

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Coram**

1. Shri D.P. Sinha, Member
2. Shri G.S. Rajamani, Member
3. Shri K.N.Sinha, Member

**Petition No.77/2000**  
**and**  
**IA 90/2001**  
**in**  
**Petition No.77/2000**

In the matter of

Approval of Revised Fixed Charges due to Additional Capitalisation and Foreign Exchange Rate Variation for the years 1997-98, 1998-99, 1999-2000 and 2000-01 of Gandhar GPS

And in the matter of

National Thermal Power Corporation Ltd. .... Petitioner

VS

1. Madhya Pradesh Electricity Board
  2. Maharashtra State Electricity Board
  3. Gujarat Electricity Board
  4. Electricity Deptt., Daman
  5. Electricity Deptt., Silvassa, Via VAPI
- .... Respondents

The following were present:

1. Shri K.K. Garg, GM (Comml), NTPC
2. Shri M.S. Chawla, DGM (Comml.), NTPC
3. Shri S.K. Sharma, Sr. Mgr (Comml.), NTPC
4. Shri M. Sravan Kumar, SM (F), NTPC
5. Shri T.R. Sohal, NTPC
6. Shri R.Singhal, NTPC
7. Shri V.K. Padha, NTPC
8. Shri A.K. Juneja, NTPC
9. Shri Rohit K. Singh, Advocate for MPSEB
10. Shri D.K. Srivastava, EE, MPSEB
11. Shri K. Khandelwal, SE, MPSEB

**ORDER**  
**(DATE OF HEARING 20-12-2001)**

This petition was filed by the petitioner, NTPC, a generating company owned by the Central Government, seeking the Commission's approval to the Revised Fixed Charges due to additional capitalization and Foreign Exchange Rate Variation (FERV) for the years 1997-98 and 1998-99 for Gandhar Gas Power Station(Gandhar GPS). Subsequently, the petitioner filed IA (No.22/2001) praying for amendment to the petition so as to claim the Revised Fixed Charges due to above noted two components of tariff for the year 1999-2000, in addition to the years 1997-98 and 1998-99 claimed in the original petition. The prayer was granted by the Commission vide its order dated 14-8-2001. The petitioner filed another IA No.100/2001 to further amend the petition so as to claim Revised Fixed Charges for the year 2000-01, as well and also to implead Chhatisgarh State Electricity Board. This IA was listed before us on 20-12-2001. Through an oral order we had allowed the IA. The amended petition was directed to be taken on record. Thus in the present petition, as amended, the petitioner seeks Revised Fixed Charges due to additional capitalisation and FERV in respect of Gandhar GPS for the years 1997-98 to 2000-01 as under in Table I:

**TABLE I**

Effective period	Fixed charges as per notification (Rs.Cr./year)	Impact capital capitalisation (Cr./yr.)	Additional Expenditure (Rs.)	Revised Fixed Charges (Rs.Cr./yr)
1997-98	599.025	0.443		599.468
1998-99 (up to 31-10-98)	599.025	1.653		600.678
1998-99 (1-11-98 to 31-3-99)	645.536	1.815		647.351
1999-2000	645.536	4.523		650.059
2000-01	645.536	14.066		659.602

2. The relevant details/calculations in support of the Revised Fixed Charges claimed have been furnished with the petition and subsequently through an affidavit filed on 12-10-2001 under direction from the Commission

3. The tariff for sale of power from Gandhar GPS was determined on two part basis by Ministry of Power as notified on 28-4-1997 in exercise of its powers under Section 43 A(2) of the Electricity (Supply) Act, 1948. This notification was valid from 17-3-1994 to 31-3-2000. This notification was amended through subsequent notifications issued by Ministry of Power on 30-11-1998 and 14-5-1999. Through the notification dated 14-5-1999, Ministry of Power determined the Revised Fixed Charges taking into account the increase in ROE to 16% w.e.f. 1-11-1998 and additional capitalisation up to the 1996-97.

4. Clause 2 of the notification dated 28-4-1997, as amended, *inter-alia* provided that the impact of additional capital expenditure capitalised in each financial year during the tariff period would be determined by the Central Government immediately on finalization of accounts. Clause 5 of the notification further provided that effect of FERV to be paid to/by the petitioner by/to the beneficiaries would be determined by the Central Government at the end of each financial year. Thus, under the notifications issued by Ministry of Power, determination of impact of additional capitalised and FERV was to be determined by the Central Government in exercise of its powers under Section 43 A(2) of the Electricity (Supply) Act 1948 at the end of a financial year when the audited accounts for that year were available.

