

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 144/MP/2021

Coram:

**Shri Jishnu Barua, Chairperson
Shri I.S Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 20th January, 2024

In the matter of:

Petition under Section 129 of the Electricity Act, 2003 seeking compliance of the Hon'ble Supreme Court of India's judgment dated 9.5.2019 passed in Civil Appeal No. 13452 of 2015.

And

In the matter of

M.P. Power Management Company Limited,
Block No. 11, Shakti Bhawan, Rampur
Jabalpur (MP)- 482008

..... **Petitioner**

Vs

1. NTPC Limited,
NTPC Bhawan, Scope Complex,
Core-7, Institutional Area, Lodhi Road
New Delhi- 110003
2. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan, Race Course,
Vadodra- 390007
3. Maharashtra State Electricity Distribution Company Limited,
Prakashgad, Plot No. G-9, Anant Kanekar Marg,
Bandra (E), Mumbai- 400051
4. Chhattisgarh State Power Distribution Company Limited,
P.O. Sunder Nagar, Danganiya, Raipur- 492013
5. Electricity Department,
Govt. of Goa, Vidyut Bhawan, Panaji, Goa- 403001
6. Secretary (Power),
Secretariat, Fort Area, Moti Daman, Daman-396220



7. Secretary (Power),
DNH Power Distribution Corporation Limited,
Silvassa- 396230

.....**Respondents**

Parties Present:

Shri Pradeep Mishra, Advocate, MPPMCL
Shri Venkatesh, Advocate, NTPC
Shri Ashutosh Srivastava, Advocate, NTPC
Shri Nihal Bharadwaj, Advocate, NTPC
Shri. Kartikay Trzveli, Advocate, NTPC
Ms. Nikita Choukse, Advocate, MSEDCL

ORDER

The Petitioner, Madhya Pradesh Power Management Company Limited (in short 'MPPMCL'), has filed this Petition seeking the following reliefs:

- (a) *Revise the tariff orders issued during the period from 2004 to 2020 in respect of the generating stations of Respondent No.1, namely Korba Super Thermal Power Station (2100 MW), Vindhyachal Super Thermal Power Station (1260 MW), Vindhyachal Super Thermal Power Station-II (1000 MW) and Kawas Gas based Power Station (656.20 MW) by re-allocating the FERV amount against debt liability in place of allocation of same between debt and equity; and*
- (b) *Allow the interest from 2004 till the issuance of revised tariff order in accordance with the prevailing Tariff Regulations.*

Submissions by the Petitioner

2. In support of the prayer in the Petition, the Petitioner has mainly submitted as under:

- a) On 9.12.2008, a notification was issued by the Government of India under the Electricity Supply Act, 1948, determining the tariff of Kahalgaon STPS of the Respondent NTPC for the period 1.8.1996 to 31.3.2000. Kahalgaon STPS achieved COD on 1.8.1996.
- b) On 21.12.2000, the Commission passed an order laying down the terms and conditions for determining the tariff of the said generating station. On 26.3.2001,



the Central Electricity Regulatory Commission (Terms and Conditions for determination of tariff) Regulations, 2001 (in short, 'the 2001 Tariff Regulations') for the period 2001-04 was notified. Regulations 1.7 and 1.13 of the Tariff Regulations, 2001 dealt with FERV as under:

"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 supplier 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 12 months period in arrears."

c) On 30.6.2003, the Commission passed an order on a petition filed by Power Grid Corporation of India (PGCIL), inter-alia, applying the capitalization of FERV. In the said order, the Commission applied the methodology decided in the order dated 21.12.2000 and the 2001 Tariff Regulations.

d) On 26.3.2004, the Commission notified the Central Electricity Regulatory Commission (Terms and Conditions for determination of tariff) Regulations, 2004 (in short 'the 2004 Tariff Regulations') for determination of tariff for the period 2004-09. As regards FERV, the Commission provided the following in the 2004 Tariff Regulations:

"9. Extra Rupee Liability: (1) Extra Rupee Liability towards interest payment and loan repayment corresponding to the normative Foreign Debt or actual Foreign Debt, as the case may be, in the relevant year shall be permissible provided it directly arises out of Foreign Exchange Rate Variation and is not attributable to the generating company or the transmission licensee or its supplier or contractors. Every generating company and the transmission licensee shall recover Foreign Exchange Rate Variation on a year to year basis as income or expense in the period in which it arises and Foreign Exchange Rate Variation shall be adjusted on a year to year basis.

10. Recovery of Income Tax and Foreign Exchange Rate Variation: Recovery of Income Tax and Foreign Exchange Rate Variation shall be done directly by the generating company or the transmission licensee, as the case may be, from the beneficiaries without making any application before the Commission. Provided that in case of any objections by the beneficiaries to the amounts claimed on account of Income Tax or Foreign Exchange Rate Variation, the generating company or the transmission licensee, as the case may be, may make an appropriate application before the Commission for its decision."



