



9.	Shri G.C. Jain, EE, UPPCL	Respondent
10.	Shir B.K.Saxena, Sr. AE, UPPCL	-do-
11.	Shri S.P. Srivastava, Sr. AE, UPPCL	-do-
12.	Shri H.C. Verma, AE, UPPCL	-do-
13.	Shri Vinod Devichand, Dir.(I/S), HPSEB	-do-
14.	Shri V.K. Gupta, SE (ISP), RSEB	-do-
15.	Shri S.C.Mehta, EE(ISP), RSEB	-do-

**ORDER (Dates of Hearing: 12/6/2000 and  
23/6/2000)**

National Hydroelectric Power Corporation (NHPC), the petitioner, has filed these petitions for permission to recover provisionally from the respondents the effect of Foreign Exchange Rate Variation (FERV) in respect of Chamera HEP (petition No.20/2000) and Uri HEP (Petition No.26/2000) on account of repayment of loan and interest payment for the year 1999-2000 in proportion of generation tariff payable by the respondents for that year.

2. The terms and conditions and tariff for power supply from Chamera (Stage-I) HEP for the period from 1.4.97 to 31.3.2000 have been notified by the Ministry of Power vide its notification dated 8.2.99. Similarly, the terms and conditions and tariff for supply from Uri HEP were notified on 14.5.99. These notifications have been issued by the Ministry of Power by virtue of powers under Section 43 A (2) of the Electricity (Supply) Act, 1948 as it stood then and are based on the notification dated 30<sup>th</sup> March, 1992, which prescribes the general principles for tariff determination. As per these notifications, the effect of Foreign Exchange Rate Variation to be paid to/by NHPC by/to beneficiaries shall be determined by the Central Government at the end of each financial year. The Foreign Exchange Rate Variation in respect of these two projects for

the years 1994-95 to 1998-99 have already been notified by the Ministry of Power and is stated to have been recovered by the petitioner from the beneficiaries.

3. Section 43 A (2) of the Electricity (Supply) Act, 1948 has been omitted w.e.f. 15.5.99 by virtue of powers under Section 51 of the Electricity Regulatory Commissions Act, 1998, on account of which the Ministry of Power is divested of its jurisdiction to determine tariff of the Central Generating Companies and other related matters. The tariff determined through the notifications dated 8<sup>th</sup> February, 1999 and 14<sup>th</sup> May, 1999 has been continued by virtue of proviso to regulation 79 of the Central Electricity Regulatory Commission (Conduct of Business ) Regulations, 1999 and the Commission's notification dated 12<sup>th</sup> May, 1999. Accordingly, these petitions have been filed before the Commission under Regulation 79 (1) of the CERC (Conduct of Business) Regulations, 1999.

4. According to the petitioner, the extra rupee liability towards loan repayment and interest payment directly arising out of Foreign Exchange Rate Variation paid by it during the year 1999-2000 in respect of Chamera Project is Rs. 22,73,25,499/- and Uri Rs.26,11,34,190/-. The details of these amounts are contained in the respective petitions.

5. The replies to these petitions have been filed by respondent No.1 (PSEB), respondent No.4 (UPPCL) and Respondent No.5 (RSEB). The respondents have generally objected to the provisional determination of the amount claimed on account of Foreign Exchange Rate Variation. It has been

pointed out on behalf of the respondents that provisional determination of amounts will not be in the interest of the beneficiaries. Respondent No.1 (PSEB) has raised certain additional legal issues. According to this respondent, the petitions under Regulation 79 of the CERC (Conduct of Business) Regulations, 1999 are not maintainable since the said Regulation deals with determination and fixation of norms and new tariff. It has been further stated on behalf of the PSEB that the notifications dated 8.2.99 and 14.5.99, dealing with fixation of tariff for Chamera and Uri projects respectively are unlawful and invalid as these do not conform to the principal notification dated 30.3.92, issued under section 43 A (2) of the Electricity (Supply) Act, 1948. The respondents have not raised any serious objection to the claim of the petitioner on merits.