5. Section 43 A(2) of the Electricity (Supply) Act 1948 was omitted by the Central Government, Ministry of Power in exercise of powers under Section 51 of the Electricity

Regulatory Commissions Act 1998 w.e.f. 15-5-1999 in terms of notification dated 22-3-1999 and from that date power to regulate tariff of the generating stations owned or controlled by the Central Government came to be vested in the Commission. By that date, the Central Government did not determine the impact of the above-noted two components of tariff for the years 1997-98 and onwards. Therefore, with the vesting of power of regulation of tariff in the Commission, the Central Government did not have the jurisdiction to determine the above-noted two components of tariff. The Commission is in *seisin* of the issue raised in the petition against the above backdrop.

6. After the vesting of the power to regulate tariff in the Commission in respect of generating stations owned or controlled by the Central Government, the Commission was to prescribe the terms and conditions of tariff by virtue of Section 28 of the Electricity Regulatory Commissions Act, 1998 before actual determination of tariff of individual generating stations. These terms and conditions were decided by the Commission under its order dated 21-12-2000 in petition No.4/2000 and other related petitions and were subsequently notified on 26-3-2001. These terms and conditions have become applicable w.e.f. 1-4-2001. The Commission's Order dated 21-12-2000 *ibid* provides that in all cases where the tariff was determined earlier under the Government Notifications shall continue to apply till 31-3-2001. Beyond that date the terms and conditions notified by the Commission shall be applicable and tariff shall be determined based on these terms and conditions.

7. The replies to the petition have been filed on behalf of MPSEB (Respondent No.1) and MSEB (Respondent No.2).

8. MPSEB in its written statement has raised a preliminary issue regarding the jurisdiction of Ministry of Power to issue notifications dated 30-11-1998 and 14-5-1999. This needs a detailed examination. According to MPSEB, Ministry of Power, by notification dated 11-9-2000 omitted sub-section (2) of Section 43 A of the Electricity (Supply) Act 1948 w.e.f. 24-7-1998 and, therefore, any notification issued by Ministry of Power after omission of Section 43 A(2) of the Electricity (Supply) Act 1948 on 24-7-1998, is a nullity, without jurisdiction and void ab initio. When viewed in the context of the notifications issued by Ministry of Power on 30-11-1998 and 14-5-1999, it had been the contention of MPSEB that the said notifications cannot be given effect to, since these have been issued when the Central Government stood divested of power to prescribe terms and conditions of tariff in view of omission of Section 43 A(2) w.e.f. 24-7-1998.

9. Earlier, a notification was issued by Ministry of Power in exercise of its powers under Section 51 of the Electricity Regulatory Commissions Act on 22-3-99 providing that Section 43 A(2) of the Electricity (Supply) Act 1948 would be omitted w.e.f. 15-5-99. The tariff notifications in respect of Gandhar GPS were issued on 30-11-1998 and 14-5-1999 and, therefore, it was within the competence of Ministry of Power to issue such notifications. However, by a subsequent notification issued on 11-9-2000 in partial modification of the notification issued on 22-3-1999, the Central Government notified that Section 43 A(2) of the Electricity (Supply) Act 1948 would be deemed to have been omitted w.e.f. 24-7-98. In other words, the notification dated 11-9-2000 was given a retrospective effect.

10. It is settled law that a statutory provision which seeks to reverse from an anterior date a benefit which has been granted or availed of can be assailed to the extent it

operates retrospectively. In State of Gujarat Vs Raman Lal Keshav Lal Soni (1983) 2 SCC 33, the Supreme Court held as under:

*"52..... The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history."*

11. The Supreme Court in a case reported as Chairman, Railway Board Vs. C.R. Rangadhamaiah [(1997) 6 SCC 623] after referring a number of earlier judgements<sup>1</sup> of the Supreme Court has observed that in many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Article 14 and 16 of the Constitution. (Emphasis added).

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<sup>1</sup> K.C.Arora, Vs. State of Haryana [(1984)3SCC 281), T.R. Kapur Vs. State of Haryana [ 1986 Supp SCC 584], P.D. Aggarawal Vs. State of U.P. [ (1987) 3 SCC 622], K. Narayanan Vs. State of Karnataka [1994 Supp (1) SCC 44], Union of India Vs. Tushar Ranjan Mohanty [(1994) 5 SCC 450] and K. Ravindranath Pai Vs. State of Karnataka [ 1995 Supp (2) SCC 246].

