Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal Nos. 102 of 2005

Dated 6th June, 2007

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

Under Section 111 (2) of Electricity Act, 2003

In the matter of :

Appeal 102 of 2005

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

…Appellant (s)

Versus

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

2. U. P. Power Corporation Ltd.,
Shakti Bhawan
14, Ashoka Marg,
Lucknow – 255001

…Respondent(s)

For the appellant : Mr. M.G. Ramachandran, Advocate with
Ms Anand K. Ganeshan

For the Respondent (s) : Mr. Pradeep Misra, Advocate for Resp. No. 2

JUDGEMENT

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

The appellant, NTPC Ltd., a Central Power Sector Undertaking, has filed this appeal directed against the tariff order for the period from 14.01.2000 to 31.03.2004 passed on 24. 01.2002 by the Central Electricity Regulatory Commission (hereinafter referred to as 'The Central Commission') relating to Tanda Thermal Power Station, acquired from Uttar Pradesh State Electricity Board (for brevity referred to as 'UPSEB') predecessor of Uttar Pradesh Power Corporation Ltd. (hereinafter referred to as 'UPPCL') under the Uttar Pradesh Electricity Reforms (Transfer of Tanda Undertaking) Scheme, 2000 (hereinafter to be referred as 'the Scheme') framed by the State Government of Uttar Pradesh under Section 23 of the Uttar Pradesh Electricity Reforms Act 1999 (for brevity referred to as 'the Reforms Act'). The Tanda TPS was acquired by the appellant on 14.01.2000 from UPSEB which is the predecessor of the second respondent herein, for a consideration amount of rupees 1000 crore.

2. The power generated from Tanda TPS is supplied exclusively to the second respondent. The appellant and UPSEB had also entered into a Power Purchase Agreement (PPA) dated 07.01.2000 which is valid for a period of 25 years from the date of acquisition of the Tanda TPS by the appellant i.e. 14.01.2000.

FACTS OF THE CASE.

3. The Appellant filed the petition for determination of tariff for Tanda Thermal Power Station on 03.09.2001 for the period from 14.01.2000 to 31.03.2004.

4. The Central Commission vide its order dated 21.12.2000 determined operational norms for determination of tariff for Tanda Thermal Power Stations owned by the appellant which amongst others provided for reduction in depreciations rate from 7.84% to 3.60%. The Appellant challenged these norms, inter-alia, on the following grounds:

(a) Level playing field was not being maintained.

(b) Discrimination was practiced against NTPC stations.

(c) Norms laid down by Government of India vide notification dated 29.03.1994 being in the nature of tariff policy are binding on the Central Commission.

(d) Authority to lay down the norms rests with Government and not with Central Commission.

5. The Central Commission determined the tariff for Tanda Thermal Power Station by an order passed by it on 28.06.2002 for the period of 14.01.2000 to 31.03.2004.

6. The Central Commission notified the terms and conditions for determination of tariff by a notification called Central Electricity Regulatory Commission (Terms and Conditions for Tariff) Regulations, 2001 (for brevity referred to as "Regulations, 2001") on 26.03.2001 applicable for the period from 01.04.2001 to 31.03.2004. From the impugned order of 28.06.2002 it is observed that appellant claimed the tariff for sale of power from Tanda Thermal Power Station for the period from 14.01.2000 to 31.03.2001 in terms of Ministry of Power notification dated 31.03.1992 and thereafter in terms of the Regulations, 2001.

7. By the examination of the tariff order dated 28.06.2002 the appellant found that some of the findings and observations therein require reconsideration and/or clarification and/or review and/or modification of the Central Commission under the following provisions of the Act and Regulations:

(a) Section 12 of the Act read with regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (for short 'Regulation, 1999) and Section 114 and Order 47 of the Code of Civil Procedure, 1908 whereby the Central Commission with the powers of the civil code is empowered to review its decision, directions and orders and to deal with any other matter which may be prescribed.

(b) Regulations 111, 114 and 115 of Regulations, 1999 read with Section 151 of the Code of Civil Procedure, 1908 vest the Central Commission with inherent powers to issue orders.

(i) as may be necessary for ends of justice and use of its procedure,

(ii) to 'amend any defect or error' in any proceeding before it for the purpose of determining the rule, questions or issues arising in the proceedings; and

(iii) to remove any difficulty in giving effect to any provisions of the regulations.

