

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri Ashok Basu, Chairman**
2. **Shri K.N. Sinha, Member**

**IA No. 22/2003 in
Petition No.2/2002**

In the matter of

Tariff for Simhadri Thermal Power Project (2x500 MW)

And in the matter of

National Thermal Power Corporation Ltd.

.... **Petitioner**

Vs

Transmission Corporation of Andhra Pradesh

..... **Respondent**

The following were present:

1. Shri K.K. Garg, GM(Comml.), NTPC
2. Shri V.B.K. Jain, GM(Comml.), NTPC
3. Shri M.S. Chawla, AGM (Comml.), NTPC
4. Ms. Rachna Mehta, Manager (Comml.), NTPC
5. Shri Balaji Dubey, Senior Law Officer, NTPC
6. Shri A.K. Juneja, NTPC
7. Shri Manoj Mathur, NTPC
8. Shri A. Surendra, NTPC
9. Shri K. Durga Prasad, Jt. Managing Director, APTRANSCO
10. Shri G. Venkateswara Rao, Divisional Engineer, APTRANSCO

**ORDER
(DATE OF HEARING: 18.9.2003)**

In pursuance of our directions dated 4.6.2003, the petitioner has filed the amended petition along with audited accounts as on the date of commercial operation of Unit II, that is, 1.3.2003 and also certain additional details vide affidavit sworn by Shri A.K. Juneja, Dy. Genl Manager (Comml.) in the petitioner company on 8.9.2003. On perusal of the amended petition as also the additional details filed on behalf of the petitioner, we find that following information is still needed for determination of tariff:

- (a) Details of additional capitalisation and FERV for the period from 1.3.2003 to 31.3.2003;

- (b) Details of works though within the scope of approved project but not undertaken; works undertaken but not completed till 1.3.2003 and the balance payments to be made on account of works already completed but not capitalised;
- (c) The tranche-wise details of drawals of JBIC loan during the year 2003-2004;
- (d) Supporting documents in regard to financial charges in case of HDFC-III loan and bonds of XII series
- (e) Cost break-up in Form 5 with suitable explanation in the form of footnotes to enable the Commission to take a view on the actual capital expenditure on various packages.

2. The above details shall be furnished by the petitioner within one month from the date of this order.

3. List this petition on 30.10.2003.

IA No. 22/2003

4. In this IA, filed by the petitioner, NTPC, a prayer is made that the petitioner may be allowed to raise bills provisionally for incentive/disincentive for Simhadri Thermal Power Station (the project) based on the provisions of mutually agreed Power Purchase Agreement (the PPA), to be adjusted retrospectively, based on the final orders as may be issued by the Commission.

5. The petitioner had entered into the PPA on 4.2.1997 with Andhra Pradesh Electricity Board, the predecessor of the respondent, a copy of which has been filed along with the original petition. Para 5 of the PPA relates to tariff for supply of power from the project and provides that the tariff and terms and conditions for energy to be supplied from the project shall be as per the notification(s) to be

issued by Government of India, Ministry of Power from time to time under Section 43 A of the Electricity Supply Act, 1948, (the Supply Act) as amended from time to time. The PPA, however, further lays down that the following would specifically be taken into account while working out tariff for the power sold from the project.

- “(i) Return would be 16% on equity.
- (ii) The Debt Equity ratio for the project shall be 70:30 (Seventy :Thirty) as approved by the Govt. of India. All capital expenditure towards the project shall stand allocated in the same proportion for tariff purposes irrespective of the actual Debt : Equity ratio.
- (iii) Incentive shall be paid as an additional return on equity calculated on the basis of Debt : Equity ratio of 70:30 (Seventy : Thirty), irrespective of the actual Debt : Equity ratio, at the following rates:
PLF including

Deemed Generation	Rate of Incentive
68.49% - 75.5%	0.5% of Equity for every 1% increase in PLF above 68.49%
Above 75.5% - 80.5%	0.6% of Equity for every 1% increase in PLF above 68.49%
Above 80.5%	0.7% of Equity for every 1% increase in PLF above 68.49%

Deemed generation is applicable only up to a PLF of 85% for the purpose of incentive.

DISINCENTIVE for reduction in generation below 68.49% (6000 kWh/kw/Yr) inclusive of deemed generation shall be applicable at the rate of 1.46% (one point four six percent) of the Fixed Charges for every one percent reduction in PLF below 68.49% (6000 kWh/kw/Yr).

During the stabilisation period of 180 days from the date of commercial operation, the PLF norms for disincentive would be 51.37% (4500 kWh/kw/Yr).

No disincentive will be applicable on account of force majeure events

No disincentive will be applicable on account of NTPC resorting to restriction of generation or stopping generation altogether on account of non-payment of dues.

The issue regarding disincentive in case of generation loss due to non-availability of fuel will be discussed between NTPC, APSEB and Fuel

Suppliers and shall be mutually agreed separately. The PLF, for this purpose, shall be calculated on Financial Year basis.

