, approved the tariff by an order dated 28<sup>th</sup> June, 2002 rejecting some of the contentions of the NTPC whereafter the NTPC filed a review petition being No.2 of 2003 and at the same time filed an appeal being No. FAO 530 of 2002, before Delhi High Court. The CERC allowed the review petition filed by the NTPC only on the point of interest on working capital by an order dated 9<sup>th</sup> April, 2003 and with this order the appeal before Delhi High Court stood dismissed on 10<sup>th</sup> August, 2004. Against the order dated 9<sup>th</sup> April, 2003 passed by the CERC in review

petition No. 2 of 2003, the NTPC preferred an appeal being appeal No. 102 of 2005 before this Tribunal which is said to have been disposed of earlier. This is the first background we put on record before we proceed to consider the merit of the appeal under reference.

3. The second background is that the NTPC filed a petition being number 8 of 2005 claiming additional capitalization for the period from 14<sup>th</sup> January, 2000 to 31<sup>st</sup> March, 2004 on the ground that Tanda Thermal Power Station was in a bad shape and to improve its condition, renovation and modernization expenses were incurred by NTPC for which schemes in two phases were framed. The phase I of the scheme related to revival of units for Rs.199.5 crores which was expected to be completed by 31<sup>st</sup> January, 2005, while in respect of the phase II of the scheme for R&M works the total amount was expected to be Rs.316 crores and in respect of which additional capitalization to the tune of R.177.7 crores was claimed by NTPC for the period from the year 2000 to 2004. The appellant raised objections to this proposal for

additional capitalization for the period from 2000 to 2004 on the ground that it was less than 20% of the capital cost and, that apart ,there was no approval of the CEA which was the only authority to approve of the additional capitalization as per regulation 1.10 and 2.5 of the CERC (Terms and conditions of Tariff) Regulations, 2001. The CERC, however, allowed additional capitalization of Rs.177.47 crores overruling the objections of the appellant though the appellant demanded of the NTPC to show the conditions under which loans were taken from PFC and UCO Bank for the purpose of R&M works. The appellant also raised objections to the effect that the interest on loan payment started w.e.f. 15.10.2003 and 26.8.2003 for PFC and UCO Bank respectively but the impact of interest was shown during the year 2000-2004 on normative basis. The CERC held that as the amount of additional capitalization during the years 2001-2004 came to Rs.135.24 crores which is about 22% of the capital cost of Rs.607 crores as on 14.1.2000 thus calling for allowance of additional capitalization. Now, after allowing the additional capitalization the CERC by an order dated 24.10.2005 revised

the tariff against which the appellant preferred an appeal before this Tribunal being appeal No. 205 of 2005. However, during the pendency of the appeal No.205 of 2005 the appellant filed petition No.26 of 2005 before CERC for revision of operational parameters for Tanda Thermal Power Station for the period 2004-2009 and during the hearing of the said petition the Commission is said to have directed NTPC as well as the appellant to check the accounts and balance sheets furnished by NTPC which, according to the appellant, revealed that during the period from 2000- 2004 the gross block as per balance sheet is Rs.751.54 crores as against gross block determined by CERC at Rs.784.47 crores meaning thereby that additional cost which was not spent was also claimed and was allowed by the Commission. Then the appellant filed a Review Petition No. 99 of 2006 before the CERC pointing out this fact. The CERC dismissed the said petition on the ground that the appeal No.205 of 2005 meanwhile was pending before this Tribunal against the order dated 24.10.2005 which was an order passed for revision of tariff following allowance of additional capitalization of

Rs.135.24 crores relating to the period between 2001-2004. The appellant filed an appeal against dismissal of the Review Petition No. 99 of 2006 before this Tribunal but the said appeal as also the appeal No. 205 of 2005 stood disposed of together by this Tribunal by partly allowing the same.

