

CENTRAL ELECTRICITY REGULATORY COMMISSION
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Coram:

- 1. Shri Ashok Basu, Chairman**
- 2. Shri G.S. Rajamani, Member**
- 3. Shri K.N. Sinha, Member**

**IA No. 51/2002 in
Petition No. 77/2001**

In the matter of

Application seeking clarification and/or reconsideration and/or review
and/or modification of the order dated June 28, 2002 in Petition No. 77/2001 –
approval of tariff of Tanda Thermal Power Station

And in the matter of

National Thermal Power Corporation Ltd.

... **Petitioner**

Vs

Uttar Pradesh Power Corporation Ltd.

.... **Respondents**

The following were present:

1. Shri K.K. Garg, GM (Comml), NTPC
2. Shri M.S. Chawla, AGM (Comml), NTPC
3. Shri T.R Sohal, NTPC
4. Shri A Dua, NTPC
5. Shri M.R.K. Rao, Sr. Mgr. (Law), NTPC
6. Shri S.K. Samvi, SM (C), NTPC
7. Shri M.K.V Rama Rao, NTPC
8. Shri G Chandu, NTPC
9. Ms Ranjana Gupta, NTPC
10. Shri Rajeshwar Datt, AGM, NTPC
11. Shri Amit Kapur, Advocate NTPC
12. Shri Shyam Moorjani, Advocate, UPPCL
13. Er. A.K. Tandon, Sr. AE, UPPCL
14. Shri B.K. Saxena, Sr. AE, UPPCL
15. Shri D.D. Chopra, Advocate, UPPCL
16. Shri M.N. Arora, UPPCL
17. Shri T.K. Srivastava, EE, UPPCL

ORDER
(DATE OF HEARING 17-12-2002)

This application has been filed on behalf of NTPC Ltd. (hereinafter referred to as the petitioner) wherein the petitioner has prayed the Commission to “clarify and/or reconsider and/or review and/or modify the specific observations and findings of the order dated June 28, 2002 passed in Petition No. 77/2001 in terms of the present Application”.

2. Petition No. 77/2001 was filed by the petitioner for approval of tariff for Tanda Thermal Power Station (hereinafter referred to as Tanda TPS) for the period from 15.1.2000 to 31.3.2004. The Commission in its order dated 23.1.2002, passed after the hearing on 7.1.2002, nominated one of us, namely Shri K.N. Sinha, Member of the Commission (hereinafter referred to as the Special Bench) to examine the different aspects of the controversies raised by the parties. The Special Bench by its detailed order dated 22.2.2002, made certain recommendations for the Commission's consideration on the terms and conditions of tariff for supply of power from Tanda TPS. After giving a further opportunity to the parties on the recommendations made by the Special Bench in its order dated 22.2.2002, and hearing them on 22.4.2002, the Commission passed an elaborate order dated 28.6.2002, whereby the Commission finally decided the terms and conditions of tariff and also the actual tariff chargeable from 15.1.2000 to 31.3.2004.

3. The petitioner has filed the present application seeking clarifications and/or reconsideration and/or review and/or modification of the order dated 28.6.2002 in Petition No. 77/2001 with the substantive prayer reproduced above. The application is stated to have been filed under Sections 12, 13, and 28 of the Electricity Regulatory Commissions Act, 1998 (hereinafter referred to as the Act) read with Regulations 103, 111, 114 and 115 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. Under Section 12 of the Act, the Commission is invested with power of review as vested in Civil Court under Section 114 read with Order 47 of the Code of Civil Procedure (hereinafter referred to as the Code). Regulation 103 relates to certain aspects of review, not provided for in the Code. Regulation 111 saves the inherent power of the Commission to do justice to the parties or prevent abuse of the process of the Commission and is in *pari materia* with Section 151 of the Code. Regulation 114 empowers the Commission to amend the defect or error in any proceedings before it for the purpose of determining the real question or issue arising therein. Regulation 115 clothes the Commission with power to remove difficulties arising in giving effect to the provisions of the Regulations. In our opinion Regulations 114 and 115 relied upon by the petitioner have no relevance, direct or indirect, with the issues raised in the application. As such, any reliance by the petitioner on these Regulations is wholly unfounded.

4. As noticed above, Regulation 111 saves the inherent power of the Commission to do justice or prevent abuse of the process of the Commission, as

in the Civil Court under Section 151 of the Code. It is established principle of law that the inherent powers are to be exercised by a court in very exceptional circumstances and cover the situations where no specific procedure is laid down, though the words of the provision may be very wide. The decisions of the Hon'ble Supreme Court by construction of Section 151 of the Code have circumscribed its scope. If there are provisions extensively covering a particular aspect then no power can be exercised in respect of the said aspect otherwise than in the manner prescribed therein. The construction placed by the Hon'ble Supreme Court of Section 151 of the Code governs Regulation 111 as well.

