CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram:

1. Dr. Pramod Deo, Chairperson
2. Shri Bhanu Bhushan, Member
3. Shri S.Jayaraman, Member

Review Petition No. 9/2007
in
Petition No. 163/2004

In the matter of

Review of the order dated 30.11.2006 in Petition No. 163/2004 regarding determination of tariff in respect of Tanda TPS for the period 1.4.2004 to 31.3.2009.

And in the matter of

NTPC Limited, New Delhi … … **Petitioner**

Vs

Uttar Pradesh Power Corporation Limited, Lucknow … … **Respondent**

The following were present:

1. Shri S N Goel, NTPC
2. Shri Manoj Saxena, NTPC
3. Shri Shankar Saran, NTPC
4. Shri V K Padha, NTPC,
5. Shri D G Salpekar, NTPC
6. Shri S K Samui, NTPC
7. Shri Sakya Singh Chaudhari, Advocate, UPPCL
8. Shri Vishal Anand, Advocate, UPPCL
9. Shri T K Srivastava, UPPCL
10. Shri V K Gupta, UPPCL

ORDER
(Date of Hearing: 18.9.2008)

This application has been made under Section 94 of the Electricity Act, 2003 (hereinafter referred to as "the Act") read with Regulations 103, 111 and 114 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as "the Conduct of Business Regulations") seeking review of the order dated 30.11.2006 in Petition No. 163/2004, determining tariff for Tanda Thermal Power Stations (hereinafter referred to as "the generating station") for the period 1.4.2004 to 31.3.2009 on the following grounds:

(a) Computation of loan re-payment for the period prior to 1.4.2004 and consequential effect on loan outstanding as on that date,
(b) Rate of interest on Government loan,
(c) Advance Against Depreciation,
(d) O & M expenses,
(e) Cost of secondary Fuel oil, and,
(f) Cost of spares in working capital.

2. The Commission by its order dated 28.2.2007 admitted the application on grounds (a), (b), (d), (e) and (f) above.

3. The respondent has filed its reply vide affidavits dated 7.4.2007 and 10.9.2008. The petitioner has also filed its rejoinder and the additional information sought by the Commission.

4. We heard Shri S N Goel, the representative of the petitioner and Shri Sakya Singh Chaudhari, Advocate and Shri T K Srivastava on behalf of the respondent.

5. The respondent has made a preliminary submission on maintainability of the application for review in its counter as well as at the oral hearing. The respondent has submitted that the cost recovered by the petitioner through normative tariff but not actually incurred should be refunded/adjusted. It was submitted that the excess profits earned by the petitioner were on account of incentive, sale of extra electricity generated within the permissible limit of 1% during the day above the schedule at UI rates, savings on oil consumption and coal consumption recovered on the basis of norms in place of actuals or expected revenue in terms of Section 62(5) of the Act. The respondent has submitted that the above submissions should be taken into account before considering review. The respondent has further submitted that recovery of un-incurred cost and consequential income-tax at the grossed up rate should not be allowed.

6. While considering the preliminary submission, we may clarify that the scope of the application for review made by the petitioner is limited to examination as to whether or not the order sought to be reviewed meets the criteria under Rule 1, Order XLVII of the Code of Civil Procedure. Viewed from that angle, the issue of excess profits allegedly earned by the petitioner in accordance with the terms and conditions notified by the Commission, raised by the respondent in reply to the application for review is outside the scope of the present proceedings. The respondent has to invoke other remedies available to it to seek redressal of its

grievances, if any, in accordance with law. We are, therefore, not deliberating on the above issues raised on behalf of the respondent.

7. We now proceed to consider the grounds admitted in the order dated 28.02.2007.

Computation of loan repayment during the period prior to 1.4.2004 and consequential effect on the loan outstanding as on that date.