4. Against the aforesaid background which it was necessary for us to place on record so as to appreciate the merit of the present appeal we now proceed to say that so far as the present appeal is concerned, NTPC on 30.11.2006 filed a petition before the CERC being No. 163 of 2004 in respect of Tanda Thermal Power Station for revision of tariff for the period from 1.4.2007 to 31.3.2009 following extensive R&M works through additional capitalization. After this petition was filed, the CERC framed and notified the CERC(Terms and Conditions of Tariff)(Amendment) Regulations, 2007(for short, the Amendment Regulations, 2007) whereby operating norms in respect of Tanda Thermal Power Station were revised w.e.f. 1.4.2007. Now, as the operating norms have been revised in respect of Tanda Thermal Power Station, the NTPC filed revised calculations in respect of energy charges and interest

on working capital. This petition of the NTPC was allowed by the CERC by its order dated 14.12.2007 whereby the tariff in respect of Tanda Thermal Power Station for the period from 1.4.2007 to 31.3.2009 was revised.

5. This order dated 14.12.2007 is now under challenge by the appellant on the ground that the CERC wrongly applied the data for the period from January 2007 to March 2007 for the purpose of considering the fuel price and gross calorific value (GCV) of fuel because as per the Regulations 2004 the data for the period from January to March 2004 has to be taken into account. The second ground is that the CERC ought to have decided the issue of capital cost along with the revision of tariff. Operational parameters were revised w.e.f. 1.4.2007 and the NTPC sought for revision in respect of energy charges and interest on working capital through their affidavits dated 9.4.2007 and 25.5.2007. It has been stated in the memorandum of appeal that the CERC vide order dated 30.10.2007 determined the base rate of energy charges at Rs.163.57 paise/kwh as on 1.4.2007 wrongly based on fuel



price and GCV of fuel applicable during the three months from the date of applicability of revised norms i.e. January, 2007 to March 2007.

6. The NTPC filed a counter affidavit stating inter alia that in paragraph 7 of the order dated 14.12.2007 the CERC re-determined the tariff in respect of revision of interest on working capital taking into account the revised operating norms and fuel price and GCV for coal procured during January 2007 to March 2007. Prior to that tariff was approved by the CERC for the period from 1.4.2004 to 31.3.2009 whereby the NTPC was allowed energy charges based on fuel price and GCV on the basis of fuel price prevalent during the period January 2004 to March 2004 with adjustments to be made as per the formula contained in the Tariff Regulations, 2004. The appellant on 22.4.2000 filed petition before the CERC being petition No. 26 of 2006 for revision of the operating norms of the NTPC in view of the R&M works having been completed by NTPC and to regulate the tariff for Tanda Thermal Power Station from 1.4.2004. By

the order dated 24.1.2007 the CERC held that the performance of the Tanda Thermal Power Station had since improved and thus thereby revised the norms in respect of Tanda thermal Power Station w.e.f. 1.4.2007. The revised norms as decided by the CERC in respect of Tanda Thermal Power Station will be reproduced in the subsequent paragraph. Against the order dated 24.1.2007 the appellant filed a writ petition being No. 1815 of 2007 before the Allahabad High Court at Lucknow Bench praying for application for the revised norms from 1.4.2004 as against 1.4.2007 as decided by the CERC. The said writ petition is said to be still pending in the High Court of Allahabad. Pursuant to the order dated 24.1.2007 and another order dated 13.3.2007, the CERC, as said above, notified the CERC (Terms and Conditions of Tariff) (Amendment) Regulations, 2007(for short Amendment Regulations, 2007) whereby the Commission revised the operating norms and parameters for Tanda Thermal Power Station w.e.f. 1.4.2007. It is contended that it is the appellant who has been the beneficiary because of revised operating norms in terms of the Amendment

Regulations 2007. NTPC filed revised calculations in respect of energy charges and interest on working capital for the period from 1.4.2007 to 31.3.2009. As noticed earlier, by the order dated 3.10.2007 the Commission determined the base rate of energy at Rs.163.57 paise / kwh as on 1.4.2007 based on fuel price and GCV applicable during the preceding three months before the date of applicability of the Amendment Regulations, 2007 i.e. January 2007 to March 2007. In the said order CERC observed as under:

*“12. The petitioner has filed an application for review of order dated 30.11.2006. The said application is under consideration of the Commission separately. Also , revision of capital cost for the period to 1.4.2004 is being considered by the Commission consequent to remand of the matter by the Appellate Tribunal. The revision of interest on working capital, which is one of the components of annual fixed cost, will be considered after a final view on these matters is taken.”*

7. It is contended that against the order dated 3.10.2007, the appellant did not file an appeal despite the consideration of fuel price and GCV applicable during the period from January 2007 to March 2007 for determination of the base rate of energy charges.

