Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal No. 9 of 2007 & 205 of 2005

Dated : 6th June, 2007

Present : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

Under Section 111(2) of The Electricity Act, 2003

In the matter of :

Appeal No. 9 of 2007:

U.P. Power Corporation Ltd.,
Shakti Bhawan,
14, Ashoka Marg,
Lucknow – 255 001. … Appellant

Versus

1. **N.T.P.C. Ltd.**
Scope Complex, 7 Industrial Area,
Lodhi Road, New Delhi – 110 003.

2. **Central Electricity Regulatory Commission**
Core-3, 6th Floor, SCOPE Complex,
New Delhi – 110 003. ..Respondent(s)

Appeal No. 205 of 2005

U.P. Power Corporation Ltd.
Shakti Bhawan,
14, Ashok Marg,
Lucknow – 255 001. … Appellant

Versus

1. **Central Electricity Regulatory Commission,**
Core-3, 6th Floor, SCOPE Complex,
New Delhi – 110 003.

2. **N.T.P.C. Ltd.,**
SCOPE Complex, 7 Industrial Area,
Lodhi Road, New Delhi – 110 003. ...Respondent(s)

For the Appellant : Mr. M. G. Ramachandran, Advocate
along with Mr. Anand K. Ganeshan,
Advocate and
Mr. Pradeep Misra, Advocate

For the Respondent(s): Mr. Pradeep Misra, Advocate
Mr. M. G. Ramachandran, Advocate
along with Mr. Anand K. Ganesan,
Advocate for Respondent No.1

J U D G M E N T

Per Hon'ble Mr. A. A. Khan, Technical Member

The Appellant, Uttar Pradesh Power Corporation Ltd. (herein after referred to as "UPPCL") has appealed against the orders dated 24.10.2005 passed by Central Electricity Regulatory Commission (for brevity "Central Commission/CERC") and dismissal of the Review Petition of 26.10.2006 filed by the Appellant. The Review Petition was dismissed by the Central Commission as no ground for review could be made out and as the Appellant had already filed the appeal against the order dated 24.10.2005.

Facts of the case :

2. The respondent, NTPC, acquired Tanda TPS from Uttar Pradesh State Electricity Board, (for short "UPSEB") the predecessor of the Appellant, UPPCL for a consideration of Rs.1,000 Crores on 14.01.2000 under the Uttar Pradesh Electricity Reforms (Transfer of Tanda undertaking) Scheme 2000 framed by the State Government of Uttar Pradesh by virtue of power under Section 23 of The Uttar Pradesh State Electricity Reforms Act, 1999.

3. The power generated from the Tanda TPS is supplied exclusively to the Appellant, Uttar Pradesh State Electricity Board, the predecessor of the Appellant and the Appellant and respondent, NTPC a Central Power Sector generating Company had entered into a Power Purchase Agreement dated 07.01.2000 which is valid for a period of 25 years from the date of transfer of asset of Tanda TPS to the respondent i.e. 14.01.2000.

4. The Central Commission notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 (to be referred as "Regulations 2001") vide their notification dated 26.03.2001 for the tariff period from 01.04.2001 to 31.03.2004. The Appellant filed a Petition before the Central Commission on 08.06.2001 seeking directions to the respondent, NTPC to approach the

Commission for determination of tariff. After hearing both the parties the Central Commission, after taking serious note of the lapse on the part of the respondent, NTPC directed the respondent to file a petition for determination of tariff through order dated 08.08.2001.

5. NTPC filed a Petition before the Central Commission on 03.09.2001 for determination of tariff for the period 14.01.2000 to 31.03.2004. By order dated 28.06.2002, CERC determined the tariff of Tanda TPS for the period 14.01.2000 to 31.03.2004.

6. The respondent, NTPC, filed Petition No.8 of 2005 before the Central Commission for additional capitalisation of Rs.177.74 Crores. The Appellant objected to the additional capitalisation being conceded for tariff determination for the period up to 31.03.2004 on various grounds and main amongst them being that:

(a) Renovation & Modernisation (R&M) program requires approval of the Central Electricity Authority,
(b) Amount of additional capitalisation is less than 20% of the capital cost for determination of tariff,
(c) The R&M works proposed to be additionally capitalized has not yet been completed,
(d) Certain items proposed for capitalisation are in the nature of O&M expenses and not R&M expenses,

(e) Additional capitalisation has to be funded out of unreasonable profit earned by NTPC,

(f) R&M has been claimed under the provision of Clause 5 of the Power Purchase Agreement dated 07.01.2000 which is held void by the Central Commission and

(g) Amount capitalized not reflected in the Annual Accounts of the respondent.