- e) Thus, the Commission, in the above Tariff Regulations, deleted the provision of FERV as per the Accounting Standards-11 of the ICAI and the same was accounted for against the debt liability only if equity was not in foreign currency.
- f) On 4.8.2005, the Commission determined the tariff for the Kahalgaon STPS for the period 2001-04. However, the effect of FERV during this tariff block was not considered.
- g) On 4.10.2006, the Appellate Tribunal for Electricity (APTEL), in an Appeal No. 135-140 of 2005 filed by TNEB against PGCIL, held that if equity is not in foreign currency, the amount of FERV would be capitalized only towards loan or debt and not apportioned between debt and equity.
- h) On 23.11.2006, the Commission in Petition No. 120/2005 filed by Respondent No. 1 NTPC, determined the tariff for the generating station for the period 2004-09. While determining the tariff, the Commission capitalized FERV of Rs.1207 lakh on a normative loan basis instead of an actual FERV of Rs. 539 lakh on an actual loan basis. During capitalization FERV of Rs. 1207 lakh on a normative loan basis was apportioned in the ratio of 50:50 in debt and equity.
- i) On 22.12.2006, the APTEL vide judgment in Appeal No. 161 of 2006 (MPSEB Vs. PGCIL) to the effect that FERV adjustment for PGCIL should be allocated only to debt.
- j) On 26.2.2007, PGCIL filed a Civil Appeal No. 684/2007 before the Hon'ble Supreme Court of India against the APTEL judgment dated 4.10.2006 in Appeal Nos. 135-140 of 2005.
- k) On 21.5.2008 Review Petition No. 86/2007 filed by the Petitioner herein for review of Commission's order dated 23.11.2006 in Petition No. 120/2005, which was dismissed as time barred. The said Review Petition was filed for application of the orders dated 4.10.2006 and 22.12.2006 of the APTEL in PGCIL's case to the Kahalgaon STPS of Respondent No. 1, NTPC.
- l) On 16.12.2008, APTEL, in Appeal No. 127/2008 filed by the Petitioner against the order dated 21.5.2008, after condoning the delay in filing the Review



Petition, remitted the matter to the Commission with the direction to decide the Review Petition on merits.

m) As regards FERV, the Commission, in the 2009 Tariff Regulations applicable for the period 2009-14, provided the following:

2009 Tariff Regulations

“40. Foreign Exchange Rate Variation:

(1) The generating company or the transmission licensee, as the case may be, may hedge foreign exchange exposure in respect of the interest on foreign currency loan and repayment of foreign loan acquired for the generating station or the transmission system, in part or full in the discretion of the generating company or the transmission licensee.

(2) Every generating company and transmission licensee shall recover the cost of hedging of foreign exchange rate variation corresponding to the normative foreign debt, in the relevant year on year-to-year basis as expense in the period in which it arises and extra rupee liability corresponding to such foreign exchange rate variation shall not be allowed against the hedged foreign debt.

(3) To the extent the generating company or the transmission licensee is not able to hedge the foreign exchange exposure, the extra rupee liability towards interest payment and loan repayment corresponding to the normative foreign currency loan in the relevant year shall be permissible provided it is not attributable to the generating company or the transmission licensee or its suppliers or contractors.

(4) Every generating company and the transmission licensee shall recover the cost of hedging and foreign exchange rate variation on year-to-year basis as income or expense in the period in which it arises.

41. Recovery of cost of hedging Foreign Exchange Rate Variation. Recovery of cost of hedging and foreign exchange rate variation shall be made directly by the generating company or the transmission licensee, as the case may be, from the beneficiaries or the transmission customers, as the case may be, without making any application before the Commission: Provided that in case of any objections by the beneficiaries to the amounts claimed on account of cost of hedging or foreign exchange rate variation, the generating company or the transmission licensee, as the case may be, may make an appropriate application before the Commission for its decision.”

n) On 29.9.2009, the Commission allowed Review Petition No. 86/2007 (in Petition No.120 of 2005) and directed that the said Petition relating to the tariff of the Kahalgaon STPS for the period 2004-09 be heard afresh on the issue of allocation of FERV.

o) On 11.1.2010, the Commission issued a fresh order regarding the allocation of FERV towards equity and loan and held that Foreign Exchange utilized for the project was in the form of debt only. Hence the same should be



adjusted against the loan and not against the equity. Accordingly, this Commission allotted the amount of change in FERV towards loan only.

p) On 25.2.2010, Respondent No. 1, NTPC, filed an Appeal No. 58/2010 before APTEL, challenging the order dated 11.1.2010. APTEL, vide its judgment dated 1.9.2010, set aside the Commission's order dated 11.1.2010 and directed that a change in FERV will be apportioned towards debt and equity in the ratio of 50:50.

q) On 28.10.2010, Petitioner herein, filed a Civil Appeal No. 10278/2010 before the Hon'ble Supreme Court of India against the APTEL judgment dated 1.9.2010 in Appeal No.58/2010.

r) As regards FERV, the Commission in the 2014 Tariff Regulations applicable for the period 2014-19 provided the following:

2014 Tariff Regulations

“50. Foreign Exchange Rate Variation:

(1) The generating company or the transmission licensee, as the case may be, may hedge foreign exchange exposure in respect of the interest on foreign currency loan and repayment of foreign loan acquired for the generating station or the transmission system, in part or in full in the discretion of the generating company or the transmission licensee.

(2) As and when the petitioner enters into any hedging based on its approved hedging policy, the petitioner should communicate to the beneficiaries concerned about its hedging decision within thirty days of entering into such hedging transaction(s).

