

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

Coram:

1. Shri Ashok Basu, Chairman
2. Shri K.N. Sinha, Member
3. Shri Bhanu Bhushan, Member

**Petition No.139/2004**

**In the matter of**

Approval of revised fixed charges on account of additional capital expenditure for the period 1.4.2001 to 31.3.2004 in respect of Feroze Gandhi Unchahar Thermal Power Station Stage-I

**And in the matter of**

**National Thermal Power Corporation Ltd.                      ...                      Petitioner**  
**Vs**

1.     **Uttar Pradesh Power Corporation Ltd., Lucknow**
2.     **Jaipur Vidyut Vitran Nigam Ltd., Jaipur**
3.     **Ajmer Vidyut Vitran Nigam Ltd., Jaipur**
4.     **Jodhpur Vidyut Vitran Nigam Ltd., Jaipur**
5.     **Delhi Transco Ltd., New Delhi**
6.     **Haryana Vidyut Prasaran Nigam Ltd., Haryana**
7.     **Punjab State Electricity Board, Patiala**
8.     **Himachal Pradesh State Electricity Board., Shimla**
9.     **Power Development Department, Govt.of J&K, Srinagar**
10.    **Power Department, Chandigarh**
11.    **Uttaranchal Power Corporation Ltd., Dehradun..... Respondents**

**The following were present:**

1.     Shri R.S. Sharma, ED, NTPC
2.     Shri I.J. Kapoor, GM, NTPC
3.     Shri V.B.K. Jain, GM, NTPC
4.     Shri Balaji Dubey, Dy. Manager (Law), NTPC
5.     Shri D.G. Salpekar, DGM(C), NTPC
6.     Shri P.K. Gupta, DTL
7.     Shri B.K. Paliwal, DTL
8.     Shri R.K. Arora, XEN(T), HVPNL

**ORDER  
(DATE OF HEARING: 30.11.2004)**

Through this petition, the petitioner seeks approval for the revised fixed charges in respect of Feroz Gandhi Unchahar Thermal Power Station Stage –I (FGUTPS-I) for the period 1.4.2001 to 31.3.2004 after considering the impact of additional capital expenditure incurred during the period.

2. FGUTPS-I comprises of two units of 210 MW each. The generating station was taken over by the petitioner from the erstwhile Uttar Pradesh State Electricity Board on 13.2.1992. The Central Government in Ministry of Power by its letter dated 2.5.1993 had accorded approval for the taken over cost of Rs.925.00 Crore. Subsequently, CEA vide its letter dated 5.8.1996 accorded its approval for R&M under Environment Action Plan for Rs.2.85 Crore. Thus the total approved project cost is Rs.927.85 Crore.

3. The terms and conditions for determination of tariff for the period 1.4.2001 to 31.3.2004 were notified by the Commission on 26.3.2001 in terms of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations 2001 (hereinafter referred to as "the notification dated 26.3.2001"). A petition (No.41/2001) was filed by the petitioner for approval of tariff for the period from 1.4.2001 to 31.3.2004 in respect of FGUTPS-I, the basis for which was stated to be the notification dated 26.3.2001. In the tariff claimed, the petitioner had considered the impact of additional capitalisation for the period 1.4.2001 to 31.3.2004. The tariff was approved by the Commission by its order dated 24.10.2003. For the purpose of tariff, the capital cost of Rs.940.70 Crore as on 1.4.2001 was considered. The additional capitalisation claimed by the petitioner was not considered since it was based on the estimated capital expenditure and was without the supporting auditor's certificate.

4. The year-wise details of additional capitalisation claimed with reference to the balance sheet are as follows:

(Rs. in Crore)

|   | 2001-02      | 2002-03       | 2003-04       | Total         |
|---|--------------|---------------|---------------|---------------|
| <b>Total additional expenditure on the Stage-I as per reconciliation of accounts between Stage-I and Stage-II (A)</b> | 0.321        | 5.114         | 0.444         | <b>5.880</b>  |
| <b>Exclusions</b>   |              |               |               |               |
| FERV capitalized (B)  | 0.032        | 0.158         | 0.018         | 0.208         |
| Balance payment of works not admitted by CERC earlier*(C)   | 0            | -0.214        | -0.002        | -0.216        |
| Replacement Exclusion* (D)  | -0.007       | -0.120        | -0.086        | -0.213        |
| <b>Sub-total Exclusions (E=B+C+D)</b>   | <b>0.025</b> | <b>-0.176</b> | <b>-0.070</b> | <b>-0.221</b> |
| Additional capital expenditure Claimed (A-E)  | 0.296        | 5.291         | 0.514         | 6.101         |

5. Based on the above, the petitioner has claimed the revised fixed charges.

6. The petitioner's claim for additional capitalisation and the revised fixed charges is based on Clause 1.10 of the notification dated 26.3.2001, reproduced hereunder:

"1.10 Tariff revisions during the tariff period on account of capital expenditure within the approved project cost incurred during the tariff period may be entertained by the Commission only if such expenditure exceeds 20% of the approved cost. In all cases, where such expenditure is less than 20%, tariff revision shall be considered in the next tariff period."

