

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

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

**Review Petition No. 72/2007
in
Petition No. 91/2004**

In the matter of

Review of order dated 23.3.2007 in Petition No. 91/2004 pertaining to the determination of tariff for Talcher Thermal Power Station (460 MW) for the period from 1.4.2004 to 31.3.2009.

And in the matter of

NTPC Limited, New Delhi

...**Petitioner**

Vs

Grid Corporation of Orissa, Bhubaneswar

... **Respondent**

The following were present:

- 1) Shri M.G.Ramachandran, Advocate, NTPC
- 2) Shri Anand K. Ganesan, Advocate, NTPC
- 3) Shri S.N.Goel, NTPC
- 4) Shri S.K.Samui, NTPC
- 5) Shri V Kumar, NTPC
- 6) Shri B.Kar, NTPC
- 7) Shri R.K Mehta, Advocate, GRIDCO
- 8) Ms. Suman Kukrety, Advocate, GRIDCO

**ORDER
(DATE OF HEARING: 29.1.2008)**

This application has been made by the petitioner, NTPC Ltd, a generating company, for review of order dated 23.3.2007, made by the Commission in Petition No.91/2004, determining tariff in respect of Talcher Thermal Power Station (460 MW)

(hereinafter referred to as “the generating station”), for the period 1.4.2004 to 31.3.2009.

2. The petitioner sought review of the order on the following issues:
 - (a) Computation of Interest on Loan,
 - (b) Loss on account of decapitalisation of assets-Impact on allowable O&M expenditure for the period 2004-09,
 - (c) Depreciation,
 - (d) Non-recovery of full depreciation in tariff due to decapitalisation of certain assets,
 - (e) Non-recovery of full depreciation in tariff due to disincentive for not achieving the specified target availability.

3. The Commission in its order dated 28.9.2007 admitted the application on the grounds mentioned at (a), (c), (d) and (e) above. So far as the ground at (b) above is concerned, it was noted that there was no error apparent on the face of the record and as such, this ground for review was rejected.

4. We have carefully gone through the record and the submissions made by parties who were heard at great length. We now proceed to consider the grounds on which the review petition was admitted.

Computation of Interest on Loan

5. In Petition No. 91/2004, the petitioner had considered the weighted average rate of interest based on actual interest rate for actual loans and 14% interest on notional loan. However, the Commission in its order dated 23.3.2007 had adopted the rate of interest on actual loans and had applied the same on the entire loan amount, including the normative loan to arrive at the interest on loan as under:

(Rs in lakh)

	2004-05	2005-06	2006-07	2007-08	2008-09
Gross loan-Opening	34801	34801	34801	34801	34801
Cumulative repayments of Loans up to previous year	21589	23825	26061	28297	30533
Net loan-Opening	13211	10975	8740	6504	4268
Increase/ Decrease due to FERV	0	0	0	0	0
Increase/ Decrease due to Additional capitalisation	0	0	0	0	0
Total	13211	10975	8740	6504	4268
Repayments of Loans during the year	2236	2236	2236	2236	2236
Net loan-Closing	10975	8740	6504	4268	2032
Average Net Loan	12093	9857	7622	5386	3150
Rate of Interest on Loan	8.6282%	8.6626%	8.7001%	8.7518%	8.8275%
Interest on loan	1043	854	663	471	278

6. The learned counsel for the petitioner submitted that 14% interest on notional loan claimed was in line with the MoU/PPA signed with the respondent and the Govt. of Orissa at the time of takeover of the generating station by the petitioner in 1995. He pointed out that this methodology was considered by the Commission in the order dated 19.6.2002 in Petition No. 62/2000, whereby the tariff for the generating station for the period 2000-2004 was approved. The learned counsel further submitted that non-consideration of 14% interest on notional loan for calculation of weighted average rate of interest which would cause irreparable loss to the petitioner, is an error apparent on the face of the record, in view of the departure from the established past practice and the MoU/PPA signed.

7. Learned counsel for the respondent opposed the submissions made by the learned counsel for the petitioner. He pointed out that the parameters agreed to at the time of take over of the generating station by the petitioner were valid up to 31.3.2000. It was contended that notional interest rate of 14% could not be applied.