(3) Every generating company and transmission licensee shall recover the cost of hedging of foreign exchange rate variation corresponding to the normative foreign debt, in the relevant year on year-to-year basis as expense in the period in which it arises and extra rupee liability corresponding to such foreign exchange rate variation shall not be allowed against the hedged foreign debt.

(4) To the extent the generating company or the transmission licensee is not able to hedge the foreign exchange exposure, the extra rupee liability towards interest payment and loan repayment corresponding to the normative foreign currency loan in the relevant year shall be permissible provided it is not attributable to the generating company or the transmission licensee or its suppliers or contractors.

(5) Every generating company and the transmission licensee shall recover the cost of hedging and foreign exchange rate variation on year-to-year basis as income or expense in the period in which it arises.

51. Recovery of cost of hedging or Foreign Exchange Rate Variation:

(1) Recovery of cost of hedging or foreign exchange rate variation shall be made directly by the generating company or the transmission licensee, as the case may



be, from the beneficiaries or the long term transmission customers /DICs, as the case may be, without making any application before the Commission: Provided that in case of any objections by the beneficiaries or the long term transmission customers /DICs, as the case may be, to the amounts claimed on account of cost of hedging or foreign exchange rate variation, the generating company or the transmission licensee, as the case may be, may make an appropriate application before the Commission for its decision.

s) The Hon'ble Supreme Court of India, vide its judgment dated 9.10.2014, set aside the APTEL's judgment dated 1.9.2010 in Appeal No. 58/2010 and remitted the matter back to APTEL with the direction to reconsider the matter on merits in accordance with the law.

t) On 18.8.2015, the APTEL dismissed Appeal No. 58/2010 filed by Respondent No. 1, NTPC, as under:

20. In view of the above discussion, we agree with the findings and observations made by the Central Commission in the impugned order dated 11.01.2010. We do not find any cogent or strong reason to deviate from any of the findings or observations made in the impugned order. We approve the same view. Consequently, the issue is decided against appellant and this appeal is liable to be dismissed. We are clearly of the view that the learned Central Commission in the impugned order dated 11.01.2010 has acted within its powers and correctly and legally interpreted the relevant regulations of Tariff Regulations 2001 and has rightly reached the correct, just and legal view and has further rightly modified its earlier order dated 23.11.2006 in regard to allocation of FERV to loan and equity in the ratio of 50:50 and correctly directed that the entire FERV should be allocated only towards loan. The Commission has based the impugned order on the interpretation of the provisions of Regulation 1.13 of Tariff Regulations 2001 saying that the Central Commission has been computing the extra rupee liability arising out of FERV on account of interest payment and loan repayment as per the Accounting Standard-11 and capitalized the same along with project cost. According to the Central Commission itself, for the purpose of sourcing, it was apportioned between debt-equity ratio for the generating stations as well as transmission systems and since there was clear mandate or view on the interpretation of Regulation 1.13 of this Appellate Tribunal, Central Commission has rightly applied the decision dated 04.10.2006 in Appeal No. 135-140 of 2005 of Appellate Tribunal to the present case of NTPC."

u) On 26.10.2015, Respondent No. 1, NTPC, filed Civil Appeal No. 13452 of 2015 before the Hon'ble Supreme Court of India, New Delhi, challenging the APTEL judgment dated 18.8.2015 in Appeal No. 58/2010.

v) On 9.5.2019, the Hon'ble Supreme Court of India dismissed the Civil Appeal No. 684 of 2007 filed by PGCIL and Civil Appeal No. 13452 of 2015 filed by Respondent No. 1, NTPC. In respect of the Civil Appeal filed by NTPC, the



Hon'ble Supreme Court observed that CERC has rightly applied the decision dated 4.10.2006 to the matter and directed that the entire FERV should be apportioned only in respect of debt liability. The relevant part of the judgment is as under:

“Civil appeal no. 13452 of 2015

12. This appeal is preferred against the impugned judgment and order dated 18.08.2015 passed by the Appellate Tribunal for Electricity whereby the appeal preferred by the appellant was dismissed. Further, the order of CERC was upheld by observing that the CERC has rightly applied the decision dated 04.10.2006, which is the same order i.e. impugned in Civil appeal no. 684 of 2007, to the instant matter and directed that the entire FERV should be apportioned only in respect of debt liability. Thus, the issue being the same, this appeal is also dismissed in a sequel to the discussion set out above. No order as to costs.”

w) Besides accounting of FERV against debt liability, the Commission, in the Tariff Regulations notified for the period from 2004-09 to 2019-24, also provided the provisions for generating or transmission companies to opt hedging of foreign exchange exposure in respect of the interest on foreign currency loan and repayment of foreign loan acquired for the generating station or the transmission system, in part or full in the discretion of the generating company or the transmission licensee. The generating or transmission companies have been generally hedging the foreign currency loan from the period 2004-09.

x) Thus, the judgment of the Hon'ble Supreme Court, which is the law of the land, has to be applied, and the variance in FERV for the period 2001-04 of Kahalgaon STPS and other generating stations of Respondent No. 1, NTPC have to be apportioned towards loan liability and not towards equity. Further, the amount on Return-on-Equity (ROE) for this period taken by Respondent No. 1, NTPC, has to be adjusted towards interest on the loan and the remaining amount with carrying cost ought to be refunded to the Petitioner.