7. The response to the petition has been filed by Haryana Vidyut Prasaran Nigam Ltd (HVPNL), Uttar Pradesh Power Corporation Ltd. (UPPCL) and Punjab State Electricity Board (PSEB). The common ground running through these responses is that tariff revision as claimed by the petitioner on account of additional capital expenditure incurred during the tariff period cannot be entertained in view of Clause 1.10 of the notification dated 26.3.2001, reproduced above, since the additional capital expenditure does not exceed 20% of the approved capital cost. Some of the respondents have questioned the manner of computation of the revised fixed charges.

8. In the first instance, we consider the admissibility of additional capital expenditure claimed in the present petition.

**Additional Capitalisation**

9. Additional capitalisation as per books of accounts is Rs.5.88 Crore, including FERV of Rs. 0.208 Crore (Refer table at para 4). However, as the impact of FERV is being claimed separately from the respondent beneficiaries, the total claim after excluding FERV should be Rs.5.672 Crore. The petitioner has claimed additional capitalisation of Rs. 6.101 Crore.

10. The difference is mainly on account of re-inclusion (negative entries in exclusions) of certain assets in capital base on the grounds discussed below on

- (a) An amount of Rs. 0.208 Crore for 2001-04 on account of FERV has been excluded from the claim as the impact of FERV has been billed directly to the beneficiaries.
- (b) An amount of (-) Rs.0.216 Crore has been excluded on works not admitted by the Commission earlier. Accordingly, balance payment on these works need to be excluded.
- (c) The petitioner by way of negative entries in exclusions is re-including certain assets like unserviceable Gypsy, T.G components, hydraulic jacks, water coolers, matador, cars etc. on the ground that the Commission while considering additional capitalisation for the years 1997-2001 has not allowed capitalization of such items and since capitalization of such items was not allowed, de-capitalization of these items should also not be considered. The word “such items” mentioned by the petitioner has been used in general terms.

“Such items” do not specifically refer to Gypsy, TG component, hydraulic jack etc. which were in fact included in the capital cost for tariff purpose. This was clarified by the petitioner during the hearing on 30.11.2004. For this reason, re-inclusion of such items cannot be allowed as these assets are not in use. Hence the amount has to be decapitalised.

11. The year-wise and category-wise break up of additional expenditure claimed by the petitioner is as follows:

(Rs. in Crore)

| Details of additional capitalization claim  | 2001-02      | 2002-03      | 2003-04      | Total        |
|---|--------------|--------------|--------------|--------------|
| <b>(A) Within the Scope of approved cost or admitted works after the date of commercial operation</b> |              |              |              |              |
| Balance payment against admitted works (Category-10A)   | 0            | 0.041        | 0.009        | 0.051        |
| New works within approved Revised Cost Estimates (Category-21A)                                       | 0.093        | 0            | 0            | 0.093        |
| <b>Sub-total (A)</b>  | <b>0.093</b> | <b>0.041</b> | <b>0.009</b> | <b>0.144</b> |
| <b>(B) Not within the Scope of approved Cost and works not admitted by CERC</b>                       |              |              |              |              |
| Balance payment against works not admitted by CERC (Category-10B)                                     | 0            | 0.076        | 0            | 0.076        |
| New works not in approved Revised Cost Estimates (Category-21B)                                       | 0.202        | 0.034        | 0.050        | 0.285        |
| Spares not in approved cost (Category-22B)  | 0            | 0.603        | 0.461        | 1.063        |
| Replacement (Category.-23)  | 0            | 4.538        | -0.005       | 4.532        |
| Rearrangement (Category -24)  | 0            | 0            | 0            | 0            |
| <b>Sub-total (B)</b>  | <b>0.202</b> | <b>5.249</b> | <b>0.505</b> | <b>5.956</b> |
| <b>Total of additional capitalisation claimed (A+B)</b>   | <b>0.296</b> | <b>5.291</b> | <b>0.514</b> | <b>6.101</b> |

\*There may be minor difference in decimal places due to rounding off of the corresponding figures in Crore.

