Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 58 of 2010

Dated : 18th August, 2015

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

NTPC Ltd.
NTPC Bhawan, SCOPE Complex,
Core-7, Institutional Area,
Lodhi Road,
New Delhi – 110 003. **... Appellant(s)**

Versus

1. **Central Electricity Regulatory Commission**
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110 001.

2. West Bengal State Electricity Board
Vidyut Bhawan, Block-DJ,
Sector-11, Salt Lake City,
Kolkata – 700 091.

3. Bihar State Electricity Board
Vidyut Bhawan, Bailey Road,
Patna – 800 021.

4. Jharkhand State Electricity Board
Engineering Building of Heavy Engineering Corpn.
Dhurwa, Ranchi – 834 004.

5. GRIDCO Ltd.
Vidyut Bhawan, Janpath,
Bhubaneshwar – 751 007.

6. Damodar Valley Corporation
DVC Towers, VIP Road,
Calcutta – 700 054,
West Bengal.

7. Power Department
Govt. of Sikkim, Kazi Road,
Gangtok – 737 101, Sikkim.

8. Tamil Nadu Electricity Board
800, Anna Salai,
Chennai – 600 002,
Tamil Nadu.

9. Kerala State Electricity Board
Vaidyuthi Bhawan,
Pattam,
Trivandrum – 695 004.

10. Government of Pondicherry
Electricity Department
Pondicherry – 605 001.

11. Uttar Pradesh Power Corp. Ltd.
Shakti Bhawan,
14, Ashoka Marg,
Lucknow – 226 001.

12. Power Development Department
Government of Jammu and Kashmir
Mini Secretariat, Jammu – 180 001.

13(a) BSES Rajdhani Power Ltd.
BSES Bhawan, Nehru Place,
New Delhi – 110 019.

13(b) BSES Yamuna Power Ltd.
Shakti Kiran Building,
Karkardooma, Delhi – 110 092.

13(c) North Delhi Power Ltd.
Grid Sub Station Building,
Hudson Lines,
Kingsway Camp,
Delhi – 110 009.

14. Power Department
Union Territory of Chandigarh
Addl. Office Building,
Sector-9D,
Chandigarh – 160 009.

15. Madhya Pradesh State Electricity Board
Shakti Bhawan,
Vidyut Nagar,
Jabalpur – 482 008.

16. Maharashtra State Electricity Distribution Co. Ltd.
5th Floor, Prakashgad
Plot No. 9, Ananat Kanekar Marg,
Bandra (East),
Mumbai – 400 005.

17. Gujarat Urja Vikas Nigam Ltd.
Vidyut Bhavan, Race Course
Vadodra – 390 007.

18. Electricity Department
Administration of Daman & Diu
Department of Energy Secretariat,
Daman – 396 210.

19. Electricity Department
Administration Dadra and Nagar Haveli
Department of Energy Secretariat
Silvassa, Via Vapi – 396 230. **... Respondent(s)**

Counsel for the Appellant(s) : Mr. M. G. Ramachandran,
Ms. Poorva Saigal,
Ms. Ranjitha Ramachandran and
Ms. Anushree Bordhan

Counsel for the Respondent(s) : Mr. Pradeep Misra
Mr. Shashank Pandit,
Mr. Suraj Singh,
Mr. Manoj Kumar Sharma,
Mr. Daleep Kumar Dhyani for
Resp. Nos. 11 & 15
Mr. S. Vallinayagam for R.No.8

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

This is an appeal under Section 111 of the Electricity Act, 2003, filed by the NTPC Ltd. (hereinafter referred to as the 'appellant') against the order dated 11.01.2010, passed by the Central Electricity Regulatory Commission

(hereinafter referred to as the 'Central Commission') in Petition No.120 of 2005, relating to tariff of Kahalgaon Super Thermal Power Station Stage I (hereinafter referred to as 'Kahalgaon Station') of NTPC Ltd. for the period 01.04.2004 to 31.03.2009, whereby the Central Commission revised/modified its main order dated 23.11.2006 in regard to allocation of Foreign Exchange Rate Variation (FERV) to loan and equity ratio of 50:50 and directed that the entire FERV should be allocated only to loan.