8. The Commission in order dated 25.9.2006 in Petition No. 35/2004 while revising of the fixed charges on account of additional capitalization for the period 2000-2004 in respect of the generating station, had adopted the rate of interest of 14% for calculation of interest on normative loan arising out of the admitted additional capital expenditure. However, in the Review Petition No. 6/2007 in Petition No. 35/2004 filed by the respondent against the order dated 25.9.2006, the Commission considered the issue in the light of the observations of the Appellate Tribunal for Electricity in its judgment dated 6.6.2007 in Appeal No.9/2007 and 205/2005 pertaining to Tanda Thermal Power Station and in its order dated 4.3.2008 directed that -

“15. The Appellate Tribunal for Electricity (hereinafter referred to as “the Appellate Tribunal”) in para 23 of its judgment dated 6.6.2007 in Appeals No. 9 of 2007 and 205 of 2005 pertaining to Tanda TPS observed as under:

“Where the actual debt component is less than 70% of the aggregate cost, a special care needs to be taken to arrive at the applicable interest, as the developer is not incurring the interest burden in reality. The respondent, NTPC has claimed rate of interest @14.5% through out 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.”

16. We have given our consideration to the issue in the light of the above observations of the Tribunal. In case of Tanda TPS notional loan component was 70%. Per contra, notional loan component in the case of Talcher TPS is 50%, which is below the threshold prescribed by the Appellate Tribunal. Besides, agreed rate of interest as per the PPA in respect of the generating station was 14%. From the records, it is seen that additional capitalization during 2001-04 was funded through actual loans. It is also observed that weighted average rate of actual loan was 10.54% during 2001-02, 10.43% during 2002-03 and 9.45% during 2003-04.

17. The respondent has been enjoying credit rating at par with sovereign rating. In view of this, we feel it would be appropriate to service the notional loan component of the generating station at the rate of interest of actual loans in the wake of the falling interest regime. Accordingly, interest on notional loan component has been calculated based on the weighted average rate of interest in respect of the actual loans taken during the respective years.

18. While calculating tariff, repayment of notional loan component is taken as per PPA agreed to between the parties and repayment of actual loans has been worked out on normative basis. Total repayment during the year, for tariff purpose, is the sum of the notional and worked out normative repayment and serviced at weighted average rate of interest calculated based on actual loans. For the year 2000-01, rate of interest on notional loans has been kept as 14% as agreed to in PPA and has not been changed because the regulation came into force from 1.4.2001. We are also satisfied that servicing the notional loan at the interest rate prevailing in the market at the relevant point time renders even handed justice to the parties, because, in reality, the generating company is not incurring the interest burden.

19. *Actual loan details provided by the respondent vide affidavit dated 20.10.2004 in Petition No. 35/2004 has been considered for calculating weighted average rate of interest. The interest on notional loan has been calculated accordingly and annexed to this order. All other figures as regards debt-equity ratio, opening cumulative depreciation recovered, opening cumulative repayment recovered, etc. have been retained as per our order dated 25.9.2006 in Petition No. 35/2004”.*

9. The Commission has thus taken a considered and conscious view that calculation of interest on loan should be made on the basis of the weighted average rate of interest on actual loans. The view taken is strictly in conformity with the spirit of the judgment of the Appellate Tribunal in Appeal No. 205/2005. Further, the calculations also conform to clause (1) of Regulation 38 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (the 2004 regulations) on the notional loan arrived at in the manner indicated in Regulation 36 of the 2004 regulations. This methodology has been uniformly followed in all cases of approval of tariff. The petitioner had financed the loan presently being considered as notional out of its own resources at the time of signing of MoU/PPA and there was no actual loan. Therefore, we do not find any error in the order dated 23.3.2007 and no ground for review has been made out.

Depreciation

10. The Commission in order dated 23.3.2007 had computed the rate of depreciation by spreading the balance depreciable value over the remaining useful life of the generating station, in deviation of the provisions of sub-clause (a) of clause (ii) of Regulation 21 of the 2004 regulations, on account of substantial R&M and life extension involved.