8. In the circumstances, it is contended by NTPC that interest on working capital was rightly considered by the CERC as per the fuel cost and GCV of fuel prevalent during the period from January 2007 to March 2007, the period immediately preceding the application of Tariff Regulations 2004, as amended in the year 2007 and effective from 1.4.2007. According to the NTPC, the contention of the appellant that the provisions of the Tariff Regulations, 2004 expressly provide for determination of interest on working capital by considering fuel price and GCV of fuel for the period from January 2004 to March 2004 cannot be accepted because in the Regulations 2004 there is no such provision. It is contended that the order of the CERC for determination of fuel cost and GCV for the period from January 2007 to March

2007 for determining interest on working capital from 1.4.2007 is just, proper, rational and consistent with the Tariff Regulations 2004 as amended in 2007 with effect from 1.4.2007. It is contended that while considering the tariff elements for the period from 1.4.2007 to 31.3.2009 the base data of the fuel price and GCV of fuel to be considered is the data for the period from 1<sup>st</sup> January, 2007 to 31<sup>st</sup> march, 2007 as opposed to the fuel price and GCV of the fuel for the period of 3 years prior to the period for which tariff was to be calculated. The CERC in petition No. 163 of 2004 considered the revision in tariff as per the provision of the revised parameters notified by the Amendment Regulations, 2007 and thus a revision of the fuel cost as per the latest prevailing rate was also to be revised. Further, during the pendency of the appeal the CERC by order dated 9.4.2008 re-determined the issue of capital cost for the period from the year 2000 to 2004 as per the direction of this Tribunal in judgment dated 6.6.2007, as such issue on this does not survive.

9. On the pleadings as aforesaid the question that calls for consideration is :

Whether the CERC was justified in applying the data for the period from January 2007 to March 2007 when, as alleged by the appellant, the Regulations 2004 provides that data from January 2004 to March 2004 should be considered for fixing the tariff for the years 2004-2009?

10. It is the submission of Mr. Pradeep Mishra, learned Counsel appearing for the appellant that the CERC was not legally justified in applying the data for the period from January 2007 to March 2007 for the purpose of considering fuel price and GCV because the relevant Regulations 2004 was required to be made applicable and while applying so the data for the period from January 2004 to March 2004 was required to be taken into account. The second submission of Mr. Mishra is that if the data for the period from January 2007 to March 2007 is taken into account for the purpose of determination of tariff then it would result into the higher

fixation of tariff which would be against the spirit and the object of the Electricity Act, 2003. It is submitted that the CERC failed to appreciate that the tariff for Tanda Thermal Power Station on the basis of revised norms ought to have been fixed in accordance with Regulations 2004. The argument goes on further that the tariff should not be revised frequently and while revising the tariff the issue of capital cost should have been taken into account.

11. Mr. M.G. Ramachandran, learned Counsel for the NTPC submitted that the Regulations 2004 was purely inapplicable for the purpose of revision of tariff consequent upon the requirements of revised parameters and completion of R&M works; and secondly, Regulations 2004 does not expressly provide for determination of interest on working capital by considering the fuel price and GCV of fuel for the period from January to March 2004. The Central Commission re-determined the tariff on the aspect of revision of interest on working capital taking into account the revised operational

norms and fuel price and GCV of coal procured during January 2007 to March 2007.