6. In its rejoinder, NHPC has stated that its claim for the Foreign Exchange Rate Variation for the year 1999-2000 is based on the audited figures for the period ending 31<sup>st</sup> March, 2000 and, therefore, its claim may be treated as final. In view of this position, the preliminary objection raised on behalf of the respondents regarding provisional nature of the amount does not survive and only the other objections raised on behalf of the respondent No.1 (PSEB) need to adjudicated upon.

7. We have heard Shri B. Datta, Senior Advocate, on behalf of the petitioner and Shri Saroop Singh, Advocate on behalf of PSEB. We have also heard the representatives of UPPCL, RSEB and HPSEB present at the hearing.

8. According to PSEB, the main provision of Section 43 A (2) enjoins upon the Central Government to notify in the official gazette the norms regarding tariff and plant load factor as may be laid down by the Central Electricity Authority and the rates of depreciation and reasonable return and such other factors as may be determined by it from time to time for the purposes of determination of tariff. Proviso to Section 43 A (2) empowers the Central Government to determine the terms and conditions and tariff for sale of electricity in respect of generating company wholly or partly owned by it. The Central Government, in exercise of power under Section 43 A (2) of the Electricity (Supply) Act, 1948 had notified the norms for fixation of tariff on 30<sup>th</sup> March, 1992, which has been amended subsequently from time to time. The said notification dated 30<sup>th</sup> March, 1992, as amended contains the following provisions in regard to payment on account of Foreign Exchange Rate Variation.

*" Extra rupee liability towards interest payment and loan repayment actually incurred in the relevant year shall be admissible, provided it directly arises out of foreign exchange rate variation and is not attributable to Generating Company or its suppliers or contractors"*

9. It has been contended on behalf of PSEB that in accordance with para 3.3 of the notification dated 30<sup>th</sup> March 1992, the norms contained therein are applicable for determination of the tariff for sale of electricity from such generating stations whose financial package for investment is approved by CEA on or after the date of its publication in the official gazette. It has been further pointed out that in accordance with para 3.4 of the said notification dated 30<sup>th</sup> March, 1992 incorporated vide notification dated 12<sup>th</sup> January, 1995, the said notification dated 30<sup>th</sup> March, 1992 is applicable to such hydro- power generating stations which commenced commercial operation on or after 1<sup>st</sup> January, 1997. According to PSEB, the Chamera and Uri HEPs had started

commercial operations before 1 January, 1997 and their financial package was approved before issuance of the notification dated 30<sup>th</sup> March, 1992 and, therefore, the principles contained in the notification dated 30<sup>th</sup> March 1992, including that relating to payment on account of Foreign Exchange Rate Variation, are not applicable to these projects. Therefore, according to PSEB, the notifications dated 8.2.99 and 14.5.99 which have adopted the terms and conditions and tariff for Chamera and Uri Hydroelectric projects contained in the principal notification dated 30<sup>th</sup> March, 1992, shall be deemed to be invalid. PSEB has also referred to the Ministry of Power Office Memorandum dated 1<sup>st</sup> April, 1997, according to which the tariff of the existing NHPC power stations may be fixed as per Government of India tariff notification dated 30<sup>th</sup> March, 1992, as amended vide notification dated 12<sup>th</sup> January, 1995 and subsequent amendments. It is urged on behalf of the PSEB that the Office Memorandum dated 1<sup>st</sup> April, 1997 cannot over-ride the statutory provisions of the notification dated 30<sup>th</sup> March, 1992, which, in view of paras 3.3 and 3.4, are inapplicable to the NHPC projects in question, particularly because fixation of tariff is a legislative function. It is alleged that the Office Memorandum dated 1<sup>st</sup> April, 1997 is a colourable exercise of power aimed at raising of revenue.