8. The petitioner has submitted that the Commission, for computation of interest on loan in respect of the generating station, considered the annual repayment amount for the years 1999-2000 to 2003-04 based on the actual repayment during the year or as worked out as per the following formula, whichever was higher:

$$\text{Normative Repayment} = \text{Actual Repayment} \times \frac{\text{Normative loan}}{\text{Actual loan}}$$

9. Similar methodology was adopted by the Commission for computing interest on loan for other generating stations. Feeling aggrieved by the above methodology, the petitioner had challenged it in the appeals filed before the Appellate Tribunal for Electricity. The Appellate Tribunal in its judgement dated 14.11.2006 in Appeals Nos. 94 and 96 of 2005 set aside the methodology adopted by the Commission and directed the Commission to consider only the normative repayment of loan as the basis for computation of interest on loan. The petitioner has approached the Commission for review of the order dated 30.11.2006 in accordance with the directions of the Appellate Tribunal.

10. The respondent in its reply has submitted that the issue of repayment of loan from 14.1.2000 to 31.3.2004 is already settled since the orders of the Commission pertaining to that period were neither challenged before the Commission in review nor in the appeal before the Appellate Tribunal. The respondent has further submitted that the Appellate Tribunal's order dated 14.11.2006 in Appeals Nos. 94/2005 and 96/2005 pertain to Gandhar GPS and Kawas GPS only and cannot be applied in case of the generating station whose loan repayment methodology is entirely different.

11. In the ordinary course, review on this ground is not maintainable in terms of the Explanation under Rule 1, Order XLVII of the Code, which provides that "the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment." However, the Commission in exercise of its powers under Regulation 92 of the Conduct of Business Regulations revised the tariff of all the generating stations of the petitioner while giving effect to the directions of the Appellate Tribunal in the judgement dated 14.11.2005 in Appeal Nos. 94 and 96 of 2005. In the case of the generating station, the Commission in its order dated 9.4.2008 in Petition No.8/2005 has already implemented the judgement of the Appellate Tribunal for the period prior to 1.4.2004 in terms of para 30 of the said order extracted as under:

> "30. The Commission has decided to apply the methodology decided by the Tribunal to all cases of tariff determination. Accordingly, while calculating interest on loan, notional debt repayment has been worked out on the basis of the normative loan".

12. As the methodology for computation of loan has been revised in respect of the generating station for the period 2000-04 in terms of the judgement of the Appellate Tribunal dated 14.11.2006 in Appeals Nos. 94 and 96 of 2005, relief on this ground has already been given.

Rate of Interest on Government loan

13. As per the order dated 30.11.2006, rate of interest of 9.58% (interest rate of 9.55% applicable for loans re-financed by the petitioner for Faridabad GPS plus 0.03% as surveillance charges) was considered for the generating station since the petitioner had not taken any external loans and the entire cost was financed through the internal accruals.

14. The petitioner has submitted that the entire capital for the takeover of the generating station was financed through 100% equity. However, for the purpose of tariff, it was agreed in the Power Purchase Agreement dated 7.1.2000 that the takeover cost would be notionally apportioned between debt and equity in the ratio of 70:30, with further stipulation that the rate of interest would be the same as applicable to Government of India loans to Central PSUs. The provisions of the PPA dated 7.1.2000 were made part of the Statutory Transfer Scheme as per the notification dated 14.1.2000 issued by State Government of Uttar Pradesh. It has been urged that even though 70% of the capital cost has been taken as notional loan, the interest rate applicable to re-financed loans cannot be extended to the generating station since the notional loan cannot be deemed to have been

refinanced. It has been further submitted that surveillance charges of 0.03% have not been considered in actual computation of interest though expressly so stated in the said order dated 30.11.2006. Hence, it has been stated, there is an error apparent in the order dated 30.11.2006 as in the absence of any refinancing having taken place for the generating station, the Commission should have allowed 14.5% interest rate as considered for the period prior to 1.4.2004, which is also said to be in conformity with the provisions of the PPA dated 7.1.2000.

15. The respondent has submitted that the Commission had allowed 14.5% interest on loan for the generating station for the period 2000-04 in its order dated 28.6.2002 as applicable to Faridabad GPS of the petitioner. Similarly, the Commission allowed interest on loan for the period 2004-09 as applicable in case of Faridabad GPS. It has been submitted that while 9.58% interest on loan be retained, the income tax thereon should be borne by the petitioner.

