

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal Nos. 86, 87,227 of 2006 & 14 of 2009**

**Dated 8<sup>th</sup> December, 2011**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,  
Chairperson**

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

**Appeal No.86 of 2006**

**In the matter of:**

Grid Corporation of Orissa Ltd.,  
Represented through its Chairman-cum-  
Managing Director, Janpath  
Bhubaneswar, Orissa

... Appellant

Versus

National Thermal Power Corpn. Ltd.,  
Represented through its Managing Director,  
NTPC Bhavan, Scope Complex,  
Institutional Area,  
Lodhi Road, New Delhi-110 003.

... Respondent

Counsel for the Appellant(s):

Mr. R.K. Mehta,  
Mr. Antaryami Upadhyay  
Mr. Lakhi Singh,  
Ms. Morie Riba

Counsel for the Respondent(s):

Mr. M.G. Ramachandran,  
Mr. Anand K. Ganesan &  
Ms. Swapna Seshdari  
Ms. Sneha Venkataramani  
Ms. Ranjitha Ramachandran

**Appeal No.87 of 2006**

**In the matter of:**

National Thermal Power Corpn. Ltd.,  
NTPC Bhavan, Scope Complex,  
Core-7, Institutional Area,  
Lodhi Road, New Delhi-110 003. ... Appellant

Versus

1. Grid Corporation of Orissa Ltd.,  
Represented through its Chairman-cum-  
Managing Director, Vidyut Bhawan, Janpath  
Bhubaneswar, Orissa
2. Central Electricity Regulatory Commission,  
Scope Complex, Core-3, 6<sup>th</sup> Floor,  
Lodhi Road, New Delhi-110 003 ... Respondents

Counsel for the Appellant(s): Mr. M.G. Ramachandran,  
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Mr. Antaryami Upadhyay  
Mr. Lakhi Singh,  
Ms. Morie Riba

**Appeal No.227 of 2006**

**In the matter of:**

Grid Corporation of Orissa Ltd.,  
Janpath  
Bhubaneswar, Orissa ... Appellant

Versus

1. National Thermal Power Corpn. Ltd.,  
Represented through its CMD,  
NTPC Bhavan, Scope Complex,  
Institutional Area,  
Lodhi Road, New Delhi-110 003.

2. Central Electricity Regulatory Commission,  
Scope Complex, Core-3, 6<sup>th</sup> Floor,  
Lodhi Road, New Delhi-110 003 ... Respondents

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Ms. Ranjitha Ramachandran

### **Appeal No.14 of 2009**

#### **In the matter of:**

National Thermal Power Corpn. Ltd.,  
NTPC Bhavan, Scope Complex,  
Core-7, Institutional Area,  
Lodhi Road, New Delhi-110 003. ... Appellant

Versus

1. Central Electricity Regulatory Commission,  
Scope Complex, Core-3, 6<sup>th</sup> Floor,  
Lodhi Road, New Delhi-110 003
2. Grid Corporation of Orissa Ltd.,  
Vidyut Bhawan, Janpath  
Bhubaneswar, Orissa ... Respondents

Counsel for the Appellant(s): Mr. M.G. Ramachandran,  
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## **JUDGMENT**

### **HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

Appeal No. 86 of 2006 has been filed by Grid Corporation of Orissa Ltd. ('GRIDCO') against the order dated 19.6.2002 passed by the Central Electricity Regulatory Commission ('Central Commission') determining the tariff of Talcher Thermal Power Station for the period from FY 2000-01 to FY 2003-04. Appeal no. 87 of 2007 has been filed by the NTPC Ltd. against the same order as modified by the Central Commission by its orders dated 1.4.2003, 25.9.2003 and 5.11.2003.

2. Appeal no. 227 of 2006 has been filed by GRIDCO against the summary order dated 28.7.2006 in Petition no. 35 of 2004 filed by NTPC for approval of revised fixed charges for the period FY 2000-01 to FY 2003-04

due to additional capitalization towards Renovation & Modernization works executed during the above period at Talcher Thermal Power Station. Subsequently, the Central Commission filed a detailed order dated 25.9.2006.

3. Appeal no. 14 of 2009 has been filed by NTPC against the order dated 4.3.2008 of the Central Commission in the Review Petition filed by GRIDCO against the order dated 25.9.2006 regarding the additional capitalization for Renovation & Modernization works carried out at Talcher Thermal Power Station of NTPC.

4. The brief facts of the cases are as under:

4.1. On 8.3.1995 a Tripartite Power Purchase Agreement ('PPA') was signed between NTPC Ltd., the Government of Orissa and Orissa State Electricity

Board envisaging transfer of Talcher Thermal Power Station of 460 MW capacity and specifying the terms and conditions for generation and sale of electricity by NTPC to the Orissa State Electricity Board. The Power Station was taken over by NTPC with effect from 3.6.1995. GRIDCO is one of the successor entities of the State Electricity Board which purchases power from Talcher Thermal Power Station.

4.2. NTPC made investments on the renovation and modernization of the Power Station to bring the station to operate at the optimum capacity and improve its operating parameters and performance.

4.3. The Central Commission was constituted on 24.7.1998 under the Electricity Regulatory Commissions Act, 1998. Subsequently, NTPC on 31.7.2000 filed a petition being no. 62 of 2000 before

the Central Commission for determination of tariff of Talcher Thermal Power Station for the period from 1.4.2000 to 31.3.2004.

4.4. On 26.3.2001, the Central Commission notified its Tariff Regulations of 2001 specifying the terms and conditions of tariff for the period from 1.4.2001 to 31.3.2004.

4.5. The Central Commission decided the tariff for Talcher TPS for the period from 1.4.2000 to 31.3.2004 by its order dated 19.6.2002.

4.6. NTPC filed a Review Petition against the order dated 19.6.2002 before the Central Commission and at the same time filed an appeal before the Delhi High Court. GRIDCO also filed a Review Petition against this order and simultaneously filed an appeal in the High Court of Orissa.