7. The Central Commission by an order passed on 24.10.2005 allowed additional capitalisation of Rs.177.47 Crores. The Appellant filed Appeal No. 205 of 2005 against the aforesaid order before this Tribunal which was then pending adjudication. During the pendency of this appeal the Appellant filed a Revision Petition No. 26 of 2005 before the Central Commission for revision of operating parameters of Tanda TPS for the period 01.04.2004 to 31.03.2009. In the meanwhile, the CERC directed that the Appellant and respondent, NTPC, should check the Accounts and Balance sheets furnished by NTPC. It has been stated that during such checking it was revealed that the amount approved by the 'Central Commission' was found to be more than actual amount shown in the Balance sheet. Based on such finding the Appellant filed a Review Petition No. 99 of 2006 before the CERC seeking review of fixed charges for the period from 14.01.2000 to 31.03.2004 determined by the Central Commission through order dated 24.10.2005 in Petition No. 8 of 2005 filed by the NTPC.

8. In the above Petition the Appellant also submitted that gross block as per the Balance sheet submitted by NTPC, is Rs.751.54 Crores as against gross block of Rs.784.47 Crores (excess of Rs.32.93 Crores) which resulted in recovery of higher tariff. The Review Petition was dismissed by the Central Commission by the order passed on 26.10.2006. Aggrieved by the order the Appellant filed the appeal No. 9 of 2007 before this Tribunal.

Grounds of Appeal :

9. As the subject matter of Appeal Nos. 205 of 2005 & 9 of 2007 are related to each other we propose to take up these appeals together for adjudication. The Appellant, UPPCL has brought out following grounds of appeal :

I. The grievances arising from the impugned order dated 24.10.2005 challenged in Appeal No. 205 of 2005 are as under :

(a) In terms of Clause 1.10 and 2.5 of Regulations, 2001 additional capitalisation requires approval of Central Electricity Authority (CEA),

(b) CERC has denied opportunity of giving hearing to the Appellant,

(c) Expenditure on account of R&M works has to be financed by recovery of depreciation amount of Rs.163 Crores and extra profit of Rs.126 Crores,

(d) CEA is the only authority for approval of additional capitalisation,

(e) Duplicity in recovery of cost and interest on loan re-payment does not match with the Petition,

(f) Normative Debt-Equity Ratio is adopted despite funding being against outstanding dues,

(g) Spares of Rs.7.16 Crores should not be allowed,

(h) Certain works for replacement of old parts have to be made from O&M and depreciation,

(i) CEA is the only competent authority for approval of R&M works,

(j) Tariff cannot be amended retrospectively,

(k) Clauses 5 & 6 of the Power Purchase Agreement dated 07.01.2000 are un-enforceable but have been taken as a basis by the respondent for undertaking R&M works,

(l) Incomplete R&M works did not improve the operating norms,

(m) CERC allowed review in various items of tariff which was not even prayed for by the respondent.

II. The grievances emanating from the impugned order dated 26.10.2006 which are the subject of appeal No. 9 of 2007 are described below :

(a) Amount of capitalisation not reflected in the balance sheet is not eligible for additional capitalisation for the purpose of determination of tariff.

(b) CERC's earlier order for which the Appellant approached the Central Commission for review ought to have been considered as the earlier order was based on misrepresentation,

(c) CERC had inherent power to review this order to rectify the mistake and therefore it should have reviewed the order,

(d) The amount approved on account of R&M is higher than those reflected in the audited balance sheet.

(e) Due to higher amount of expenses on account of R&M works, the tariff is also higher,

(f) Initial spares of Rs.7.18 Crores should not be allowed,

(g) Additional capital expenditure did not match with the balance sheet and adequate details not made available,

(h) Balance sheet does not contain necessary schedules and report of auditors,

(i) The additional R&M amount is less than 20% of the approved cost.