12. None appeared on behalf of CERC. Having heard the learned Counsel for the parties, it appears to us that the moot question is whether the amended Regulations 2007 that came to be effective from 1.4.2007 or the original Regulations 2004 would be applicable for the purpose of re-determination of tariff on the aspect of revision of interest on working capital after taking into account the revised operating norms. Leaving aside the history of litigations recorded in the opening paragraphs, certain orders require mention. Originally the CERC passed an order on 30.11.2006 determining the tariff in respect of the NTPC for the period from 1.4.2004 to 31.3.2009 in accordance with the CERC (Terms and Conditions of Tariff) Regulations, 2004. By that order Annual Fixed Charges for the said period were fixed, and the NTPC was also allowed energy charges of 142.24 paise / kwh based on fuel price and GCV for the period January 2004 to March 2004, and normative operating parameters as per the said



Regulations,2004. Then the CERC amended its Regulations, 2004 in March, 2007, called the Amendment Regulations, 2007 revising thereby the operational norms of target availability, target PLF, station heat rate, auxiliary energy consumption and specific oil consumption for the generating station w.e.f. 1.4.2007 in the following manner:

Target Availability	80%
Target PLF	80%
Station Heat Rate	2850kCal/kWh
Auxiliary Energy Consumption	12.0%
Specific Fuel Oil Consumption	2.0ml/kWh

Then the NTPC filed revised calculations in support of the energy charges and interest on working capital based on the revised operational norms for the period from 1.4.2007 to 31.3.2009. The Commission by its order dated 3.10.2007 determined the base rate of the energy charges at 163.57 paise /kwh as on 1.4.2007 based on the fuel price and GCV applicable during the preceding three months from the date of applicability of the revised norms i.e. January 2007 to March

2007. This order dated 3.10.2007 whereby the base rate of energy charges based on the fuel price and GCV during preceding 3 months i.e. January 2007 to March 2007 was fixed was not appealed against by the appellant. Importantly, it was the appellant who filed a petition being No. 26 of 2006 before the CERC praying for revision of operating parameters and norms for determination of tariff of Tanda Thermal Power Station for the period 2004-2009. This petition was disposed of by the CERC by the order dated 24.1.2007. In the memorandum of appeal there is no mention of this fact. Since the NTPC did not make any application for revision of operating norms, it was the appellant U.P. Power Corporation Ltd. who made an application contending inter-alia that due to extensive R&M works having been carried out the performance of the generating station improved thereby demanding revision of the operational norms so as to bring them at par with the other thermal power generating stations. The CERC observed while disposing of appellant's petition being No. 26 of 2006 that the applicability of the revised norms require amendment of the regulation 16 of the Regulations 2004. Regulation 16 of

the Regulations 2004 laid down the operational norms applicable to the different generating stations for the period from 1.4.2004 to 31.3.2009 and in case of the generating station which was under R&M works relaxed operational norms as follows:

<i>Name of Station</i>	<i>Target Availability</i>	<i>Target PLF</i>	<i>Station Heat Rate (kCal/kwh)</i>	<i>Auxiliary Energy Consumption Norm (%)</i>	<i>Specific Fuel Oil Consumption (ml/kWh)</i>
<i>Tanda TPS/440 MW</i>	<i>60%</i>	<i>60%</i>	<i>3000</i>	<i>11.00</i>	<i>3.5</i>

Accordingly, amendments to Regulations 2004 were carried out and by Gazette Notification dated 13.3.2007 the Amended Regulations, 2007 was made applicable w.e.f. 1.4.2007. It was because of extensive R&M works having been carried out and of the NTPC having shown its improved performance in respect of Tanda Thermal Power Station that necessity arose for revising the operating parameters through amendment of Regulations 2004. It was the appellant U.P. Power Corporation Ltd. that first set the ball into motion with regard to approach to the Commission for revision of operating

norms, which the Commission did. The order dated 3.10.2007 whereby the base rate of energy charges was fixed is after the amended Regulations 2007 came into being with effect 1.4.2007. By the order dated 24.1.2007 whereby the petition No. 26 of 2006 of the UPPCL was disposed of, the Commission could not translate the revised operating norms on the ground that Regulation, 2004 required amendment, which to our mind the CERC rightly held. The position is that after the improvement of the performance of the NTPC consequent upon completion of the R&M works there was necessity for change of operational norms which was impossible to be done unless the Regulations 2004 was amended and by the Amended Regulations 2007 the operational norms were revised as stated above. Once the operational norms are determined by amendment of Regulations such norms have to be prospective and it was rightly made prospective w.e.f. 1.4.2007. Necessarily, when the amended regulations came into being related data from January 2004 to March 2004 cannot be taken into account and cannot be made applicable for revision of tariff consequent upon redetermination of operating norms

through amendment effective on the commencement of the financial year 2007. In this connection, it is proper to see the reasoning of the CERC in the impugned order :