4.7. By order dated 1.4.2003, the Central Commission decided to hear the Review Petition filed by NTPC and GRIDCO on some of the issues. On 25.9.2003 the Central Commission passed an order deciding I.A. no. 30 of 2003 filed by the NTPC in respect of relatable fixed charges for Units under Renovation & Modernization payable by GRIDCO to NTPC. On 5.11.2003 the Central Commission passed the order on the matters which were reserved for consideration by the Central Commission vide order dated 1.4.2003.

4.8. On 6.4.2004 NTPC filed Petition no. 35 of 2004 before the Central Commission for approval of the revised fixed charges for the period from 2000-01 to 2003-04 due to additional capitalization incurred by the NTPC during the said period.



4.9. On 19.7.2004 the Hon'ble Supreme Court passed an order in the prayer of NTPC directing transfer of the Appeal filed by GRIDCO in the High Court of Orissa to Delhi High Court. Subsequently, on 23.2.2006 the Delhi High Court directed the transfer of the Appeals to this Tribunal, now numbered as 86 of 2006 and 87 of 2006.

4.10. On 28.7.2006 the Central Commission in the Petition no. 35 of 2004 filed by NTPC for additional capitalization passed a summary order. GRIDCO filed an appeal (no. 227 of 2006) before the Tribunal challenging the summary order dated 28.7.2006. Subsequently, the Central Commission passed a detailed order dated 25.9.2006.

4.11. GRIDCO also filed a Review Petition before the Central Commission on 21.6.2007 against the

order dated 25.9.2006 raising a number of issues including the interest of 14% on the normative loans decided by the Central Commission.

4.12. On 4.3.2008 the Central Commission passed an order in the Review Petition filed by GRIDCO directing revision on the interest on notional loan from 14% as decided earlier to the weighted average rate of actual loan.

4.13. Aggrieved by the order dated 4.3.2008 NTPC has filed the Appeal no. 14 of 2009.

5. As the issues involved in the above Appeals are arising out of the common orders, this common judgment is being rendered.

6. A number of issues were raised by NTPC and GRIDCO in their Appeals but as a result of the various

orders passed subsequently, they have confined the Appeals to only some issues, as described in the following paragraphs.

7. NTPC in Appeal no. 87 of 2006 has raised the following issues:

7.1. Inadequate Operation & Maintenance (O&M) Expenses for tariff period 2000-01: The Power Purchase Agreement ('PPA') dated 8.3.1995 provided for O&M expenses for Talcher Power Station for a period of 5 years which ended on 31.3.2000. The O&M expenses were to be reviewed after the expiry of the period of 5 years. The actual O&M expenses were higher on account of various reasons not attributable to NTPC. The Central Commission, however, continued to calculate the O&M expenses as per the provisions contained in the PPA. The Central

Commission ought to have considered the O&M expenses on actual basis for the FY 2000-01. For the period 2001-02 to 2003-04, the Central Commission took into account the actual O&M expenses for five year period from FY 1995-96 determining the average as on 1.4.1997 and escalating the same as per the provisions of the Tariff Regulations, 2001 for calculating the applicable O&M expenses from 2001-02 to 2003-04. The Central Commission ought to have allowed the O&M at least as per Tariff Regulations, 2001 even for the previous FY 2000-01 instead of applying the O&M charges specified in the PPA till 31.3.2000.

7.2. Disallowance of Reimbursement of Income Tax arising out of interest on notional loan: The capital towards acquisition of Talcher Thermal Power Station was invested by NTPC from its internal resources. As

agreed between the parties, 50% of the capital cost was considered as equity and balance 50% as notional loan. NTPC was allowed 14% interest on the notional loan which added to its income. The Central Commission in its order dated 19.6.2002 in Petition no. 62 of 2000 had held that the treatment of Income Tax on the income arising out of interest on notional loan should be dealt with as provided in the Tariff Regulations, 2001. However, by order dated 5.11.2003 passed in Petition no. 62 of 2000 after review, the Central Commission disallowed the income tax on interest earned by NTPC on notional loan. The Central Commission ought to have allowed the income tax as pass through in tariff according to the 2001 Regulations read with the PPA as interest was accruing on core activity of NTPC i.e. generation of power. The Central Commission should have

appreciated that Talcher Power Plant was operating at very poor operational parameters at the time of take over which necessitated the funding of the project entirely by equity.

8. In Appeal no. 14 of 2009, NTPC is aggrieved by the order dated 4.3.2008 passed by the Central Commission allowing the Review Petition no. 6 of 2007 filed by GRIDCO reducing the rate of interest on notional loan. NTPC's submissions in this regard are described in the following sub-paragraphs.

8.1. In the tariff order dated 19.6.2002, the Central Commission fixed the rate of interest for the notional debt at 14% per annum. In the Review order dated 19.6.2002, the Central Commission did not entertain the petition of GRIDCO on interest rate on notional loan.

8.2. In its orders dated 28.7.2006 and 25.9.2006 in Petition no. 35 of 2004 for approval of revised fixed charges for the period 2000-2004 due to additional capitalization incurred by NTPC during the said period, the Central Commission allowed the interest of 14% per annum on the normative loan. However, in the impugned order dated 4.3.2008 after review of its earlier order dated 25.9.2006, the Central Commission reduced the rate of interest from 14% to the weighted average rate of interest on the actual loans for the period from 2001 to 2004 on the basis of the findings of this Tribunal in its judgment dated 6.6.2007 in Appeal no. 9 of 2007 relating to Tanda Thermal Power Station of NTPC, thus incorrectly altering the settled position of the parties decided by the order dated 19.6.2002.