y) Subsequent to the judgment dated 9.5.2019 of the Hon'ble Supreme Court, the Petitioner, vide its letters dated 29.8.2019, 16.3.2020, 6.10.2020 and 9.11.2020, requested the Commission to initiate a Suo-moto Petition for modification of tariff orders of the generating stations in Western Region viz., Korba STPS, Vindhyachal STPS, Kawas GPS etc. The Commission, vide its letter dated 1.12.2020, informed that the Petitioner was free to approach the



Commission by filing an appropriate application in the matter, which would be considered in accordance with the law.

z) The statements indicating the capitalization of FERV in respect of Korba STPS, Vindhyachal STPS, Vindhyachal STPS-II and Kawas GPS have been annexed by the Petitioner. As per law declared by the Hon'ble Supreme Court in Kahalgaon STPS, the tariff orders in respect of the above four generating stations be revised by allocating the FERV amount against debt liability in place of allocation of the same between debt and equity.

Accordingly, the Petitioner has filed the present Petition.

Hearing on 6.8.2021

3. The Commission, after hearing the learned counsel for the Petitioner, admitted the Petition on 6.8.2021 and ordered notice on the Respondents. The Commission also directed the completion of the pleadings in the matter by the parties. In response, the Respondents GUVNL (vide affidavit dated 17.8.2021), MSEDCL (vide affidavit dated 27.8.2021), CSPDCL (vide affidavit dated 3.9.2021) and NTPC (vide affidavit dated 8.8.2023) have filed their replies. The Petitioner, MPPMCL, has, vide affidavit dated 14.9.2023, filed its rejoinder to the reply of the Respondent NTPC.

Reply of the Respondent GUVNL

4. The Respondent GUVNL, vide reply affidavit dated 17.8.2021, has mainly submitted as under:

(a) GUVNL agrees to all the submissions of the Petitioner regarding the application of the judgment of the Hon'ble Supreme Court for modification of the tariff orders of the NTPC generating stations in Western Region (Korba STPS, Vindhyachal STPS, Kawas GPS, Jhanor GPS etc)

(b) As provided under the Tariff Regulations for the period 2004-09 to 2019-24, a generating company or transmission company is allowed to recover their



exposure towards FERV on the interest amount and repayment against the foreign loan corresponding only to the normative debt, in the relevant year on year-to-year basis as expense in the period in which it arises.

(c) The Commission, in the impugned order dated 1.1.2010 (in Petition No. 120/2005), had rightly taken the view that any additional liability or gain arising out of FERV against the Foreign exchange utilized for the power project of NTPC should be adjusted only against the loan liability and should not form part of the equity. Further, the APTEL in its judgment dated 18.8.2015 in Appeal No. 58/2010, had upheld the order of the Commission. Also, the Hon'ble Supreme Court, vide its judgment dated 9.5.2019 in the Civil Appeal filed by NTPC has dismissed the Appeal and observed that the entire FERV should be apportioned only in respect of debt liability. The order of the Hon'ble Supreme Court is the law of the land and binding on all, including this Commission.

Reply of the Respondents MSEDCL and CSPDCL

5. The Respondent, MSEDCL, vide reply affidavit dated 27.8.2021, has submitted that the Respondent adopts all the contentions and pleadings filed by the Petitioner in the present proceedings. The Respondents MSEDCL and CSPDCL have, in their replies, made submissions similar to that of the Respondent GUVNL above and hence not mentioned herein for the sake of brevity.

Reply of the Respondent NTPC

6. The Respondent NTPC, vide reply affidavit dated 8.8.2023, has submitted that the present petition is not maintainable on the following grounds:

(a) Section 129 of the Electricity Act, 2003 (the 2003 Act) applies only in the case of seeking compliance with any provision of the said Act, which has been contravened or likely to be contravened by the generating company or a licensee. There is no averment by the Petitioner as to what provisions of the 2003 Act is/are been contravened or is/are likely to be contravened by NTPC.



Reliance was placed on the judgment of APTEL dated 30.5.2012 in Appeal No. 201/2010 and judgment dated 30.1.2017 in Appeal No. 226/2014.

- (b) The present Petition is barred by Section 3 of the Limitation Act, 1963, as the Petitioner is seeking the claim for the period 2001-04 in respect of the generating stations for which tariff orders had been passed during the period 2006 to 2010, as the time limit to challenge the tariff orders in respect of the said four generating stations have long expired as per the 2003 Act and the Limitation Act and the Petitioner cannot now seek to amend or modify the said tariff orders retrospectively. Thus, the Petitioner does not have any right to seek remedy after the expiry of the limitation period. Once the limitation period for claiming a debt has expired, the rights of the party to claim such debt becomes illegal. Judgment of APTEL dated 30.5.2023 in Appeal No. 358/2022 (PSPCL v RRVPNL & Anr. relied upon)
- (c) The Petitioner is seeking compliance with the Hon'ble Supreme Court judgment on all other generating stations, whereas the said judgment was passed exclusively for Kahalgaon STPS of NTPC and is subject to the issues and challenges made therein.
- (d) The Hon'ble Supreme Court, in its judgment, has clearly held that the dispute has arisen with respect to the tariff charges between the period 2001-04 on account of FERV calculation and apportionment and any variation of apportionment of FERV in 2019 (the year when the judgment was passed) for the said period would consequentially be passed on to the consumers. This would not only be unfair to the consumers (who may or may not have been consumers back in the said period) but also would cause financial distress to them. Therefore, the Hon'ble Supreme Court did not interfere in the said dispute.
- (e) The Petitioner has sought to retrospectively revise the tariff orders for the period 2004 to 2020 under the guise of seeking compliance with the SC judgment. It has never challenged the said tariff orders of the said generating stations on any ground whatsoever within the limitation period, and hence, the