2. At the outset it is pertinent to mention here that this Tribunal had earlier also heard the appeal, being Appeal No.58 of 2010 filed against the same impugned order dated 11.01.2010 passed by the Central Commission and allowed the appeal vide judgment/order dated 01.09.2010. The judgment dated 01.09.2010 passed by this Appellate Tribunal was challenged by Madhya Pradesh State Electricity Board, now known as Madhya Pradesh Power Trading Co. Ltd. (MPPTCL), before the Hon'ble Supreme Court by way of Civil Appeal No.10278 of 2010 captioned as Madhya Pradesh State Electricity Board Vs. NTPC Ltd. and Others and Hon'ble Supreme Court on 09.10.2014 considered the Order dated 29.09.2009 of the Central Commission and the judgment dated 01.09.2010 of this Appellate Tribunal and then set aside this Appellate Tribunal's judgment dated 01.09.2010 and remitted the matter back to this Appellate Tribunal directing to reconsider the controversy 1 in accordance with law.

3. The relevant facts for the purpose of deciding this appeal are as under:

a) that the appellant NTPC is a company incorporated under the Companies Act 1956. The appellant is a Government of India Enterprise and is engaged in the business of generation and

sale of electricity and operates 22 generating stations with an installed capacity in excess of 30,000 MW.

b) that the appellant owns, operates and maintains various generating stations including Kahalgaon Station in the State of Bihar with an installed capacity of 840 MW. The power generated from Kahalgaon Station is supplied to beneficiaries who are respondent Nos.2 to 19 herein. The tariff for the generation and sale of power from Kahalgaon Station is under regulatory control of the Central Commission, respondent No.1 herein.

c) that by the order dated 23.11.2006, passed in the impugned Petition, being No.120 of 2005, the Central Commission had determined the tariff for Kahalgaon Station for the period from 01.04.2004 to 31.03.2009. The fixed charges were determined on the basis of admitted capital cost of Kahalgaon Station as on 01.04.2004.

d) that in the said order dated 23.11.2006, the learned Central Commission had taken into account the additional capitalization of Rs.1207.27 Lacs on account of FERV against Foreign Currency Loan for the period ended on 31.03.2004 by apportioning the same between debt and equity in the ratio of 50:50 and the tariff for the period 01.04.2004 to 31.02.2009 had been accordingly computed on the above basis.

e) that the methodology adopted for allocation of FERV in the order dated 23.11.2006 in regard to the tariff till 31.03.2004 was based on the CERC operational and financial norms vide order dated 21.12.2000 passed by Central Commission in

Petition No.4 of 2000 whereby the Central Commission dealt with the norms and parameters applicable to the tariff for generating companies such as NTPC. In the said order, the Central Commission took note of the methodology adopted by NTPC in the past as per Government of India Notification issued under Section 43(A) of the Electricity (Supply) Act 1948 and decided as under:

"*6.2.4 CAS, in its recommendation, has favoured full protection for both debt and equity. However, the methodology for protection has not been spelt out, which is dealt with below. It has also not given any specific recommendation on a higher return to compensate for forex risk.* ***Keeping the past practice in mind, we consider that foreign exchange risk needs protection. This is agreeable in principle to the beneficiaries also. The protection, as far as debt is concerned, has to be allowed both on account of principal repayment and interest to the extent not already included in the tariff which is decided up front. The methodology can be put in position so that actual quantification could be done and charged to beneficiaries without seeking formal approval once again.***

6.3 ***Methodology***

6.3.1. Regarding the methodology for escalation, in case of debt, we find two different practices in NHPC and NTPC. In the former case, the entire burden of rate variation falls at the time of repayment of the loan; whereas in the latter case a revaluation on each balance sheet date is done thereby correspondingly increasing the value of the fixed asset so that consequent return, interest and depreciation are charged to tariff. Charging the return variation at the time of repayment is more harmful particularly, if there are bullet repayments or there is a progressive devaluation of the Rupee. Such a practice gives a gives a big tariff jolt. Hence, the practice adopted by NTPC which is also in accordance with the Accounting Standards of the Institute of Chartered Accountants of India (AS-11) is advisable and should be adopted. The present practice is to charge depreciation on the additional capitalization and also charge interest and ROE on the normative basis of debt/equity mix of 50:50. The variation to be charged for the 1st year is 50% of the number as it is reckoned at the end of the year. This treatment avoids tariff shocks and is commendable. The ultimate impact on tariff should be to the extent of return on equity, interest on loan

and depreciation as if the increase in asset is an additional investment. **In order to ensure uniformity, all utilities shall follow this practice in future. We are conscious that change over to this method in case of NHPC may create a liquidity problem as suitable source of finance has to be found for the actual repayment. However, since 50% of the escalation is treated as equity, there is a leverage provided to the utility which should incentivise NHPC to change over to the new system. We understand that NHPC was adopting the system of annual revision but switched over to the system of charging at the time of repayment since 1997-98. As already stated this system is not advisable as it gives a tariff jolt to the beneficiaries and is also not in accordance with the accounting standard.**

The methodology suggested above is also tax neutral. Any adjustment in tariff on account of interest on the additional loan amount and on account of depreciation would get allowed for taxation purposes, thereby leaving only the return to get taxed which in any case has to be borne by the beneficiaries. In the methodology followed by NHPC the tax neutrality is doubtful.

