

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

**Appeal Nos. 103 of 2008**

Dated : 26<sup>th</sup> March, 2009

**Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. A.A. Khan, Technical Member**

**IN THE MATTER OF:**

N.T.P.C. Ltd  
N.T.P.C. Bhawan, SCOPE Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi- 110003

.... Appellant

Versus

1. Central Electricity Regulatory Commission  
Core-3, floor-6, Scope Complex,  
Lodhi Road, New Delhi – 110002

2. Uttar Pradesh Power Corporation Ltd.  
Shakti Bhawan  
14, Ashoka Road  
Lucknow - 226001

... Respondents

Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Mr. Anand K. Ganeshan and  
Ms. Swapna Shesadri  
Counsel for the Respondent(s) : Mr. PRadeep Misra and  
Mr. Daleep K. Dhyani for UPPCL

**JUDGMENT**

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

Appellant, NTPC Limited has filed this appeal challenging the order dated 11.04.2008

*Corrections( Shown in Italics and Bold) in Paragraphs 7,9 and 36 are done as per orders of Hon'ble Court I dated 11.05.2009 in Review petition No. 6 of 2009*

passed by the Central Electricity Regulatory Commission (hereinafter referred to as the “Central Commission”) in petition No. 8 of 2005 pertaining to certain aspects of the Tariff for the period 14.01.2000 to 31.03.2004 for Tanda Thermal Power Station (for short “Tanda TPS”) owned by NTPC.

### **BACK GROUND**

2. Tanda TPS consisting of four units each of 110 MW was established by Uttar Pradesh State Electricity Board (‘UPSEB’) a predecessor to Uttar Pradesh Power Corporation Ltd. (UPPCL), and the units were progressively commissioned over a period of time, first unit being in 1988 and fourth unit in 1998.

3. In order to liquidate the outstanding dues payable by UPSEB to NTPC, Tanda TPS was transferred to NTPC under a statutory transfer scheme notified by the Government of Uttar Pradesh on 14.01.2000. UPSEB and NTPC had also entered into a Power Purchase Agreement dated 07.01.2000 containing the terms and conditions for generation and sale of Power from Tanda TPS to UPSEB or its successor entities. The parties had agreed for Rs. 1000 crores to be the capital cost of the Tanda TPS on the date of transfer i.e. 14.01.2000.

4. The Central Commission vide its order dated 28.06.2002 decided the petition No. 77 of 2001 filed by the NTPC and determined the tariff for the period from 14.01.2000 to 31.03.2004. In the meantime, under Government of India’s one-time settlement scheme

to settle the outstanding dues of Central Power Sector Utilities payable by the State Utilities, Rs. 393 crores was decided to be adjusted from the capital costs of Rs. 1000 crores of 'Tanda' TPS for tariff determination. The capital costs, therefore, for the purpose of tariff determination was reduced from Rs. 1000 crores to Rs. 607 crores. The reduction in capital cost was formalized through a Minutes of Meeting held on 27.08.2002 between the officials of the parties.

5. Subsequent to taking over of Tanda TPS by NTPC during 14.01.2000 to 31.03.2004, it incurred an expenditure of Rs. 177.74 crores qualified for additional capitalization. A petition No. 8 of 2005 was accordingly filed by NTPC on 27.01.2005.

6. The Central Commission by its order dated 24.10.2005 decided the petition no. 8 of 2005 and allowed additional capitalization of Rs. 177.47 crores (instead of Rs. 177.74 crores in the petition) for the period 14.01.2000 to 31.03.2004.

7. **UPPCL** had challenged the Central Commission's order dated 24.10.2005 before this Tribunal through Appeal No. 205 of 2005. UPPCL a successor entity of UPSEB appealed against the afore said order before this Tribunal through a cross Appeal No. 9 of 2007. The entire electricity generated by the Tanda TPC is allocated to UPPCL. Both the aforesaid appeals were heard together and disposed of by this Tribunal through its order passed on 06.06.2007.

***Corrections( Shown in Italics and Bold) in Paragraphs 7,9 and 36 are done as per orders of Hon'ble Court I dated 11.05.2009 in Review petition No. 6 of 2009***

8. It may be pertinent to point out here that the respondent, UPPCL had not challenged the capital cost of Rs. 607 crores as determined in petition No. 77 of 2001 and

the same was formalized between the parties on 27.08.2002. Even in the appeal no. 205 of 2005 before this Tribunal the issue was limited to the validity and acceptability of quantum of additional capitalization of Rs. 177.47 crores and no issue was raised to question the capital cost of Rs. 607 crores determined earlier.

