

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi**

Appeal No. 95 of 2007

Dated this 11th day of Feb., 2008

**Coram : Hon'ble Mr. A.A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member**

IN THE MATTER OF:

Uttar Pradesh Power Corporation Ltd.

Shakti Bhawan, 14- Ashok Marg,
Lucknow.

....Appellant

Versus

1. **Central Electricity Regulatory Commission**
Through its Secretary,
6th Floor, Core-3, SCOPE Complex,
Lodhi Road, New Delhi – 110 003.
2. **National Thermal Power Corporation Ltd.,**
NTPC Bhawan, Core-7, Scope Complex,
Lodhi Road, New Delhi- 110 003.
3. **Rajasthan Rajya Vidyut Parsaran Nigam Ltd.**
(RRVPL), Vidyut Bhawan
R.C. Dave Marg, Jaipur- 302 005.
4. **Delhi Vidyut Bhawan (DVB)**
Shakti Bhawan, Nehru Place,
New Delhi- 110 019.
5. Haryana Vidyut Parsaran Nigam Ltd.(HVPNL)
Shakti Bhawan, Sector-VI,
Panchkula, Haryana 134 109.

No. of correction

6. **Punjab State Electricity Board (PSEB)**
The Mall,
Patiala- 147 001.
7. **Himachal Pradesh State Electricity Board,**
(HPSEB), Kumar House Complex Building-II,
Vidyut Bhawan, Simla 171 004,
8. **Power Development Department (J&K),**
Government of J&K, Mini Sectt.,
Jammu.
9. Chief Engineer-cum-Secretary,
Engineering Deptt., UT of Chandigarh,
Add. Office Building Sector 9-D,
Chandigarh.
10. **Uttranchal Power Corporation LTD. (UPCL),**
Urja Bhawan, Kanwali Road,
Dehradun- 248 006. ... Respondents

For the Appellant : Mr. Shyam Moorjani Adv.

For the Respondents : Mr. M.G. Ramachandran with
Mr. Anand K. Ganeshan &
Ms. Swapna Sheshadri, Advs.

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

1. This appeal is directed against the orders of the Central Electricity Regulatory Commission (the Commission or CERC for short) dated 11.3.2004 in petition No. 89 of 2003 and the order dated 30.10.02 in petition No. 33/2002 (Main). The petition No. 89 of 2003 was filed by the appellant seeking review of the order dated 30.10.2002, which was passed in tariff petition No. 33 of 2002 (main) filed by the respondent No. 2 in respect of its power station known as Feroze Gandhi Unchahar Thermal Power Station (FGUTPS for short) . The appellant sought review of the generation tariff fixed by order dated 30.10.02 on the ground that the component of capital cost was over-estimated.

Facts leading to the appeal:

2. The appellant came into existence on restructuring of the U.P. State Electricity Board by virtue of section 23 of the Uttar Pradesh Electricity Reforms Act 1999. It is as such a successor in interest of the UPSEB. The appellant is a company of Government of Uttar Pradesh. The relief is directed against the respondent No. 2 namely the National Thermal Power Corporation Ltd. (NTPC for short), which is

No. of correction

also a Government of India Undertaking. The respondents No. 3 to 10 are Proforma parties. The facts of the case may be stated as under:

3. The Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. (UPRVUNL for short) a wholly owned electric generating company of the State Government of Uttar Pradesh set up the Feroze Gandhi Unchachar Thermal Power Station (FGUTPS for short). The UPRVUNL was not able to operate the FGUTPS at its optimum capacity resulting in loss in generation of electricity. In order to salvage the FGUTPS, the State Government of UP acquired the FGUTPS from the UPRVUNL and transferred the same to NTPC on 13.2.1992 under the UPRVUNL (Acquisition and Transfer of Undertaking) Act, 1992. At the time of the acquisition and transfer, the generation tariff was being determined by the Ministry of Power, Government of India under section 43-A(2) of the Electricity (Supply) Act 1948 on the basis of norms implemented by Central Government on the recommendations of the Central Electricity Authority (CEA for short).
4. In respect of FGUTPS, the tariff was determined by the Central Government, Ministry of Power vide Notification dated 26.3.1994. The Electricity Regulatory Commission Act (ERC Act for short) came into force on 2.7.1998. The

No. of correction

Commission, respondent No. 1 herein, was constituted under the said act. The Commission under the ERC act had the power to determine tariff for generating companies owned and controlled by the Central Government. Vide Notification dated 22.3.1999, section 43-A was withdrawn for the State of UP w.e.f. 15.5.1999 under section 51 and 52 of the ERC act.