10. According to Shri B.Datta, the learned Senior Counsel, the power of the Commission to grant Foreign Exchange Rate Variation directly flows from its power to regulate tariff under regulation 79 read with the Commissions notification dated 12<sup>th</sup> May, 1999 and the notifications dated 8<sup>th</sup> February, 1999 and 14<sup>th</sup> May, 1999 do not independently create any liability to pay on account of Foreign Exchange Rate Variation. According to the learned senior counsel, the



Commission has jurisdiction to enforce the terms and conditions while exercising the power of regulating the tariff. The payment on account of Foreign Exchange Rate Variation which forms part of the terms and conditions of tariff cannot be left to be decided by any other authority, except the Commission. The learned senior counsel has pointed out that even prior to 1<sup>st</sup> April, 1997 (from 1-4-1994 to 31-3-1997) the tariff notifications for these two projects were issued by Ministry of Power, taking into consideration the principles contained in the notification dated 30<sup>th</sup> March, 1992 and these were duly honoured by the respondents, including respondent No.1(PSEB). By applying the same yardstick, the notifications issued during 1999 cannot be held to be invalid, otherwise there would be no valid tariff notification in place. The learned senior counsel has further contended that the validity of the Office Memorandum dated 1.4.1997 cannot be questioned on any grounds since the law is well settled that within the limits of executive powers under the constitutional scheme it is open to the government to issue instructions to fill up the gaps, so long as these instructions do not run contrary to the rules in existence.

11. By virtue of provisions of Section 13 ( a) of the Electricity Regulatory Commissions Act, the Commission has jurisdiction to regulate tariff of the generating companies owned or controlled by the Central Government. The power to regulate tariff includes the power to determine tariff, including any component thereof. It is not disputed that the amount due on account of Foreign Exchange Rate Variation is a component of tariff or in any case forms part of terms and conditions of tariff. In view of the statutory provisions contained in the Electricity Regulatory Commissions Act, the petitioner can approach the



Commission for determination of the amount payable on account of Foreign Exchange Rate Variation, since after omission of Section 43 A (2) of the Electricity (Supply) Act, 1948, the Central Government ceases to have jurisdiction on tariff related matters in respect of such companies. Therefore, we do not find any merit in the contention raised on behalf of the PSEB that the petition is not maintainable on the ground that it has been filed under Regulation 79 (1) of the CERC (Conduct of Business) Regulations. The legitimate claim of the petitioner cannot be defeated by raising technical pleas. Such a contention, if accepted, will negate the statutory provisions contained in the Electricity Regulatory Commissions Act, 1998. We accordingly hold that the present petitions filed by the petitioner can be taken up for adjudication of the claim raised by the petitioner in view of the provisions of Section 13(a) of the Electricity Regulatory Commissions Act, 1998.

12. The tariff notifications for Chamera and Uri HEPs dated 8.2.99 and 14.5.99 respectively have been issued by virtue of powers under proviso to Section 43 A (2) of the Electricity (Supply) Act, 1948. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main document [(1985) 1 SCC 591]. It is undisputed that by virtue of proviso to Section 43 A (2) the Central Government has exclusive jurisdiction to determine tariff and terms and conditions of tariff in respect of generating companies wholly or partly owned by it. In our opinion, the proviso to Section 43 A (2) carves out an exception to the main provision of that Section as held by the Supreme Court in Tribhovandas Haribhai Tamboli VS Gujarat Revenue Tribunal (AIR 1991 SC 2538) which states as under:

*" It is a cardinal rule of interpretation that proviso to a particular provision of a statute only embraces the field, which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect."*

13. In proviso to Section 43 A (2) of the Electricity (Supply) Act 1948, we do not find any limitation on the power of the Central Government regarding the determination of tariff and the terms and conditions of the Central Generating Stations. Therefore, we are not persuaded to agree to the contention raised on behalf of PSEB that the terms and conditions in respect of the generating companies owned by the Central Government, in exercise of powers conferred under proviso to Section 43 A (2) of the Electricity (Supply) Act 1948 can be determined only if the notification dated 30<sup>th</sup> March, 1992 applies to such generating stations. Therefore, we hold that notwithstanding what is contained in paras 3.3 and para 3.4 of the said notification dated 30<sup>th</sup> March, 1992, the notifications dated 8.2.99 and 14.5.99 are validly made by the Central Government in exercise of its powers conferred under the statute and are enforceable.