8. The appellant in the review petition raised a hoast of issues seeking clarification and/or reconsideration and/or review and/or modification in the order dated 28.06.2002. The Central Commission in its order dated 10.08.2004 admitted the review petition only on one ground namely mistake in computation of interest on working capital and found all other issues raised in the application as not maintainable as being out side the scope of review as prescribed in Section 114 read with Order 47 of the Code of Civil Procedure. The working capital ought to have been worked out on the basis of receivables equivalent to two months of average billing for sale of electricity calculated at targeted availability, on account of both, the fixed charges as also the variable charges payable by the respondent to the Appellant. The working capital was computed only on the fixed charges and not on account of variable charges. The Central Commission allowed the recalculation of interest on working capital by adding two months variable

charges to receivables and modified the order dated 28.06.2002 on 09.04.2003.

9. It may be mentioned that the Appellant through FAO No. 30 of 2002 approached the High Court of Delhi against the Central Commission's orders dated 17.12.2002 and 09.04.2003 in Petition No. 77 of 2001. The Delhi High Court by an order passed on 10.08.2004 has, inter alia, noted that these orders had also been challenged by way of a review petition before the same authority and the order in review had been passed and further since the aforesaid review order had not been challenged in the High Court, FAO No. 30 of 2002 had become infructuous.

10. The review petition was admitted by the Central Electricity Regulatory Commission only on one count i.e. calculation of interest on working capital. The Appellant on the principle of merger has claimed that the review order gets merged with the original order dated 28.06.2002. The adjudication in the instant case, therefore, is for appeal against the impugned order of 28.06.2002 and the review order passed on 09.04.2003

PRELIMINARY ISSUES

11. There are two preliminary issues in the matter. One is about maintainability and other is of limitation. The challenge in the appeal is against order dated 09.04.2003. The order dated 09.04.03 has been passed on a Review Petition No. 77/2001 over the order deciding the Petition No. 77/2001. The decision in Petition No. 77/2001 was also a subject matter of appeal before the High Court being FAO No. 530/2002. The High Court disposed of the FAO No. 530/2002 as infructuous as the order in the review had not been challenged. The High Court's order is dated 10.08.2004. By the Impugned Order, the CERC computed the interest on the working capital, substituted certain fixed charges approved by the order dated 28.06.2002 by those indicated in the review order. The appellant had first approached the High Court of Delhi challenging the order dated 28.06.2002. It is contended on behalf of the Commission that the petitioner having failed before the High Court in his challenge against the order dated 28.06.2002, cannot challenge the order in this appeal. The

order dated 09.04.2003 modifies the order dated 28.06.2002 to the extent indicated above. Accordingly, the order dated 28.06.2002 merges in the order of 09.04.2003. The appeal before the High Court relate to the order dated 28.06.2002. The High Court did not dismiss the appeal on merit. It only observed that the appeal was infructuous because the subsequent order dated 09.04.2003 has not been challenged. Accordingly, it can be said that the High Court had dealt with the Impugned order in Petition No. 77/2001 as merged in the subsequent order dated 09.04.2003. In this view, the appeal is maintainable.

12. On behalf of Commission it is contended that the appeal is barred by time when calculated from the first order dated 22.06.2003 as well as from the order dated 09.04.2003. The real situation is that the appellant was already before the High Court against the order dated 28.06.2002, before the limitation to challenge the order dated 28.06.2002 had expired. The appeal remained pending till 10.08.2004. By then The Electricity Act 2003 had been passed. The Act came

into force in 10.06.2003 which was the last day of limitation to challenge the order of 09.04.03. By virtue of Section 185 the order is deemed to have been passed under The Electricity Act 2003. The Electricity Rules, 2005 framed under 176 of The Electricity Act, 2003 has prescribed limitation for an appeal. The Rule No. 10 of these rules is as under :

> "*10.* ***Appeal to the Appellate Tribunal*** *– In terms of sub-section (2) of section 111 of the Act, the appeal against the orders passed by the adjudicating officer or the appropriate commission after the coming into force of the Act may be filed within forty-five days from the date as notified by the Central Government, on which the Appellate Tribunal comes into operation."*

13. The Appellate Tribunal came to be established on 21.07.2005. Counting 45 days from 21.07.2005 (excluding the first day for the purpose of counting) the limitation expired on 05.09.2005. The present appeal is preferred on 05.09.2005 and is therefore within limitation.