16. The question of interest on notional loan in respect of the generating station for the period 2000-04 was considered by the Appellate Tribunal in its judgement dated 6.6.2007 in Appeals Nos. 205/2005 and 9/2007 wherein the Appellate Tribunal directed that:

> "The respondent, NTPC, has claimed rate of interest @ 14.5% throughout the period of 2000 to 2004 which appears to be on the higher side keeping in view that the respondent enjoys credit rating which is at par with sovereign rating. We, therefore, direct the CERC to take a re-look into the matter to establish the applicable rate of interest."

17. In compliance with the above directions, the Commission in said order dated 9.4.2008 considered the matter in the light of the provisions of the PPA dated

7.1.2000 and the tariff regulations of applicable for the period 1.4.2001 to 31.3.2004. The Commission in para 27 of the said order dated 9.4.2008 decided as under:

> "27. In our view the rate of interest on the normative loan as prescribed by Ministry of Finance from time to time should be taken for calculation of interest for the period 14.1.2000 to 31.3.2001 in conformity with the provisions of PPA. The rate of interest for capital investment in respect of industrial and commercial undertakings in the public sector and cooperatives with equity capital of more than Rs.1crore w.e.f 1.6.2000 is 14.5%. For the period 2001-2004 during which the tariff regulations of 2001 were in vogue, we decide to allow weighted average rate of interest on actual loans drawn by the petitioner during this period, in compliance with the directions of the Appellate Tribunal. The interest on notional loan has been calculated accordingly."

18. In view of the above decision, we direct that the rate of interest for calculating interest on loan shall be arrived at in accordance with methodology considered in the said order dated 9.4.2008.

Operation and Maintenance Expenses

19. The petitioner has submitted that the expenditure on the following items has not been taken into consideration for calculating O&M expenses:

(a) Unrecovered depreciation on decapitalised assets;

(b) Loss incurred on the disposal of fixed assets; and

(c) Incentive and *ex gratia* payment made to the personnel of NTPC.

20. As regards the un-recovered depreciation, it has been stated by the petitioner that as per the standard accounting practices, as and when a capital asset fails, it is taken out of the capital base. While taking out the cost from the capital base, depreciation recovered from the asset is reduced from the cumulative depreciation recovered and the un-recovered depreciation is charged to O&M expenses as an expense. Hence, the petitioner has contended that the un-recovered

depreciation needs to be allowed as part of O&M expenses in tariff. As regards the loss incurred on disposal of fixed assets, it has been argued that the unserviceable assets are decapitalised from gross block, but pending disposal, they are retained in the gross block at residual value. When the assets are finally disposed of and if the sale value is less than the residual value of the assets, the loss so incurred is booked to O&M expenses as cost, the petitioner has explained. Therefore, it is the claim of the petitioner that loss incurred in the process need to be considered as a part of O&M cost for fixing the base cost. It has been further urged that the Commission has failed to understand that the incentive and *ex gratia* payment to the employees are normal business expenditure incurred by the petitioner and this expenditure is directly related to O&M expenditure of the generating station. It is averred that such expenses were allowed in the past for determination of tariff by the Central Government. It has been argued that there was no justification for excluding the incentive and *ex gratia* as part of O&M cost.

21. The respondent in its reply has submitted that the issues such as the unrecovered depreciation on decapitalised amount to be treated as O&M expenses and loss incurred on account of disposal of fixed assets should not be allowed being inconsistent with Accounting Standard 10. As regards the *ex gratia* payments and incentive, it has been submitted that the decision of the Commission for not allowing this expenditure has been upheld by the Appellate Tribunal in the judgement dated 22.1.2007 in Appeal No.81/2005 and other related appeals and hence review on this ground be rejected.