9. In Appeal no. 86 of 2006 arising out of the Central Commission's order dated 19.6.2002 in Petition no. 62 of 2002 and Appeal no. 227 of 2006 arising out of the order dated 28.7.2006 of the Central Commission in Petition no. 35 of 2004 for additional capitalization, GRIDCO has raised the following issues:

9.1. Capital Base: Talcher Thermal Power Station was transferred from the erstwhile Orissa State Electricity Board on 3.6.1995 at a cost of Rs. 356 Crores though the original book value of the power plant was Rs. 178.30 Crores. The Central Commission has considered the transfer price of Rs. 356 Crores as the capital base for determination of tariff. However, in Tanda Thermal Power Station of U.P. State Electricity Board which was transferred to NTPC under similar circumstances, by order dated 28.6.2002, the Central Commission considered the book value of



Rs. 607 Crores as capital base even though the actual transfer price was Rs. 1000 Crores. The Central Commission should not have adopted different principles for the purpose of capital base in the case of two similarly placed power plants and should have considered the original book value of Rs. 178.30 Crores as capital base for Talcher.

9.2. Treatment of accumulated depreciation: Talchar Thermal Power Station had nearly outlived its useful economic life before renovation and modernization (R&M). Following R&M at an expenditure of Rs. 429.70 Crores the plant got a fresh lease of life. Thus the consumer should only pay the Return on Equity on the capital base reduced by accumulated depreciation i.e. the capital cost not recovered by the investor by way of depreciation. The Central Commission while allowing additional capitalization on

R&M, should have deducted the accumulated depreciation already recovered from the original project cost.

9.3. Effective date of Life Extension of the Power Plant

consequent upon R&M: The Central Commission in its order dated 19.6.2002 has decided that the life of the power station as a result of R&M would be extended by 20 years with effect from 1.4.2001. However, the expenditure on R&M upto 1.4.2001 was only 19.3% of the total proposed R&M. Upto 2006-07, the total expenditure was less than 50% of the total proposed R&M. Thus the effective date of life extension should have been taken after the completion of R&M activities or at the most from the date when 50% of the proposed R&M was completed.

9.4. Restoration of Lost Capacity: The installed capacity of Talchar Thermal Power Station at the time of transfer to NTPC was 460 MW, comprising 4 Units of 60 MW each and 2 Units of 110 MW each. The installed capacity was, however, subject to de-rating/re-rating according to the PPA dated 8.3.1995. The 60 MW Units were originally rated at 62.5 MW but had been de-rated to 60 MW. In the R&M proposal NTPC had proposed to restore the lost capacity and de-rated efficiency. Even though the lost capacity of 60 MW Units had been restored after the R&M activities but the Central Commission has not recognized the same. Consequently, the GRIDCO has been made to pay incentive as well as UI charges to NTPC on the basis of de-rated capacity, causing financial loss to GRIDCO.

9.5. Debt Equity Ratio: In the order dated 19.6.2002, the Central Commission has allowed Debt Equity Ratio of 50:50 with ROE of 16% for the purpose of tariff. However, for Tanda Thermal Power Station taken over by NTPC from UP State Electricity Board, the Central Commission has allowed debt equity ratio of 70:30, with ROE of 16%. There is no justification for following two parameters in case of Talcher and Tanda which were transferred to NTPC under similar circumstances.

9.6. Operating Parameters: The operating parameters such as Plant Load Factor, specific oil consumption, auxiliary consumption and Station Heat Rate fixed by the Central Commission vide order dated 19.6.2002 and subsequent orders are much less than which has been actually achieved by NTPC. The Central Commission ought to have applied the principle laid

down in the notification dated 26.3.2001 and fixed the operating parameters on the basis of norm or actual, whichever is lower.

9.7. O & M expenses: The Central Commission has relied on the base figure of O&M expenses wrongly calculated by NTPC for FY 1999-2000. Therefore, the finding and consideration of the Central Commission is erroneous. The Central Commission should have computed the average of last five years excluding the abnormal expenses towards repair and maintenance of power house as these are not recurring expenditure in future. The Central Commission has given no justification for treating the same as revenue expenses instead of capital expenditure.

9.8. Additional fixed charges on additional capital investment towards R&M: The Central Commission

has not considered whether the additional capital expenditure capitalized at the end of the accounting year is eligible for servicing from first day of the year or middle of the year or subsequent years. It should have been considered from the middle of the year or in the subsequent years.

9.9. Return on Equity: According to the notification dated 26.3.2001, NTPC is entitled to only 16% ROE. Any profit in excess of 16% ROE can not be retained by NTPC. The Central Commission should undertake truing up of the accounts of NTPC.

10. On the above issues the learned counsel for the parties made elaborate submissions. After considering the rival contentions of the parties, the

following questions would arise for our consideration:

- i) Whether the Central Commission has erred in determining the O&M charges for the FY 2001-2002 to 2003-2004 by including the abnormal expenditure incurred by NTPC during the period 1995-2000?
- ii) Whether the Central Commission has wrongly determined the O&M charges for the FY 2000-01 according to the term of the PPA, even though the term of the PPA had expired on 31.3.2000, and not on the basis of the 2001 Regulations?
- iii) Whether the Central Commission was correct in disallowing the income tax on the interest earned by NTPC on notional

loan in its review order instead of passing on the same to GRIDCO?

iv) Whether the Central Commission was correct in revising the interest on loan from 14% to weighted average rate of interest on actual loans for the period 2001-04 in the review order dated 4.3.2008, thus altering the settled position?

v) Whether the Central Commission was correct in adopting capital base on the sale price of the project instead of book value contrary to its own order in another case relating to Tanda Thermal Power Station?



- vi) Whether the Central Commission has erred by not deducting the accumulated depreciation from the capital cost while deciding the additional capitalization for Renovation & Modernization?
  
- vii) Whether the Central Commission was correct in considering the effective date of life extension of Talcher Power Station from 1.4.2001 when only 19.3% of the total R&M works had been completed?
  
- viii) Whether the Central Commission has erred in not up-rating the capacity of 60 MW Units of Talcher to the original installed capacity of 62.5 MW?