5. Though the substantive relief sought by the petitioner in the present application is "to clarify and/or reconsider and/or review and/or modify the specific observations and findings of the order dated June 28, 2002 passed in Petition No. 77/2001 in terms of the present application", Shri Amit Kapur, learned counsel for the petitioner, at the hearing could not point out any specific observation or finding recorded by the Commission in the order dated 28.6.2002 which needed any clarification on account of ambiguity. Learned counsel submitted that some of the findings needed to be reconsidered and modified by the Commission and are reviewed. The relief prayed for by the petitioner falls within the realm of review of order. The assistance of Regulation 111 is, therefore, not available to the petitioner. In our opinion the relief sought in the application is to be considered in the light of provisions of Section 12 of the Act read with Section 114 and Order 47 of the Code. We, therefore, direct that the present application shall be treated as

an application to seek review of order dated 24.6.2002 in Petition No. 77/2001. The application shall be registered accordingly.

6. Before considering the specific issues raised by the petitioner, we will briefly examine the position in law concerning review of order, etc. Under Order 47 Rule 1 of the Code, review is permissible on the following grounds:

- (i) Discovery of new or important matter of evidence which was not available or which after exercise of due diligence was not within the knowledge of the person seeking review,
- (ii) Mistake or error apparent on the face of record, and
- (iii) Any other sufficient reason.

7. As per law laid down by the Hon'ble Supreme Court, power of review can be exercised to correct a patent error which stares one in the face and does not require any elaborate argument. The power of review under the Code cannot be invoked to correct an erroneous decision on merits, which is within the province of the Appellate Court. The issues raised by the petitioner are to be considered in the light of this legal position.

APPLICABILITY OF PROVISIONS OF PPA FOR DETERMINATION OF TARIFF

8. Tanda TPS was owned by the erstwhile Uttar Pradesh State Electricity Board (UPSEB), the predecessor of the present respondent (hereinafter referred

to as the respondent) and was transferred to the petitioner w.e.f. 15.1.2000 under the Uttar Pradesh Electricity Reforms (Transfer of Tanda Undertaking) Scheme, 2000 (hereinafter referred to as the Transfer Scheme) notified under Section 23(5) of the Uttar Pradesh Electricity Reforms Act, 2000. The petitioner had entered into a Power Purchase Agreement (hereinafter referred to as the PPA) dated 7.1.2000 with the respondent which contains the parameters, terms and conditions of tariff for supply of power from Tanda TPS. The said PPA dated 7.1.2000 has been recognised by the Transfer Scheme. In the Petition No. 77/2001 the petitioner had contended that the terms of the PPA being part of the Transfer scheme had statutory sanction and were binding on all persons, including the Commission particularly so when the Uttar Pradesh Electricity Reforms Act, 2000 is to be given over-riding effect as it had received assent of the President under Article 254(2) of the Constitution of India. The Special Bench in its order dated 22.2.2002 through the process of elaborate reasoning considered the arguments made on behalf of the petitioner regarding enforceability of the PPA dated 7.1.2000. The Special Bench, for the reasons recorded in the order dated 22.2.2002 held that the parameters of tariff determination contained in the PPA dated 7.1.2000 could not be relied upon, though these could be considered to the extent found to be just and fair. These findings of the Special Bench have not been departed from by the Commission in its order dated 28.6.2002. Therefore, the findings on the issue are decisive on the question of the scope of review of order as prescribed under Rule 1 Order 47 of the Code.

9. In the present application for review, the petitioner has submitted that the Commission does not have power or jurisdiction to declare a contract or part of it to be void, more so when its terms have statutory protection under the Transfer Scheme. It is further contended that the terms of the PPA dated 7.1.2000 were settled as a matter of policy and the same cannot be deviated from or modified by the Commission to the disadvantage of any of the parties. In our opinion, the petitioner seeks to reopen the issues already decided through the detailed orders. The course sought to be followed by the petitioner is not permissible in exercise of power of review by the Commission in the light of legal position discussed above.