12. The expenditure claimed for additional capitalisation and our decisions thereon are as under:

**(a) Balance payment against admitted works**

The balance payment against admitted works of Rs. 0.051 crore claimed in the petition is in order and has been allowed.

**(b) New works within the approved cost**

The petitioner have claimed capital expenditure of Rs. 0.093 Cr. on new works within the approved cost. This capital expenditure has been claimed on the following two works, namely -

- (i) Balance internal electrification work of A.E type quarters amounting to Rs.1.065 lakh - The petitioner has stated that when the generating station was taken over on 13.2.1992, a few AE-Type Qtrs. were in half-built condition, which were completed by the petitioner after take over. This was to provide good living conditions to residents of colony at remote locations. This is a balance work of the work admitted by the Commission in its order dated 30.10.2002 in petition No. 33/2002. Accordingly, the expenditure of Rs.1.065 lakh on internal electrification of the quarters has been allowed.
- (ii) Balance erection of boiler lift amounting to Rs.8.25 lakh - The petitioner has stated that the boiler lifts of the generating station were in half-erected condition at the time of its take over in February 1992 and were not functional. Hence, the original supplier M/S Otis Elevator Co. (P) Ltd. was called upon to do the balance work of erection and commissioning. However, after lot of persuasion, the party agreed to take up the balance work. Accordingly, work was awarded to M/s Otis and the lifts got commissioned. It is further clarified that these two boiler lifts are in addition to one lift for coal bunker and one lift in service building. Considering the facts that the lifts were in half erected condition at the time of takeover of the plant by the petitioner and delay in execution due to non-responsive

attitude of the OEM M/s Otis, we have allowed the capital expenditure on commissioning of boiler lifts.

**(c) Additional Capital Expenditure relating to balance payment against works not admitted**

An amount of Rs. 0.76 Crore against works not admitted by the Commission earlier has not been considered for additional capitalisation.

**(d) Additional Capital Expenditure on New works not within the approved cost**

An expenditure to the tune of Rs. 0.285 crore on new works not within the original scope has been claimed under this head. The justifications furnished by the petitioner in support of the expenditure on the works/assets included in this head have been scrutinized. An amount of Rs.0.058 crore has been found to be admissible. The year-wise breakup of allowed/disallowed expenditure for this head is as follows:

| <b>Year</b>  | <b>Claimed (Rs.)</b>                | <b>Allowed (Rs.)</b>                | <b>Disallowed (Rs.)</b>             |
|--------------|-------------------------------------|-------------------------------------|-------------------------------------|
| 2001-02      | 2023343                             | 0                                   | 2023343                             |
| 2002-03      | 335044                              | 82597                               | 252447                              |
| 2003-04      | 496475                              | 496475                              | 0                                   |
| <b>Total</b> | <b>2854862</b><br><b>(0.285Cr.)</b> | <b>579072</b><br><b>(0.058 Cr.)</b> | <b>2275790</b><br><b>(0.228Cr.)</b> |

**(e) Additional Capital Expenditure on spares not in approved cost**

An expenditure of Rs.1.063 crore claimed for capitalisation relates to capitalization of spares during 2001-04. Capitalization of such spares is on account of revised accounting standards and is over and above the spares capitalized as initial spares. The Commission while dealing with additional capitalization petitions of other generating stations belong to the petitioner, for the period prior to 2001 did not allow capitalization of such spares. Accordingly, capitalization of spares not within the approved cost shall not be permitted.

**(f) Additional Capital Expenditure on replacement**

The expenditure of Rs.4.538 crore is claimed in the year 2002-03 on following two works/equipment.

- (i) An amount of Rs.4.414 crore has been claimed for the construction of CW system. The petitioner has submitted that when FGU STTP-I was taken over in 1992, RCC duct was part of the station for cooling water (CW) from pump to condenser. The duct had developed heavy leakages at a number of places. Leakages from CW duct resulted in lower condenser flow causing low condenser vacuum. Further, water leakages also created safety problems to other assets/ building in the plant area (Sinking of foundations due to very high water table). Efforts were made to attend to these leakages, but these efforts could not yield any fruitful results. Hence it became critical station requirement to lay steel CW duct for safety requirement of the station and surrounding areas. The amount is against the old CW duct for which an amount of Rs.2.492 crore has been de-capitalized. On consideration of the facts explained above, we allow the net expenditure of Rs.4.414 crore incurred on replacement of the CW system on safety considerations.
- (ii) An amount of Rs.0.124 crore has been claimed on replacement of silica gel hydrogen drier with safe refrigerant type hydrogen drier. The petitioner has submitted that the generating station was provided with Silica gel Hydrogen drier for drying the Hydrogen used for generator cooling. Silica gel type Hydrogen drier is required to be changed from one drier to other drier on almost daily basis for the purpose of regeneration of Silica gel. Frequent change overs caused Hydrogen leakage, which was potential safety hazard. To ensure safe & reliable



operation of station, Silca gel driers were replaced with refrigerant type Hydrogen drier. During the hearing, it has been further clarified by the petitioner that Silica Gel drier were also being used in series with the refrigerant type drier and hence it is not a case of replacement but is a new addition for safety reasons. The same has been allowed.