Any exchange rate variation on non-project financing or on account of normal purchases may have to be absorbed through the allowed O&M Cost and Return and can not be additionally passed on to the beneficiaries. Presently such a practice has not come to our notice either. As regards exchange risk on interest payment the variation has to be recognized at the time of payment of interest, which can not be helped. However, the same can be spread over subsequent year's billing, though payment of interest on half yearly basis may be the normal practice. The variation on account of interest of previous year shall be chargeable next year. The variation in principal and interest should be limited to the extent of permissible loans only. This shall be communicated before the commencement of each financial year, duly authenticated.

As regards exchange rate variation on equity in case of floatation of equity, it cannot be a charge on the tariff. However, any rate variation on project financing in foreign currency should ensure the dollar / Foreign Currency return as per the agreement and to the extent of the permissible equity. ***Hence any exchange rate variation to the extent of the dividend paid out on permissible equity contributed in foreign currency subject to the ceiling of permissible return has to have an element of exchange rate risk which has to be built into the tariff.***

This as and when paid may be spread over the 12 month period in arrears. *This is at present is irrelevant in case of CSUs. Any joint venture however may attract this treatment if the case falls under cost based tariff fixation. In the final analysis exchange rate variation both on loan (including interest) and dividend shall be allowed subject to the normative debt/equity on pro rata basis. This is in line with the Government of India Notification as well."*

6.5 Procedural Simplification

In our consultation paper we raised the issue of how can costly and time consuming procedures can be avoided on escalation of tariff. Presently petitions are being filed every time exchange rate variations are claimed. This can be clearly avoided. Once the principles for escalations are settled, the utilities have to get their data verified by the Auditors of the company both on account of repayment and interest and forward the same to the beneficiaries annually for information and continue to change the tariff accordingly. It is unnecessary to file separate petitions in this regard. This procedure will facilitate beneficiaries in including the same in their annual revenue requirements. If beneficiaries have any objection to the change they may file a petition before the Commission."

f) that pursuant to CERC operational and financial norms vide order dated 21.12.2000, the Central Commission notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2001 (hereinafter referred to as Tariff Regulations 2001) on 26.03.2001 in regard to tariff determination for the period from 01.04.2001to 31.01.2004. The Central Commission having gone into the genesis of concept of FERV specified the methodology and the procedure for its claim from the beneficiaries in its order dated 21.12.2000 and therefore, specified the Regulations as per clause 1.13 and 1.7 as under :

Clause: 1.13 :

Extra Rupee Liability:

"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 Accounts of India to calculate the impact of exchange rate variation on loan repayment".

Clause: 1.7:
"Recovery of Income Tax and Foreign Exchange Rate variation shall be done directly by the utilities from the beneficiaries without filing a petition before the Commission. In case of any objections raised by the beneficiaries to the amounts claimed on these counts, they may file on appropriate petition before the Commission."

g) that thereafter by an order dated 04.08.2005 passed in Petition No.37 of 2001, the Central Commission determined the tariff for Kahalgaon Station of NTPC for the period from 01.04.2001 to 31.03.2004 in terms of the aforesaid order dated 21.12.2000 and the Tariff Regulations 2001.

h) that according to the appellant, NTPC, the methodology of apportioning of FERV between debt and equity in the ratio of 50:50 which had been followed from the beginning and even before the constitution of Central Commission, the order dated 21.12.2000 passed by Central Commission in Petition No.4 of 2000, wherein the above methodology was commended and applied, the tariff order dated 04.08.2005 passed in Kahalgaon Station relating to the period 01.04.2001 to 31.03.2004 was not challenged by any of the beneficiaries on the aspect of FERV and had therefore become final.

i) that according to the NTPC, in the aforesaid circumstances, in the order dated 23.11.2006 passed in Petition No.120 of 2005, the Central Commission had only followed the methodology already implemented and there was no fresh adjudication or decision on the methodology.

j) that Madhya Pradesh Power Trading Co. Ltd., the successor of Madhya Pradesh State Electricity Board filed a Review Petition, being Review Petition No.86 of 2007 seeking review of order dated 23.11.2006 on the issue of apportionment of FERV between debt and equity contending that as per the judgment dated 04.10.2006 of this Appellate Tribunal in Appeal No.135-140 of 2005 (Tamil Nadu Electricity Board Vs. CERC & Ors.) and the subsequent judgment dated 22.12.2006 in Appeal No.161 of 2006 (Madhya Pradesh State Electricity Board Vs. Powergrid Corp. Of India Ltd. & Ors.) the allocation of FERV on account of foreign currency loan should be adjusted only against debt and not apportioned between debt and equity.