11. The learned counsel for the petitioner contended that since repayment of loans undertaken for the various R&M schemes had not been fully repaid, depreciation rate

of 4.5% per annum based on 20 years life, as was considered by the Commission for the tariff period 2001-04, had to be considered instead of the methodology adopted by the Commission in the order dated 23.3.2007. The learned counsel has also prayed for modification of the cumulative depreciation recovered up to 31.3.2004, for the fact that depreciation in respect of relatable fixed charges was not recovered.

12. Learned counsel for the respondent pointed out that the Commission had power to deviate from the provisions of the 2004 regulations. He supported the Commission's order on this account.

13. The submission of the learned counsel for the petitioner, as regards the rate of depreciation, has some force. It is accepted that depreciation should normally be calculated in accordance with the 2004 regulations. In accordance with the 2004 regulations, the concept of spreading over the depreciation recoverable over the balance useful life is invoked when the loan is fully paid. This is not the case here. Therefore, by applying the straight line method for calculation of depreciation as provided in the 2004 regulations, we direct that the depreciation shall be worked out @ 4.5% per annum during the period 2004-2009, instead of spreading it over to the balance useful life as considered in our order dated 23.3.2007.

14. The other prayer of the learned counsel for modification/adjustment of cumulative depreciation in respect of relatable fixed charges is not sustainable. The Commission in its order dated 25.9.2006 in Petition No. 35/2004, concerning the generating station, had held as under:

"27. R&M work on these units has been a major exercise, with considerable cost, time and effort. It has also borne fruit, both in terms of improvement in generating station performance

and in life extension. In this connection, the respondent has vehemently contended that consequent to R&M the petitioner has claimed life extension amounting to 15 years only and the same must be made 20 or 25 years. To remove the apprehension of the respondent we make it clear that in the order dated 19.6.2002 in Petition No. 62/2000, the Commission has already held that the life of the generating station stands extended by 20 years w.e.f. 1.4.2001 (for the purpose of calculation of depreciation amount in the tariff for the future years). This was further reiterated in the Commission's order dated 30.9.2004. Under these circumstances, it is necessary and reasonable to adequately compensate the petitioner for R&M work.

28. The petitioner has been paid annual fixed charges for the period 2000-2004 based only on the station capacity in service, and has not been paid any fixed cost for the units under shut down due to R&M. Further, the petitioner would also have been required to discharge debt liabilities during the above period. On these grounds, there is a genuine need to compensate the petitioner.

29. Accordingly it has been decided to allow actual expenditure incurred towards administrative and general expenses and interest on existing loan prior to R&M. However, we do not propose to accept relatable fixed charges as claimed by the petitioner as a part of the tariff. Total expenditure on this account comes to Rs. 2713 lakh. During the hearing, the respondent has agreed to its reimbursement rather than including it in the capital cost. Accordingly, this expenditure will be reimbursed by the respondent in two equal annual installments along with revised tariff as per this order."

15. In view of our earlier decision as quoted in the preceding paragraph, we do not find any merit in the prayer of the petitioner for review on this ground and accordingly the same is rejected. As pointed out by the learned counsel for the respondent, the petitioner itself worked out the capital base after adjusting the cumulative depreciation of Rs.246.59 crore.

Non-recovery of full depreciation in tariff due to decapitalisation of certain assets.

16. The Commission while determining the additional capital expenditure for the period 2000-2004 in order dated 25.9.2006 in Petition No. 35/2004, admitted the additional capital expenditure on account of R&M for the generating station and allowed decapitalisation of corresponding old assets on account of the assets being decapitalised in the books of accounts for the reason that they were not in use or were damaged. The gross value of the assets was taken out of the admitted capital cost.

17. The learned counsel for the petitioner submitted that after the gross value of the assets was taken out from the capital cost, it was also necessary to take out the depreciation in respect of such assets from the cumulative depreciation recovered, failing which, it would result in under-servicing of the balance capital cost.