12. The notification issued by Ministry of Power in exercise of powers under Section 51 of the Electricity Regulatory Commissions Act 1998 is of the nature of delegated legislation and can be given retrospective effect. However, as held by the Supreme Court, the delegated legislation cannot be applied retrospectively if the effect is to divest the person of vested rights. We are of the view that the notifications dated 30-11-1998 and 14-5-1999 created a vested rights in the petitioner to claim tariff based on the terms and conditions contained therein. In case the subsequent notification dated 11-9-2000 is given effect to, it will deprive the petitioner of its vested right of tariff for the electricity already supplied to the respondents, besides causing uncertainty in the matter of fixation of tariff. Therefore, we are not inclined to take any cognizance of the notification dated 11-9-2000 and we shall proceed to consider the matter in accordance with the notifications issued by Ministry of Power on 30-11-1998 and 14-5-1999 read with the earlier notification dated 24-8-1997.

13. Another preliminary issue that has been raised by respondent No.1 is that as per Bulk Power Supply Agreement dated 12-1-1994, signed between the petitioner and the respondents, the respondents are required to make payment as per the notification dated 2-11-1992 issued by Ministry of Power which was valid up to 31-10-1997. According to this respondent, new tariff for the period from 1-11-1997 is required to be notified in order to enable the petitioner to claim the Revised Fixed Charges beyond that period. We are not convinced by the issue raised. As we have already noticed, the tariff and the terms and conditions were notified on 28-4-1997, which are valid up to 31-3-2000. Therefore, there is no force in the preliminary objection raised on behalf of the respondent No.1.

14. It was further argued that additional capitalisation and FERV for the period beyond 31-3-2000 could not be determined by the Commission unless it also determined the effect of other components of tariff, namely, ROE, depreciation, loan repayment, etc. It was submitted that repayment of loan and charging of depreciation, etc. during the period of validity of the tariff notifications issued by Ministry of Power would have the effect of reducing tariff, when re-determined after expiry of the period of the notification. According to the petitioner, the tariff notified by Ministry of Power was continued by the Commission up to 31-3-2001 and, therefore, the question of re-determination of tariff by the Commission for the period prior to 31-3-2001 should not normally arise.

15. This issue was also raised by the respondents in petition No.42/2000 and other related petitions in which the order was issued on 2-1-2002. In those petitions we took a view that all the components of tariff were required to be re-determined from the date of expiry of validity of the notification issued by Ministry of Power. It was further held that the question of re-determination of only two components of tariff, namely, additional capitalisation and FERV could not be considered in isolation of other components of tariff, otherwise it would lead to distortion in tariff. In those petitions, the petitioner was directed to file fresh petitions for re-determination of entire tariff from the date of expiry of the notifications issued by Ministry of Power.

16. We are inclined to reiterate the view taken in our order dated 2-1-2002 *ibid*. As we have already noted the notification in respect of Gandhar GPS was valid up to 31-3-2000. Therefore, the impact of additional capital expenditure capitalisation and FERV would be determined for the years 1997-98, 1998-99 and 1999-2000.



17. MSEB in its reply has stated that the terms and conditions of tariff ought to have been reviewed after period of 5 years, in keeping with the recommendation of the K.P. Rao Committee. It is further stated that the details of additional expenditure and justification for the same have not been furnished. A direction to the petitioner to furnish the necessary details has been sought. It has also been urged on behalf of MSEB that the revision of capital cost should be implemented with prospective effect at next tariff revision since retrospective adjustment would result in heavy burden on the beneficiaries. So far as FERV is concerned MSEB has stated that the petitioner be directed to give all the details stationwise for proper verification.

18. Any reference to the recommendations of the K.P. Rao Committee is not considered relevant. The Revised Fixed Charges are to be determined in accordance with the notification issued by Ministry of Power, in accordance with which the revision of fixed charges is always retrospective since these are to be determined after the financial year. All the necessary details have been furnished by the petitioner either along with petition or in the affidavit filed on 8-10-2001 under directions of the Commission. The notification provided that the Revised Fixed Charges would be determined at the end of the financial year when audited figures of expenditure became available. The Revised Fixed Charges sought to be re-determined are in accordance with the notification issued by Ministry of Power. The petitioner had stated on oath that the additional expenditure incurred was within the approved capital cost of the project. In view of this, the issues raised on behalf of MSEB do not merit any further consideration. So far as FERV is concerned, it is seen that the petitioner has not claimed the revision of fixed charges on account of FERV, though in the title of the petition FERV has been referred to. Accordingly even this issue raised by MSEB is not considered relevant.

