

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Coram:**

- 1. Shri Bhanu Bhushan, Member**
- 2. Shri. R. Krishnamoorthy, Member**

**Review Petition No. 33/2007  
in  
Petition No.26/2006**

**In the matter of**

Review of order dated 24.1.2007 in Petition No.26/2006, for revision of operational parameters and norms for determination of tariff in respect of Tanda TPS for the period 2004-09.

**And in the matter of**

NTPC Ltd, New Delhi

. . . . . **Petitioner**

**Vs**

Uttar Pradesh Power Corporation Ltd, Lucknow.

..... **Respondent**

**The following were present:**

1. Shri S.N.Goel, NTPC
2. Shri Manoj Saxena, NTPC
3. Shri Shankar Saran, NTPC

**ORDER  
(DATE OF HEARING: 14.6.2007)**

This application for review has been made by the petitioner, NTPC Ltd, a generating company, on 15.3.2007 for review of order dated 24.1.2007 in Petition No.26/2006, whereby the operational norms and parameters in respect of Tanda TPS (hereinafter referred to as "the generating station") were to be revised with effect from 1.4.2007.

2. In the application for review, the petitioner has prayed for the following substantive reliefs, namely:

- “ (i) review and rectify the order dated 24.1.2007 in so far it directs the revision of norms for Tanda TPS before R&M works are completed;
- (ii) continue the norms as notified vide CERC (Terms and conditions of Tariff) Regulations, 2004 dated 26.3.2004 for the period 2004-09;
- (iii) give appropriate consequential direction pursuant to prayer (i) and (ii) above.”

3. Uttar Pradesh Power Corporation Ltd (the respondent), filed Petition No. 26/2006, for revision of operational norms for the generating station on the ground that its performance had improved remarkably after R&M. In the said petition, it was also urged that the operating norms in respect of the generating station be brought at par with other thermal power generating stations as laid down in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (hereinafter called “the 2004 tariff regulations”).

4. In the original proceedings, the petitioner had placed on record the data of actual performance of the generating station for the years 2004-05 and 2005-06, consequent to R&M works initiated by it. This data revealed considerable improvement in performance during these years over the performance for the year 2002-03, considered while laying down operational parameters and norms for the generating station in the 2004 tariff regulations. It was observed that in certain respects performance achieved in 2004-05 and 2005-06 was comparable with the performance of other thermal power generating stations owned by the petitioner. The

Commission by its order dated 24.1.2007, decided to revise the operational norms for the generating station with effect from 1.4.2007 as follows:

Name of Station	Target Availability	Target PLF	Station Heat Rate (kcal/kWh)	Auxiliary Energy Consumption Norm (%)	Specific Fuel Oil Consumption (ml/kWh)
Tanda TPS ( 440MW)	80%	80%	2850	12%	2

5. The revision of norms for the generating station called for amendment of the 2004 tariff regulations. Therefore, the Commission published on 24.1.2007 its proposed draft of these amendments to invite comments from the stakeholders in view of the requirement of sub-section (3) of Section 178 of the Electricity Act that the regulations are to be specified by the Commission after previous publication. On consideration of the comments received from the petitioner as also the respondent, the amendments to the 2004 tariff regulations have been finalized and published in the Official Gazette on 14.3.2007 as the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Amendment) Regulations, 2007, which have come into force w.e.f.1.4.2007. The issues raised by the parties concerned have been elaborately dealt with in the "Statement of Reasons" of 8.3.2007.

6. The petitioner while praying for review of the order dated 24.1.2007 and continuation of the norms as originally specified in the 2004 tariff regulations, has submitted that the petitioner was to approach the Commission for revision of the operational norms only after completion of R&M works for the generating station. The petitioner has submitted that there was no cause for it to approach the Commission for revision of operational norms as R&M works were still in progress when the

application was made by the respondent. The petitioner has stated that R&M works so far done may not be able to sustain the performance of the generating station and before revision of operational norms it is necessary to wait till the remaining R&M works are completed. The petitioner has argued that revision of operational norms be held in abeyance till completion of R&M.

7. We have heard Shri.S.N. Goel for the petitioner on admission. It was stated before us that nearly 60% of R&M works were already completed. Shri Goel further stated that performance for the year 2006-07 matched the performance for the two preceding years.