10. For sake of convenience the above grievances in respect of issues raised in Appeal Nos. 205 of 2005 and 9 of 2007 can be clubbed together in broader categories. We have, therefore, clubbed the issues requiring our consideration and dealt with them in the highlighted paragraphs that follow:

I. Whether in terms of clause 1.10 and 2.5 of Regulations 2001 the CEA is the only authority for approving additional capitalisation and whether Clauses 5 & 6 of the Power Purchase Agreement dated 07.01.2000 held to be void can be the basis for undertaking R&M works?

11. Under Clause 5(II) of the Power Purchase Agreement it is provided that "*NTPC will undertake R&M expenditure at the power station in phased manner based on its technical assessment and as per their procedures and guidelines".* This intent was also manifest in the transfer scheme notified by the Government of Uttar Pradesh through a notification No. 154/P-1/2000-24 dated 14.01.2000 at Para 4 which reads as under :

> "*NTPC shall be entitled to undertake renovation and modernization of Tanda generation undertaking based on its technical assessment and as per guidelines and procedures followed by NTPC".*

12. The aforesaid reflects the common intention of the Appellant as well as the respondent whether there is a need for initiating R&M works with a view to derive better performance from the plant. It also brings out that the Appellant was leaving the quantum and extent of R&M works to the discretion of the respondent, NTPC, and placed its reliance on the technical assessment of the respondent. The Central Commission has rightly declared Clause 5 of the PPA un-enforceable for the purpose of determination of tariff. However, the Appellant having agreed to such a dispensation in regard to undertaking R&M works has taken a plea that the said clause has subsequently been declared as enforceable for all purposes. It may be pointed out that the said clause was declared un-enforceable for the purpose of recovery of tariff without approval of the CERC. It cannot be said that the clause considering the provisions of the Transfer Scheme quoted above looses its significance for all purposes.

13. The Appellant has contended that in terms of Clause 2.5 of Regulations, 2001, the additional R&M works are required to be approved only by the CEA before these works could be considered as part of the capital assets for the purpose of determination of tariff. This issue has come up before this Tribunal in the case of UPPCL Vs. NTPC & Others in Appeal No. 36 of 2006 for which the judgment was delivered on

07.07.2006. In the aforesaid judgment it was decided thus "T*hat apart, it is CERC which is the competent authority to approve or undertake prudent check and allow additional capitalisation after amendment of Section 43-A(2) of The Electricity (Supply) Act, 1948 by amending 14 of the Act, 1998"* and further states that *"CEA is no longer the authority to approve project for additional investments on the project with respect to generation and it is CERC which is competent to undertake prudent check and allow capital investment or additional investment for the purpose of determining tariff"* and also observes that " *In any event after CEA ceased to be the authority and CERC is in terms of 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."* Moreover, the notification dated 09.01.1997, issued by the Ministry of Power, Government of India provided that the expense of amount exceeding Rs.500 Crores on the scheme of R&M of existing power generation station would be submitted to the CEA for its concurrence. As the proposed R&M works were less than Rs.500 Crores there would not have been any need to approach the CEA in terms of the above notification.

14. In view of the aforesaid, we are of the opinion that it was not mandatory for the respondent, NTPC, to obtain CEA

clearances for the R&M works before approaching the Central Commission for revision in the tariff.

II. The Central Commission has denied opportunity of hearing to the Appellant?

15. Going by the records submitted for our consideration, we are of the opinion that adequate opportunity was given to the Appellant to put forth its submissions regarding the matter, before the Central Commission.

III. R&M amount should be financed by recovery of depreciation amount of Rs.163 Crores and extra profit of Rs.126 Crores.

16. As regards financing of R&M works out of the amount of depreciation, the Appellant has contended that the revival activities of R&M Phase-I at the cost of Rs.177.47 Crores must be met from depreciation amount of Rs.163 Crores as a part of O&M expenses. While permitting capitalisation of R&M works, the issue is not only of sources of finance used for financing the R&M works but also about recovery of the same through tariff. The respondent is at liberty to use various sources of financing the R&M works subject to over all guiding principle that the financing is not detrimental to the Appellant. It is possible that the respondent, NTPC, might have used funds available to it on account of recovery

of tariff in the form of depreciation but that will not deny the respondent its right to recovery of the same through tariff in the future.