14. There is another aspect of the matter. The notifications dated 8.2.99 and 14.5.99 laid down the tariff and terms and conditions for the period from 1.4.97



to 31.3.2002. The respondents, including PSEB have honoured these

notifications by making payments. In case PSEB felt aggrieved by these notifications, it should have initiated appropriate steps to have them declared invalid through the proper judicial forum. The Commission does not sit in appeal over the notifications issued by the Central Government in exercise of its statutory powers. These notifications so long as they are not declared invalid by the Competent Authority, have to be given effect to. We are fortified in our conclusion by the observations in Smith VS. East Elloe Rural District Council [(1956) 1 All ER 855] wherein it was held as under:

*"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."*

15. The Supreme Court, in State of Punjab Vs Gurdev Singh [(1991) 4 SCC 1] has approved the above observations of the House of Lords and held as under:

*"It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the court for relief of declaration that the order against him is inoperative and not binding upon him."*

16. The Respondents have entered into a Bulk Power Purchase Agreement with the petitioner in respect of Bairasul , Salal , Tanakpur , Chamera and Uri HEPs. Para 6 of the bulk purchase agreement deals with tariff for supply of energy from these stations. According to this para, the tariff and terms and conditions for sale of energy supplied or to be supplied from NHPC stations shall be **as determined by Government of India from time to time** w.e.f. the date as may be notified by the Government of India under Section 43 A (2) of the Electricity (Supply) Act and the notifications form an integral part of the



agreement ( emphasis supplied). The Central Government through the notifications dated 8.2.99, 26.3.99 and 14.5.99 has already decided for payment on account of Foreign Exchange Rate Variation. In view of the agreement entered into by the parties, the respondents are liable to pay for the Foreign Exchange Rate Variation as prescribed by the Central Government through the station-wise tariff notifications. They cannot escape liability to make payment in accordance with the terms and conditions determined by the Central Government and cannot be permitted to resile from the agreement entered into with the petitioner.


17. Thus from whatever angle the matter is viewed, there is no escape from the conclusion that the terms and conditions contained in these notifications can be given effect to and are enforceable under the authority of the Commission. This can be followed without our own terms and conditions being in place. In view of these findings, we do not propose to deal with the contention raised on behalf PSEB on the validity of Office Memorandum dated 1.4.1997 as examination of this issue would not alter our findings as aforesaid. All the preliminary issues raised on behalf of the Respondent No.1 (PSEB) are hereby rejected.

18. None of the respondents have raised any serious dispute on the merits of the claim of the petitioner in these petitions except that a certification be obtained from the petitioner that the payments made on account of Foreign Exchange Rate Variation relate to these projects. At the bar it was stated that the respondents will not have any objection if the claim is verified by the staff of

the Commission. Accordingly, we detailed our staff for the purposes of verification. On consideration of the report submitted by the staff we are satisfied about the correctness of the claim. Therefore, we direct that the respondents shall make payments of the amount claimed by the petitioner on account of Foreign Exchange Rate Variation for the year 1999-2000, in terms of prayer (a) within a period of two months from the date of raising of the bills by the petitioner. In order to allay the fears of the respondents, we made it clear that this is the final determination of Foreign Exchange Rate Variation amount for the year 1999-2000 in respect of these two projects.

  
**(A.R. Ramanathan)**  
Member

  
**(G.S. Rajamani)**  
Member

  
**(D.P. Sinha)**  
-HWember

  
**(S.L. Rao)**  
Chairman

New Delhi dated the 7<sup>th</sup> December, 2000.