- ix) Whether the Central Commission has erred in adopting debt equity ratio in 50:50 for Talcher instead of 70:30 as adopted in case of Tanda?
- x) Whether the Central Commission has erred in deciding the tariff on normative operational parameters instead of adopting normative or actual whichever is less?
- xi) Whether the additional capitalization should have been allowed from the first day of the year instead of middle of the year?
- xii) Whether NTPC is entitled to return over and above 16% ROE? Should the Central Commission be directed to true-up the financials of NTPC?

11. The first issue is regarding the O&M expenses for the period 2001-2004.

11.1. According to the learned counsel for GRIDCO, the abnormal expenses such as salary, welfare, repair & maintenance, power, T.A. security, etc., incurred during the period 1995-96 to 1999-2000 should be excluded while determining the base figure for calculating the O&M for the period 2001-02 to 2003-04.

11.2. According to the learned counsel for NTPC, the O&M expenses calculated by the Central Commission in accordance with the Regulations are inadequate and there is no basis for excluding normal expenditure such as salary, welfare, repair & maintenance, water cess, etc., as abnormal expenses.

11.3. We have examined the impugned order and found that the Central Commission has gone into the reasons for abnormal increase in O&M expenses during 1996-97 and 1997-98 over the expenses for the respective previous year. The relevant extracts of the order dated 19.6.2002 are reproduced below:

*“The petitioner in its affidavit filed on 5.2.2002, has explained the reasons for abnormal increase in O&M expenses during 1996-97 and 1997-98 over the expenses for the respective previous year. It has been explained that increase is on account of employee cost as a result of revision of pay structure of the employees. It has also been explained that increase is on account of power charges provided for proper illumination of station area and township, increase in travelling expenditure, increase in security expenses and professional expenses, etc. We are satisfied that the increase in O&M expenses during 1996-97 and 1997-98 categorised as “abnormal” by the respondent were not one time expenses but would*

*be recurring year after year and, therefore, justified and beyond the control of the petitioner. We, therefore, allow these expenses to be considered for the purpose of fixation of O&M charges. Accordingly, we direct that O&M charges shall be calculated in accordance with the notification issued by the Commission on 26.3.2001, without excluding any part thereof as “abnormal expenses”.*

11.4. We are in agreement with the findings of the Central Commission. Further, in the Review order dated 5.11.2003, the Central Commission allowed inclusion of water charges for the purpose of computation of O&M charges as the counsel for the respondent conceded that these charges need to be included. The relevant extracts of the Central Commission’s order dated 5.11.2003 are reproduced

below:

*“At the hearing, learned counsel for the respondent conceded that the expenses on account of water charges need to be included for the purpose of computation of O&M expenses. There is no dispute in computation of O&M expenses already directed vide order dated 19.6.2002 on any other count. Accordingly, the fresh O&M charges being allowed after including water charges, are as under:*

*(Rs. in lakh)*

<b>2000-2001</b>	<b>2001-2002</b>	<b>2002-2003</b>	<b>2003-2004</b>
5556	8051	8534	9046”

In view of above, we reject the contention of GRIDCO and confirm the findings of Central Commission.

12. The second issue is regarding O&M expenses for the FY 2000-01.

12.1. According to learned counsel for NTPC, the O&M charges for the FY 2000-01 should be decided as per the 2001 Regulations and not as per the PPA which had expired on 31.3.2000.

12.2. We do not agree with this contention of the learned counsel for NTPC that the 2001 Regulations should be applied for the previous year namely FY 2000-01. The Central Commission has correctly computed the allowable O&M expenses according to the terms of the PPA i.e after allowing 10% escalation over the expenses for FY 1999-00 as agreed in the PPA. We, therefore, re-affirm the order of the Central Commission in respect to O&M for the FY 2000-01.

13. The third issue is regarding disallowance of income tax on the interest earned by NTPC on notional loan.

13.1 According to learned counsel for the NTPC, the income tax on interest income on notional loan ought to have been allowed as pass through according to the Regulations, as it was an income generated in the core activity of NTPC.

13.2 According to learned counsel for GRIDCO, if NTPC had invested the amount being shown as “notional loan” by arranging loan from the open market, the interest paid by NTPC would also have been reflected as an expenditure whereby the income arising on account of receipt of interest would have been neutralized by the expenditure. Therefore, GRIDCO had no liability to pay income tax on the interest on notional loan. Further, in case NTPC had invested the amount of notional loan elsewhere and earned interest on the same then NTPC itself would be



liable to pay Income Tax. Such interest income on surplus funds of NTPC is also not the income on core activity of NTPC viz, power generation.

13.3 We find that the Central Commission has given detailed reasonings in the Review Order dated 5.11.2003 for not allowing the income tax on the amount of notional loan as pass through. The relevant extracts of the order dated 5.11 2003 are reproduced below:

*“The "main business" of the petitioner is generation of power. Other objectives referred to by the petitioner are incidental to its pursuing its main objective of generation. In fulfilment of its main objective, the petitioner is to employ capital by arranging loan from the financial institutions, etc. Similarly, the petitioner is permitted to invest its surplus funds by its Memorandum and Articles of Association. Nevertheless, authorisation of such an*

*activity by the Memorandum and Articles of Association, does not make it the "core activity" of the petitioner, which continues to be the generation of power. Thus, from whatever angle the matter is viewed, the respondent is not liable to refund to the petitioner income tax on interest earned by the petitioner on notional loan”.*

We are in agreement with the above findings of the Central Commission and accordingly we reaffirm the same.

14. The fourth issue is revision of interest on loan from 14% to weighted average rate of interest in the review order dated 4.3.2008.

14.1 According to the learned counsel for NTPC, the Central Commission has incorrectly altered the settled position of the parties decided by the order dated 19.6.2002.

14.2 According to learned counsel for GRIDCO, the Central Commission had correctly allowed the interest rate at the weighted average rate of interest on actual loans for the period 2001-04.