9. This Tribunal by its order passed on 06.06.2007 decided the Appeal No. 205 of 2005 filed by *UPPCL* and Appeal No. 09 of 2007 by the *UPPCL* remitting the following issues to the Central Commission for re-examination with the direction:

- (a) That the additional capitalization for the purpose of determination of tariff based on the audited accounts and the relevant regulations is to be ascertained;
- (b) Rate of interest of 14.5% on notional loans claimed by NTPC for the period of 2000-04 appeared to be on the higher side keeping in view that the NTPC enjoys the credit rating equivalent to that of sovereign rating.

*Corrections( Shown in Italics and Bold) in Paragraphs 7,9 and 36 are done as per orders of Hon'ble Court I dated 11.05.2009 in Review petition No. 6 of 2009*

10. Subsequent to the determination of the above issues by the Central Commission the Appellant has additionally raised one more issue which *inter-alia* claims that in the de-capitalization process the value of the services rendered by the contractor in establishing fixed costs is to be excluded.

11. The Central Commission vide impugned order passed on 09.04.2008 re-determined the additional capitalization and after certain adjustments determined it to be Rs. 173.83 crores for the period from 14.01.2000 to 31.03.2004. The Central Commission, however, reduced the original gross block of capital asset of Rs. 607 crores as on 14.01.2000 having been settled earlier, by Rs. 32.71 crores. The gross block of capital assets, thus, is modified from gross block of Rs. 1000 crores to Rs. 574.36 crores. The Central Commission has also re-determined the interest rate on notional loan based on weighted average of interest rates on actual loans drawn by NTPC from different sources during the period.

12. The appellant, NTPC has filed this appeal no. 103 of 2008 challenging the impugned order dated 09.04.2008 passed by the Commission

**ISSUES RAISED IN THE APPEAL**

13. Appellant, NTPC has challenged the impugned order dated 09.04.2008 on the following grounds:

- (a) Re-opening of the original gross block of capital assets at Rs. 607 crores as on 14.01.2000 and reducing it to Rs. 574.36 crores (i.e. by Rs. 32.71 crores).
- (b) Reduction of interest rate on notional loan from 14.5% which is the rate at which NTPC was paying to the Government of India and was consistently complied with by others including the Central Commission.
- (d) Increase in the de-capitalized amount by including the value of the services rendered for establishing the fixed assets.

### **DISCUSSION AND ANALYSIS**

14. We shall now proceed to deal with each of the above issues separately.

#### **Issue No. 1: Reduction of Capital Cost from Rs. 607 crores to Rs. 574.36 crores**

15. Mr. M.G. Ramachandaran, learned counsel for the appellant has submitted that this Tribunal order dated 06.06.2007 in Appeal Nos. 205 of 2005 and 09 of 2007 had remitted the issue to the Central Commission with the direction to re-examine the validity of allowance of additional capitalization of RS. 177.47 crores based on the audited accounts of NTPC. He contends that the Respondent, UPPCL had also raised this point in the context of whether the additional capitalization incurred by NTPC was 20% or more of the existing capital costs of Rs. 607 crores already approved by the Central Commission as the opening gross block of assets on 14.01.2000. The Appellant further points out that in Appeal No. 09 of 2007 filed by the Respondent, UPPCL, the challenge

was about the validity of the quantum of additional capitalization of Rs. 177.47 crores incurred by NTPC during the period of 14.01.2000 to 31.03.2004 and the capital cost of Rs. 607 crores as on 14.01.2000 was neither questioned nor challenged by it. Accordingly, the order dated 06.06.2007 of the Hon'ble Tribunal did not issue any direction to the Central Commission to re-consider Rs. 607 crores of opening gross block as on 14.01.2000. Mr. Ramachandaran, learned counsel for the Appellant has stressed that the Central Commission having established the validity of additional capitalization of Rs. 177.47 crores and that being in excess of 20% of the existing capital cost of Rs. 607 crores, had no alternative but to allow it as such.

16. Shri Pradeep Misra learned counsel for Respondent No. 2, UPPCL has submitted that the appellant before the Central Commission had submitted that the initial spares were handed over to it by UPPCL at the time of taking over of the Plant. The amount of spares of Rs. 32.71 crores was not to be, therefore, included in the capital costs of Rs. 607 crores on the date of commercial operation and is to be deducted from the capital costs. Mr. Misra, learned counsel further contended that it was on this ground that the Appellant has claimed additional spares of RS. 7.7 crores which was accepted by the Commission in its order dated 24.10.2005 and approved by this Tribunal in its judgment dated 06.06.2007.

17. It is, further stated that, cost difference being of Rs. 32.71 crores in the un-audited balance sheet of the Appellant NTPC, this Tribunal had directed the Central Commission to re-examine the matter and capitalization was to be limited to amount shown in the

audited balance sheet. Mr. Pradeep Misra learned counsel for the Respondent had used this as a ground to justify as to how the Central Commission had looked into the matter and found that spares of Rs. 32.71 crores not being reflected in the balance sheet needs to be reduced from the gross block of capital assets amounting to Rs. 607 as on 14.01.2001 for the purpose of tariff determination.