8. Under clause (f) of sub-section (1) of Section 94 of the Electricity Act, the Commission has the powers of review of its orders or decisions as conferred on a civil court under the Code of Civil Procedure under Section 114 read with Order 47 thereof. It is a fundamental principle of construction that rules/regulations made under the statute are treated as exactly if they were in the statute and are of same effect. The amendments to the 2004 tariff regulations having been notified by the Commission in exercise of its legislative powers conferred under the Act have become part of the statute and partake the character of legislation. Clause (f) of sub-section (1) of Section 94 of the Act undeniably confers powers of review on the Commission on same basis as vested in a civil court under the Code of Civil Procedure (the Code).The powers of the civil court in regard to review are contained in Section 114 read with Order 47 of the Code. The civil court exercises power of review while performing its adjudicatory functions of settlement of civil disputes. The civil courts do not perform the legislative functions on the lines vested in the Commission under Section 178 of the Act.

Therefore, for exercise of powers by the Commission under Clause (f) of sub-section (1) of Section 94 of the Act, a distinction has necessarily to be made between the power exercised in legislative capacity and that exercised in the judicial or quasi-judicial capacity. It follows that the powers conferred on the Commission by virtue of clause (f) of sub-section (1) of Section 94 of the Act to review its decisions, directions and orders are limited to the adjudicatory functions of the Commission under the Electricity Act or an order made in exercise of quasi-judicial power. In this view of the matter, the provisions of the 2004 tariff regulations including amendments thereof are beyond the scope of review under Clause (f) of sub-section (1) of Section 94 of the Act. A view similar to this was taken by the Commission earlier while disposing of the applications made by certain utilities for review of the 2004 tariff regulations, as originally notified.

9. The order dated 24.1.2007, presently sought to be reviewed has merged in the notification dated 13.3.2007, published in the Official Gazette on 14.3.2007, as amendment to the 2004 tariff regulations and for this reason also it is outside the scope of review of orders under the Code of Civil Procedure.

10. The above conclusions draw further sustenance from the decisions of the Appellate Tribunal for Electricity. The petitioner had filed appeals before the Appellate Tribunal impugning certain orders leading to notification of terms and conditions for determination of tariff applicable for the period 1.4.2001 to 31.3.2004. The Appellate Tribunal in its common judgment dated 6.12.2006 in Appeal 51/2006 and other related appeals, has held that:

*“3. We have considered the submissions of the learned counsel for the parties. It is not in dispute that the CERC under Section 58 of the*

*Electricity Regulatory Commissions Act, 1998 has framed Regulations called CERC (Terms and Conditions of Tariff) Regulations, 2001 (for short 'Regulations of 2001) which were notified on March 26, 2001. The tariff is, therefore, to be determined in accordance with the Regulations of 2001. 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.*

4. *In Neyveli Lignite Corporation vs. Tamil Nadu Electricity Board & Ors. (Appeal Nos. 14 and 115 of 2005), we have taken a view that this Tribunal has no jurisdiction to determine the validity of the Regulations in appeal as the Regulations are in the nature of sub-ordinate legislation. While holding so, we relied upon the decision of the Supreme Court in West Bengal Electricity Regulatory Commission v. CESC Ltd. (2002) 8 SCC 715 at page 739, wherein it was held to the effect that the Regulations framed by the Regulatory Commission are under the authority of sub-ordinate legislative functions conferred on it by Section 58 of the Electricity Regulatory Commission Act, 1998. It was further held that the High Court sitting as an appellate court under the Act of 1998 could not have gone into the validity of the Regulations in exercise of its appellate power.*

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. In the case of U.P. Cooperative Federation vs. Singh Consultants, 1988 (1) SCC 174, it was held that one cannot do something indirectly what one is not free to do directly. Again in the case of Sangramsinh Vs. Shantadevi, 2005(11) SCC 314, the Supreme Court held that it is trite that what cannot be done directly cannot be done indirectly. To the same effect is the decision of the Supreme Court in the case of Jagir Singh vs. Ranbir Singh, 1979(1) SCC 560.*

6. *The learned counsel for the appellant submitted that the courts have been allowing the parties to impugn the orders of the authorities even though they were notified under the Statute subsequently. The authorities cited by the learned counsel for the appellant have no bearing to the case in hand as there is nothing to show that the courts permitted challenge to orders after they were replaced by the rules/regulations framed under the statutory provisions without challenging the*

*latter { rules/ regulations}, especially when no action is taken under the former (orders).”*

11. A similar view was taken by the Appellate Tribunal in its judgment dated 22.11.2006 in Appeal No. 263/2006 (Delhi Transco Ltd & another vs CERC and others), when it held that:

*“In this appeal, the appellant, inter alia, challenges the Order of the Central Electricity Regulatory Commission, dated December 12, 2000. This Order was passed by the Central Electricity Regulatory Commission to settle the terms and conditions for determination of tariff. The appellant challenges that part of the aforesaid order which provides that return on equity shall be computed on the paid up and subscribed capital and shall be 16 % of such capital. This Order, dated December 12, 2000, was a precursor to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2001 (for short ‘Regulations’), which have been framed under Section 28 read with Section 55 of the Electricity Regulatory Commission Act, 1998. These Regulations have been published in the Gazette of India on March 26, 2001. The term relating to return on equity has been incorporated in Regulation 3.5.1(c) of the Regulations. Therefore, it is only under the Regulation 3.5.1 (c) that the return on equity can be calculated for the purposes of fixation of tariff and not on the basis of the order, dated December 12, 2000. The challenge, therefore, can only be to the validity of the aforesaid Regulation. In Neyveli Lignite Corporation Ltd. Vs. Tamil Nadu Electricity Board and Others (Appeal nos. 114 and 115 of 2005), We have already taken a view that this Tribunal does not have jurisdiction to determine the question relating to the validity of the Regulations.*

*In the circumstances, therefore, the appeal is dismissed.”*

12. In the light of the above discussion and facts and circumstances of the present case, we are of the considered view that the present application for review is not maintainable, on the accepted principles of law.

13. For sake of record we may observe that the issues similar to those now raised by the petitioner were also raised in its comments filed against the draft regulations proposing revision of norms applicable to the generating station. The Commission

after detailed deliberations did not find any merit in the issues raised as recorded in the Statement of Reasons dated 8.3.2007 as under:

*“9. Next we consider the suggestions and objections received from NTPC. It has been stated by NTPC that question of revision of operational norms for the generating station should be deferred till completion of R&M works by the end of 2008-09. The submission made deserves to be rejected at the outset. By order dated 24.10.2005 in Petition No.8/2005, the Commission has already approved capitalization of additional expenditure amounting to Rs.17747 lakh, incurred by NTPC on R&M works during the period up to 31.3.2004. Based on the additional capital expenditure approved, NTPC has been authorized the revised fixed charges. Thus, NTPC is already enjoying the fruits of the expenditure incurred on R&M and UPPCL is paying additional tariff on that account. Therefore, improvement of efficiency of the generating station consequent to R&M should be to the advantage of UPPCL. On perusal of the data made available on record by NTPC as well as UPPCL in Petition No.26/2006, the Commission was satisfied that despite partial R&M, the generating station had achieved efficiency, generally at par with other generating stations of NTPC except the auxiliary energy consumption and gross station heat rate. Nothing has now been brought to our notice to dispute the corrections of the conclusions earlier arrived at by the Commission.*

*Therefore, we are satisfied that there is a strong case for revision of operational norms, as published in the draft amendments of the tariff regulations.*

*10. We accordingly direct that the draft proposals for amendment of the tariff regulations be finalized and notified in the official Gazette to be effective from 1.4.2007.”*

14. Before parting, we may add that specification of norms, particularly for payment of tariff, would lose whole of its purpose in case the norms are far off from the actual achievements. As the generating station has consistently achieved annual availability of over 85%, station heat rate better than 2800 Kcal/kWh and specific oil consumption of less than 1.0 ml/kWh consistently for 2004-05, 2005-06 and 2006-07, there can be no justification at all for continuation of the previous relaxed norms of target availability/PLF of 60%, station heat rate of 3000 Kcal/kWh and specific fuel oil consumption of 3.5 ml/kWh. In view of the general parity of performance of the



generating station with other similar generating stations, the respondent pleaded for revision of norms from 1.4.2004. However, since acceptance of plea of the respondent involved retrospective amendment of the 2004 tariff regulations, the Commission ordered revision from 1.4.2007.

15. The argument of the petitioner that the improved performance of the generating station may not be sustained, is also not found to be tenable on the basis of data on actual performance, when the generating station has performed on all counts at levels better than the new norms for three years continuously, there should be no reason for harbouring a doubt about its performance in future years.

16. Accordingly, the application for review is dismissed at the admission stage as not maintainable.

**Sd/-  
(R. KRISHNAMOORTHY)  
MEMBER**

**Sd/-  
(BHANU BHUSHAN)  
MEMBER**

**New Delhi dated 27<sup>th</sup> June, 2007**