

**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.41/2000**  
**and**  
**IA 98/2001**  
**in**  
**Petition No.41/2000**

**In the matter of**

Approval of Revised Fixed Charges due to Additional Capital Expenditure Capitalisation and Foreign Exchange Rate Variation for Farakka STPS (1600 MW).

**And in the matter of**

National Thermal Power Corporation Ltd.

.... Petitioner

VS

1. West Bengal State Electricity Board, Kolkata
2. Bihar State Electricity Board, Patna
3. Grid Corporation of Orissa Ltd., Bhubaneswar
4. Damodar Valley Corporation, Kolkata
5. Power Deptt., Govt. of Sikkim, Sikkim
6. Assam State Electricity Board, Guwahati
7. AP TRANSCO, Hyderabad
8. Madhya Pradesh State Electricity Board, Jabalpur
9. Tamil Nadu Electricity Board, Chennai
10. Kerala State Electricity Board, Trivandrum
11. Karnataka Power Transmission Corp. Limited, Bangalore
12. Uttar Pradesh Power Corp. Limited, Lucknow
13. Gujarat Electricity Board, Baroda
14. Union Territory of Pondicherry, Pondicherry

.... 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 S.K. Agnihotri, Advocate for MPSEB
10. Shri Rohit K. Singh, Advocate for MPSEB
11. Shri D.K. Srivastava, EE, MPSEB
12. Shri K. Khandelwal, SE, MPSEB
13. Shri M.H. Parviz, Controller, KPTCL

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

This petition was filed by the petitioner, NTPC, a generating company owned or controlled by the Central Government, seeking the Commission's approval to the Revised Fixed Charges due to additional capital expenditure and Foreign Exchange Rate Variation (FERV) for the years 1997-98 and 1998-99 for Farakka Super Thermal Power Station. Subsequently, the petitioner filed IA (No.29/2001) 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 as also impleadment of additional respondents (Respondents No.6 to 13). The prayer was granted by the Commission vide its order dated 23-8-2001. The petitioner filed another IA No.86/2001 to further amend the petition so as to claim Revised Fixed Charges for the year 2000-01, as well and also implead Secretary, Electricity Deptt., Union Territory of Pondicherry. 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 capital expenditure capitalisation and FERV in respect of Farakka STPS for the years 1997-98 to 2000-01 as under:

<b>Effective period</b>	<b>Fixed charges as per tariff notification (Rs.Cr./year)</b>	<b>Impact Additional capital Expenditure capitalisation (Rs. Cr./yr.)</b>	<b>Impact of FERV (Rs.Cr./yr)</b>	<b>Revised Fixed Charges (Rs.Cr./yr)</b>
1997-98	611.39	1.427	0.832	613.649
1998-99 (upto 31-10-98)	611.39	5.169	7.143	623.703
1998-99 (1-11-98 to 31-3-99)	668.33	5.759	8.257	682.346
1999-2000	668.33	7.741	25.144	701.215
2000-01	668.33	11.663	33.465	713.458

The relevant details/calculations in support of the Revised Fixed Charges claimed have been furnished.

2. The tariff for sale of power from Farakka STPS was determined on two part basis by Ministry of Power as notified on 7.5.1999 in exercise of powers under Section 43 A(2) of the Electricity (Supply) Act, 1948. This notification was valid from 1.7.1996 to 31.3.2000. The tariff notified by Ministry of Power is stated to be based on the audited accounts for the year 1996-1997.

3. Clause 2.0 of the notification dated 7.5.1999 *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 notification issued by Ministry of Power, determination of impact of additional capital expenditure 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.

4. 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.

5. With the vesting of the power to regulate tariff in respect of generating stations owned or controlled by the Central Government in the Commission, 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 became 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.

6. MPSEB in its written submissions filed on 10-7-01 has raised an issue regarding the jurisdiction of Ministry of Power to issue notification dated 7-5-99 and needs a detailed examination. According to MPSEB, Ministry of Power, by notification dated 11-9-00 has sought to omit sub-section (2) of Section 43 A of the Electricity (Supply) Act 1948 w.e.f. 24-7-98 and, therefore, any tariff notification issued by Ministry of Power after omission of Section 43 A(2) of the Electricity (Supply) Act 1948 on 24-7-98, is a nullity and void ab initio. When viewed in the context of the notification issued by Ministry of Power on 7-5-99, it had been the contention of MPSEB that the said notification cannot be given effect to since it has been issued when the Central Government was divested of power to prescribe terms and conditions of tariff.

7. 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 notification in respect of Farakka Super Thermal Power Station was issued on 7-5-99 and was, therefore, it was within the competence of Ministry of Power to issue such notification. However, by a subsequent notification issued on 11-9-00 and in modification of the notification issued on 22-3-99, 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 11-9-00 was given a retrospective effect. 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 [Chairman Railway Board Vs. C.R. Rangadhamaiah (1997) 6 SCC 623]. 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.**" (Emphasis added )*

8. In B.S. Yadav Vs State of Haryana a Constitution Bench of the Supreme Court, while holding that the power exercised by the Governor under the proviso to Article 309 partakes the characteristic of the legislative, not executive, power and it is open to him to give retrospective operation to the rules made under that provision, has held that when the retrospective effect extends over a long period, the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules.