14.3 We have noticed that NTPC had not borrowed any funds for investment in Talcher TPS and had invested its own funds. However, the notional loan component was considered as 50%. The Central Commission has recorded in its order dated 4.3.2008, that additional capitalization during 2001-04 was funded through actual loans which according to the records was at weighted average interest rate of 10.54% during 2001-02, 10.43% during 2002-03 and 9.45% during 2003-04.

14.4 Let us now examine the relevant portion of the impugned order dated 4.3.2008, which is reproduced below:

*“15. The Appellate Tribunal for Electricity (hereinafter referred to as “the Appellate Tribunal”) in para 23 of its judgment dated 6.6.2007 in Appeals No. 9 of 2007 and 205 of 2005 pertaining to Tanda TPS observed as under:*

*“Where the actual debt component is less than 70% of the aggregate cost, a special care needs to be taken to arrive at the applicable interest, as the developer is not incurring the interest burden in reality. The respondent, NTPC has claimed rate of interest @14.5% through out the period of 2000 to 2004, which appears to be on the higher side keeping in view that the respondent, enjoys credit rating, which is at par with sovereign rating. We therefore, direct the CERC to take a re-look into the matter to establish the applicable rate of interest.”*

16. We have given our consideration to the issue in the light of the above observations of the Tribunal. In case of Tanda TPS notional loan component was 70%. Per contra, notional loan component in the case of Talcher TPS is 50%, which is below the threshold prescribed by the Appellate Tribunal. Besides, agreed rate of interest as per the PPA in respect of the generating station was 14%. From the records, it is seen that additional capitalization during 2001-04 was funded through actual loans. It is also observed that weighted average rate of actual loan was 10.54% during 2001-02, 10.43% during 2002-03 and 9.45% during 2003-04.

17. The respondent has been enjoying credit rating at par with sovereign rating. In view of this, we feel it would be appropriate to service the notional loan component of the generating station at the rate of interest of actual loans in the wake of the falling interest regime. Accordingly, interest on notional loan component has been calculated based on the

*weighted average rate of interest in respect of the actual loans taken during the respective years.*

*18. While calculating tariff, repayment of notional loan component is taken as per PPA agreed to between the parties and repayment of actual loans has been worked out on normative basis. Total repayment during the year, for tariff purpose, is the sum of the notional and worked out normative repayment and serviced at weighted average rate of interest calculated based on actual loans. For the year 2000-01, rate of interest on notional loans has been kept as 14% as agreed to in PPA and has not been changed because the regulation came into force from 1.4.2001. We are also satisfied that servicing the notional loan at the interest rate prevailing in the market at the relevant point time renders even handed justice to the parties, because, in reality, the generating company is not incurring the interest burden”.*

14.5 Thus, the Central Commission allowed interest rate at 14% as per PPA for the FY 2000-01, but

allowed weighted average rate of actual loan for the period 2001-02 to 2003-04 as the 2001 Regulations came into effect from 1.4.2001. We feel that the Central Commission has correctly allowed the actual weighted average rate of loans from the effective date of the 2001 Regulations.

14.6 Learned counsel for NTPC has argued that they had financed the entire transfer price for acquisition of Talcher Thermal Power Station through equity only, however, for tariff purpose, it was agreed in the agreement that 50% of the transfer price would be considered as notional loan with interest rate of 14 %. Had the same been considered as equity, NTPC would have recovered ROE @ 16% as applicable during the period.

14.7. We do not find any force in this contention of NTPC. The capital cost of the project was agreed before the parties to be divided notionally in 50:50 ratio between equity and loan as per the prevailing practice at that time. The Central Commission has also allowed the interest rate @ 14% as agreed between the parties till the FY 2000-01. After the expiry of the agreement between the parties, the terms & conditions of the tariff had to be revised. When the Central Commission's Regulations of 2001 came into effect from 1.4.2001, the tariff has to be determined as per the Regulations only. Thus, the Central Commission in its review order dated 4.3.2008 correctly reviewed its earlier position and allowed weighted average rate of actual loans of NTPC, in the interest of justice.

14.8. Accordingly, this issue is decided against NTPC.



15. The fifth issue is regarding the capital cost of Talcher project on sale price instead of book value.

15.1 According to the learned counsel for GRIDCO, the Central Commission has taken a different position in this case contrary to its own order in case relating to similarly placed Tanda Thermal Power Station.

15.2 According to learned counsel for NTPC the claim made by GRIDCO on parity with the decision of Tanda case is totally misplaced. Tanda Thermal Power Station's transfer was pursuant to the notification by Government of U.P. on 7.1.2008 what was issued subsequent to coming into force of the Electricity Regulatory Commissions Act, 1998 and formation of the Central Commission. Thus, the Central Commission had the authority to determine the tariff. The PPA for Tanda also recognized the same and had a

provision for compensating NTPC in case any statutory authority or court restrained NTPC from charging the agreed transfer price of Rs. 1000 crores. Pursuant to the direction of the Central Commission to consider the capital cost on book value of Rs. 607 Crores, UP Power Corporation had given adjustment to NTPC of the difference between Rs. 1000 Crores and Rs. 607 Crores.

15.3 We take note of the contention of the NTPC that GRIDCO had not challenged the capital base for Talcher in the Petition No. 62 of 2002, which was decided by the Central Commission in its order dated 19.6.2002 and also in Review Petition as well as in the Appeal filed by GRIDCO as against the order dated 19.6.2002. This issue was also not raised in Petition no. 35 of 2004 for revised fixed charges on account of additional capitalization, which was decided by the

Central Commission vide order dated 25.9.2006. Only in the Review Petition filed by GRIDCO against the order dated 25.9.2006, the issue of capital base was raised for the first time.

15.4 We are convinced that the circumstances of the case relating to Tanda were different from that of Talcher, as the transfer of Tanda was decided after the constitution of the Central Commission. In the case of Tanda, the successor of State Electricity Board had compensated NTPC for difference in capital cost agreed to in PPA and that allowed by the Central Commission, which has not been done in the present case. Also, the GRIDCO had never raised the issue of capital cost in the original petitions for determination of tariff and additional capitalization and a new issue was raised only at the time of review, after the order

dated 25.9.2006 was passed, which is not permissible under law.

