

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri A.K. Basu, Chairperson**
2. **Shri Bhanu Bhushan, Member**
3. **Shri A.H. Jung, Member**

Petition No. 7/2006

In the matter of

Direction to NTPC for refund of amount recovered on account of impact of foreign exchange rate variation for the period 2001-2004 in case of Kawas Gas Power Station.

And in the matter of

Gujarat Urja Vikas Nigam Ltd.

.... **Petitioner**

Vs

1. National Thermal Power Corporation Ltd., New Delhi
2. Madhya Pradesh State Electricity Board, Jabalpur
3. Maharashtra State Distribution Co. Ltd., Mumbai
4. Chattisgarh State Electricity Board, Raipur
5. Electricity Department, Admn of Dadra & Nagar Haveli, Silvassa
6. Electricity Department, Admn of Daman and Diu, Daman
7. Western Regional Electricity Board, Mumbai **Respondents**

The following were present:

1. Shri P.J. Jani, GUVNL
2. Shri Kamlesh P. Jangid, GUVNL
3. Shri V.B.K. Jain, NTPC
4. Shri I.J. Kapoor, NTPC
5. Shri A.S. Pandey, NTPC
6. Shri S.K. Sharma, NTPC
7. Shri S.K. Khanna, NTPC
8. Shri U.V. Jivane, MSEDCL,
9. Shri Siddhartha Singh, MPSEB
10. Shri Ashish Kumar, Advocate, MPESCL

**ORDER
(DATE OF HEARING: 14.7.2006)**

The petitioner through this petition seeks refund of an amount of Rs.8.50 crore recovered by the first respondent on account of interest of loan, depreciation and return on equity during the period 1.4.2001 to 31.3.2004 as the impact of capitalisation on account of Foreign Exchange Rate Variation

(FERV) in respect of Kawas Gas Power Station (Kawas GPS) owned by the first respondent. The petitioner has also sought directions to the first respondent for similar refund in respect of other generating stations located within or outside Western Region, and supplying power to the petitioner.

2. It has been stated that the petitioner is drawing power from Korba TPS Vindhyachal Thermal Power Station Stage I, Vindhyachal Thermal Power Station Stage-II, and Gandhar Gas Power Station, all located in Western Region in addition to Kawas GPS. Also, the petitioner is allocated power from Talcher STPS, Farakka STPS, Kahalgaon STPS located in Eastern Region, out of the unallocated quota of the Central Government.

3. For proper appreciation of the dispute raised by the petitioner, we refer to the facts relating to Kawas GPS.

4. Kawas GPS was declared under commercial operation on 1.11.1993. Tariff for the generating station was initially notified by Ministry of Power by virtue of its powers under proviso to Section 43 A (2) of the Electricity (Supply) Act, 1948 vide notification dated 30.4.1994, subsequently revised vide notification dated 14.5.1999 based on additional capitalisation and FERV for the period up to 31.3.1997. The notification dated 30.4.1994 was valid up to 31.10.1998, but was continued on ad hoc basis beyond that date. The Commission by its order dated 19.4.2002 in Petition No.76/2000 approved revised fixed charges after accounting for additional capitalisation and FERV for the period up to 31.3.1998. Subsequently, the Commission approved tariff

for the period 1.11.1998 to 31.3.2001 by its order dated 18.5.2004 in Petition No. 99/2000 as in the meanwhile, Section 43 A (2) was omitted and the jurisdiction to determine tariff in respect of the generating stations owned by the first respondent came to be vested in the Commission. While approving the revised fixed charges for the period 1.4.1997 to 31.3.1998 and approving tariff for the period 1.11.1998 to 31.3.2001, the provisions of Ministry of Power notification dated 30.4.1994 were considered. The tariff was approved after accounting for additional capitalisation and FERV for the period from 1.4.1998 to 31.3.2001.