9. The notification dated 7-5-99 created a vested right in the petitioner to claim tariff based on the terms and conditions contained therein. In case a subsequent notification dated 11-9-00 is given effect too, 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 11-9-00 and we shall proceed to consider the matter in accordance with the notification issued by Ministry of Power on 7-5-99.

10. Some of the respondents like TNEB, KSEB, DVC and MPSEB have stated that approval to Revised Fixed Charges claimed by the petitioner would result in retrospective increase of tariff, which is not permissible, since, according to them, any payments becoming due for the earlier period due to upward revision of tariff cannot be recovered from the consumers. MPSEB, in support of this contention, has referred to a number of judgements of the Supreme Court in the written submissions. We do not find any merit in the contention raised. The notification issued by Ministry of Power on

7.5.1999 itself provided that the impact of additional capital expenditure in a financial year and FERV would be determined at the end of each financial year. Thus, the relevant provisions of the notification itself provided for retrospective revision of fixed charges. We are of the opinion that the impact of these two items of tariff cannot be foreseen and has to be calculated after the accounts for a financial year have been closed. In our view, capitalisation of additional capital expenditure and determination of FERV based on notification dated 7.5.1999 does not amount to retrospective determination of tariff. UPPCL has submitted that the petitioner be directed to submit its claim for Revised Fixed Charges in conformity with the provision of K.P.Rao Committee Report. We are unable to agree to the submission made for the reason that the Revised Fixed Charges are to be worked out in accordance with the provisions of the notification dated 7-5-99 and not based on the K.P.Rao Committee Report. WBSEB has stated that capital cost approved by CEA should be considered for the purpose of tariff and additional expenditure, if any, incurred by the petitioner over and above the approved capital cost which is attributable to the petitioner or its suppliers, contractors, etc. should not be considered for the purpose of revision of fixed charges. A similar contention has been raised on behalf of GRIDCO. These utilities have not furnished any details, whatsoever in regard to additional expenditure, if any, incurred by the petitioner without approval of CEA or where the expenditure is attributable to the petitioner or any of its supplier or contractor. In view of the generality of the averment made by WBSEB and GRIDCO and without specifics, the submissions made deserve summary rejection and we are unable to take any cognizance of the submission. DVC in its reply has raised certain issues regarding propriety of the norms for fixation of



tariff as notified by Ministry of Power on 7-5-99. We are of the view that these issues are beyond the scope of the present petition since we have to determine the Revised Fixed Charges based on the notification issued by the Ministry of Power. DVC has further contended that FERV should not be taken in tariff calculation and should be settled separately on the basis of pro rata energy drawal by the beneficiaries. This contention makes a departure from the terms and conditions notified by Ministry of Power and is, therefore, beyond the scope of present petition.

11. Another preliminary issue that has been raised is that additional capital expenditure capitalisation and FERV 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 notification 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.

12. 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 capital expenditure 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.

13. 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 Farakka STPS was to remain valid up to 31.3.2000. Therefore, the impact of additional capital expenditure and FERV would be determined for the years 1997-98, 1998-99 and 1999-00.

14. The amount of additional capitalisation claimed by the petitioner in the financial years 1997-1998, 1998-1999 and 1999-2000 are as follows :-

	(Rs. In lakhs)		
Financial Years	1997-1998	1998-1999	1999-2000
New work	119.00	115.00	1151.00
Balance Payments	2544.00	453.00	723.00
<b>Total</b>	<b>2663.00</b>	<b>568.00</b>	<b>1874.00</b>

15. The claim of the petitioner has been examined. The petitioner has submitted detailed justification for the new works involving Rs.89.47 lakhs for the year 1997-1998, 102.30 lakhs for the year 1998-1999 and Rs.1110.77 lakhs during 1999-2000. The

following amount on account of new works is considered to be justified and is allowed :-

(Rs. In lakhs)			
Financial Years	1997-1998	1998-1999	1999-2000
New work	11.71	4.40	1094.24

16. While examining the petitioner's claim, the following criteria has been followed :
- (a) Any work, which was in 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 has outlived its utility in the normal course of operation, the same has also been allowed for capitalisation.
  - (c) The expenditure on the works undertaken/in purchasing of additional equipment/facility which is giving entire 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 requisite facilities at the remote location of the power project.

17. The petitioner's claim for capitalisation on account of balance payments is as under :-

(Rs. In lakhs)			
Financial Years	1997-1998	1998-1999	1999-2000
Balance Payments	2544.00	453.00	723.00

18. It has been clarified on behalf of the petitioner that the claim relates to adjustment/payment/ final settlements made subsequent to 31.3.1997. The claim of the petitioner has been considered. It is seen that an amount of Rs.24.53 lakhs claimed as balance payments pertaining to supply of control panel for which order was placed on 31.3.1998 should have been claimed as new works with proper justification. We, therefore, disallow this amount. In view of this, year-wise additional capitalisation on account of balance payments is allowed as under :-

(Rs. In lakhs)

1997-1998	2540.00
1998-1999	428.47
1999-2000	723.00

19. The total capitalisation allowed on account of additional capital expenditure is as under :-

(Rs. In lakhs)

1997-1998	2551.71
1998-1999	432.87
1999-2000	1817.24

20. The annual fixed charges due to additional capitalisation and on account of foreign exchange rate variation are as given in Table I & Table II respectively.