**(g) Decapitalisation**

The amount of (-) Rs.0.005 crore indicated in the year 2003-04 pertains to decapitalisation of obsolete items and has been allowed.

12. In the light of above discussion, the following additional capital expenditure has been allowed:

(Rs. in Crore)

| Details of additional capitalization claim                      | 2001-02      | 2002-03      | 2003-04          | Total        |
|---|--------------|--------------|------------------|--------------|
| <b>(A) Within the Scope of approved cost/admitted works</b>     |              |              |                  |              |
| Balance payment against admitted works                          | 0            | 0.041        | 0.009            | 0.051        |
| New works within approved Revised Cost Estimates                | 0.093        | 0            | 0                | 0.093        |
| <b>Sub-total (A)</b>  | <b>0.093</b> | <b>0.041</b> | <b>0.009</b>     | <b>0.144</b> |
| <b>(B) Not within the Scope of approved cost/admitted works</b> |              |              |                  |              |
| Balance payment against works not admitted by CERC              | 0            | 0            | 0                | 0            |
| New works not in approved Revised Cost Estimates                | 0            | 0.008        | 0.050            | 0.058        |
| Spares not in approved cost                                     | 0            | 0            | 0                | 0            |
| Replacement   | 0            | 4.538        | (-) 0.005        | 4.532        |
| Rearrangement   | 0            | 0            | 0                | 0            |
| <b>Sub-total (B)</b>  | <b>0</b>     | <b>4.546</b> | <b>0.045</b>     | <b>4.590</b> |
| <b>Total (A+B)</b>  | <b>0.093</b> | <b>4.587</b> | <b>0.054</b>     | <b>4.734</b> |
| <b>Exclusion not permitted</b>                                  |              |              |                  |              |
| Replacement exclusion (C)                                       | (-) 0.007    | (-) 0.120    | (-) 0.086        | (-) 0.213    |
| <b>Additional Capitalisation allowed (A+B+C)</b>                | <b>0.086</b> | <b>4.467</b> | <b>(-) 0.032</b> | <b>4.521</b> |

\*There may be minor differences in decimal places due to rounding off corresponding to figures in Crore.

## **REVISION OF FIXED CHARGES**

13. We now proceed to examine the knotty question of revision of fixed charges based on the expenditure allowed to be capitalised.

### **Question of retrospective revision of fixed charges**

14. It has been submitted on behalf of the petitioner that the notification dated 26.3.2001 does not bar retrospective adjustment of tariff. The petitioner has submitted that stipulation is made in Clause 1.10 of the notification dated 26.3.2001 that in cases where capital expenditure is less than 20%, which is the position in the present case, tariff revision is to be considered in the next tariff period. According to the petitioner, since the next tariff period has already started on 1.4.2004, the fixed charges approved earlier call for a revision. The petitioner in this regard has also placed reliance on Clause 2.5 of the notification dated 26.3.2001, according to which, the actual capital expenditure incurred on completion of the project forms the basis for fixation of tariff. For that reason, in the view of the petitioner, the additional capital expenditure qualifies for revision of tariff applicable for the period 1.4.2001 to 31.3.2004.

15. The notification dated 26.3.2001 was preceded by the Commission's order dated 21.12.2000 on terms and conditions of tariff applicable from 1.4.2001 to 31.3.2004. Generally, this order dated 21.12.2000 forms the basis for the terms and conditions contained in the notification dated 26.3.2001 and is, therefore, akin to the statement of objects and reasons in support of the provisions made in the notification dated 26.3.2001. For resolution of the issue raised, it may be necessary to refer to the relevant observations made by the Commission in the order dated 21.12.2000, which the petitioner has also relied upon. For this

purpose, an extract from Para 1.7.7 of the order dated 21.12.2000 is reproduced below:

“The Commission was concerned about the tariff shocks to the beneficiaries on account of revisions even after setting the tariff for a certain period. It was noted that in certain stations, due to the capital cost not being finalised for over 5 years, a provisional tariff is being followed. In certain cases, substantial additions to the fixed costs over a period of 2 to 3 years were incurred, subsequent to the approval of the revised project cost by the CEA. The beneficiaries are also required to pay bills for taxes actually paid, as well as the effect of foreign exchange rate variation on the value of repayment of loans and interest payments at irregular intervals. In addition, fuel price adjustments through a built in mechanism in the tariff are also done. The beneficiaries have limited scope to pass on such billing to the end consumers, due to the tariff system at retail level not being flexible. The issues regarding changes occurring in between two filing periods and the retrospective adjustment of tariff, are composite issues, which have to be dealt with together. This is because any developments in between two filing periods invariably result in a retrospective adjustment as the matter is considered, approved and then allowed, resulting in a time escalation and subsequent adjustment in tariff. The Commission has already expressed its considered view that retrospective revision should not be allowed other than for unavoidable reasons. The consultation paper has also indicated that it is possible to adopt a principle that once tariff are set, they shall remain in place for some time. This will assure regulatory certainty.”

16. Further, in Para 1.7.8 of the order dated 21.12.2000, now divided into three sub-paras for facility of analysis, the Commission noted as under:

(a) “The Commission has carefully considered the views of utilities, beneficiaries and others on the above issues. The consensus which emerged from all the submissions is that there should be certainty with regard to the tariff for the period for which it is announced. There is also a consensus that automatic escalation/passthrough should be confined to the minimum. The Commission is in full agreement with the views of parties. It is endeavouring to reduce the scope for passthrough to the minimum, which is appropriately taken care of on items relating to taxation, O&M and foreign exchange variations, which are dealt with separately herein.”

(b) “As regards capital costs, the situation is somewhat difficult. As the law stands today in respect of PSUs, the required approvals from the Government and clearance from CEA have to be obtained before the commencement of the project, subject to certain limits for which no clearance is required. After the completion of the project, if the actual expenditure or the scope of the project vary beyond certain limits, they are required to be further approved. This process of approval is time consuming, resulting in a provisional clearance, making a subsequent

retrospective revision inevitable. Changes in legislation are being contemplated by which the clearance from CEA for projects might be done away with. However, as the law stands today, approvals are inevitable. Still, it is possible to bring about stability in tariff in case a time schedule is worked out by which utilities may submit data to CEA at least 6 months prior to the completion of a project, so that clearance could be obtained sufficiently in time before the tariff for the station/lines is determined. It is hoped that any variations on actual finalisation of accounts thereafter should be minor in nature, which could be absorbed by the utility and if substantial, can be taken care of in the next revision. In view of the above, all utilities seeking determination of tariff in respect of new projects shall submit their applications to us at least 3 months in advance of the anticipated date of completion, along with the project cost as approved by the appropriate independent authorities, other than the Board of Directors of the company. This project cost will constitute the basis for tariff fixation, and no revision would be entertained till the next tariff period. This direction presupposes that CEA may hereafter, unlike the past, clear capital cost escalations on factors other than the change in scope as well. We would urge upon CEA to consider and deal with the approval of additional capital costs other than those due to change in the scope of the project as well, in the interest of avoidance of tariff shocks down stream. In case of projects exempted from CEA clearance, the Commission would consider accepting a due diligence clearance from any recognised agency.”

(c) “Any expenditure approved in the project cost but incurred during a tariff period shall have to wait till the next tariff revision unless it constitutes more than 20 % of the approved cost.”

17. Similarly, the extract of para 10.6 of the order dated 21.12.2000 considered relevant, is reproduced hereunder:

“10.6 The following highlights of the present order need emphasis:

- (i) The tariff shall be stationwise/linewise for generation and transmission respectively;
- (ii) The normal tariff period shall be a period of five years but shall at this stage be for a period of three years;
- (iii) The tariff would remain undisturbed for the entire tariff period excepting for changes in foreign exchange rate variation, corporate taxation and fuel costs. Revision on account of exchange rate variation and corporate taxation shall be on annual basis with advance notice; revision on fuel cost shall be based on actuals. Consequently, there shall be no retrospective adjustment of the tariff. A mechanism for firming

up the capital cost at the commencement of operations has been evolved.”