The aforesaid Review Petition No.86 of 2007 was filed after considerable delay with the delay condonation application. The Central Commission vide its order dated 21.05.2008 dismissed the delay condonation application in filing the said Review Petition.

k) that the Madhya Pradesh Power Trading Co. Ltd. thereafter filed an appeal, being Appeal No.127 of 2008 before this Appellate Tribunal challenging the order dated 21.05.2008 of the Central Commission. This Appellate Tribunal vide its judgment/order dated 16.12.2008 remitted the matter to the Central Commission for reconsideration on the issue of condonation of delay. The Central Commission vide order dated 29.09.2009 allowed the delay condonation application filed by the Madhya Pradesh Power Trading Co. Ltd. for review of the order dated 23.11.2006 in the impugned Petition No.120 of 2005.

l) that thereafter the Central Commission in the Review Petition No.86 of 2007 in Petition No.120 of 2005, after allowing the parties to file documentary evidence, namely affidavit and documents in support of their respective contentions, observed that though limitation for filing the application for review was 60 days, this period could be extended by Commission for sufficient reasons which finds place in Section 5 of the Limitation Act 1963 and allowed IA No.26 of 2007 praying for condonation of delay and condoned the delay in filing the Review Petition of the tariff order dated 23.11.2006 in Petition No.120 of 2005. Vide an order dated 29.09.2009 and vide the same order dated 29.09.2009 the Central Commission allowed the Review Petition holding that the original tariff petition (Tariff Petition No.120 of 2005) shall be set down for hearing on 22.10.2009 further making it clear that the Central Commission had not considered the partys' claim on merits based on the earlier judgment of this Appellate Tribunal and the said issue will be considered when the original tariff petition is heard and decided. Subsequently the Central Commission vide impugned order dated 11.01.2010 disposed of the Petition No.120 of 2005 and revised/modified its main order dated 23.11.2006.

m) that in the meanwhile the Central Commission by orders dated 29.09.2008 and 11.12.2008, in Petition No.27 of 2007 filed by NTPC decided on the impact of additional capitalization in Kahalgaon Station for the tariff period 2004-05 and 2005-06 and revised the fixed charge.

n) that in addition to the above, the NTPC also filed a Petition, being Petition No.126 of 2009 and subsequently an IA, being IA No.38 of 2009 for revising the fixed charges taking into account

the impact of additional capitalization during the period 2006-07, 2007-08 and 2008-09 which petition remains pending with the Central Commission.

o) that during the pendency of the aforesaid Petition, being Petition No.126 of 2009 and IA No.38 of 2009 therein, the Central Commission vide its order dated 11.01.2010 decided the impugned Petition No.120 of 2005 on the issue of allocation of FERV during the previous tariff period of 01.04.2001 to 31.03.2004 and held that the said FERV should be adjusted as loan only and not against loan and equity in the ratio of 50:50. Consequently, the Central Commission revised the debt equity allocation of capital cost, return on equity, interest on loan etc. while passing the order dated 11.01.2010 in Impugned Petition No.120 of 2005. The Central Commission proceeded on the basis that the matter involves interpretation of Regulation 1.13 of the Tariff Regulations 2001 notified by the Central Commission. In the impugned order dated 11.01.2010, the Central Commission also held that the said Regulation 1.13 of the Tariff Regulations 2001 and Accounting Standard mentioned therein were interpreted by this Appellate Tribunal in the matter relating to tariff of Powergrid Corporation of India Ltd. for the period 01.04.2001 to 31.03.2004 and the same had the effect of considering FERV only towards loan and not as equity and loan and the same interpretation should be applied to the appellant NTPC also.

p) that according to the appellant NTPC, the above decisions dated 04.10.2006 in Appeal No.135-140 of 2005 and dated 22.12.2006 in Appeal No.161 of 2006, both relating to Powergrid Corp. Of India Ltd., were not based on the interpretation of