15.5 Learned counsel for the NTPC has also referred to the judgment of this Tribunal in Appeal no. 95 of 2007 in the matter of UP Power Corporation Ltd. Vs CERC reported as 2008 ELR (APTEL) 0061 wherein the Tribunal had rejected a similar contention of UPPCL in case of Feroze Gandhi Unchahar Station which was taken over by NTPC according to a Statutory Transfer Scheme in the year 1992, and upheld the order of the Central Commission.

15.6 In our view, the same ratio as decided by this Tribunal in its judgment in case of Feroze Gandhi Unchahar Station, would be applicable to the present case as well. Hence, this issue is decided against GRIDCO.

16. The sixth issue is regarding deduction of accumulated depreciation from the capital cost while deciding the additional capitalization from R&M.

16.1. According to the learned counsel for the GRIDCO, when the life of the power plant had come to an end and a massive expense was called for towards Renovation & Modernization to give a fresh lease of life to the power plant, original equity capital should not enjoy return regularly after the expiry of the life of the plant. In the instant case, the plant had nearly outlived its useful economic life before renovation & modernization and, therefore, the consumer should at best pay the Return on Equity on the capital base reduced by accumulated depreciation i.e. the capital cost not recovered by the investor by way of depreciation.

16.2. According to the learned counsel for the NTPC, the Central Commission in its order dated 21.12.2000, which is the detailed order before the Tariff Regulations, 2001 were notified, had recognized that the equity investment in the project would remain constant in perpetuity.

16.3. Let us now examine the order dated 21.12.2000 of the Central Commission issued before the issuance of the Notification of the 2001 Tariff Regulations. The relevant extracts are reproduced below:

*“2.8.7 From a study of the policy of the Government of India with regard to IPPs it is evident that there was a conscious decision to offer incentives to investors so that they can continue to sustain their plants and operate the services. In case they discontinue they would also lose the return on the*

*hypothetical capital which may not be the actual capital employed. This policy appears to have found its way into the pricing for public sector utilities also as evident from the notification dated 16th December, 1997 in respect of Powergrid. We consider this as a deliberate policy of the government though not formally communicated under section 38 of the ERC Act. We do not propose to upset this deliberate scheme before a comprehensive study of the implications. We would like to view this as an encouragement in its own way to continue to plough back the cash flow including depreciation in either replacing the capacity and creating additional capacities. Public Sector undertakings so long as they stand committed to the power sector and do not diversify to other sectors without prior approval and proper justification should be entitled to this incentive of a return on the equity employed based on the liability side approach rather than a strict administered pricing approach based on the asset values. As such in all matters of tariff under section 13(a) or (b) or (c) for valid reasons viz., to promote*

*investment in the sector and to plough back the funds within the sector either for replacement of capacity or addition to capacity a return on original equity has to be provided. The Commission will monitor the non-core investment and regulate the return in case of application of funds in non-core activities. We would like to sustain the underlying incentive feature behind the existing policy and would not like to upset the same in view of the need for promotion of investments in this sector. All the same the acceleration of depreciation, needs proper justification though augmentation of cash in flow has an equal and opposite cash out flow effect on beneficiaries. We shall take note of the same while dealing with depreciation”.*

16.4. Let us now examine the relevant portion of the impugned order of the Central Commission dated 25.09.2006:

*“The policy of R & M is yet to be finalised. The Regulation of 2001-2004 as well as 2004-2009 are silent on the treatment of depreciation once the*



*project has under gone life extension. We are of the view that the issue of reduction of capital cost by accumulated depreciation as claimed by GRIDCO needs to be discussed with all the stakeholders. Once Commission takes a view on the matter, same will be applicable to this generating station as well”.*

16.5. Thus, the Central Commission has allowed ROE on the capital cost as per the prevailing Regulations. Therefore, we do not find any infirmity in the findings of the Central Commission.

16.6. The learned counsel for the GRIDCO has stated that although a separate Renovation & Modernization Policy was yet to be formulated by the Central Commission in the Tariff Regulation of 2009 for the period 2009-2014, while dealing with treatment of Renovation & Modernization, the Central Commission had observed that any

expenditure incurred on renovation, modernization and life extension after deducting the accumulated depreciation already recovered from the original project cost would form the basis for determination of Tariff. We are not convinced with the arguments of the learned counsel for the GRIDCO. The period under dispute is the FY 2000-01 to 2003-04 for which the Tariff Regulations of 2009 could not be made applicable. The 2009 Regulations would apply for the period from 1.4.2009 onwards only. The 2009 Regulations also provided a second option to the generating company of special allowance as compensation for meeting the requirement of expenses including renovation & modernization beyond the useful life of the generating stations which was not available earlier. In view of above, the contention of

GRIDCO is rejected and the decision of the Central Commission is upheld.

17. The seventh issue is regarding effective date of life extension of the Talchar Power Station.

17.1. According to learned counsel for the GRIDCO, the Central Commission has incorrectly taken the effective date from 1.4.2001 when the expenditure incurred on Renovation and Modernization was only 19.3% of the total proposed amount and had also taken the extended life as 20 years only instead of 25 years as per the original proposal of NTPC. According to him, the effective date of life extension should have been taken either after the completion of the Renovation & Modernization activities or at the most from the date when 50% of the proposed Renovation & Modernization was completed.

17.2. According to learned counsel for the NTPC, the Renovation & Modernization proposal of NTPC had envisaged life extension to be of 20-25 years and not in absolute term of 25 years as contended by GRIDCO. Further, unlike a new generating station, while undertaking Renovation & Modernization works of the units are in operation, there is a commencement of the life of the unit. The R&M work is undertaken to ensure that the units perform on a sustainable basis over a period of 20 years. The units could function even without Renovation & Modernization but with a low Plant Load Factor.