GROUNDS OF THE APPEAL

14. The appellant being aggrieved by the aforesaid orders of the Commission filed this appeal before the Tribunal on the following grounds:

(a) Operational norms decided by the Central Commission by its order dated 21.12.2000 have been appealed against by NTPC in FAO No. 131 of 2001 which subsequently was filed before the Tribunal and is since pending before the Tribunal.

(b) Different norms applicable to generating stations of Central Sector, State Sector and Private Sector amount to hostile discrimination and denial of level playing field to appellant.

(c) Government of India only has jurisdiction to set norms and not the Central Commission.

(d) Setting depreciation rate at 3.6% as against 7.84% in Government notification dated 29.03.2004 is discriminatory and bad in law:

It may be pertinent to note here that the appeal No. 54 of 2006 with above mentioned issues along with other appeal Nos. 51, 52, 53, 54, 55, 56, 145, 146, 147, 148,

149, 150, 198, 199 & 200 of 2006 were heard and dismissed by this Tribunal in December, 2006.

(e) Reduction of Rs. 175.19 crores from the capital cost on account of depreciation charged by the second respondent prior to transfer of the assets to the appellant should not have been made.

(f) Capital base for depreciation purposes and for other purposes cannot be different and is resulting in serious prejudice to the appellant.

(g) CERC failed to appreciate that the Appellant acquired Tanda Thermal Power Station at a cost of Rs.607 crores and, therefore, the capital cost for tariff for all intents including depreciation be taken as Rs. 607 crores.

(h) CERC failed to appreciate that the Appellant cannot be deprived of servicing of Rs. 175.19 crores which forms a part of the consideration paid by the appellant.

(i) The operation norms determined by the Central Commission based on the unrealistic projection made by the Second Respondent (its predecessor) is wholly inappropriate and irrational.

(j) Unrealistic operating norms resulted in loss of Rs. 219.88 crores (Rs. 82.36 crores in recovery of fuel charges and Rs. 137.52 crores in recovery of O&M charges) to the appellant.

(k) Due to inefficient operation & maintenance of Tanda TPS, it was not possible for the Appellant, immediately after taking over the plant to maintain the norms relating to Heat Rate, Auxiliary consumption and Special Oil Consumption fixed by the CERC.

(l) Difficulties faced in achieving the norms set by the Central Commission are beyond the control of the appellant

(m) The Central Commission failed in not recognizing the need for transition period before norms applied by the Central Commission are achieved.

(n) The Central Commission failed to appreciate that there was no lack of prudence on the part of the Appellant and the Appellant has also made more than reasonable efforts to improve the performance. Appellant should have been allowed operating and maintenance costs on actual basis.

15. It may be pointed out that grounds of grievances mentioned above at paras 8(a) to 8(d) were part of the Appeal No. 54 of 2006 before this

Tribunal which was dismissed by the order passed on 06.12.2006 as being not maintainable. The aforesaid judgement reads thus:

> *"The orders dated January 4, 2000, December 15, 2000 and December 21, 2000 cannot be utilized and even in the past were not utilized for the purposes of determining the tariff. The orders dated January 4, 2000, December 15, 2000 and December 21, 2000 were protempore in nature and held the field till the Regulations were framed. After the Regulations were framed the aforesaid orders lost their efficacy and utility. In the circumstances, the challenge to the orders is academic in nature. The appellant, in fact by an indirect way is challenging the Regulations of 2001 in the guise of attacking the aforesaid orders. This cannot be permitted.*
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> *xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
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> *5. Since the appellant cannot challenge the Regulations in appeal before us, it cannot be allowed to challenge the impugned orders dated January 4, 2000, December 15, 2000 and December 21, 2000 as no tariff determination has taken*

place on the basis of these orders and they have been replaced by the Regulations of 2001. It is well settled that what cannot be done directly ought not to be allowed to be achieved indirectly.

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Since the Regulations of 2001 were notified on March 26, 2001, the tariff petition is, therefore, required to be filed for determination of tariff in accordance with the Regulations of 2001. Unless the appellant challenges the Regulations of 2001 and succeeds in his challenge, he cannot ask for determination of tariff as per the earlier norms."