Tariff Regulations but on the interpretation of notification dated 16.12.1997 issued by Government of India determining the tariff for Powergrid Corp. Of India Ltd. In the said notification, Government of India had specifically stated on the equity part as "*that which shall remain constant up to the technical life of the asset*". Pursuant to the above, the Government of India had, in the case of Powergrid Corporation, treated the entire FERV to be adjusted in the loan and not in the equity and loan. In contrast to the above, the notification dated 09.12.1998 was issued by Government of India determining the tariff for NTPC for the period up to 31.03.2001, prior to constitution of Central Commission including in regard to Kahalgaon Station adopted methodology of FERV to be apportioned to debt and equity in the ratio of 50:50.

q) that further according to the NTPC, a similar issue was raised by the Transmission Corporation of Andhra Pradesh Ltd. in Appeal No.25 of 2009 filed before this Appellate Tribunal against the order of Central Commission and this Appellate Tribunal, vide judgment dated 05.05.2009, had dismissed the contention of the Transmission Corporation of Andhra Pradesh Ltd. observing as under:

"*viii) The Appellants' main contention is that that there is a continuous cause of action and as such for every cause of action, they have got a right to file a separate Petition opposing the FERV methodology. This contention is absolutely wrong because the present case involves the issue relating to the period 2001-04, whereas the cause of action raised in the methodology of FERV for the said period would arise immediately after the Order dated 21.12.2000 was passed. There is no fresh FERV issue for the Appellants from 31.3.2004*".

4. In this way, NTPC Ltd., the appellant herein, challenged the Impugned Order dated 11.01.2010 passed by Central Commission in Petition No.120 of 2005 only on the issue of allocation of FERV during the previous tariff period 01.04.2001 to 31.03.2004 wherein the Central Commission held that the said FERV should be adjusted as loan only and not against loan and equity in the ratio of 50:50.

5. We have heard Mr. M. G. Ramachandran counsel for the appellant, Mr. Pradeep Misra for Respondent Nos. 11 & 15 and Mr. S. Vallinayagam for Respondent No.8 and gone through the material including the impugned order which is available on record. We have also gone through and considered the written submissions filed on behalf of the appellant and also on behalf of respondent Nos.11 and 15.

6. The only issue arising for our consideration is:
whether Foreign Exchange Rate Variation (FERV) capitalized during the years 2001-02, 2002-03 and 2003-04 should be apportioned between debt and equity in the ratio of 50:50, as claimed by the appellant, NTPC or to be entirely 100% allocated to debt?

7. The following contentions have been made on behalf of the appellant, NTPC on this issue relating to **<u>Foreign Exchange Rate Variation (FERV) adjustment between debt and equity</u>**:

a) that the FERV adjustment is required because the foreign currency loan is converted to Indian Rupees and the total capital cost is decided in Indian Rupees. The repayment of foreign currency loan has to be made in foreign currency. At the time of repayment on annual basis, there is bound to be an

exchange rate variation, namely the value of Indian Rupee in comparison to the foreign currency may be higher or lower, as compared to the value when the foreign currency loan was utilized to find the assets i.e. incurring of capital expenditure.

b) that accordingly, in each FY the value of foreign currency loan outstanding in the form of converted Indian Rupees varies qua the foreign currency. The Accounting Standard 11 provided is as under, with respect to recognition of exchange difference:

> "*10. Exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which are carried in terms of historical cost, should be adjusted in the carrying amount of the respective fixed assets. The carrying amount of such fixed assets should, to the extent not already so adjusted or otherwise accounted for, also be adjusted to account for any increase or decrease in the liability of the enterprise, as expressed in the reporting currency by applying the closing rate, for making payment towards the whole or a part of the cost of the assets or for repayment of the whole or a part of the monies borrowed by the enterprise from any person, directly or indirectly, in foreign currency specifically for the purpose of acquiring those assets.*"

c) that when the capital cost is included in foreign currency and the capital cost is maintained in the foreign currency, the FERV issue would not arise as the capital cost is serviced in foreign currency. In that event, when the capital cost is apportioned between debt and equity, the apportioned debt and equity continue to be maintained throughout.

d) that FERV adjustment is a necessary consequence of the borrowed foreign currency loan being converted to Indian Rupees. The capital cost is determined in the beginning. At that stage, the total capital cost was apportioned between debt and equity in the proportion of 50:50, though the equity component

in the case of NTPC was generally more than 50% and the excess was treated as notional loan. If the FERV fluctuation in future was then known, the adjustment of fluctuation would have also been taken into account and apportioned between debt and equity and notional loan i.e. in excess of 50% of equity would have been determined after factoring in loan including FERV. In other words, part of the excess equity being treated as notional loan would have been reduced or increased at that time itself. Since it was not possible to know about such variation that would happen in future, the appropriate adjustment is made on notional basis in future.