same has attained finality and cannot, therefore, be retrospectively amended and revised by the Commission. In UPPCL v NTPC (2009) 6 SCC 235, the Hon'ble Supreme Court has observed that the determination of tariff by an appropriate Commission is a multi-stage process, and the parties get enough opportunity to challenge not only at the stage of making of tariff but also at a later stage.

- (f) Further, the APTEL and this Commission have time and again held that once the tariff is fixed and has attained finality, the reopening of the same cannot be sought. Reliance was placed on the judgment of APTEL in Appeal No. 246/2014 and Appeal No. 289/2013 (TPDDL v DERC), and the Commission's order in Petition No. 121/MP/2011 (NTPC v UPPCL).
- (g) The Petitioner is seeking to challenge the tariff orders which have not been the subject matter of challenge either in the SC judgment or in the APTEL judgment dated 18.8.2015 in Appeal No. 58/2010 or in the Commission's order dated 11.1.2010 in Petition No. 120/2005. The Supreme Court judgment on which the Petitioner is placing reliance for securing compliance is exclusively for Kahalgaon STPS, and the tariff orders of other generating stations have not been whispered in the said judgment.

Rejoinder of the Petitioner MPPMCL to the reply of Respondent NTPC

7. The Petitioner, vide rejoinder affidavit dated 14.9.2023 to the reply of the Respondent NTPC, has submitted the following:

- (a) The Hon'ble Supreme Court, vide its order dated 9.5.2019, has declared the law that the entire FERV should be apportioned only in respect of debt liability. As per Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India, and therefore FERV component in respect of various other generating stations of the Respondent NTPC ought to have been capitalized in loan and not in



equity. The amount of the FERV apportioned in the head of equity is in direct contravention to the provisions of the 2003 Act and unlawful being in contravention to the law laid down by the Hon'ble Supreme Court. This is grossly in contravention of Section 61 (d) of the 2003 Act.

- (b) Any legal issue settled by the Hon'ble Supreme Court becomes the law, and therefore, this judgment will apply to all the cases wherein the order of this Commission is in contravention to the order of the Supreme Court.
- (c) The implementation of the judgment dated 9.5.2019 of the Hon'ble Supreme Court will result in a reduction of financial burden on the consumers of Electricity and thus is in the overall interest of the consumers. Further, by any means, the Respondent NTPC cannot be allowed unlawful enrichment at the cost of consumers.
- (d) The provisions of the Limitation Act do not apply in this case. Any wrong doing cannot be allowed to continue forever and ought to be corrected. When it is settled that the allocation of FERV towards equity is against the law, the Respondent NTPC must be made to refund the excess unlawful amount recovered by it. Even otherwise, when the recovery of water charges was allowed retrospectively after the period of more than 25 years (in respect of Vindhyachal STPS-I) in the tariff order for the period 2014-19, the same analogy may be applied in considering the present petition.

Hearing on 10.10.2023

8. During the hearing, the learned counsels for the Petitioner and Respondents made detailed oral submissions in the matter. The learned counsel for the Petitioner, however,



clarified that since there has been a violation of the Tariff Regulations notified by the Commission (in terms of the provision of the Electricity Act, 2003) and which has been interpreted by APTEL and the Hon'ble Supreme Court, Section 129 of the 2003 Act is attracted in the present case. The Commission, after permitting the parties to file their written submissions, reserved its order in the matter.

Written Submission of Respondent MSEDCL

9. The Respondent MSEDCL on 31.10.2023 has filed written submissions, mainly as under:

- (a) The judgment dated 9.5.2019 is not a mere dismissal of the civil appeal of NTPC rather, the Court has, after perusal of the relevant Tariff Regulations expressed a categorical opinion while upholding the view taken by APTEL and this Commission that the entire FERV should be apportioned only in respect of debt liability. The Hon'ble Supreme Court has decided the issue, finally giving rest to the controversy on the adjustment of FERV.
- (b) The argument regarding limitation does not also survive considering that until the judgment was passed on 9.5.2019, there was no certainty on the issue, as it was pending adjudication before the Hon'ble Supreme Court. Once the Court has decided on the issue in 2019, the limitation will apply only from the date of the judgment.
- (c) The findings of the Hon'ble Supreme Court are based on the provisions of the Tariff Regulations. There can be no estoppel on the applicability of the Regulations once it is settled by the Hon'ble Supreme Court.