(iv) Deemed generation for the purpose of incentive/disincentive shall mean for any period the quantum of energy which NTPC was in a position to generate during such period, but could not generate, as a direct result of:

- (a) any direction, issued by SREB/SRLDC/APSEB to reduce or restrict generation for any reason whatsoever, and/or
- (b) any failure on the part of APEB to draw/purchase energy.”

6. According to the petitioner, in view of the PPA the respondent is liable to pay incentive/disincentive in accordance with the terms agreed to between them. This prayer of the petitioner was opposed by the representative of the respondent who submitted that consequent to notification of terms and conditions of tariff by the Commission vide its notification dated 26.3.2001, the petitioner's claimed for incentive is to be governed by the said notification dated 26.3.2001.

7. Prior to constitution of the Commission under the Electricity Regulatory Commissions Act, 1998 (the Commissions Act), the terms and conditions and tariff for sale of electricity by a generating company was regulated in terms of section 43 A of the Supply Act. Sub-section (2) of Section 43 A provided as under:

“(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette:

Provided that the terms and conditions and tariff for such sale shall, in respect of a Generating Company wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned.”

8. By virtue of powers under Section 51 of the Commissions Act, Section 43 A (2) was omitted with effect from 15.5.1999 and the jurisdiction to regulate tariff, including power to lay down the terms and conditions of tariff stood vested in the Commission with effect from that date. The Commission by virtue of powers under Section 28 of the Commissions Act has notified the terms and conditions, which are contained in the Commission's notification dated 26.3.2001, applicable with effect from 1.4.2001. It is not in dispute that the project was commissioned after 1.4.2001, first unit of the project was commissioned on 1.9.2002 and the second unit was commissioned on 1.3.2003 when the terms and conditions notified by the Commission were already in force.

9. In the light of above factual position, we have to consider the validity and applicability of the terms for regulating payment of incentive/disincentive which necessarily form part of the terms and conditions of tariff contained in Clause 5 of the PPA. The contention of the petitioner is that since there exists an agreement between the parties, the payment of incentive/disincentive is to be regulated in terms of that agreement only. We have considered the argument, but are not inclined to accept it. As we have noticed above, when the PPA was signed on 4.2.1997, the terms, conditions and tariff for sale of electricity from the project could be regulated by the Central Government in terms of proviso to sub-section (2) of the Section 43 A of the Supply Act. The provisions of the PPA so far as these relate to terms and conditions of tariff are ultra vires since these are violative of the statutory provisions of the Supply Act, and are void *ab initio* in view of the provisions of Section 23 of the Contract Act, 1872. Clause 5 of the PPA containing the provisions relating to the terms and conditions of tariff have the

effect of defeating the provisions of Section 43 A (2) of the Supply Act, according to which the power to regulate tariff and prescribe terms and conditions of tariff was within the exclusive purview of the Central Government. Therefore, Clause 5 of the PPA cannot be enforced at the instance of any of the parties, including the petitioner. We have recorded our findings in regard to Clause 5 of the PPA since it is severable from other provisions contained therein.

10. The issue may now be considered from another angle. Consequent to omission of Section 43 A (2) of the Supply Act, the Commission is vested with the jurisdiction to regulate tariff under Section 13 of the Commissions Act and prescribe the terms and conditions of tariff by virtue of Section 28 of that Act. The Commission in exercise of these powers has notified the terms and conditions of tariff vide notification dated 26.3.2001 in force from 1.4.2001, before the date of commercial operation of the project. Thus, the terms and conditions of tariff including the payment of incentive/disincentive are to be regulated in terms of the Commission's notification dated 26.3.2001. As per the notification dated 26.3.2001, the incentive/disincentive is a function of Target Availability and Plant Load Factor of the generating station. Clause 2.3 of the notification dated 26.3.2001 reads as under:

"The operational norms, except those relating to "Target Availability" and "Plant Load Factor" for the existing and the new stations at NTPC and NLC for which no tariff notification has been issued by the Central Government but Power Purchase Agreements (PPAs)/Bulk Power Supply Agreements (BPSAs) exist on the date of issue of this notification, shall be governed by the respective PPAs/BPSAs signed by the Generating Company with the beneficiaries."

11. Even if it is presumed that the provisions relating to payment of incentive/disincentive in the PPA are valid, still the petitioner cannot claim

incentive/disincentive under the PPA for the reason that the Commission's notification which is in exercise of the statutory powers, specifically excludes applicability of provisions relating to the Target Availability and the Plant Load Factor contained in the PPA. This is an additional ground for which the contentions of the petitioner for payment of incentive/disincentive in terms of the PPA cannot be accepted.

12. In view of the findings recorded above, we hold that incentive/disincentive on account of the power supplied from the project shall be regulated in terms of the Commission's notification dated 26.3.2001 and not in terms of Clause 5 of the PPA.

13. With the above observations, IA No. 22/2003 stands disposed of.

**Sd/-
(K.N. SINHA)
MEMBER**

**Sd/-
(ASHOK BASU)
CHAIRMAN**

New Delhi dated the 30th September, 2003