18. The Commission after taking notice of the prevalent practice of retrospective revision of tariff unmistakably expressed a view that it had been opposed to retrospective revision of tariff, unless it was absolutely necessary. The Commission recognised three items of expenditure which needed retrospective adjustments as because of the prevalent situation retrospective revision was considered unavoidable; these items being, Foreign Exchange Rate Variation, Corporate Taxation and Fuel Cost. As regards the capital expenditure, the Commission decided that where such expenditure during the tariff period is more than 20% of the approved cost, the tariff revision will be undertaken. In other words, to put it negatively, the expenditure up to 20% during the tariff period does not qualify for revision of tariff during that period. In the latter category of cases, the benefit of the expenditure for the purpose of tariff will accrue to the petitioner when tariff revision is being undertaken during the next tariff period. The conventional way of interpreting a statutory provision is to give effect “to the intent of them that make it”. Thus, going by the intention of the Commission as disclosed in the order dated 20.12.2000 which has been translated into Clause 1.10 of the notification dated 26.3.2001, tariff for the period 1.4.2001 to 31.3.2004 does not call for any revision.

19. The petitioner has urged that retrospective adjustment of tariff is permissible and for this proposition, the petitioner has relied upon the judgement of Hon'ble Delhi High Court in G.D. Ferro Alloys (P) Ltd and others Vs. Delhi Electric Supply Undertaking (AIR 1998 Delhi 17) wherein the High Court while dealing with the aspect of enhancement of energy charges on account of fuel

adjustment charges relating to the past period held the same not to be retrospective.

20. In our opinion, the rationale of the judgement in G.D. Ferro Alloys (P) Ltd (Supra) is not applicable to the facts of the case before us. In that case, the Hon'ble High Court came to the conclusion that the tariff and the conditions, forming integral part of the tariff made it clear that the energy charges realised were provisional till variation in fuel adjustment charges was determined on taking the final accounts at the end of the relevant year. The Hon'ble High Court noted that the general conditions which authorised the DESU Management to make adjustment provisionally from time to time, incorporate it as a part of the monthly bill for payment by the consumer and on finalisation of the accounts levy and recover the same retrospectively from the beginning of the financial year. It is noticed that a provision similar to that made in the general conditions of the tariff applicable to the DESU for adjustment of fuel cost have been made. However, in view of the specific provisions of Clause 1.10 of the notification dated 26.3.2001, retrospective revision of fixed charges on account of additional capital expenditure up to 20% of the approved cost is ruled out.

21. The petitioner has placed heavy reliance on the observations made in Para 10.6 (iii) of the order dated 21.12.2000 to the effect that "a mechanism for firming up the capital cost at the commencement of the operations has been evolved". It has been argued that the order recognises that the firming up of capital cost has been dealt with in other part of the order and a mechanism for that purpose has been evolved. It has been urged that the reference to retrospective adjustment of tariff in para 10.6 (iii) of the order dated 21.12.2000 should exclude the

mechanism of adjustment of capital cost and bar to retrospective adjustment of tariff should not apply. We agree with the petitioner's contention that mechanism for firming up the capital cost at the commencement of operations has been evolved and that is contained in Para 1.7.8, now sub-divided and reproduced as sub-para (b) above. The mechanism, however, applies in the case of new generating stations or the transmission assets as it is clear from reading of sub-para (b) of para 1.7.8 of the order dated 20.12.2000, reproduced above. This was for a specific reason that the generating stations which were already commissioned prior to 1.4.2001, like the present one, would normally not need any large scale additional capital expenditure. This is made further clear by reading of Para 10.6 (iii) that the mechanism devised for firming up of capital cost is applicable at "the commencement of the operations" of the generating station or the transmission system, as the case may be. In the present case, no part of capital cost incurred up to the commencement of operation of the generating station, that is, the date of commercial operation has been excluded for the purpose of fixation of tariff. The only question before us is whether the expenditure, which does not exceed 20% of the approved cost and incurred during the tariff period, is to be accounted for during this tariff period. In our opinion, no portion of Para 10.6 (iii) of the order dated 21.12.2000 furthers the petitioner's case. On the contrary it expressly interdicts retrospective revision of tariff, except under three circumstances referred to therein.

### **Contemporary interpretation**

22. Banking upon certain observations made by the Commission approving tariff in some of the cases the petitioner has pressed into service, the principle of *contemporanea expositio*. It is well settled principle of interpretation that in

construing a statutory provision, much weight is given to the interpretation put upon it by those, whose duty it has been to construe, execute and apply it. According to the petitioner, denial of revised fixed charges on account of additional capital expenditure will be contrary to the interpretation given by the Commission in some of its orders.

23. The Commission while approving tariff in some of the cases observed that the additional capitalisation claimed had not been considered for tariff determination, as the claim was not in line with the notification dated 26.3.2001. However, as a matter of caution, the Commission added that the petitioner could keep its purchasers informed that they should keep a provision for additional capitalisation arrears on ad hoc basis in their annual revenue requirement.