CAPITAL BASE

10. As per the PPA dated 7.1.2000, the transfer of Tanda TPS took place after adjustment of Rs.1000 crores due from the erstwhile respondent, to the petitioner. However, the Commission in its order dated 28.6.2002 had directed that the book value of Rs.607 crores which reflects the original cost of the project as on the date of commercial operation, would be the basis (the capital base) for calculation of tariff as recommended by the Special Bench. The depreciation of Rs.175.91 crores had already been recovered from the consumers till the date of transfer of the assets to the petitioner. Therefore, the Commission in the order dated 28.6.2002, directed that the treatment of the amount of depreciation earlier recovered from the consumers should be appropriately dealt with by UPERC as part of their jurisdiction.

11. According to the petitioner, with the directions as contained in the order dated 28.6.2002 it has been placed in a highly inequitable position. The petitioner has contended that any attempt in reducing the capital base from Rs.1000 crores would penalise the petitioner. It has, therefore, been prayed that in order to prevent any loss or prejudice to the consumers on account of the capital base being taken at Rs.1000 crores for the purpose of determination of tariff, appropriate direction could be given by the Commission to Govt. of Uttar Pradesh to provide adequate subsidy support. In the alternative, it has been contended that in case the capital base could not be taken as Rs.1000 crores, then the difference between the transfer cost of Rs.1000 crores and revised capital base of Rs.617 crores along with surcharge must be paid in cash by the respondent to the petitioner as a pre-condition to the revised capital base being given effect to.

12. We are afraid that the case of the petitioner does not have a sound legal basis on this count as well. It was argued on behalf of the petitioner before the Special Bench as well as the Commission that the transfer price of Rs.1000 crores be considered as the capital base for determination of tariff. The Special Bench as also the Commission, have given reasons in support of the finding that the capital base of Rs.1000 crores could not be agreed to for the purpose of tariff. We do not consider it necessary to reproduce here the reasons given in the two orders. We feel contented by recording that the issue is being re-agitated by having resort to the present proceedings, which cannot be permitted. We may also add that in these proceedings, the petitioner cannot be allowed to state the

alternative case which was not urged when the original petition was heard, particularly so when State Government of Uttar Pradesh was neither party to the original proceedings nor to the present one. Accordingly, the petitioner's contentions on the issue are rejected.

INTEREST ON WORKING CAPITAL

13. In accordance with the Commission's notification dated 26.3.2001, receivables equivalent to two months of average billing for sale of electricity calculated at target availability, among others, are to be considered as a component of working capital. This aspect has been duly noted by the Commission in its order dated 28.6.2002. The receivables comprise of the fixed charges and the variable charges. It has been urged that while computing working capital for the purpose of tariff of Tanda TPS, receivables equivalent to two months average billing on account of variable charges has not been taken into consideration by the Commission in its order dated 28.6.2002, though two months average billing on account of fixed charges has been allowed. In our view, this constitutes an error apparent on the face of the record and therefore, prima facie a case for review of order on this specific direction has been made out under Rule 1, Order 47 of the Code.

OPERATING PARAMETERS

14. The Commission in its order dated 28.6.2002 has accepted the operating parameters (Station Heat Rate, Auxiliary Power Consumption and Specific Oil

Consumption) and Target Plant Load Factor/Target Availability recommended by the Special Bench. All these aspects were elaborately dealt with by the Special Bench in its order dated 22.2.2002. The Commission while adopting the operating norms, and norms on Target PLF/Target Availability recommended by the Special Bench had also dealt with the points raised on behalf of the petitioner.

15. The petitioner now submits that the operating norms and norms on Target PLF/Target Availability decided by the Commission are unachievable and they should be made more liberal after review. In the present application, the petitioner has placed on record the actual details of operational norms and Target PLF/Target Availability achieved in the past.

16. We feel that difficulty in achieving the norms prescribed by the Commission cannot be a ground for review of the norms decided after undertaking an elaborate exercise. We also notice that most of the details now filed by the petitioner were available with them before the Special Bench or the Commission passed orders deciding operating norms and norms of the Target PLF/Target Availability. Any additional data which was not presented before the Commission before issue of orders, cannot be itself become a ground for review of orders issued by the Commission. We, therefore, do not find merit in the petitioner's contention for review of norms on operating parameters and Target PLF/Target Availability. The petitioner's contention in this regard calls for rejection.

17. In the light of above discussion, the review petition is admitted on a limited point, regarding computation of working capital and consequently the interest on working capital. We further direct that a notice be issued to the respondent limited to this issue. We direct the petitioner to supply a copy of the petition along with copy of this order to the respondent latest by 15.1.2003. The respondent may file its reply, latest by 7.2.2003 with an advance copy to the petitioner who may file its rejoinder, if any, by 20.2.2003. The review petition be listed for hearing on 11th March 2003.

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

**Sd/-
(G.S. RAJAMANI)
MEMBER**

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

New Delhi dated the 6th January, 2003