e) that in case of NTPC where equity contribution is more as compared to that (in the existing generating station), a part of equity is apportioned as deemed loan or notional loan. If FERV is not apportioned in the ratio of 50:50 and is entirely apportioned to loan then, NTPC would be seriously prejudiced in the beginning, part of its equity being treated as deemed loan and at a later stage, the FERV would be entirely treated as loan.

f) that furthermore, in the initial stages the FERV was apportioned between debt and equity at 50:50 giving substantial benefit to respondent beneficiaries as the interest rate was much higher, namely 16% to 18% as compared to return on equity at 12%. Thus, the respondent beneficiaries had benefited from the FERV apportionment when the interest regime was higher by getting 50% of FERV adjustment towards equity. At the time the interest regime had fallen below the return on equity, the respondents cannot be allowed to wriggle out of the methodology being continued.

g) that judgment dated 04.10.2006 in Appeal No.135-140 of 2005 of this Appellate Tribunal in Powergrid Corp. Of India Ltd. case is quite different from the case of the present appellant, NTPC because this Appellate Tribunal adopted the methodology of allocating the FERV entirely to loan in the case of Powergrid Corp. Of India Ltd. because of the Notification dated 16.12.1997 issued by Government of India wherein it was held that in the case of Powergrid Corp., the equity shall remain constant up to the technical life of the asset and further in the Powergrid Corp. Case there was no apportionment to equity prior to 01.04.2001. In fact, such apportionment in Powergrid Corp. Case was introduced for the first time by order dated 21.12.2000 of the Central Commission, effective from 01.04.2011.

h) that in the case of appellant, NTPC, the Government of India Notification did not provide for any such stipulation that the equity be constant, as in the case of Powergrid Corp., but rather provided for capitalization of FERV on an annual basis and the apportionment of the same between debt and equity. In the case of NTPC, unlike in the case of Powergrid Corp., capitalization of FERV was prevalent right from the beginning which had been to the benefit of respondents. The Government of India Notification dated 09.12.1998 provides for treatment of FERV for NTPC as: "*the effect of foreign exchange variation on interest on loan, loan repayment due, depreciation and return on equity to be paid to/by NTPC/beneficiary would be determined by Central Government at the end of each financial year*". Thus the Government of India's Notification is clearly different in the case of NTPC.

i) In the case of Simhadari Station of NTPC, a similar issue was raised before this Tribunal in Appeal No. 25 of 2009 in the case of Transmission Corporation of Andhra Pradesh Limited V National Thermal Power Corporation Limited and the same was dismissed by the Hon'ble Tribunal holding that in the case of NTPC there was no reason for altering the methodology because of the decision in the Powergrid case.

j) In the order dated 5.5.2009 passed in Appeal No.25 of 2009, this Tribunal had considered the FERV apportionment in the case of NTPC generating stations for the period 1.4.2001 to 31.3.2004 and decided the matter in favour of NTPC on the ground that FERV methodology decided by the Central Commission on 21.12.2000 was not challenged. The following extracts from the above judgement of the Hon'ble Tribunal would clearly show that the cause of action was the Order dated 21.12.2000:

"3. NTPC, the Respondent herein is owning and operating generating stations in various States of India. The first Appellant is the Transmission company. The Appellants 2 to 5 are the Distribution Companies. They are having all their operations in the State of Andhra Pradesh. The NTPC approached the Central Commission for deciding the methodology for calculation of the Foreign Exchange Rate Variation (FERV). The Central Commission deliberated on the different practices followed with regard to the claim of FERV existing with different utilities including the Appellants, and finalized the methodology for calculation of FERV, and passed the order dated 21.12.2000. The Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 notified on 26.3.2001 incorporated the said methodology for calculation of FERV.

"a) The issue raised by the Appellants in the Appeal related to the decision about the methodology of calculation of FERV taken by the Central Commission on 21.12.2000 itself. Admittedly, that Order was not challenged. Without challenging the same, the Appellants cannot reopen the issue which was already decided

by the Central Commission, under the garb of this Appeal challenging the dismissal of the Review Petition."