5. The Commission in exercise of powers conferred under Section 28 of the Electricity Regulatory Commissions Act, 1998, notified the terms and conditions for determination of tariff, in terms of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 (the regulations). For proper appreciation of the issue arising for consideration, the relevant provisions of the regulations are reproduced below:

“1.13 Extra Rupee Liability

- (a) 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 Utility or its suppliers or contractors. Every utility shall follow the method as per the Accounting Standard – 11 (Eleven) as issued by the Institute of Chartered Accountants of India to calculate the impact of exchange rate variation on loan repayment.
- (b) Any foreign exchange rate variation to the extent of the dividend paid out on the permissible equity contributed in foreign currency, subject to the ceiling of permissible return shall be admissible. This as and when paid, may be spread over the twelve-month period in arrears.”

“2.7 Payment of Capacity (Fixed) Charges

The capacity charges shall be computed on the following basis and its recovery shall be related to Availability.

(a) **Interest on loan Capital**

Interest on loan capital shall be computed on the outstanding loans, duly taking into account the schedule of repayment, as per the financial package approved by the Authority or an appropriate independent agency, as the case may be.

(b) **Depreciation**

The value base for the purpose of depreciation shall be the historical cost of the asset.

.....

(c)

(d) **Return on Equity**

Return on equity shall be computed on the paid up and subscribed capital and shall be 16 percent of such capital.

7. The regulations were applicable for the period 1.4.2001 to 31.3.2004. Tariff in respect of Kawas GPS for this period was determined by the Commission by its order dated 7.4.2005 in Petition No.31/2001 based on these regulations. While approving tariff, the Commission did not allow interest on loan.

8. The petitioner has submitted that the Commission had not allowed any interest on loan during the period 2001-04, considering that the entire loan was already paid up. Therefore, according to the petitioner, in the absence of outstanding balance loan there should not be any liability to bear the impact of FERV from 1.4.2001 onwards. After approval of tariff by the Commission by order dated 7.4.2005, the petitioner took up the matter with the first respondent for refund of amount of Rs.8.50 crore but to no avail.

9. The first respondent in its reply has stated that extra rupee liability towards interest payment and loan repayment, “actually incurred” is to be capitalised in accordance with the Accounting Standard – 11, the methodology adopted by it for maintenance of annual accounts, and the beneficiaries are required to pay tariff on the FERV capitalised on the actual foreign loan outstanding. The first respondent has submitted that prior to vesting of jurisdiction in the Commission, the methodology followed by Ministry of Power was that FERV on the actual outstanding loan was capitalised in the books of accounts and was treated as capital expenditure. As a consequence of this, tariff was revised to authorise depreciation, return on equity and interest on loan. It has been further submitted on behalf of the first respondent that the Commission also while notifying the impact of additional capital expenditure and FERV for the period 1.4.1997 to 31.3.2001 followed the methodology earlier adopted by Ministry of Power and permitted capitalisation of the actual FERV as per books of accounts and worked out the impact of this capitalisation on depreciation, return on equity and interest on loan. The first respondent has submitted that in case of Kawas GPS though the notional loan was repaid during 2000-01, the actual loan was still outstanding, and therefore, it has been contended that it is entitled to claim impact of FERV against foreign loan actually outstanding, on tariff for the period from 1.4.2001 to 31.3.2004 going by the past practice. The first respondent has placed emphasis on the words “actually incurred” in Regulation 1.13(a) reproduced above. The first respondent has also pointed out that by following the same methodology, because of favourable foreign exchange rate position benefit of Rs.41.95 crore in 1999-2000 and Rs.5.09 crore in 2000-01 was given by way of reduction in

capital cost based on actual loan outstanding, though on normative basis, the loan outstanding was much lower. Accordingly, the first respondent has opposed the relief claimed by the petitioner.

10. Among the other respondents, only Madhya Pradesh State Electricity Board, (Respondent No.2) has filed its reply and has supported the case of the petitioner.