18. Contrary to the above, the learned counsel for the Appellant has contended by stating that no appeal was filed by UPPCL in regard to Rs. 607 crores as the same was being settled much earlier. He further submitted that UPPCL had challenged in appeal before the Tribunal about the additional capitalization of Rs. 177.47 crores incurred after 14.01.2000 and there was no challenge whatsoever to Rs. 607 crores. The issue was not even raised during the hearing before this Tribunal.

19. Mr. M.G. Ramachandaran, learned counsel for Appellant averred that the order dated 06.06.2007 passed by this Tribunal directed the Central Commission to reconsider additional capitalization of Rs. 177.47 crores and not the opening gross block of Rs. 607 crores as on 14.01.2000. The Central Commission in its impugned order found the amount of Rs. 177.47 crores of additional capitalization having been incurred after considering the audited accounts of the Appellant. The additional capitalization being admitted was to have been accordingly allowed as the amount was in excess of 20% of the existing capital cost of Rs. 607 crores.



20. The learned counsel for the Appellant further submits that the Central Commission had no jurisdiction to go into the issue of opening gross block of capital assets of Rs. 607 crores because, firstly, the issue was settled long back with the Central commission order dated 28.06.2007 in the petition number 77 of 2001 and the Memo of Settlement signed between NTPC and UPPCL whereby NTPC agreed to the reduction of the capital costs from Rs. 1000 crores to Rs. 607 crores; secondly, UPPCL has not appealed against the decision on the original gross block of capital assets as on 14.01.2000 and the matter relating to opening gross block of capital assets became final; thirdly, UPPCL from 14.01.2000 onwards has been determining the tariff based on the opening gross block of Rs. 607 crores; fourthly, the Respondent, UPPCL has not raised any issue about gross block of Rs. 607 crores in appeal before this Tribunal and questioned only the additional capitalization of Rs. 177.47 crores and finally the directions issued by this Tribunal in appeal Nos. 205 of 2005 and 09 of 2007 vide order dated 06.06.2007 is only related to Rs. 177.47 crores.

21. Learned counsel for the appellant further submits that Rs. 32.71 crores found as difference in the gross block of assets as on 14.01.2000 is on account of initial spares which amount in the audited accounts of NPTC is shown as inventory and for the purpose of tariff is to be capitalized.

22. In our view the contention of the Respondent UPPCL that the Tribunal's order dated 06.06.2007 directing the Commission to reconsider the capitalization was not

restricted to additional capitalization of RS. 177.47 crores but also included the original capital block of Rs. 607 crores is without merit.

23. Petition No. 08 of 2005 filed by the Appellant before the Central commission related to the revised fixed charges on account of expenditure incurred on additional capitalization during the period 14.01.2000 to 31.03.2004. In this petition there was no issue of opening block of Rs. 607 crores as on 14.01.2000 which was settled much earlier. The Respondent, UPPCL had challenged the Appellant, NTPC's claim of Rs. 177.47 crores as additional capitalization in appeal No. 09 of 2007. It is quite evident from the first grievance recorded in the order dated 06.06.2007 passed by this Tribunal which is reproduced herein below:

*“xi Amount of capitalization not reflected in the balance sheet is not eligible for additional capitalization for the purpose of determination of tariff.”*

24. We observe that in the order dated 06.06.2007 this Tribunal while examining the issue at Paras 31, 32 and 36 discussed the expenditure incurred on additional capitalization. These paragraphs if read with grievance framed as indicated above would make it transparently clear that the Central Commission was directed to only relook the additional capitalization of Rs. 177.47 crores and not the gross capital of Rs. 607 crores as on 14.01.2000.

25. In view of the above, the impugned order of the Central Commission to that extent is liable to be set aside as it has reduced the gross capital assets of Rs. 607 crores by the cost of spares Rs. 32.71 crores without any justification.

**Issue No. 2: Interest Rate on notional loan**

26. The direction of this Tribunal related to the perceived higher rate of interest on notional loan claimed by the Appellant than available in the market during the relevant period. The Central Commission was directed to re-examine the appropriateness of the interest rate. The Central Commission in its impugned order has proceeded to establish interest rate claimed by NTPC on the notional loan by taking the weighted average rate of interests to be calculated only on actual loans.

27. This Tribunal in its order dated 06.06.2007 had observed that the rate of interest at 14.5% appears to be on the higher side particularly when the appellant enjoyed the rating which is at par with the sovereign rating of the country. The aforesaid order remitted this issue to the Central commission to take a re-look into the matter to establish the applicable rate of interest.