17. In the absence of corresponding loans or loan component lower than 70% of the total R&M works, a normative Debt Equity Ratio of 70:30 is adopted to decide about the Debt and Equity components. Thus, the contention of the Appellant that the cost of R&M must be met out of depreciation amount and should not form the part of the tariff in the future is not tenable.

18. The Appellant has raised another issue that the respondent, NTPC, has earned extra profit more than 16% of return on admissible equity. The scheme of tariff determination makes it possible for recovery of tariff such that the Return on Equity may be more than 16%. This can be in the form of improved operating parameters compared to those permitted in terms of tariff order or the regulations, incentives etc.

19. We are, therefore, of the view that if the Appellant has specific grounds of respondent indulging in tariff recovery which is not permissible as per the tariff order or Regulations; the same can be brought to the notice of Central Commission for necessary remedial action.

III. Duplicity in recovery of cost :

20. The Appellant has contended that out of Rs.177.7 Crores of R&M works claimed by the respondent, Rs.169.02 Crore were under Category-21 (meant for new works of R&M) which cannot be capitalized again as the same has already been covered in the original capital cost of Rs.607 Crores making it duplicate recovery of the cost. From the various records submitted before us it is observed that the Central Commission has conducted prudent check on the claims of the respondent.

21. The Central Commission in its order dated 24th October, 2005 observed that "*some of the expenditure has been incurred on procurement of new items, infrastructure facilities and miscellaneous items like ….with no de-capitalisation of the old assets. There are certain other assets which have been replaced without corresponding de-capitalisation… normally such expenditure is allowed after corresponding de-capitalisation.* ***But here the circumstances are very different. Therefore, the entire expenditure under this head has been allowed to be capitalized."*** (emphasis supplied)

22. The Central Commission, on one hand, argues that normally such expenditure on certain assets which have been replaced is only allowed after corresponding de-

capitalisation but, on the other hand, allows the said expenditure on the ground that "*the circumstances are very different*". It is not tenable. It does not safeguard the interest of the consumers as such avoidable allowance leads to double recovery of components of the capital cost resulting into higher tariff for the consumers.

IV. Interest on loan payment not matching with the petition:

23. The Appellant has contended that capitalisation of interest can take place to the extent of actual interest payment by the respondent. It is a very important issue. For the purpose of recovery of the interest for the particular period the aggregate funding is divided on the basis of Debt Equity Ratio of 70:30. 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.

V. Normative Debt Equity Ratio adopted despite funding being against outstanding dues.

24. Adoption of normative Debt Equity Ratio of 70:30 is in line with Regulations, 2001. Even if the consideration of acquisition of plant was for the settlement of old outstanding dues, the respondent, NTPC, is to be allowed full recovery of its capital whether actual or notional.

VI. Spares of Rs.7.16 Crores not to be allowed.

25. The Appellant has drawn attention of this Tribunal towards order of the Central Commission in Petition No. 34 of 2002 in respect of Korba STPS, wherein it was held that the expenditure on account of spares subsequent to the date of commercial operation is to be accounted for as a part of O&M expense and not to be capitalized. The aforesaid case is not strictly comparable to the case before us as the instant case is a case of plant acquisition. Keeping in view the smooth operation of the plant the Central Commission deemed it prudent to allow the spares of Rs.7.18 Crores. We accept the decision of the CERC in this regard.

VII. Certain works for replacement of old parts to be met from O&M or depreciation.

26. The Appellant has contended that several works are alleged to be undertaken by the respondent for replacement of old parts which are to be met either from O&M expenses or from depreciation collected by the respondent. We do not agree with the plea of the Appellant. Recovery permitted in the past towards depreciation and O&M expenses are not to be necessarily used for the purpose of replacing old parts. If the parties have agreed to permit R&M works the cost of the same has to be recovered through the tariff.