17.3. We have noticed that the Central Commission has recorded that as a result of Renovation & Modernization activity life of project would be extended by 20 years which had nearly outlived its useful and

economic life prior to its acquisition by the NTPC. We are in agreement with the findings of the Central Commission and feel that the extended life considered by the Central Commission was correct since the economic life of the power plant had already been over. We also do not find any fault with the effective date allowed by the Central Commission for the life extension as the useful life of the power plant was already over. The GRIDCO had not produced any document to establish that the life could be extended by 25 years. Thus, this issue is decided against GRIDCO.

18. The eighth question is regarding up-rating of the capacity of 60 MW units of Talchar.

18.1. According to learned counsel for the GRIDCO, 60 MW units should have been up-rated to 62.5 MW.

According to him, even though the lost capacity had already been restored, the same was not recognized by the Central Commission as a result of which GRIDCO was paying incentive as well as Unscheduled Interchange charges to NTPC every month on the basis of the de-rated capacity.

18.2. According to learned counsel for the NTPC, on the basis of actual capacity test done, the Central Commission had concluded that the rating of the four units at 60 MW was in order.

18.3. Let us now examine the findings of the Central Commission on this aspect in the impugned order dated 26.09.2007. The relevant extracts of the order are as under:

*“10. The respondent has pleaded that one of the agreed objectives of R&M was the restoration of the lost capacity and deteriorated efficiency. Since the*

*majority of R&M works on all 60 MW units of Stage-I are over, the respondent has contended that the declared capacity of these units should be restored to its original nameplate capacity of 62.5 MW each. This issue was not raised by the respondent in Petition No. 62/2000 when norms of operation were being prescribed for the period 2000-04. We find that the major emphasis by the parties has been on the extension of the life of the generating station and improving its performance level as a result of R&M. We could not find any record to show any agreement between the parties on the definite performance level and the capacity restoration. In view of this we are not able to accept the argument of the respondent. Accordingly, for the purpose of the present petition the capacity of each unit of Stage has been considered as 60 MW”.*

18.4. Further the Central Commission has dealt with this issue in the impugned order dated 4<sup>th</sup> March, 2008 wherein the Central Commission has gone into

the relevant clauses of Power Purchase Agreement, the circumstances leading to de-rating of 62.5 MW to 60 MW and the actual data of generation of the 60 MW unit and came to the conclusion that there was no case for re-rating the four units of 60 MW to 62.5 MW each. We are in agreement with the findings of the Central Commission and do not want to interfere with this finding of the Central Commission. Thus, this issue is decided against GRIDCO.

19. The ninth issue is debt equity ratio.

19.1. According to learned counsel for the GRIDCO, the Central Commission had allowed debt equity ratio of 50:50 in respect of Talchar but in case of Tanda Thermal Power Station which was also taken over by NTPC the debt equity ratio had been allowed as 70:30 in Central Commission's order dated 28.6.2002.



19.2. According to learned counsel for the NTPC, the debt equity ratio of 50:50 had been provided for in the Power Purchase Agreement dated 8.3.1995 and the tariff since the time of take over of the Talchar Station and the capital base had been serviced as per the said debt equity ratio. Further, the debt equity ratio of all generating stations whose financial packages were approved prior to 30.3.1992 were taken as 50:50. In respect of generating stations which had been established after 30.3.1992, the debt equity ratio was considered at 70:30. Talchar Thermal Power Station was commissioned prior to 30.3.1992 whereas Tanda Thermal Power Station was commissioned during 1998 i.e. after 30.3.1992 and, therefore, debt equity ratio of 70:30 was considered for Tanda. Thus, there was a clear distinction between Talchar and Tanda Thermal Power Stations taken over by NTPC.

19.3. We find from the order dated 19.06.2002 where the Central Commission has noted as under:

*“The parties are ad idem on the proposal and there is no dispute between them on this issue and we, therefore, hold that debt-equity ratio of 50:50 shall be allowed for the purpose of tariff.”*

Therefore, it seems that the GRIDCO has raised a new issue after the Central Commission’s Tariff order for Tanda Thermal Power Station which was taken over by NTPC from U.P. State Electricity Board was issued. This is not permissible. Further, there is a clear distinction between the Talchar and Tanda as pointed out by NTPC. In view of this, we do not think that there is any substance in the contention of GRIDCO. This issue is accordingly decided against GRIDCO.

20. The tenth issue is regarding the normative operational parameters.

20.1. According to learned counsel for the GRIDCO, NTPC was not supposed to make any profit by way of savings made from variable cost arising out of operation at improved parameters compared to the norms fixed by the Central Commission. The benefit of actual parameters achieved as a consequence of Renovation and Modernization activity should have been passed on to the consumers. According to him, the operating parameters could have been adopted on the basis of actual or norms whichever is lower according to clause 2.4 of CERC's Notification dated 26.03.2001.

20.2. According to learned counsel for the NTPC, clause 2.3 of the 2001 Tariff Regulations makes an exclusion for existing power stations where PPA exists and in such cases the governing provision will be the

terms contained in the Power Purchase Agreement existing on the date of Tariff Regulations. In case of Talchar Station, there was an existing PPA dated 8.3.1995 which exclusively dealt with the operating parameters. According to him, this issue has already been decided by this Tribunal in the case of U.P. Power Corporation Ltd. vs. NTPC Limited & Ors. reported as 2007 APTEL 77.