19. Amount of additional capitalisation claimed by the petitioner in the financial years 1997-98, 1998-99 and 1999-2000 is as per Table II below:

**TABLE II**

Financial Years	(Rs.in lakhs)		
	1997-98	1998-99	1999-2000
New work	88.18	258.43	275.87
Balance Payments	537.71	108.89	2337.60
TOTAL	625.89	367.32	2613.47

20. Against the above claim of the petitioner, the petitioner has furnished justification for the new works involving following expenditures as given in Table III below:

**TABLE III**

Financial Years	(Rs.in lakhs)		
	1997-98	1998-99	1999-2000
New work	70.28	204.89	274.48

27. The matter has been considered and the following amounts against new works in the relevant years have been found to be justified and are allowed as per Table IV below:

**TABLE IV**

Financial Years	(Rs.in lakhs)		
	1997-98	1998-99	1999-2000
New work	61.23	138.01	236.78

27. The reasons for allowing/ disallowing the claims, the details in respect of which have been submitted by the petitioner are incorporated in the

statement at Appendix 'A' to this order. While examining the admissibility of the claims the following aspects have been taken into consideration.

- (a) Any work, which was within the scope of approved project cost but undertaken after the COD has been allowed.
  - (b) Wherever the expenditure has been incurred for the replacement of existing equipment/facility due to technology becoming obsolete or the equipment outliving its utility in the normal course of operation, it has also been allowed for capitalisation.
  - (c) The expenditure on the works undertaken or on purchasing of additional equipment/facility which is giving exclusive benefit to the petitioner and without any apparent benefit to the beneficiaries has not been allowed, unless it is found that expenditure was necessary for the benefit of the employees for giving necessary facilities at the remote location of the power project.
27. As regards the balance payments sought to be capitalised, the petitioner, vide its letter dated 6.2.2002, had informed that the capitalization of Bond interest in the year 1997-98 pertains to X Series Bonds issued in the year 1993-94 due for repayment in the year 2000-01 under the Triple Money Bond. Upto the year 1996-97, no provision was made for the interest accrued but not due in respect of the triple money bonds as the ownership of the bonds was not ascertainable at the close of the financial year due to bonds being in the nature of Promissory

Note transferable by endorsement and delivery. The same was also disclosed in the notes of accounts forming part of audited account of the petitioner for the year 1996-97 and the issue was referred to CBDT. In the year 1997-98, a provision was made for interest accrued but not due upto 1997-98 in respect of triple money bond in view of the clarification received from CBDT and it was also disclosed in the notes of account forming part of the audited account for the year 1997-98.

27. The petitioner, vide its earlier letter dated 4.12.2001, had submitted the allocation of X Series Bond amounting to Rs.187.50 crores to its project NCTPS,Dadri (Rs.10.95 crores), Kehalgaon STPS (Rs.28.88 crores), Talcher STPS (Rs.20 crores) and Gandhar GPS (Rs.127.67 crores). The X Series Bonds consist of 16.5% Regular Return Bonds of Rs.133.233 crores and triple money bond of Rs.54.267 crores. The separate allocation of the triple money bond has not been made available.
27. The total amount of interest capitalized in respect of triple money bond, claimed by the petitioner, works out to Rs.13.8864 crores as below in Table V:-

**TABLE V**

(Rs. In Crores)		
NCTPS,Dadri	=	1.5620
Kehalgaon STPS	=	5.1590
Gandhar GPS	=	7.1654
		13.8864

This is less than the interest accrued worked out of Rs.17.386 crores upto 1-11-1995 i.e. COD of the Gandhar GPS.

26. However, as per Note 10 (a) of published Annual Report of the petitioner company for the year 1997-98, Rs.13.53 crores has been capitalized in respect of interest on triple money bond. Therefore, there is a difference of 0.356 crores in respect of capitalization of interest on triple money bond as per Annual Accounts for the year 1997-98 and as claimed by the petitioner in its petitions of the above projects. The amount as capitalised as per the Annual report of 1997-98 is Rs.13.53 Cr., could only be allowed. As case of three projects namely NCTPS, Dadri, Kahlgaon STPS and Gandhar GPS. As such proportionately following amounts as given in Table VI could be allowed for the above three projects:-

**TABLE VI**

(Amount in Rs.Cr.)