28. The Central Commission in the impugned order has determined the rate of interest on the notional loan on the basis of normative debt-equity ratio. Prior to 11.04.2001 the Clause 5.1(V) of the Power Purchase Agreement (PPA) executed between the petitioner, NTPC and respondent, UPPCL (or its predecessor) provided for calculation of interest on loan and the same is reproduced below:

*“Interest shall be computed on the outstanding loans considering the scheduled repayments in line with Government of India notification No. 251(E) dated 30.3.92 and repayment period in respect of loan portion shall be based on the terms applicable on government of India loans to central public sector undertakings.”*

29. Thus, the interest on the normative loan as prescribed by the Government of India for loans given to Central Public Sector Undertaking being 14.5% was applicable in this case for the period 14.01.2000 to 31.3.2001. For the period from 01.04.2001 to 31.03.2004 during which Tariff Regulation, 2001 was in operation, the Central Commission, in accordance with Regulation 2.7(a) has allowed weighted average rate of interests on actual loans drawn by the Appellant during the period, Accordingly the interest on notional loan has been worked out which is as under:

- (a) 14.50% - For the period from 14.01.2000 to 31.03.2001
- (b) 9.97% - For the period from 01.04.2001 to 31.03.2003
- (c) 9.30% - For the period from 01.04.2003 to 31.3.2004

30. Appellant contends that the rate of interest of 14.5% ought not to have been disallowed for the periods mentioned in (b) and (c) above. It is to be noted, however, that the circular of Government of India dated 30.03.1992 mentioned in clause 5.1(v) of the PPA ceases to be operative from the date on which the Tariff Regulations, 2001 became effective as the interest rate in accordance with Regulation 2.7(a) allowing weighted average rate of interests on actual loans will become effective. Admittedly, the acquisition of Tanda TPS was not financed by any borrowed capital but as an adjustment of the outstanding dues payable by UPPCL to NTPC. The cost of raising the loan capital in 70:30 debt-equity ratio would be governed by the prevailing interest rate in the market during the period.

31. The Respondent No. 2, UPPCL supporting the decision of the Central Commission on this issue has submitted that the methodology followed in this case was also applied by the Central Commission for determining tariff in respect of Singrauli Super Thermal Power Station (STPS) and Vindychal STPS for the period 2001-04. It has further submitted that the appellant, NTPC should not be allowed to raise this issue in the present case as it has not challenged the rate of interest in the aforesaid tariff petition.

32. In view of the above, we find that the methodology adopted by the Central Commission in calculation of interest on notional loan is reasonable and justified and the appeal on this issue is liable to be rejected.

**Issue No. 3: Should the de-capitalization exclude the associated service charges paid to the contractor for installation of fixed assets.**

33. The Appellant, NTPC contends that the de-capitalization (prior to corresponding additional capitalization) carried out by the Central Commission should not have included the cost of service charges paid to the contractor for installation of fixed assets as it was a necessary expenditure incurred and the benefit of the same had been enjoyed during the past period.

34. The Respondent, UPPCL has opposed the claim of the Appellant and has submitted that the cost of an asset installed and put to use includes the cost of erection and thus, while decapitalizing the said asset the cost towards erection/installation of that asset cannot be taken out of decapitalization value of the asset.

35. In our view, the logic advanced by the Appellant is not sustainable as it will equally apply for the associated fixed assets being de-capitalized which too have given benefits during its operational life in the past. No asset by itself is of any benefit unless put in service. The de-capitalization is for the assets which have given useful service while operating in the past and are being retired and replaced by additional capitalization that include fixed assets with necessary charges for service such as installation, testing, commissioning, etc. The de-capitalization is the mirror image of re-capitalization (i.e. additional capitalization) and both have to be treated alike insofar as its effect on capital assets used for determination of tariff, is concerned. We have, therefore, no hesitation in rejecting the claim of the Appellant on this issue.

**CONCLUSION**

36. In view of the above, we allow the appeal on the issue No. 1 wherein the Central Commission has re-opened the settled gross capital block of Rs. 607 crores as on 14.01.2000 and reduced it by Rs. **32.71** crores.

37. The Appeal, however, in respect of Issue No. 2 (Interest on notional loan) and Issue No. 3 (De-capitalization to exclude value of service charges) are rejected.

38. This disposes of the appeal no. 103 of the 2008 with no costs.

**(A. A. Khan)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated : 26<sup>th</sup> March, 2009

**REPORTABLE / NON REPORTABLE**

*Corrections( Shown in Italics and Bold) in Paragraphs 7,9 and 36 are done as per orders of Hon'ble Court I dated 11.05.2009 in Review petition No. 6 of 2009*