Written Submission of Respondent NTPC



10. The Respondent NTPC on 6.11.2023 has filed its written submissions, mainly on the lines of its submissions made in its reply as above, and hence not mentioned herein for the sake of brevity.

11. Based on the submissions of the parties and the documents on record, we proceed to examine the issues raised in the present case in the subsequent paragraphs:

12. The main contention of the Petitioner MPPMCL is that in terms of Article 141 of the Constitution of India, the law declared by the Hon'ble Supreme Court of India is binding on all Courts within the territory of India and therefore the judgment dated 9.5.2019 in the said Civil Appeal filed by NTPC will be applicable to all cases wherein, the orders of this Commission are in contravention of the order of the Hon'ble Supreme Court. Per contra, the Respondent NTPC has argued that the judgment of the Hon'ble Court in the said civil appeal is a simplicitor dismissal of the Civil Appeals filed by PGCIL and NTPC under Section 125 of the 2003 Act without framing any substantial question of law. Accordingly, it has been submitted that the judgment of the Hon'ble Supreme Court dated 9.5.2019 should not be treated as a binding precedent to revise the tariff of other generating stations from 2004-2020.

Analysis and Decision

13. We have examined the matter. The Commission, vide its order dated 23.11.2006 in Petition No. 120/2005, had approved the tariff of Kahalgaon STPS for the period 2004-09. In the said order, the normative FERV of Rs 1207 lakh was allocated to both debt and equity in the ratio of 50:50. Aggrieved by the said order, MPPTCL (erstwhile MPSEB) filed a Review Petition No.86/2007 (in Petition No.120/2005) on the issue of



allocation of FERV to both debt and equity in respect of Kahalgaon STPS (of NTPC), and contended that apportionment of FERV is to be made towards debt only, in terms of the judgment of the APTEL dated 4.10.2006 in Appeal Nos. 135-140/2005 (TNEB v PGCIL). It is pertinent to mention that against this judgment apportioning FERV only towards debt, PGCIL had filed Civil Appeal No.684/2007 before the Hon'ble Supreme Court, which was pending.

14. Thereafter, the Commission vide its order dated 11.1.2010 in Review Petition 86/2007 capitalized the FERV towards debt only (in terms of its judgment dated 4.10.02006) and accordingly revised the tariff of Kahalgaon STPS (already approved vide order dated 23.11.2006). Aggrieved by the said order, NTPC filed an appeal (Appeal No. 58/2010) before the APTEL, whereby the APTEL, vide its judgment dated 1.9.2010, set aside the Commission's order dated 11.1.2010 and directed the Commission to revise the tariff accordingly, considering the allocation of FERV to loan and equity in the ratio of 50:50. Against this judgment of APTEL, MPPMCL filed Civil Appeal (C.A. No. 10278/2010) before the Hon'ble Supreme Court, on the issue of apportionment of FERV, and the Hon'ble Court, vide its order dated 9.10.2014, set aside the APTEL judgment dated 1.9.2010 (in Appeal No.58/2010) and remitted the matter to APTEL, with a direction to re-consider the controversy and dispose of the same in accordance with law. Subsequently, APTEL, vide its judgment dated 18.8.2015, dismissed Appeal No.58/2010 filed by NTPC, thereby affirming the Commission's order dated 11.1.2010 (in Petition No.120/2005) holding that the entire FERV should be allocated only towards the loan. Accordingly, the tariff order in respect of Kahalgaon STPS was revised for the period 2004-09.



15. Aggrieved by the APTEL judgment dated 18.8.2015, NTPC filed Civil Appeal No. 13452/2015 before the Hon'ble Supreme Court on the issue relating to the capitalization of FERV and the Hon'ble Court vide its judgment dated 9.5.2019 dismissed the said appeal in terms of its discussions with regard to the Civil Appeal No.684/2007 filed by PGCIL as stated above. The relevant portion of the judgment dated 9.5.2019, is extracted below:

Civil Appeal No.684/2007

6. *Having heard the counsels and from a detailed perusal of the record, at the outset, we note that the present question regarding the apportionment of FERV between debt and equity is not a question of law, much less a substantial question of law. Regulation 1.13(a) of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 ["Tariff Regulations, 2001"] which has been cited before us to buttress the argument of apportionment of FERV does not in fact provide for apportionment of FERV and rather, is restricted only to the methodology of calculation of FERV. This methodology of FERV calculation is not in challenge before us and has already been affirmed by the CERC as well as the Appellate Tribunal for Electricity, New Delhi. No rule, regulation, statute or precedent has been cited before us to substantiate the argument that post calculation FERV needs to be necessarily apportioned in a debt equity ratio, much less to substantiate what exactly this ratio is and on what factors the same is determined. Thus, on this ground alone, for lack of a substantial question of law, these appeals ought to be dismissed.*

8.... *Further, FERV is sought to be capitalized by the appellant in the normative debt equity ratio of 50:50 as a matter of practice, without citing any rule, regulation, statute or precedential law.*

9.*Thus, noting the premise on which the Act was enacted and the fact that the Tariff Regulations, 2001 prescribed under the aegis of this Act do not provide for apportionment of FERV in a particular debt-equity ratio, this Court is not inclined to interfere in the matter.*

10. xxxx

11. *In light of the abovementioned observations, the appeal is dismissed. No order as to costs.*