VIII. Tariff cannot be amended retrospectively?

27. The Appellant submitted that the tariff cannot be amended retrospectively as the Appellant cannot recover any charge from the consumers with retrospective effect. This argument does not carry much force. The prospect of recovery of additional tariff from its consumers cannot guide the recovery of tariff due to the respondent. What matters is whether the respondent is entitled in terms of tariff regulations to recover such additional amount in the capital cost. Clause 1.10 of the tariff Regulations 2001 which is relevant in this regard is reproduced below :

"1.10. Tariff revision during the tariff period on account of capital expenditure within the approved 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."

28. From the above, we do not find any barrier in the Regulations, 2001 to permit retrospective increase/decrease in the tariff. In the India's power sector, the gestation period of power projects runs from months to years and it is quite common to find variation in the original approved cost and final completion cost. Therefore, it is necessary to permit retrospective revision in the tariff in accordance to the provisions of the Regulations, 2001. We, therefore, in the instant case, approve the Central Commission permitting revision in the tariff with retrospective effect.

IX. Incomplete R&M works did not improve operating norms.

29. The Appellant has contended that out of total of Rs.199.5 Crores of R&M works only Rs.177.4 Crores of works has been completed and the balance has been completed only by 31.03.2005. We do not find any discrepancy here as the Central Commission has permitted additional capitalisation of Rs.177.47 Crores only up to 31.03.2004. It is the different matter that the improvement in the operating norms as envisaged could only be expected on completion of

the entire works planned and corresponding investment made.

X. The Central Commission allowed revision in various items of tariff which was not even prayed for by the respondent.

30. The Central Commission is fully empowered to consider and decide such issues on their merits and relevance whether raised by the respondent or not.

XI. Amount of capitalisation not reflected in the balance sheet is not eligible for additional capitalisation for the purpose of determination of tariff and the balance sheet does not contain necessary schedules and report of auditors.

31. The Appellant submitted that the additional capital expenditure is to be approved based on the balance sheet and the respondent has been allowed expenditure of those items appearing in the balance sheet. In the instant case before us, the Petition was decided by the Central Commission when the audited balance sheet was available. Thus, the amount of capitalisation as reflected in the books of accounts of the respondent ought to have been taken into consideration.

32. We accept the plea of the Appellant on this count and direct the Central Commission to re-look into the matter and restrict the amount of capitalisation to the extent reflected in the balance sheet subject to its prudence check.

33. As regards the submission of the Appellant that the balance sheet does not contain necessary schedules and report of auditors, we leave it to the Central Commission to devise ways to ensure availability of reliable and complete information from the respondent to its own satisfaction. We, however, are of the view that mere absence of necessary schedules and report of auditor does not necessarily adversely impact the credibility of the information.

XI. CERC should have reviewed its earlier order which was based on misrepresentation and to rectify the mistake.

34. We do not consider it necessary to decide on this issue as the submission is more of procedural nature and all relevant issues have been addressed through this judgment

XII. Additional R&M amount less than 20% of the approved cost is not to be included in additional capitalisation for the tariff purposes.

35. The Appellant has suggested that for the purpose of determining the 20% excess in terms of Clause 1.10 of the Regulations 2001, the gross block of Rs.751.54 Crores as on 31.03.2004 should be taken into consideration. The Clause 1.10 provides that "*tariff revisions during the tariff period on account of capital expenditure within the approved 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.*"

36. We observe that the approved cost of Tanda TPS for the purpose of determination of tariff for the period from 14.01.2000 to 31.03.2004 is considered as Rs.607 Crores. The consideration of the claim for additional capitalisation of Rs.177.47 Crores which is 29% of the approved capital cost is in accordance with the Clause 1.10 of the Regulations, 2001. As a result of our decision at Para 32 above which is likely to modify admissible amount for additional capitalisation, the Central Commission is directed to accordingly apply the provision of the Clause 1.10 of Regulations, 2001.

37. In view of the above, we partly allow the appeals only to the extent indicated in paragraphs 22, 23, 32 and 36 and remit the matter to the Central Commission with direction to

decide the Revision Petition No. 8 of 2005 afresh in the light of the observations in those paragraphs. This exercise be done within a period of 2 months of the communication of this judgment. Till then the impugned order will remain in force. Any differences in the resulting tariff recoverable in this exercise be adjusted in truing up exercise to be undertaken in the ensuing tariff formulation.

Pronounced in open court on this 6th day of June, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. A. A. Khan)
Technical Member

The End