*“8. In accordance with clause (v) of Regulation 21 of the 2004 regulations, working capital in case of Coal based/Lignite- generating stations shall cover:*

- (i) Cost of coal or lignite for 1 1/2 months for pit-head generating stations and two months for non-pit-head generating stations, corresponding to the availability;*
- (ii) Cost of Secondary fuel oil for two months corresponding to the target availability;*
- (iii) Operation and Maintenance expenses for one month;*
- (iv) Maintenance spares @ 1% of the historical cost escalated @ 6% per annum from the date of commercial operation ; and*
- (v) Receivables equivalent to two months of fixed and variable charges for sale of electricity calculated on the target availability.*

9. *The respondent in its reply-affidavit sworn and verified on 27.7.2007 has submitted that the values of GCV for oil, coal, etc. as applicable during January to March 2004 are to be considered. It has further submitted that the rate of interest as per SBI PLR on 1.4.2004 should apply.*

10. *Working capital has been calculated considering the following elements:*

*a) Fuel cost: The cost of coal has been worked out for two months on the basis of operational parameters and weighted average price of Rs.1800.61 MT and GCV of 3696 kcal/kg for coal procured during January to march 2007. It is pointed out that the 2004 regulations do not contain any stipulation as regards the period for which price of fuel is to be considered for computing working capital. Therefore, it is logical to take the fuel price at the beginning or just prior to the period for which tariff is to be calculated. Therefore, while revising interest on working*

capital component of tariff for the period 1.4.2007 to 31.3.2009 fuel price prior to 1.4.2007 has been considered.(emphasis ours)

b) *Secondary Fuel Oil: Weighted average GCV (9600 kCal/l for LDO) and price for LDO at Rs.30226.09 / KL for the month of December 2006, has been considered.*

c) *Accordingly, the fuel component in working capital corresponding to target availability of 80% works out as follows:.....”*

13. Therefore, the submission of the learned Counsel for the respondent NTPC that provision of Regulations, 2004 does not expressly provide for determination of interest on working capital by considering the fuel price and GCV of fuel for the period from January 2004 to March 2004 merits acceptance. The base data for the fuel price and GCV of fuel is to be the data for the period from January 2007 to 31<sup>st</sup> March, 2007,

not from January 2004 to March 2004 as contended by UPPCL because the revision of tariff necessitated because of revision of operational norms which again was determined in terms of Amended Regulations 2007 that came into effect from 1.4.2007. Revision of tariff is co-related to the revision of parameters notified by the Amended Regulations 2007, as such, the revision of fuel cost as per the latest prevailing rates were also to be revised. The argument of Mr. Mishra that consideration of data for the period from January, 2007 to March 2007 resulted in higher tariff is of no good because the tariff is to be fixed in terms of the commercial principle and following R&M works having been extensively carried out in 2<sup>nd</sup> phase through additional capitalization of Rs.177.47 crores operational norms were required to be changed. The better performance of NTPC and consequent revision of operational norms were to the benefit of the appellant also; and it is not the spirit of the law that at all time tariff should remain static. The argument of the appellant is misplaced. The tariff so re-determined was revised following revision of the operating parameters and that too in accordance with the Amended



Regulations, 2007 so that there was no occasion for the appellant for being prejudiced.

14. As regards re-determination of the capital cost it now appears that by an order dated 9.4.2008 the CERC re-determined the issue of capital cost for the period from 2000-2004 in terms of the directions of this Tribunal in its judgment dated 6.6.2007.

14. Accordingly, we are of the opinion that impugned order dated 14.12.2007 passed in petition No. 163 of 2004 suffers from no infirmity. Thus, we dismiss the appeal without cost.

**(Justice P.S.Datta)**  
**Judicial Member**

**(Mr. Rakesh Nath)**  
**Technical member**

**Dated : 5<sup>th</sup> April, 2011**

**Index: Reportable/Non-Reportable**

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