22. The issues mentioned in sub-para (a) and (b) of para 19 above were considered by the Commission in the order dated 30.11.2006 which is extracted as under:

> "45. The petitioner has booked the losses as a part of O&M expenditure. These losses relate to unrealized depreciation of assets which has been decapitalised during the years under consideration. In our opinion, the petitioner has to bear the loss/profit arising out of its investment decision to take over the generating station. The Commission has already allowed the additional capital expenditure arising out of replacement of such assets with corresponding reduction of depreciation recovered for the decapitalised assets from the cumulative depreciation of the generating station. Hence, recovery of unrealized depreciation as a part of O&M is not allowed. Further, the amount claimed under the sub-head "Loss on disposal of Fixed assets" amounting to Rs.5.16 lakh is also disallowed, since the profit /loss on disposal of fixed assets is not a pass through in the tariff."

23. Thus, the Commission has already considered the submissions of the petitioner with regard to un-recovered depreciation and the alleged loss on account of disposal of fixed assets in the order dated 30.11.2006. In our view, the petitioner has not brought out any infirmity which could be remedied in review, but has sought to re-agitate the issue on merits.

24. As regards the incentive and *ex gratia*, the Commission has consistently been guided by the consideration that only statutory bonus will be a pass through in tariff. No exception can be made in respect of the generating station. As the petitioner has argued the point on merit and no error has been pointed out, review of the order dated 30.11.2006 on this account is not allowed. As correctly pointed out by the respondent, the Appellate Tribunal has upheld the Commission's decision to disallow incentive paid by the petitioner as part of O&M expenses.

25. It is pertinent to mention that the Commission in its order dated 30.11.2006 in the main petition had only deducted the incentive payment from the employee cost as the *ex gratia* payment was merged under the head "salary, wages and allowances" and separate account for *ex gratia* was not available at the time of passing the tariff order. During the pendency of the application for review, the petitioner was directed vide order dated 28.2.2007 to furnish the *ex gratia* payment it had made during the period 2001-02 and 2002-03. The petitioner vide its affidavit dated 11.6.2007 has furnished the required information as under:

Year	2000-01	2001-02	2002-03
Ex gratia(Rs. in lakh)	44.58	40.86	33.39

26. Consistent with the Commission's approach to exclude the payment of *ex gratia* from O&M expenses, we are of the opinion that the above amount be reduced from O&M expenses for the respective years.

Cost of Secondary Fuel Oil

27. The petitioner has submitted that in case of the generating station, the secondary fuel used is Light Diesel Oil (LDO) and not Heavy Furnace Oil (HFO), considered by the Commission in the order dated 30.11.2006. On account of variation in the prices of LDO and HFO (Rs.16,002.81 per kilo litre for LDO as against Rs. 13550/- per kilo litre for HFO on the date of application), the petitioner has claimed to be suffering losses on account of the Commission's decision, affecting calculation of base energy charges and also working capital requirements for the period 2004-09.

28. The respondent in its reply has submitted that that the Commission had determined the energy charges based on information furnished by the petitioner. It further submitted that the fuel price adjustment provided in the 2004 regulations takes care of variation in fuel price and GCV of fuel and the energy charges approved by the Commission are subject to such adjustment.

29. In sub-para (b) of para 66 of the order dated 30.11.2006, the Commission had directed as under:

> **"(b) Secondary Fuel Oil**:. The petitioner has claimed cost of fuel in the working capital based on price and GCV of secondary fuel oils (LDO & HFO) procured and burnt during September 2003. Since HFO is the main secondary fuel oil, it is considered for the computation of working capital and base rate of energy charge."

30. On perusal of the Petition No. 163/2004, we notice that the Petitioner in Form 19, Part 1 had submitted the information in respect of LDO for computation of energy charge. However, the Commission has considered HFO as the main secondary fuel which is an error apparent on the face of record. It may be true, as contended by the respondent, that fuel price adjustment formula takes care of the variation in prices of fuel. However, as energy charges are considered in the working capital as part of receivables, it is necessary to revise the base energy charge. We accordingly allow the review on this ground and the energy charges payable and working capital requirement be revised taking LDO as the main secondary fuel.

Cost of spares in working capital

31. The petitioner has submitted that the generating station was in a dilapidated state at the time of takeover and was operating at very low performance level.