11. We have heard the representatives of the parties at the hearing.

12. Ministry of Power while notifying tariff in respect of Kawas GPS vide notification dated 30.4.1994 had considered debt and equity notionally in the ratio of 50:50, without going into the actual debt and equity employed by the first respondent. Therefore, while approving tariff for the period 1.11.1998 to 31.3.2001 by order dated 18.5.2004 in Petition No.99/2002, the Commission considered the debt and equity notionally in the ratio of 50:50 as per Ministry of Power notification dated 30.4.1994 since the Commission had not finalised the terms and conditions for determination of tariff applicable for the period prior to 1.4.2001. The position regarding the capital cost, debt and equity (actual and notional) for the period from 1.11.1993 to 31.3.2001, is given hereunder:

Year	Capital cost	ACE	FERV	Total capital cost	Actual Loan at the beginning	Add. Drawal of loan	Total loan Actual	Equity actual	Notional Loan	Notional Equity
1993-94 (1.11.1993)	127589	-	-	127589	91011	11829	102840	24749	63795	63794
1994-95	127589	1083	11531	140203	114371	993	115364	24839	70101	70102
1995-96	140203	4233	4794	149229	120158	2464	122622	26607	74615	74614
1996-97	149229	2348	(-) 4816	146762	117806	8056	125862	20900	73381	73381
1997-98	146762	1264	114	148140	125976	0	125976	22164	74070	74070
1998-99	148140	1780	5935	155855	131911	0	131911	23944	77927	77928
1999-2000	155855	74	(-) 4195	151734	127716	0	127716	24018	75867	75867
2000-01	151734	94	(-) 509	151319	127207	0	127207	24112	75659	75660

13. From the above, it is to be noted that the first respondent has been recovering return on notional equity which far exceeds the equity actually employed.

14. In the proceedings before the Commission, culminating in determination of tariff for the period ending 31.3.2004, the State beneficiaries had been representing that return on equity was to be computed on "paid up and subscribed capital" as provided in the terms and conditions of tariff notified by the Commission and applicable for the period 1.4.2001 to 31.3.2004. The Commission, however, considered the notional debt and equity for determination of tariff consistent with Ministry of Power notification dated 30.4.1994, since otherwise it would have unsettled the position settled since 1.11.1993. In case the Commission had considered the actual equity and consequently the actual loan, against the normative debt and equity considered for the period ending 31.3.2001, it would have complicated the matter and might have necessitated redetermination of tariff since 1.11.1993. Therefore, the Commission took a view that 'notional' debt and equity

considered for the period ending 31.3.2001 would be taken as 'actual' debt and equity for the purpose of tariff for the period 1.4.2001 to 31.3.2004. It is also to be noticed that in case the Commission had considered the actual equity for tariff during the period 1.4.2001 to 31.3.2004, the petitioner's entitlement to return on equity would have been reduced to a large extent, because actual equity was far less than the normative, as may be noticed from the table given under para 12 above. The words "actually incurred" in Regulation 1.13 (a) *ibid* are to be considered in relation to the loan entitling the first respondent to claim interest. As the notional loan was considered as the actual loan for determination of tariff, FERV is to be considered corresponding to the notional loan. As a corollary, the loan that does not entitle the first respondent to claim interest in tariff, cannot give the benefit of FERV. When so viewed, the first respondent is not entitled to claim capitalisation of impact of FERV after the notional loan, which is considered as the "actual" loan for the purpose of tariff has been fully repaid.

15. The first respondent has further pointed out that in the past, the Commission allowed FERV based on actual foreign currency loan outstanding. This assertion of the first respondent has not been contested by the petitioner. It is to be noted that the Commission had approved capitalisation of FERV for the period 1.4.1997 to 31.3.2001 by following Ministry of Power notifications dated 30.4.1994 and dated 14.5.1999. Ministry of Power in its notification dated 14.5.1999 had allowed FERV on actual foreign currency loan outstanding. As in the absence of its own regulations on terms and conditions for determination of tariff, the Commission was following the notifications

issued by Ministry of Power, the Commission had adopted the methodology earlier considered by Ministry of Power. It is also to be noticed that in the proceedings leading to capitalisation of FERV for the period 1.4.1997 to 31.3.2001, the issue raised by the petitioner in the present petition was neither raised nor specifically considered. Therefore, the approval of the Commission of capitalisation of FERV based on actual loan was passed *sub silentio*. Therefore, the earlier decision cannot be considered to be a binding precedent. The issue presently raised by the petitioner was considered in order dated 9.5.2006 in Petition No.160/2004 (NTPC Vs UPPCL and others) relating to approval of tariff for the period 1.4.2004 to 31.3.2009 in respect of Anta Gas Power Station. The Commission while considering capitalisation of FERV, decided as under:

“31. We have very carefully considered the petitioner’s claim. For determination of tariff of the generating station normative debt-equity ratio of 50:50 is being considered since 1992, irrespective of debt and equity actually employed. It appears that in this case actual loan was more than the normative loan, and actual equity less than the normative equity. The actual as well as normative loan has been repaid through tariff in 2003-04, but the amount of actual loan, which includes foreign currency loan is more than the normative loan as per the books of accounts of the petitioner. The petitioner has accordingly sought capitalization of an amount of Rs.1392 lakh on account of FERV based on actual loan. We do not find enough justification for the petitioner’s claim. Capitalisation of FERV should be admissible on the outstanding normative loan, which is the basis for computation of tariff. Once the normative loan is repaid partly or wholly by its claim through tariff, the respondents’ liability to repay interest on loan (including foreign currency loan) gets reduced or extinguished. The petitioner is being allowed return on notional equity of 50% for more than one decade, which far exceeds return on actual equity. This accelerated amount of return on equity will be admissible to the petitioner through out the life of the generating station. This more than compensates the petitioner for the loss, if any, on account of FERV. If the matter is viewed from that angle, heartburn should be less.”

16. The issue was also considered in Petition No.151/2004 (NTPC Vs UPPCL and others) relating to approval of tariff for the period 1.4.2004 to 31.3.2009 in respect of Rihand STPS Stage-I. The Commission in its order dated 19.6.2006, after taking note of its earlier decision in Petition No.160/2004 *ibid*, further noted that:

“20. It has been noticed in the present case that the capital cost of the generating station as claimed by the petitioner as on 31.3.2004, is Rs.237417 lakh, against which the petitioner has indicated actual loan totalling to Rs.160529 lakh. Thus, the actual equity works out to Rs.76888 lakh. On the contrary, the petitioner has claimed return on notional equity of Rs.118708 lakh. Therefore, actual equity is far less than the notional equity on which return is allowed. Accordingly, the decision in Petition No.160/2004 squarely applies to the facts of the present case. In the present case, normative loan was fully liquidated on 31.10.1997. Hence, the question of capitalisation on account of FERV should not arise.”

17. The first respondent in Petition No.159/2004 (NTPC Vs MPSEB & others) had claimed capitalisation of FERV of an amount of Rs.566 lakh for the period 2001-02 to 2003-04 based on actual foreign currency loan outstanding. The Commission, however, allowed capitalisation of a sum of Rs.606 lakh based on notional loan which exceed the actual loan. The relevant extract from the Commission’s order dated 19.7.2006 is placed below:

”The petitioner’s claim for capitalisation on account of FERV has been considered. In the present case, the notional outstanding loan exceeds the actual loan. The interest on loan is allowed on notional loan. Therefore, justice demands that the computation of FERV should also be based on notional loan. Based on notional foreign currency loan outstanding, FERV works out to Rs.606 lakh which has been admitted for tariff calculations.....”

18. In the light of the considered view taken by the Commission, as noted above, capitalisation of FERV based on actual foreign loan for the period

1.4.2001 to 31.3.2004 cannot be allowed FERV is to be considered with reference to notional loan outstanding.

19. In case of Kawas GPS, the notional loan was repaid during 2000-2001. Therefore, the liability of the beneficiaries to pay FERV from 1.4.2001 onwards came to an end. Accordingly, the first respondent is not entitled to claim return on equity, interest on loan and depreciation on capitalisation of FERV against actual loan arising after 31.3.2001.

20. We accordingly direct that the first respondent shall refund or adjust the amount recovered from the beneficiaries as impact of capitalisation on account of FERV in respect of Kawas GPS and other generating stations.

21. The petition stands disposed of with no order as to costs.

Sd/-
(A.H. JUNG)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRPERSON

New Delhi dated the 18th August 2006