"(viii) The Appellants' main contention is that there is a continuous cause of action and as such for every cause of action, they have got a right to file a separate Petition opposing the FERV methodology. This contention is absolutely wrong because the present case involves the issue relating to the period 2003-04, whereas the cause of action raised in the methodology of FERV for the said period would arise immediately after the Order dated 21.12.2000 was passed. There is no fresh FERV issue for the Appellants from 31.3.2004".

k) That the cause of action, if any, for challenging the decision of the Central Commission to apportion the FERV in the case of NTPC between debt and equity at 50:50 arose on 26.03.2001 when the Tariff Regulations 2001 were issued pursuant to order dated 21.12.2000 passed by Central Commission and in the Tariff Regulations, the Central Commission provided in clause 1.13 that the utility shall follow Accounting Standard level issued by the Institute of Chartered Accountants. The respondents having chosen not to challenge the above decision at the relevant time, the decision of Central Commission became final and binding.

l) that the contention of the respondents that FERV liability for the period 01.04.2001 to 31.03.2004 was capitalized only on 23.11.2006 (order passed by Central Commission approving the project of Kahalgaon Stage 1 for the tariff period 01.04.2004 to 31.03.2009) and therefore the cause of action accrued thereafter only is wrong. In terms of clause 1.7 of the Tariff Regulation 2001, the FERV recovery for the period 01.04.2001 to 31.03.2004 based on the decision taken in order dated 21.12.2000 was allowed automatically and was recovered by NTPC during the said period. The order dated 23.11.2006 dealt

with the determination of tariff for the period 01.04.2004 to 31.03.2009. Paragraphs 11 to 20 of the order dated 23.11.2006 of the Central Commission are on the capital cost to be admitted for determination of tariff as on 31.03.2004 or opening capital cost as on 01.04.2004. This was not the case of implementation of apportionment of FERV for the period 01.04.2001 to 31.03.2004.

m) that the respondent's contention that the order dated 21.12.2000 is only a recommendation and not a statutory order and the same should be ignored while considering the tariff determination issues, is frivolous. The order dated 21.12.2000 was passed by Central Commission which got incorporated in the Tariff Regulations 2001. Accordingly, the cause of action for challenging the decision made by Central Commission on the apportionment of FERV arose when the order dated 21.12.2000 was passed and the same was followed by Tariff Regulations 2001, notified on 26.03.2001. The respondents ought to have challenged the order dated 21.12.2000 or at least the Tariff Regulations 2001 when the same were notified on 26.03.2001.

n) that the capital expenditure incurred in setting up of the project as well as additional capital expenditure incurred from time to time constitutes the project cost or the capital cost to be serviced. The servicing of capital expenditure including additional capital expenditure as a part of tariff involves the following :

A. The capital cost is apportioned between debt and equity.
B. Additional capital expenditure is also apportioned between debt and equity.
C. The apportionment amongst debt and equity is on normative basis.

D. *The applicable normative Debt and Equity ratio is 50:50*
E. *The above normative ratio is applied irrespective of actual involved in a generating station.*

o) that at the time of setting up of the project the NTPC invests in project both by equity and debt. The debt can be either domestic debt or foreign currency debt. The foreign currency debt is preferred because of low rate of interest and concessional terms. The multi lateral agencies such as the World Bank, Asian Development Bank or various lenders who are giving loan on better terms. Such borrowings from foreign sources benefit the respondent beneficiaries because of interest cost being lower as compared to domestic cost. The foreign currency borrowing needs to be converted into Indian Rupees. The converted value in Indian Rupee together with domestic loan taken and the equity funding mix the project cost. The above aggregate amount, which is the capital cost, is then apportioned in between debt and equity, in the case of old stations such as Kahalgaon in the ratio of 50:50.

p) that Kahalgaon Station was commissioned on 01.08.1996. Since then the methodology had been adopted consistently until 31.03.2004. It is not open to respondents to contend that the methodology should be different at a later stage and that too retrospectively. The retrospective revision of the methodology would necessitate the entire capital cost adjustment to be reworked since the date of commercial operation. As held in *P.S. Sada Siva Swami Vs. State of Tamil Nadu (1975) 1 SCC 152* which clearly specifies that scrambled egg cannot be unscrambled.

8. **Per Contra**, the following submissions have been made on behalf of respondent Nos.8, 11 and 15:

a) that on 16.12.1997 the Central Government issued the Notification under proviso to Section 43(A) of the Electricity (Supply) Act for determining the tariff of power namely generating tariff.

b) that on 09.12.1998 a Notification was issued by Government of India laying down terms and conditions for determination of tariff for Kahalgaon STPS for the period from 01.08.1996 to 31.03.2000. The said Notification came to an end on 31.03.2000 and cannot be legally applied thereafter because the said Notification dated 09.12.1998 had its life from 01.08.1996 to 31.03.2000.

c) that on 21.12.2000 Central Commission passed an order for laying down terms and conditions for determination of tariff. Central Commission on 26.03.2001 framed Tariff Regulations 2001 for the period 01.04.2001 to 31.03.2004.