5. The determination of tariff by the Commission was guided by section 28 and by the financial principles as contained in Schedule VI of the Electricity (Supply) Act 1948. The Commission notified CERC (Conduct of Business) Regulations 1999 w.e.f. 23.4.1999. The Commission issued a notification under Regulations No. 79 (2) of the aforesaid regulation notifying that the tariff of the Central Government generating companies, like the FGUTPS, as existing on that date would continue to be charged for the period for which tariff was approved or till any further order in that regard was passed by the CERC.
6. Tariff for FGUTPS for the period 13.2.92 to 31.3.1997 was determined by the Central Government in Ministry of Power vide notification dt. 26.3.1994. Tariff for the period 1.4.97 to 31.3.01 was determined by the Commission in its order dt. 13.10.02 in petition No. 33 of 2002. In the tariff order dated 13.10.2002, the Commission had taken

No. of correction

note of the cost at which FGUTPS was transferred to NTPC. The cost was notified as 925 crores. The Central Government had accorded its approval in take over to FGUTPS at a cost of Rs. 925 crores vide a letter dated 20.5.1993.

7. The Commission also took note of the fact that while issuing tariff notification dated 26.3.1994, the Government considered the project cost of Rs. 909 crores, which included the gross block of Rs. 893.84 crores and initial spares of Rs. 15.87 crores. Ministry of Power had allowed additional capitalization of Rs. 18.856 crores during 1992-93 to 1996-97. The total cost of the project including the initial spares worked out to Rs. 928.566 crores as on 31.3.1997. This was taken as the gross block for the tariff determination for 1997 to 2001. The commission considered the capital cost at 909.71 crores after deducting the cost of spares from the transfer cost of Rs. 925 crores for the reason that the Central Government while notifying tariff for the period upto 31.3.1997 had taken this cost into account and it (the Commission) was not inclined to reopen the issue. The appellant challenged this basis in its review petition being No. 89 of 2003. In the review, the appellant pleaded that it was not correct to take the capital cost as Rs. 909.71 crores as the depreciated value of the station on the date of transfer

No. of correction

was much less. This contention was rejected by the Commission. The Commission also held the review petition to be barred by time and not maintainable as there was no error apparent on the face of the tariff order. The appeal challenges both the tariff order as well as the order on the review petition.

Ground for challenge:

8. The appellant challenges the tariff order on the following grounds:
 1. The Commission should have taken the project cost at the depreciated book value of Rs. 643.84 crores as shown by the auditor's report of 1994 instead of accepting the same as Rs. 909.71 crores without making any inquiry in respect of the same.
 2. The higher project cost has led to higher tariff and the consumer is eventually made to bear a higher burden of tariff.
 3. The transaction cost could not be taken as the capital base as the asset does not gain value on account of the transfer.
 4. In the case of Tanda Thermal Power Station, the Commission declined to take the transfer cost

as the capital cost. Instead the Commission adopted the depreciated book value of the asset as the capital cost. There is no reason why the Commission can take a different stand for the FGUTPS.

Decisions with reasons:

9. The grounds of challenge are interconnected and, therefore, are dealt with together:

Tariff for generation is determined in two parts: (a) Fixed cost & (b) variable cost. Fixed cost broadly consists of (a) interest on loan capital (b) depreciation, (c) tax on income (d) return on equity (e) operation and maintenance expenses and (f) interest on working capital. Fixed cost is essentially the servicing of the investment made by the generating company and the amount necessarily incurred in the running of the station. The investment is done on a specified debt equity ratio. Thus capital cost goes into determination of tariff. Higher the capital cost of a generator, higher will be the tariff payable by the transmission and distribution utilities and eventually that payable by the consumer.

10. This Tribunal dealt with a similar issue involving capital cost in the appeal No. 102/05, NTPC vs. CERC and

No. of correction

another involving the Tanda TPS which was acquired by the NTPC on 14.1.2000 from the UPSEB under the Uttar Pradesh Electricity Reforms (Transfer of Tanda Undertaking) Scheme 2000 framed under the Uttar Pradesh Electricity Reforms Act 1999. The appellant was the respondent No. 2 in the matter and the exclusive purchaser of power from the Tanda TPS. The Tanda TPS was acquired for Rs. 607 crores. The NTPC claimed that the capital cost for determination of tariff should be taken as Rs. 1000 crores. The Commission reduced this by Rs. 175.19 crores on account of depreciation charges already paid by the UPSEB and UPPCL. NTPC challenged this decision in the appeal. We held in our judgment dated 6.6.07 that the accumulated depreciation of Rs. 175.91 crores had already been recovered from the consumers in the past through tariff and if such accumulated depreciation amount were again allowed to be recovered, it would amount to recovering the same cost twice and would be contrary to the intention of the scheme applicable for determining tariff.