20.3. As pointed out by the learned counsel for the NTPC, we find that this issue is already covered in the Judgment of this Tribunal in the matter of U.P. Power Corporation Ltd. vs. NTPC Limited & Ors. reported as 2007 APTEL 77, the relevant extracts of the Judgment are as under:

*“14. We are of the view that the presence of the non-obstante clause gives sub clauses (a), (b) and (c) of clause 2.3 an overriding effect over the rest of the provisions of the “notification” of Regulations,*

*2001. In other words in the instant case, clause 2.3 when given effect will render all other provisions including clause 2.4 alongwith its associated ‘Explanation’ and Regulation 1.11 specifying the prescribed norms to be ceiling norms, inoperative in the case of conflict.*

*15. It may be pointed out that neither the Ministry of Power notification dated 02.11.1992 nor the BPS Agreement contain any provision that operational norms were to be considered on the basis of “actual or normative whichever is lower”. From the forgoing it is abundantly clear that Clause 2.4 will be applicable for determination of tariff for generating stations which became operational on or after 01.04.2001. “Explanation” adjunct to Regulations 2.4 is reproduced below”.*

Accordingly, this issue also is decided against the  
GRIDCO.

21. The eleventh issue is regarding date from which additional capitalization should be allowed.

21.1. According to GRIDCO while passing the impugned order in Petition No. 35 of 2004, the Central Commission has not considered whether additional capital expenditure capitalized at the end of the accounting year is eligible from first day of the year or middle of the year or subsequent years. According to GRIDCO, this should have been considered either from the middle of the year or the subsequent years.

21.2. According to the learned counsel for the NTPC, once capital expenditure has been incurred and the asset has been put to use, the capitalization starts and there is every reason to allow the capitalization of the same. Since the capitalization occurs during a financial year on different months, it is logical that

total capitalization incurred in that financial year is serviced to extend of 50%, that is, half of the year.

21.3. We find force in the submission of NTPC. Therefore, we are in agreement with the contentions made by the learned counsel for the NTPC. Hence, we reject the contention of the GRIDCO in this regard. This issue is accordingly decided against the GRIDCO.

22. The last issue is regarding Return on Equity.

22.1. According to learned counsel for the GRIDCO, any profit in excess of 16% Return on Equity cannot be retained by NTPC and the Central Commission ought to have carried out truing up of the expenses incurred by the NTPC.

22.2. According to the learned counsel for the NTPC, the process of truing up is only relevant in case

of distribution companies where the expenditure is estimated at the beginning of the year and at the end of the year the figures are trued up based on actuals. The generation tariff determined by the Central Commission is based on normative parameters. If the generating station is not able to perform upto the level of performance notified in the norms by the Regulations, it will have to bear the cost of the inefficiency and the same could not be passed on to the consumers. Similarly, if a generating station performs better than the prescribed norms, it would be entitled to keep the gains arising out of its efficiency. This issue has already been decided by this Tribunal in the matter of U.P. Power Corporation Ltd. vs. NTPC Limited & Ors. reported as 2007 APTEL 77 as indicated in paragraph 20.3 above. In view of the ratio decided by the Appellate Tribunal in this



judgment, we reject the contention of GRIDCO for truing up the expenses of NTPC.

**23. Summary of our findings**

**23.1. O&M Expenses: The Central Commission in its order dated 19.6.2002 has gone into the reasons for abnormal increase in O&M expenses and we are in agreement with the findings of the Central Commission and confirm the same.**

**23.2. O&M expenses for FY 2000-01: We do not accept the contention of NTPC that the 2001 Tariff Regulations which were effective from 1.4.2001 should be applied for the FY 2000-01 and re-affirm the order of the Central Commission.**

**23.3. Disallowance of income on interest earned on notional loan: We are in agreement with the reasoning given by the Central Commission in its**

**order dated 5.11.2003 and confirm the order of the Central Commission.**

**23.4. Interest on loan: The Central Commission has correctly allowed the interest rate at weighted average rate of interest on actual loans for the period 2001-04.**

**23.5. Capital cost: This was a new issue raised by GRIDCO in review petition filed against order dated 25.9.2006 after the Tariff for Tanda was decided. In our opinion, the case of Tanda is different than that of Talchar. In view of ratio decided by the Tribunal in Appeal no. 95 of 2007, we decide this issue against GRIDCO and uphold the findings of the Central Commission.**

**23.6. Treatment of accumulated depreciation: The Central Commission has allowed ROE on capital cost as per the prevailing Regulations and**

**therefore, we do not find any fault with the findings of the Central Commission.**

**23.7. Effective date of life extension: We uphold the findings of the Central Commission regarding extension of useful life by 20 years and the effective date of life extension in view of completion of useful life of the power plant before commencing R&M activities.**

**23.8. Up-rating of 60 MW Units: The Central Commission has gone into the matter of re-rating the unit capacity and given detailed reasons for retaining the capacity at 60 MW. We are in agreement with the findings of the Central Commission.**

**23.9. Debt Equity ratio: The Central Commission has correctly decided the debt equity ratio as 50:50 as Talchar was established before**

**30.3.1992 and there was a specific provision for the same in the PPA. There was no dispute on this issue between the parties which is evident from the Central Commission's order dated 19.6.2002. GRIDCO has raised a new issue at subsequent stage when the Tariff for Tanda TPS was decided. This is not permissible. Further, there is a clear distinction between Tanda and Talchar.**

**23.10. Normative operational parameters: In view of ratio decided in this Tribunal's judgment reported as 2007 APTEL 77, this issue decided against GRIDCO and the Central Commission's findings in the impugned orders are upheld.**

**23.11. Date of additional capitalization: We reject the contention of GRIDCO and uphold the findings of the Central Commission.**

**23.12. True up of expenses of NTPC: We do not accept the contention of GRIDCO in light of the findings of the Tribunal in judgment reported as 2007 APTEL 77.**

24. In view of the above, all the above Appeals are dismissed as devoid of merits. The impugned orders of the Central Commission are perfectly justified and same are hereby confirmed. However, there is no order as to cost.

25. Pronounced in the open court on this **8<sup>th</sup> day of December, 2011.**

**(Justice P.S. Datta) ( Rakesh Nath) (Justice M. Karpaga Vinayagam)**  
**Judicial Member Technical Member Chairperson**

REPORTABLE / NON-REPORTABLE  
VS