Civil Appeal No. 13452 of 2015

12. *This appeal is preferred against the impugned judgment and order dated 18.08.2015 passed by the Appellate Tribunal for Electricity whereby the appeal preferred by the appellant was dismissed. Further, the order of the CERC was upheld by observing that the CERC has rightly applied the decision dated 04.10.2006, which is the same order that is impugned in Civil Appeal No. 684 of 2007, to the instant matter and directed that the entire FERV should be apportioned only in respect of debt liability. Thus, the issue being the same, this appeal is also dismissed in a sequel to the discussion set out above. No order as to costs."*



16. The Petitioner has submitted that the Hon'ble Supreme Court having declared the law in terms of Article 141 of the Constitution of India, that the entire FERV should be apportioned only in respect of debt liability, the tariff orders issued in respect of other generating stations, viz., Korba STPS, Vindhyachal, STPS-I, Vindhyachal STPS-II and Kawas GPS, are required to be revised for the period 2004-20. Article 141 of the Constitution of India provides that '*the law declared by the Supreme Court shall be binding on all courts within the territory of India.*' From the observations of the Hon'ble Supreme Court in the said judgment, it is evident that the issue of apportionment of FERV towards debt and equity did not involve any question of law, much less a substantial question of law. The Hon'ble Supreme Court, after taking note of the fact that the 2001 Tariff Regulations provided only for the calculation of FERV (and not apportionment of FERV) and that the capitalization of FERV towards debt and equity in the ratio of 50:50 was only as a matter of practice, without any rule, regulation, statute or precedential law, refused to interfere with the appeals filed by PGCIL and NTPC. The Hon'ble Supreme Court has also taken note of the fact that APTEL, vide its judgment dated 18.8.2015, had upheld the Commission's order dated 11.1.2010 relating to apportionment of FERV to loan only. In other words, the Hon'ble Supreme Court has refused to entertain the appeals filed by PGCIL and NTPC on the ground that no authority was cited in support of the contention that FERV ought to be capitalized towards debt and equity. Also, there is no finding/observation of the Hon'ble Court, in the said judgment that the decision is to be applied/made applicable to the tariff orders in respect of the other generating stations of NTPC. In our view, the judgment of the Hon'ble Supreme Court has not decided any question of law to make it applicable to other generating stations of NTPC. The judgment, as contended by NTPC, is a simplicitor dismissal of the Civil Appeals under Section 125 of the Act, without any



substantial question of law being framed. In this background, the contentions of MPPMCL (including GUVNL, CSPDCL and MSEDCL) that the judgment of the Hon'ble Supreme Court, in respect of the Kahalgaon STPS of NTPC, is a declaration of law under Article 141 of the Constitution of India and that the tariff orders in respect of other generating stations of NTPC, for the tariff period from 2004-09 onwards is required to be revised, is not acceptable.

17. Further, NTPC has contended that the Petitioner MPPMCL cannot seek to amend or modify the tariff orders in respect of other generating stations for the period 2001-04, retrospectively, as the time limit for filing review before this Commission and appeal before APTEL within 45 days, under Section 111(2) of the Act has long expired and therefore barred by limitation. *Per contra*, MPPMCL has argued that since it has been settled that FERV can only be apportioned to loan/debt component, any order contrary to this settled principle will mandatorily be required to be reopened and reviewed, and NTPC cannot escape from its responsibility of returning the unlawful gains to the beneficiaries.

18. The matter has been considered. In terms of Section 94(1)(f) of the Act read with the CERC (Conduct of Business) Regulations, 1999, the time limit for filing a review against the orders of the Commission is 30 days (later amended to 45 days) and for filing appeal against the orders of the Commission before APTEL in terms of Section 111 of the Act, is 45 days. It is pertinent to mention that though the tariff orders in respect of other generating stations (viz., Kawas GPS, Korba STPS, and Vindhayachal STPS-I) including Kahalgaon STPS were issued by the Commission for the period 2004-09, through various orders, the Petitioner MPPTCL (later MPPMCL) had filed Review Petition 86/2007, only in respect of the tariff determined for Kahalgaon STPS for the



period 2004-09 in Petition No. 120/2005 on the issue of allocation of FERV to debt and equity. Similarly, when APTEL had set aside the Commission's order dated 11.1.2010 by judgment dated 1.9.2010 in Appeal No. 58/2010, the Petitioner MPPMCL had approached the Hon'ble Supreme Court by filing an Appeal (CA No. 10278/2010), wherein the said judgment was set aside and matter remanded to APTEL. Nothing prevented the Petitioner MPPMCL from challenging the tariff orders in respect of the other generating stations of NTPC by way of review or appeal, more so when the order of the Commission dated 23.11.2006 and the judgment of APTEL dated 4.10.2006 and 18.8.2015, were favourable to it, on this issue. The Petitioner cannot, therefore, contend that it was awaiting the judgment on this issue. Having not done so and the tariff orders having attained finality, the Petitioner MPPMCL cannot now demand the revision of the tariff orders, retrospectively, on the ground that the judgment of the Hon'ble Supreme Court is a declaration of law. In view of this and considering the fact that the Hon'ble Supreme Court has declined to interfere in the said appeal, as stated earlier, we find no reason to entertain the prayer of MPPMCL (including GUVNL, CSPDCL and MSEDCL) to reopen/revise the tariff of other generating stations of NTPC, on this issue.