Therefore, extensive renovation and modernization was carried out to bring the generating station to a reasonable level of operation. It has been submitted that the additional capital expenditure incurred and capitalized be considered for the purpose of determining the cost of spares to be included in the working capital. The petitioner has further submitted that the 2004 regulations provide for escalation of spares cost in working capital from the date of commercial operation. However, it has been pointed out, the Commission has erred in providing escalation only from the date of takeover which has resulted in lower provision of spares in working capital. As the Units 1, 2 3 and 4 of the generating stations were commissioned from 21.3.1988, 11.3.1989, 28.3.1990 and 20.2.1998 respectively, it has been prayed that error in the order dated 30.11.2006 may be rectified in review by allowing escalation of spares from the date of commercial operation of the respective units of the generating station.

32. The respondent has submitted that the Commission has already denied the cost of additional capital expenditure in para 66(d) of the order dated 30.11.2006 and the decision of the Commission cannot be modified in review. In Forms 2 and 6 of the Petition 163/2004, the petitioner itself had shown the date of commercial operation as 14.1.2000 and the prayer of the petitioner in the review petition to change the date of commercial operation to the date of commercial operation of the units of the generating station is inconsistent with its own earlier affidavit.

33. The 2004 regulations provide that working capital shall cover "maintenance spares @ 1% of the historical cost escalated @ 6% per annum from the date of commercial operation". The Commission in the order dated 30.11.2006 while considering the claim of the petitioner for maintenance spares had observed as under;

> "The 2004 regulations do not provide for taking into account additional capital expenditure for working out the cost of maintenance spares for the working capital. The cost of maintenance spares for the working capital has, therefore, been computed based on historical cost of Rs.60700 lakh, as on date of commercial operation of the station and the additional capitalisation incurred during the period from the date of commercial operation of the generating station to the relevant period has not been considered for computation of maintenance spares. The value of the maintenance spares for 2004-05 works out to Rs.744 lakh."

34. The above order was challenged by the petitioner in Appeal No. 23/2007 before the Appellate Tribunal. The appeal was allowed with directions to take into account the additional capitalization while determining the historical cost. Civil Appeal No. 5451/2007 and other appeals filed before the Hon'ble Supreme Court against the said judgement are pending. The petitioner has given an undertaking that it would not press for implementation of the decisions of the Appellate Tribunal in respect of which appeals are pending before the Hon'ble Supreme Court, till their final disposal. As the Hon'ble Supreme Court is already seized of the matter, we do not consider it appropriate to deal with the issue in the present proceedings.

35. As regards the escalation, the petitioner was aware of the dates of commercial operation of the four units of the generating station, yet it claimed spares on capital cost of Rs.607 crore from the date of takeover. The Commission while determining the tariff of the generating station had also considered the actual project

cost of Rs.607 crore as on the date of takeover of the generating station. Thus the date of takeover has been treated as the date of commercial operation instead of the actual date of commercial operation of the generating station. This is contrary to express provisions of the 2004 regulations that escalation is to be allowed from the date of commercial operation. This, in our view, is an error (of law) apparent on the face of record and therefore, review on this ground is permissible. Accordingly, we direct that the maintenance spares @ 1% of the historical cost with escalation @ 6% per annum be computed from the date of commercial operation.

36. Petition No. 47/2007 for approval of revised fixed charges for the period 2004-09 based on additional capital expenditure during 2004-05 and 2005-06 is presently pending for order. The decisions arrived at in the preceding paras shall be taken note of while revising the annual fixed charges in the said petition. In the light of our decision to consider LDO as the secondary fuel oil, energy charges as also interest on working capital in keeping with base energy charge so arrived, shall also be revised.

33. Review Petition No.9/2007 is disposed in terms of the above.

Sd/-	**Sd/-**	**Sd/-**
[S. JAYARAMAN]	**[BHANU BHUSHAN]**	**[DR.PRAMOD DEO]**
MEMBER	**MEMBER**	**CHAIRPERSON**

New Delhi, dated the 15th of December, 2008