16. The issues mentioned in para 8(a) to 8(d), therefore, were decided by the aforesaid judgement of the Tribunal. The learned counsel for the appellant and respondent have submitted their arguments on the various issues listed in paras 8(e) to 8(n) above. The remaining issues mentioned in paras 8(e) to 8(n) raised by the appellant can be grouped under two heads as indicated below, one relating to capital cost for determination of depreciation rate and the other whether the Appellant should have been allowed operation and maintenance cost on actual basis.

I. Capital cost for determination of depreciation rate and depreciation amount.

17. We have gone through the orders passed by the Central Commission on 28.06.2002 and 09.04.2003 along with the submissions made by the parties before us.

18. It is observed that the Central Commission in its order has stated that depreciation amount of Rs. 175.91 crores charged up to the date of transfer shall be considered for limiting cumulative depreciation amount charged up to 90% of the capital cost of Rs. 607 crores. In our view the pivotal issue is about the determination of the capital base to be adopted for the purposes of determination of tariff. Once this issue is addressed, the issue of cumulative depreciation will become easier to be addressed.

19. In a regulated tariff determination regime capital cost incurred for setting up facility gets fully recovered by way of depreciation to the extent of 90% during the declared life time of the facility. In other words it means

that the depreciation to the extent of 90% of the capital cost is recovered from the consumer.

20. Our attention is drawn to two judgments of the Supreme Court in respect of depreciation in order to argue that depreciation should be calculated on the basis of the purchase price of the plant rather than on the depreciated book value of the predecessor. We have carefully gone through the judgments. Both judgments are rendered on Section 10(2) in the Income Tax Act. The provision of Section 10(2) explicitly require depreciation to be calculated "on the original cost there of, of the assessee". The Supreme Court interpreted these words and said that the depreciation for the purpose of Section 10 of the Income Tax Act has to be calculated on the cost of the assessee, namely the cost of transaction in respect of the assets and not the value as standing in the books of the predecessor. These two judgments namely *Jogta Coal Co. Ltd. Vs. Commissioner of Income Tax AIR 1959 SC 1232 and M/s Guzdar Kajora Coal Mines Ltd. Vs. Commissioner of Income Tax 1972 2 SCC 436* cannot be applied to our case. The purpose of assessing depreciation here is to establish an element that has to be recovered from the consumer of electricity. This depreciation is entirely different from depreciation calculated for the purpose of assessing the

income under the Income Tax Act. Accordingly, we are of the opinion that the appellant can draw no benefit from any of these two judgments.

21. The impugned order of the Central Commission states that :

"the scheme framed under the Reforms Act, enacted after approval of the President under Article 254 of the Constitution of India has to be the basis for determination of capital base. It is the contention of the petitioner that the Commission is not empowered to modify any part of operation of the Scheme since the transfer cost is a policy decision of the State Government. On the contrary, the respondent has supported the conclusion arrived at by the Special Bench so far as the capital base is concerned."

22. The Central Commission has further observed that:

"*A transfer price which is decided by two parties across the table with "debt-dissolving approach", has both parties interest in having high transfer cost-the seller wanting to clear the maximum dues possible to the buyer and the buyer also taking the opportunity to reduce his irrecoverable debt as much*

as possible. The transfer price based on such "debt dissolving approach." Cannot form the basis for determining the tariff to the consumer. Accordingly, we do not agree with the contention of the petitioner that the tariff should be based on a capital cost of Rs. 1000 crores. In this context, we would like to draw attention to the following extract from the order of the Special Bench dated 22.02.2002 which clearly brings out the position in this matter in an appropriate manner:

> *"A project is conceived with objective of providing benefit to the consumers for its normal useful life. In this particular case, asset has not outlived its useful life. The transfer of asset at a high price than the depreciated book value does not add value to the plant and consumer has to bear the additional cost in tariff without any additional benefit. Consumer has already paid for the cost of asset to the extent of depreciation already recovered. With such artificial increase in capital base, consumer is made to pay again for the same asset. Had the transfer not taken place the tariff*

would have continued to be worked on the basis of original cost and depreciation recovered. A mere change of ownership should not be a cause for increase of tariff."

23. In the instant case before the useful life-time of the facility is achieved the facility stands transferred to the Appellant. Now the question arises whether the consumers should continue to pay for the original capital cost of the facility or should the revised cost be recovered from him.