24. Three observations are spontaneous. Firstly, the argument is based on fallacious assumption that the Commission had in some of its previous orders agreed to the revision of fixed charges on account of additional capital expenditure. The observation made in some of the orders reproduced below was as a matter of caution only:

“The additional capitalisation claimed by the petitioner has not been considered for tariff determination since the claim is based on the budgetary projections and not on actual cost and is, therefore, out of tune with the notification dated 26.3.2001. However, as a precautionary measure, the petitioner may keep its purchasers informed that they can keep a provision for additional capitalisation arrears on ad hoc basis in their ARR. .... The petitioner may claim revision of tariff on account of additional capitalisation in accordance with para 1.10 of the notification dated 26.3.2001”

25. Secondly, there was no discussion in support of the observation made. Thus, at no stage, did the Commission take a view that expenditure up to 20% of the approved cost incurred during the tariff period qualified for revision of fixed



charges, because the petitioner's claim for revision of fixed charges has to be examined in the light of statutory provision contained in the Clause 1.10 of the notification dated 26.3.2001. In State Vs Ratan Lal Arora [(2004) 4 SCC 590] it was held that where in a case the decision has been rendered without reference to the statutory provision, such a decision cannot have any precedent value. Now on interpretation of Clause 1.10 of the notification dated 26.3.2001 in the light of the Commission's basic order, we have held that Clause 1.10 does not permit retrospective revision of fixed charges. Accordingly the ground of contemporaneous interpretation taken by the petitioner fails. Thirdly, the principle of contemporaneous interpretation is confined to very old statutes and the principle does not extend on the modern statutory provisions like Clause 1.10 of the notification dated 26.3.2001.

### **Loss and Hardship**

26. Next the petitioner has tried to highlight the unintended deleterious consequences of the denial of revised fixed charges on account of additional capital expenditure and has urged that it will cause hardship to the petitioner. It has also been submitted that by taking a strict and restricted view on the question of revision of fixed charges, the commercial operation of new generating stations will get delayed till such time all capital expenditure has been incurred, which will ultimately be against the interest of the respondents who will be deprived of the service. We may point out that there is no provision analogous to Clause 1.10 of the notification dated 26.3.2001, applicable for the current tariff period, which commenced on 1.4.2004. As such, the apprehension expressed by the petitioner does not deserve any cognizance.

### **Validity of Clause 1.10**

27. The petitioner has also urged that the classification contained in Clause 1.10 is arbitrary inasmuch as when the expenditure is 19.99% of the approved cost it does not qualify for revision of fixed charges but as it reaches 20% or more, the revised fixed charges get to be revised. We are not satisfied with this argument as well. The fixation of cut-off percentages is of every day occurrence. The most common examples are the qualifying percentages fixed at the examinations or cut-off limits for levy of taxes. There can always be the marginal cases when the cut-off limits are laid down under law. Thus, validity of Clause 1.10 of the notification dated 26.3.2001 should not be impaired or affected. It is settled law that the rules validly made under a statute for all intents and purposes, are deemed to be part of the statute. Therefore, the notification dated 26.3.2001 has become part of the statute under which we are functioning. In view of the law laid down by the Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission Vs CESC Ltd (AIR 2002 SC 3588), the Commission and for that matter any other authority established under the same statute, cannot go into the validity of the provisions made in the notification dated 26.3.2001.

### **Exercise of power of regulation of tariff**

28. It has been next argued by the petitioner that the Commission's power to regulate is a wide power and in exercise of its powers of regulation of tariff, the Commission should allow revision of fixed charges based on additional capital expenditure, even if it does not cross 20% limit laid down under Clause 1.10 of the notification dated 26.3.2001. For this purpose, the petitioner has relied upon the judgements of the Hon'ble Supreme Court in K. Ramanathan Vs. State of Tamil Nadu [(1985) 2 SCC 116] and Deepak Theatre Vs State of Punjab [1992 Supp (1) SCC 684].

29. We are afraid that the law laid down by the Hon'ble Supreme Court in above noted two cases does not further the petitioner's claim. In these cases the Hon'ble Supreme Court has interpreted the scope of power of regulation conferred on a statutory authority. The Hon'ble Supreme Court has held that the power to regulate carried with it full power over the thing subject to regulation, and the power must be regarded as plenary over the entire subject. It implies that the power includes the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed or the making of the rule with respect to the subject to be regulated. The notification dated 26.3.2001 has been issued in exercise of power of regulation of tariff conferred on the Commission. Once the terms and conditions have been determined by the Commission in exercise of its regulatory power, these cannot be overlooked. The regulations have to be given effect in their true spirit, otherwise the regulatory uncertainties will creep in.