11. The central issue in this case is whether the case of FGUTPS is distinguishable from the case of Tanda TPS either in facts or in law. Shri M.G. Ramachandran, learned counsel for NTPC says that the transfer price in the case of Tanda TPS was fixed by a scheme whereas in

No. of correction

the case of FGUTPS the transfer price is fixed by the legislature in its legislative power. The question actually does not relate to the authority which fixed the transfer price. The question is how should the capital cost of the asset be assessed for the purpose of tariff fixation. In the case of Tanda TPS, the transfer was intended to dissolve the debt which the UPSEB owed on account of the station. The transfer price did not represent the capital cost. We found in our judgment dated 6.6. 2007 that the capital cost should have been the depreciated value as on the date of the transfer which had taken place immediately before the tariff exercise. The same principle should apply in this case. But what is submitted on behalf of NTPC is that the depreciated value as shown in the books of the FGUTPS did not fully indicate the capital cost on transfer as several elements of capital cost had not been accounted for in the figures of Rs. 643.84 crores . Our attention is drawn to the “ terms & conditions of the transfer” which includes clause (f) which reads as under.

“(f) All rights/ allocations/ approvals regarding inputs such as land, water, environment & forest clearance, etc. for stage-I & Stage-II of the FGUTPS which have been committed to the UPVUNL would stand transferred to NTPC without any additional liability to NTPC. Government of Uttar Pradesh shall issue supporting communications to the various organizations as and when requested by NTPC.”

12. What stood transferred to NTPC was not merely the asset viz. the FGUTPS as it stood but also land, water, environment & forest clearance etc. for stage-I & stage-II which the Government of UP had committed to UPVUNL. Thus the price of land and water already committed by the Government of Uttar Pradesh also went to NTPC. Obviously the price for the commitments was included in the transfer price. The depreciated book value of the station is only one of the components of the Rs. 925 crores. Our judgment dated 6.6.2007 does not indicate that the transfer price of Tanda TPS included factors other than the asset as it stood. Thus on facts the two cases are distinguishable.
13. A Power Purchase Agreement (PPA for short) was entered into between the NTPC on the one hand the beneficiaries including the appellant's predecessor viz. Uttar Pradesh State Electricity Board on the other hand on 31.01.1994 in respect of FGUTPS. The copy of the agreement i.e. "Bulk Power Supply Agreement" is placed on record by the respondent. The term relating to tariff said that the same shall be "as determined by the Government of India from time to time, with effect from the date as notified by the Government of India under section 43 A of the Electricity (Supply) Act 1948 (as amended) which shall form an integral part of this agreement". "The terms and

No. of correction

conditions of tariff of power supplied from FGUTPS” was notified on 26.3.1994. The UPSEB duly received the notification and complied with the same. Admittedly, the Central Government was bound to follow the method prescribed in Schedule VI for determination of tariff. The UPSEB at no point of time raised any objection to the tariff notification of the Central Government. Capital cost was one of the main components of the tariff also under Schedule VI as it is now.

14. The Power Purchase Agreement dated 31.1.94 was designed to remain in force upto 31.10.07. There is, however a stipulation in the agreement (Clause 12.0) that in case the customers continue to get power from the NTPC station even after expiry of this agreement without further change or formal extension thereof, all the provisions of the agreement shall continue to operate till the agreement was formally renewed, extended or replaced. The tariff notification of 28.3.1994 determining the tariff from 13.2.92 to 31..3.97 in a appendix listed the parameters for determination of tariff. The capital cost claimed by NTPC is shown as 971.37 crores but was allowed as 909.71 crores. Therefore, there was ample scope for the UPSEB to dispute the figures of capital cost which went in determination of tariff under section 43 A of the Electricity (Supply) Act 1948. The learned counsel for

No. of correction

the respondent has built up several arguments from this fact (i) In view of the long period preceding the tariff fixation in question during which capital cost was taken as 909.71 crores, the commission was justified in continuing this figure and not reopening the same (ii) The UPSEB which is the predecessor in interest of the appellant and the appellant itself never questioned this figure of capital cost at 909.71 crores and so is estopped from challenging this figure as in the meanwhile the FGUTPS has been conducting all its activities on the basis of such capital costs of 909.71 crores. All financial arrangements and evaluation of the station has been based on this figure of capital cost (iii) The claim of the appellant is barred of the laches (iv) there is a presumption that the figure of 909.71 crores was the actual figure of capital cost and (v) the Commission could not reopen the capital cost as that would have amounted to reopening the Power Purchase Agreement which accepted tariff as determined by the Central Government under section 43 A read with schedule VI of the Electricity Supply Act.