24. It is reasonable to consider that when the facility was originally set up the normal expectation was that it would run its useful life-time for the benefit of the consumers, who would pay for the same as per Regulations applicable. Due to one reason or other, before the completion of the normal useful life-time, the facility is subjected to re-valuation resulting into a higher valuation. If the revised valuation is considered as the basis for tariff determination in the future, the consumers are denied their rights to enjoy the benefits of the facility at the cost at which it was set up. It disturbs the basic premise that the original cost at which the facility was set up was appropriate to ensure its original envisaged useful life-time.

25. Subsequent to the commercial operation date (COD) of the plant any increase in the cost has to correspond to an increase in the useful life-time of the facility. This is not the case here. The higher valuation in any way is not contributing to an increase in the useful life-time of the facility at this stage. The revised value of the plant was based on consideration other than increasing the useful life-time of the facility. On the other hand a view could be taken from another angle that since the appellant has acquired the facility at revised value it should be entitled to recover the revised cost from the consumers. The consumers, however, do not get any benefit as a result of higher value of the facility. The enhancement in efficiency and the resulting gain cannot be said to be the consideration of such higher valuation. The reason being that the higher efficiency achieved subsequently ought to have been made available to the consumers from the date of commercial operation itself, but due to reasons beyond the control they were deprived of such gains. Permitting recovery of tariff based on the revised higher valuation, has, therefore, resulted into consumer paying higher tariff for the same facility.

26. In view of the above we find no fault with the Central Commission's view restricting cost of facility to the original capital cost of Rs. 607 crores.

Once we agree that the capital costs of the facility is to be restricted to its original cost the logical course of action would be to account for the depreciation already recovered through tariff in the past. The accumulated depreciation of Rs. 175.91 crores has already been recovered from the consumers in the past through tariff. If such accumulated depreciation amount were again allowed to be recovered it would amount to recovering the same cost twice which is contrary to the intention of the applicable scheme for determination of tariff. The plea that by disallowing to recover the accumulated depreciation of Rs. 175.91 crores from the capital cost of Rs. 607 crores, the Appellant would be put to alleged perceived loss but that could not be the sufficient reason to compensate the appellant by making recovery from consumers through increased tariff. We therefore, do not find any fault with the Central Commission in considering the accumulated deprecation of Rs. 175.91 crores for the purposes of restricting recovery of capital cost to the extent of 90% in the form of depreciation.

II. Central Commission failed to appreciate that there was no lack of prudence on the part of the appellant and the appellant has taken more than reasonable efforts to improve the performance. The appellant

should have been allowed operation and maintenance costs on actual basis.

27. The appellant is aggrieved that the operation and maintenance cost have not been allowed on actual basis. The appellant's contention is that the appellant had taken over the plant which required extensive renovation before it could come to the required level of efficiency and that the Central Commission had ignored this factor while fixing the norms for the appellant. The Central Commission in fact has carefully considered the special situation of the appellant. They appointed its member Mr. K. N. Sinha to examine inter alia whether the tariff for sale of power from Tanda Power could be governed by Ministry of Power Notifications dated 30.03.1992 and 26.03.2001. Mr. Sinha, referred to as special bench in the Impugned Order, examined the arguments of the appellant that because of special circumstances applicable to the Tanda TPS terms and conditions of tariff notified by the Ministry of Power and the Central Commission could not be extended to Tanda project. The special bench expressed an opinion that the norms of determination of tariff as notified by the Ministry of Power and the Commission could not be applied to Tanda TPS. Thereafter on examining all various aspects the Commission approved the recommendation of the

special bench in respect of Plant Load Factor (PLF) and Target Availability for the purpose of incentive and recovery of full charges for the period 2000-01, 2003-04. The Commission also considered the plea raised by the appellant herein that such targets were not achievable. The Commission felt that with replacement of missing items it should be possible for the appellant to improve the plant performance. It also held that units under R&M should not be reckoned for the purpose of PLF computation. The Commission accordingly, held that the PLF and target availability norms were acceptable.

28. Keeping in view the special circumstance of Tanda, the Commission has given due relaxation in operation norms such as Heat rate, auxiliary energy consumption and specific fuel oil consumption. Appellant has also nearabout achieved these targets. We are satisfied that the Commission has fully applied its prudence in fixing the tariff norms and in allowing operation and maintenance cost. We, therefore, do not find any basis for recovery of O&M costs claimed by the appellant on actual basis.

29. In view of the above, the appeal fails and is hereby dismissed.

(A. A. Khan)
Technical Member

(Mrs. Justice Manju Goel)
Judicial Member

Dated: 6th June 2007.