**TABLE I**

**Annual Fixed Charges due to Additional Capitalisation  
for the Years 1997-98 to 1999-2000**

(Rs. in Crores)

	1997-98	1998-99		1999-2000
		with 12% ROE	with 16% ROE w.e.f. 1.11.98	
<b>Capital Cost</b>				
Balance Payments allowed during the year	25.4000		4.2847	7.2300
New Works allowed during the year	0.1171		0.0440	10.9424
<b>Total ACE Addition during the year</b>	25.5171		4.3287	18.1724
Cum. Capital Addition upto 31 <sup>st</sup> March	25.5171		29.8458	48.0182
Effective Capital Addition	12.7586		27.6815	38.9320
Equity	6.3793		13.8408	19.4660
Loan	6.3793		13.8408	19.4660
Repayment	0.0000		0.0000	0.0000
Net Loan	<b>6.3793</b>		<b>13.8408</b>	<b>19.4660</b>
<b>Rate Of Depreciation</b>	7.55%		7.55%	7.55%
<b>Debt-Equity Ratio</b>				
Debt	50.00		50.00	50.00
Equity	50.00		50.00	50.00
Total	100.00		100.00	100.00
<b>Rate of Return on Equity</b>	12%	12%	16.00%	16%
<b>Rate of Interest on Loan</b>	9.44%		9.44%	9.44%
<b>Annual Fixed Charges</b>			Upto 1.11.98 to 31.10.98	
Depreciation	0.000	1.927	1.927	2.253
Interest on Loan	0.602	1.307	1.307	1.838
Return on Equity	0.766	1.661	2.215	3.115
<b>Total</b>	<b>1.368</b>	<b>4.895</b>	<b>5.449</b>	<b>7.206</b>

**TABLE II**

**Calculation of Annual Fixed Charges due to FERV  
for the Years 1997-98 to 1999-2000**

	(Rs. In Crores)			
	1997-98	1998-99		1999-2000
		with 12% ROE	with 16% ROE w.e.f. 1.11.98	
<b>Total FERV allowed during the year</b>	15.5130	80.3910		62.5210
Cum. Capital Addition upto 31 <sup>st</sup> March	15.5130	95.9040		158.4250
Effective Capital Addition	7.7565	55.7085		127.1645
Equity	3.8783	27.8543		63.5823
Loan	3.8783	27.8543		63.5823
Repayment	0.0000	0.0000		0.0000
<b>Net Loan</b>	<b>3.8783</b>	<b>27.8543</b>		<b>63.5823</b>
<b>Rate Of Depreciation</b>	7.55%	7.55%		7.55%
<b>Debt-Equity Ratio</b>				
Debt	50.00	50.00		50.00
Equity	50.00	50.00		50.00
Total	100.00	100.00		100.00
<b>Rate of Return on Equity</b>	12%	12%	16.00%	16%
<b>Rate of Interest on Loan</b>	9.44%	9.44%		9.44%
<b>Annual Fixed Charges</b>		Upto 31.10.98	1.11.98 to 31.3.99	
Depreciation	0.000	1.171	1.171	7.241
Interest on Loan	0.366	2.629	2.629	6.002
Return on Equity	0.465	3.343	4.457	10.173
<b>Total</b>	<b>0.831</b>	<b>7.143</b>	<b>8.257</b>	<b>23.416</b>

21. The impact of additional capital expenditure and FERV during the years from 1997-1998 to 1999-2000 and as a consequence thereof, the revised fixed charges

recoverable from the respondents shall be as under:-

<b>Effective period</b>	<b>Fixed charges as per tariff notification (Rs.Cr./year)</b>	<b>Impact of Additional capital Expenditure capitalisation (Rs. Cr./yr.)</b>	<b>Impact of FERV (Rs.Cr./yr)</b>	<b>Revised Fixed Charges (Rs.Cr./yr)</b>
1997-98	611.39	1.368	0.831	613.589
1998-99 (upto 31-10-98)	611.39	4.895	7.143	623.428
1998-99 (1-11-98 to 31-3-99)	668.33	5.449	8.257	682.036
1999-2000	668.33	7.206	23.416	698.952

22. The revised fixed charges shall be recovered from the respondents in proportion to fix charges billed for the respective year. However, the beneficiaries in regions outside the Eastern Region shall not be liable to pay the Revised Fixed Charges for the period from January, 1998 to December, 1998 (both months inclusive).

23. In case the petitioner claims revised fixed charges for the year 2000-2001 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 7.5.1999. The petition, if filed 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.

24. This order disposes of petition No.41/2000.

**Sd/-  
(K.N. Sinha)  
Member**

**Sd/-  
(G.S. Rajamani)  
Member**

**Sd/-  
(D.P. Sinha)  
Member**

New Delhi dated the 19<sup>th</sup> June 2002