18. Learned counsel for the respondent supported the Commission's decision. He submitted that the respondent was paying tariff based on R&M expenditure approved by the Commission, because of which the petitioner was getting higher returns.

19. Depreciation of asset is considered for the purpose of tariff only when the asset is in use and once the asset is decapitalised, no depreciation is chargeable as the asset goes out of use. This important fact was overlooked in our order dated 25.9.2006, resulting in substantial loss to the petitioner due to under servicing of the capital cost. Hence, review on this ground is allowed.

Non-recovery of full depreciation in tariff due to disincentive on account of not achieving Target Availability.

20. The learned counsel for the petitioner submitted that Clause 2.8 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001, provided for recovery of full capacity charges at specified target availability level and in case of lower availability recovery of capacity charges on *pro rata* basis. The learned counsel also submitted that in the case of the generating station, capacity charges amounting to Rs.324 lakh had not been recovered on account of lower availability than the target availability during the year 2001-02 as a result of which depreciation recovered would be reduced in same proportion as reduction in annual

fixed charges. Accordingly, the learned counsel has prayed that the cumulative depreciation to be recovered should be reduced by an amount of Rs.29 lakh.

21. The Appellate Tribunal in its judgment dated 13.6.2007 in Appeal Nos.139 to 142/2006 and other connected appeals filed by the petitioner, involving the generating stations of the petitioner, had dealt with this issue, and decided as under:

"We note that as per the CERC Regulations appellant can recover, in full, capacity (fixed) charges on reaching the target availability. If the appellant exceeds the targeted Plant Load Factor for incentives he is entitled to an incentive at flat rate of 25 paise per kWh for ex-bus schedule energy corresponding to schedule generation in excess of ex-bus energy corresponding to target Plant Load Factor. Capacity (fixed) charges inter-alia include depreciation. Therefore, the appellant is able to recover the annual depreciation amount only if it achieves the target availability. In case of shortfall fixed charges and thereby the depreciation amount is pro-rata reduced according to the shortfall in achieving the target availability. However, if the appellant exceeds the Plant Load Factor beyond a certain value he is entitled to only a flat rate incentive of 25 paise. Whereas the depreciation amount is reduced due to underperformance, the same does not increase due to over performance.

In a regulatory cost plus regime all costs have to be reimbursed. Depreciation amount up to 90% being a cost has to be allowed over the life of the plant. If due to underperformance in a particular year the appellant is not able to recover full depreciation allowed in that year and if this denial is forever, it will tantamount to a penalty. In a contract between the appellant and the beneficiaries, only levy of liquidated damages can be permitted. It will, therefore, be enough deterrent for the appellant if the depreciation is not allowed during the year of underperformance. However, the same cannot be denied forever and, therefore, it will be only fair to allow the unpaid portion of the depreciation after the plant has lived its designated useful life. In this view of the matter the CERC needs to examine this aspect as per the aforesaid observations".

22. Further appeals have been filed before the Hon'ble Supreme Court against the above said judgment of the Appellate Tribunal, numbered as Civil Appeal No. 5434/2007 and other connected appeals. The Hon'ble Supreme Court by interim order dated 26.11.2007 had initially stayed the operation of the Appellate Tribunal's judgment dated 13.6.2007. Subsequently, by an order dated 10.12.2007 the Hon'ble Supreme Court recorded the undertaking of the petitioner to the effect that it would not press for this issue, amongst others, for implementation and revision of tariff during pendency of the appeals. As the matter is *sub judice* before the apex court, we are of the considered view that no adjustments need be made on this count, till the disposal

of the appeals. Accordingly, review of the order dated 23.3.2007 on this ground is not being allowed at this stage.

Conclusion

23. The revision of tariff of the generating station for the period 2004-09 is separately under consideration of the Commission in Petition 91/2004, based on additional capitalization for the period 2004-09. While re-calculating tariff in that petition, depreciation rate @ 4.5% and adjustment of cumulative depreciation as allowed at paras 13 and 19 above, shall be considered.

24. Review Petition No.72/2007 stands disposed of in above terms.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi dated the 5th September, 2008