15. We find force in arguments of the learned counsel for the respondents. We find that it was proper for the Commission to take the same capital cost as was taken by the Central Government for two reasons. In the first place, the same has continued to be the accepted figure of the

No. of correction

capital cost for a long time and the cost of transfer included not only the depreciated value of the asset but also the commitment made by Government of Uttar Pradesh in respect of factors like land and water. Therefore, the value of the capital cost as on the date of transfer would include the depreciated value of the existing asset plus the value of the commitments. Since only the figure of 925 crores is available, it is felt proper that this figure be taken as correct depiction of the value of the asset transferred namely the station as it stood and commitments made by the Government of UP. The learned counsel for the respondent says that the book value of the station may not reflect various benefits which the Government of UP may have provided to the station. We have no figures and data to verify what amount of expenditure the Government of UP may have made on this station which have not gone into the books. Suffice it to say that much more than the value of the station/asset was transferred and therefore, there is no basis to challenge the capital cost taken by the Central Government at Rs. 909.71 crores.

16. There is also force in the plea of estoppel and laches. The FGUTPS has always been worked on the basis of the capital cost of 909.71 crores. The tariff from the very beginning was determined on this figure, which was

No. of correction

arrived at by deducting the cost of spares from the value of the transfer. It was only on the presumption that tariff would be determined on the basis of the transfer cost that the NTPC purchased the power station and had been generating power. The Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. (Acquisition and Transfer of Undertaking) ordinance stipulates in the paragraph that the transfer was being effected as the Undertaking due to financial constraints had not been able to operate at its optimum capacity and the Government and the Nigam were not in a position to provide additional funds necessary to achieve optimum production and it has become necessary in public interest to acquire the Undertaking and to transfer the same to the NTPC. The NTPC may or may not have agreed to acquire the FGUTPS had it been represented to it that despite transfer cost being 925 crores the tariff would be determined only on the depreciated book value of the assets which was Rs. 643.84 crores. Thus the NTPC has altered its position to its disadvantage on account of the transfer value having taken as recoverable as capital cost. The state of UP as well as UPSEB (beneficiary of the acquisition) are estopped from challenging the capital cost of 909.71 crores.

17. It appears that the appellant did not raise any question about the correctness of the capital cost even during the

No. of correction

hearing of the tariff petition on 7.1.2002. Nor the issue was raised soon after the tariff order was passed on 28.06.2002. The issue was raised for the first time in the review petition more than a year after the tariff order. The laches are thus writ large.

18. The Commission dismissed the review petition not only on merit but also on ground of limitation. The impugned order categorically says that the period during which an application for review can be filed under the CERC (Conduct of Business) Regulations is sixty days and that the appellant (the review petitioner) had not placed any reason whatsoever on record for condoning the delay. Even in this appeal the appellant has not made out any ground for condoning the delay. Nor has any ground been made out for faulting the finding of the commission that the review petition was barred by limitation.

19. Learned counsel for the appellant has harped upon the plea that it was the duty of the Commission to correctly assess the capital value as the UPRVUNL audit report itself worked out the capital cost as 641.84 crores, and so there is an error in the tariff order and therefore the same needs to be corrected despite the delay and laches in pointing out the inaccuracy. We cannot agree to this argument of the learned counsel for the appellant. The

No. of correction

tariff order of the Commission had reached finality when the review petition was filed and therefore the appellant has to bear with it even if there was any mistake in the tariff calculation. We have also found on merit that the commission was justified in taking the capital cost of the station at Rs. 909.71 crores.

20. The appeal has no force and is accordingly dismissed with costs which is assessed at Rs. One lac.

Pronounced in open court on this 11th *day of Feb.,2008.*

(Ms. Justice Manju Goel)
Judicial Member

(A. A. Khan)
Technical Member

No. of correction

np