	<b>As claimed</b>	<b>As allowed base on capitalised amount of Rs.13.53 Cr.</b>
NCTPS, Dadri	1.5620	1.5219
Kahalgaon STPS	5.1590	5.0266
Gandhar GPS	7.1654	6.9815
<b>TOTAL</b>	<b><u>13.8864</u></b>	<b><u>13.53</u></b>

27. In view of above, the following additional capitalisation in respective years are recommended as against claim of the petitioner are reproduced in Table VII below:

**TABLE VII**

(Rs.in lakhs)

New Works	61.23	138.01	236.78
Balance Payments	519.32	108.89	2337.60
Total	580.55	246.90	2574.38

28. The calculation of Revised Fixed Charges due to additional capitalisation for the years 1997-1998, 1998-1999 and 1999-2000 are as under in Table VIII:-

**TABLE VIII**

(Rs. In crores)

Amount Recommended				
<b>Annual Fixed Charges</b>	1997-98	Upto 31-10-98	1-11-98 to 31-3-99	1999-2000
Depreciation	0.000	0.470	0.470	0.669
Interest on Loan	0.237	0.575	0.575	1.728
Return on Equity	0.174	0.422	0.563	1.692
<b>Total</b>	<b>0.411</b>	<b>1.467</b>	<b>1.608</b>	<b>4.089</b>

29. The detailed calculations in support of the additional capitalisation permitted are given in Table-IX below:-

**TABLE IX**

<b>Petition No.77/2000 - Gandhar GPS</b>			
<b>Calculation of Annual Fixed Charges due to Additional Capitalisation</b>			
<b>for the Years 1997-98 to 1999-2000</b>			
	<b>(Rs. in Crores)</b>		
	<b>1997-98</b>	<b>1998-99</b>	<b>1999-2000</b>
		<b>with 12% ROE</b>	<b>with 16% ROE w.e.f. 1.11.98</b>
<b>Capital Cost</b>			
Balance Payments allowed during the year	5.1932	1.0889	23.3760
New Works allowed during the year	0.6123	1.3801	2.3678
Total ACE Addition during the year	5.8055	2.4690	25.7438
Cum. Capital Addition upto 31 <sup>st</sup> March	5.8055	8.2745	34.0183
Effective Capital Addition	2.9028	7.0400	21.1464
<b>Equity</b>	<b>1.4514</b>	<b>3.5200</b>	<b>10.5732</b>
<b>Loan</b>	<b>1.4514</b>	<b>3.5200</b>	<b>10.5732</b>
Repayment	0.0000	0.0000	0.0000
<b>Net Loan</b>	<b>1.4514</b>	<b>3.5200</b>	<b>10.5732</b>
<b>Rate Of Depreciation</b>	<b>8.09%</b>	<b>8.09%</b>	<b>8.09%</b>
<b>Debt-Equity Ratio</b>			
<b>Debt</b>	<b>50.00</b>	<b>50.00</b>	<b>50.00</b>

Equity	50.00	50.00		50.00
Total	100.00	100.00		100.00
Rate of Return on Equity	12%	12%	16.00%	16%
Rate of Interest on Loan	16.34%	16.34%		16.34%
Annual Fixed Charges		Upto	1.11.98 to 31.3.99	
Depreciation	0.000	0.470	0.470	0.669
Interest on Loan	0.237	0.575	0.575	1.728
Return on Equity	0.174	0.422	0.563	1.692
<b>Total</b>	<b>0.411</b>	<b>1.467</b>	<b>1.608</b>	<b>4.089</b>

30. Based on the above, the impact of additional capital expenditure and FERV during the years from 1997-1998 and as a consequence thereof, the revised fixed charges recoverable from the respondents shall be as under as per Table X:-

**TABLE X**


Year	Fixed Charges as per tariff specification dated 14-5-1998	Additional Capitalization	(Rs. In Crores) Revised Fixed Charges
1997-98	599.025	0.411	599.436
1998-99			
1-4-1998 to 31-10-1998	599.025	1.467	600.492
1-11-1998 to 31-3-1999	645.536	1.608	647.144
1999-2000	645.536	4.089	649.625

31. The revised fixed charges shall be recovered from the respondents in proportion to fix charges billed for the respective year.

32. In case the petitioner claims revised fixed charges for the year 2000-01 it is required to file a fresh petition for re-determination of tariff for the period from 1-4-2000 to 31-3-2001 based on the terms and conditions of tariff as notified by Ministry of Power on 28-4-1997, as amended from time to time. The petition shall contain all the details as

required under performae prescribed by the Commission in its order of 14-9-2001 in review petition No.29/2001.

33. With the above directions this petition stands disposed of.



(K.N. Sinha)  
Member



(G.S. Rajamani)  
Member



(D.P. Sinha)  
Member

New Delhi dated: 10<sup>th</sup> April, 2002.