19. Even otherwise, the prayer of the Petitioner to revise or amend the tariff already granted by this Commission is not acceptable in view of the observations of the Hon'ble Supreme Court, in its judgment dated 9.5.2019, as under:

"10. Further, the present dispute arises with respect to tariff charged between 01.04.2001 and 31.03.2004 on account of FERV calculation and apportionment. Any variation in the apportionment of FERV now, for the abovementioned period, will consequently be passed on to the consumers. This will be unfair to the consumers who were not consumers for the abovementioned period but will eventually bear the brunt of transactions which took place 15-18 years ago. This is another ground for non-interference in the present matter [See U.P. Power Corpn. Ltd. v. NTPC Ltd., (2009) 6 SCC 235].



20. It is pertinent to mention that the Hon'ble Supreme Court in UP Power Corporation v NTPC Limited (2009) 6 SCC 235 had observed that the determination of tariff by an Appropriate Commission is a multi-stage process, and the parties thereto get enough opportunity to challenge not only at the stage of the making of the tariff but also at a later stage. Hence, the same questions cannot be re-agitated after the determination of the tariff. The relevant portion of the judgment is extracted below:

“Framing of tariff is made in several stages. The generating companies get enough opportunity not only at the stage of making tariff, but, may be at a later stage also to put forth its case, including the amount it has spent on operation and maintenance expenses as also escalation at the rate of 10% in each of the base year. It cannot, in our opinion be permitted to re-agitate the said question after passing of may stages. Furthermore, the direction of the tribunal that the additional costs may be absorbed in the new tariff, in our opinion, was not correct. Some persons who are consumers during the tariff year in question may not continue to be the consumers of the appellant. Some new consumers might have come in. There is no reason as to why they should bear the brunt. Such quick-fix attitude, in our opinion, is not contemplated as framing of forthcoming tariff was put subject to fresh regulations and not the old regulations.”

In view of the above, the prayer of the MPPMCL for the revision of tariff orders of other generating stations stands rejected.

21. The Petitioner has filed the present Petition under Section 129 of the Act, seeking compliance with the judgment dated 9.5.2019 of the Hon'ble Supreme Court in Civil Appeal No.13452/2015 filed by NTPC. Per contra, NTPC has contended that MPPMCL has failed to establish as to what provisions of the Act, are/have been contravened or is/are likely to be contravened by NTPC. Referring to the judgment of APTEL dated 30.1.2017 in Appeal No. 226/2014, NTPC has argued that for seeking an order under Section 129 of the Act, MPPMCL has to prove that there was specific contravention of the Act or the Regulations. In response, MPPMCL has clarified that the amount of FERV apportioned to the head of 'equity' is in direct contravention to Section 61(d) of the Act, being unlawful in view of the law laid down by the Hon'ble Supreme Court, regarding apportionment of FERV to loan component only.



22. The submissions have been considered. Section 129 of the Act provides as under:

“Section 129. (Orders for securing compliance): -(1) Where the Appropriate Commission, on the basis of material in its possession, is satisfied that a licensee is contravening, or is likely to contravene, any of the conditions mentioned in his license or conditions for grant of exemption or the licensee or the generating company has contravened or is likely to contravene any of the provisions of this Act, it shall, by an order, give such directions as may be necessary for the purpose of securing compliance with that condition or provision.

(2) While giving direction under sub-section (1), the Appropriate Commission shall have due regard to the extent to which any person is likely to sustain loss or damage due to such contravention.”

23. As discussed earlier, the Hon’ble Supreme Court, in the said judgment, had not given any directions for compliance by NTPC. The Hon’ble Court had refused to interfere in the said civil appeals, on merits, on the reasoning that no authority was shown to the effect that FERV ought to be capitalized towards debt and equity under the 2001 Tariff Regulations. Accordingly, we have held that the dismissal of the civil appeals by the Hon’ble Supreme Court in the case of Kahalgaon STPS cannot be treated as a declaration of law to permit the reopening /revision of the tariff orders of other generating stations of NTPC. Also, the contention of MPPMCL that there is a contravention of Section 61(d) of the Act by NTPC is also not acceptable, in view of the observations of the Hon’ble Supreme Court in paragraph 10 of the said judgment (quoted in para 19 above). Even otherwise, the compliance of the judgment of the Hon’ble Supreme Court is only towards the tariff of Kahalgaon STPS (which had already been revised) and not for other generating stations of NTPC. For these reasons, there is no justification for the invocation of Section 129 of the Act, in the present case, as sought by MPPMCL. The submissions of MPPMCL and other distribution licenses are accordingly rejected.



24. Based on the above discussion and findings, we hold that the Petition filed by MPPMCL is not maintainable, and the same is accordingly rejected.

25. Petition No. 144MP/2021 is disposed of in terms of the above.

**Sd/-
(Pravas Kumar Singh)
Member**

**Sd/-
(Arun Goyal)
Member**

**Sd/-
(I.S.Jha)
Member**

**Sd/-
(Jishnu Barua)
Chairperson**