**Exercise of Inherent power**

30. Lastly, it is urged that the notification dated 26.3.2001 is to be read in conjunction with the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. The petitioner has urged that in terms of Regulation 111 of the Conduct of Business Regulations, the Commission has inherent power to pass orders in the interest of justice. The petitioner has urged upon the Commission to ignore literal interpretation of Clause 1.10 and clarify the position consistent with equity, justice and appropriateness.

31. Regulation 111 of the Conduct of Business Regulations corresponds to Section 151 of the Code of Civil Procedure and is reproduced below for facility of reference:

"Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Commission."

32. The Hon'ble Supreme Court in Padam Sen and Another Vs. State of Uttar Pradesh (AIR 1961 SC 218) while interpreting the scope of Section 151 CPC has held that the Section cannot be invoked when it affects the substantive rights of the parties, since the inherent power covers only the procedural aspects. The relevant extracts from the judgement of the Hon'ble Supreme Court are given hereunder:

"The inherent powers saved by s. 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights, which any litigant possesses. Specific powers have to be conferred on the Courts for passing such orders, which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in the matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure."

33. By virtue of Clause 1.10 of the notification dated 26.3.2001, certain substantive rights are created in favour of the respondents. These rights cannot be defeated by invoking Regulation 111 of the Conduct of Business Regulations in view of the settled law, as laid down by the Supreme Court.

### **CONCLUSION**

34. It is, therefore, directed that in view of the provisions of Clause 1.10, the retrospective revision of the fixed charges in the present case cannot be permitted since the additional capital expenditure of Rs.4.521 crore, approved by us is less than 20% of the approved project cost. The additional capital expenditure approved shall be added to the gross block for the purpose of fixation of tariff for the period from 1.4.2004 to 31.3.2009 to arrive at the gross block applicable on

1.4.2004. In this manner, the gross block of Rs.945.221 crore shall be considered as the opening gross block for the tariff period 2004-09.

35. Notwithstanding the conclusion given in the preceding para, it is to be noted that the Commission is assigned the onerous responsibility of harmonizing the interests of the investor and the consumer. We are mindful of the fact that the investments were made by the petitioner during the period 1.4.2001 to 31.3.2004 with the expectation to earn reasonable return, the benefits of which have been harvested by the respondents.

36. The petitioner has claimed revision of three components of fixed charges, namely interest on loan, return on equity and depreciation. Interest of loan component includes a portion of loan repaid. However, as we decided not to allow revision of fixed charges, as such the petitioner shall not be entitled to repayment of loan for the period 1.4.2001 to 31.3.2004 and thus, there will be moratorium on repayment. Nevertheless, the petitioner incurs expenditure on servicing of loan by way of interest, which needs to be recovered. Similarly, the petitioner has invested its own equity in the process of making the generating station more viable through the additional capital expenditure. In case the petitioner had put this amount to an alternative use, it would have earned adequate return. Therefore, in our considered opinion, the petitioner is entitled to receive reasonable return on the amount of equity employed. The third component of fixed charges of which revision is sought is the depreciation. As per the notification dated 26.3.2001, depreciation is chargeable during the useful life of the generating station up to 90% of the capital cost incurred. In view of our decision to add the amount of additional capitalization approved by us to the gross block as on 31.3.2004, the

petitioner will ultimately be able to recover the admissible amount of depreciation, though the recovery gets deferred by three years. Therefore, we feel that the question of admissibility of depreciation on the basis of additional capital expenditure need not be addressed at this stage.

37. As there is nothing in the notification dated 26.3.2001 to deny the petitioner the reasonable return to service the capital expenditure incurred by the petitioner and found to be justified by us, we direct that the petitioner shall earn return on equity @ 16% on the equity portion of the additional capitalization approved by us. Similarly, the petitioner shall also be entitled to the interest on loan as applicable during the relevant period. Return on equity and interest shall be worked out on the additional capitalization of Rs.4.521 crore approved by us from 1<sup>st</sup> April of the financial year following the financial year to which additional capital expenditure relates up to 31.3.2004. The lump sum of the amount of return on equity and interest on loan so arrived at shall be payable by the respondents along with the tariff for the period 2004-09 to be approved by the Commission. The exact entitlement of the petitioner on this account shall be considered by the Commission while approving tariff for the period 2004-09.

38. The petition stands allowed in above terms.

Sd/-  
**(BHANU BHUSHAN)**  
**MEMBER**

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

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

New Delhi dated the 31<sup>st</sup> March 2005