d) that there was a gap period between 31.03.2000 when life of the Notification dated 09.12.1998 issued by Government of India expired and 21.12.2000 when Central Commission passed an order for laying down terms and conditions for tariff determination.

e) that on 04.08.2005 the Central Commission determined the tariff for Kahalgaon STPS for the period 01.04.2001 to 31.03.2004. However, the effect of FERV during this tariff block was not considered nor mentioned hence, there was no

observation regarding FERV in the tariff order dated 04.08.2005 for Kahalgaon STPS of the appellant.

f) that This Appellate Tribunal in its judgment dated 04.10.2006 in the case of Tamil Nadu Electricity Board Vs. Powergrid Corp. Of India Ltd. clearly held that the **calculation of FERV on normative basis is correct. However, if equity is not in foreign currency, the amount of FERV will be capitalized only towards loan.**

g) that on 23.11.2006 the Central Commission determined the tariff for Kahalgaon STPS for the period 2004-09. While determining the tariff, the Central Commission determined the capital cost of the station and for that purpose considered the effect of FERV. Against the actual FERV of Rs.539/- Lacs, the Commission capitalized amount of Rs.1207/- Lacs on normative basis. However, this amount was apportioned in the ratio of 50:50 in equity and loan and at that relevant time the Commission failed to consider the decision of this Appellate Tribunal dated 04.10.2006 which came one month prior to the order dated 23.11.2006 of the Central Commission.

h) that the appellant has been given the actual FERV of Rs.539/- Lacs to the enhanced amount of Rs.1207/- Lacs on normative basis and now the appellant wants apportionment of Rs.1207/- Lacs in the debt-equity ratio of 50:50.

i) that the appellant NTPC did not claim FERV in 2001-04. The appellant claimed it with tariff petition for the period 2004-09 hence, the respondent MPSEB, the predecessor of Madhya Pradesh Power Trading Co. Ltd. could not argue the said point

when the tariff order for the FY 2004-09 was to be passed. Hence, the said FERV is to be considered as per Tariff Regulations 2001.

j) that CERC came into existence on 24.07.1998 under the Electricity Regulatory Commission Act 1998 which came into force on 25.04.1998. On 09.12.1998, Notification was issued by Government of India laying down terms and conditions for determination of tariff for Kahalgaon STPS of the NTPC for the period 01.08.1996 to 31.03.2000 which completed its life on 31.03.2000.

k) that the Central Commission, vide Impugned Order dated 11.01.2010, after hearing both the parties, has capitalized the amount of FERV, Rs.1207/- Lacs towards loan.

l) that the Government of India Notification dated 09.12.1998 in case of Kahalgaon STPS as well as Notification dated 16.12.1997 in case of Powergrid Corp. became redundant w.e.f 01.04.2001 and statutory Tariff Regulation 2001 came into force and after coming into force of Tariff Regulations 2001, no reliance can legally be placed on the Notifications dated 16.12.1997 and 09.12.1998 issued by the Government of India for a particular purpose and time leg.

m) that the judgment dated 04.10.2006 in Appeal No. 135-140 of 2005 passed by this Appellate Tribunal has applicability on all the utilities whether generating station or transmitting power as Tariff Regulations 2001 are applicable to both equally.

n) that tariff order dated 21.12.2000 passed by Central Commission before framing of the statutory Regulations 2001 cannot be applied contrary to the Tariff Regulations 2001 as interpreted by this Appellate Tribunal.

o) that the judgment dated 05.05.2009 passed by this Appellate Tribunal in Appeal No.25 of 2009 in Transmission Corporation of Andhra Pradesh Vs. NTPC is not applicable in the facts and circumstances of the present case.

9. Our discussion and conclusion:

9.1 The matter before us is the methodology of apportioning Foreign Exchange Rate Variation (FERV) for the tariff period 2001 to 2004 (01.04.2001 to 31.03.2004) namely:

(a) FERV variation as additional capitalization to be apportioned as debt and equity in the ratio of 50:50 or

(b) it should be apportioned entirely to debt.

9.2 Before considering the issues, a look at the relevant Regulations namely, Regulation 1.13 and 1.7 of the Tariff Regulations 2001 is necessary. The same are produced as under:

"*1.13* *Extra Rupee Liability*

"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 Standards-11 (Eleven) as issued by the Institute of Chartered Accountants of India*** *to calculate the impact of exchange rate variation on loan repayment"*

1.7 “Recovery of Income Tax and Foreign Exchange Rate Variation shall be done directly by the utilities from the beneficiaries without filing a petition before the Commission. In case of any objections raised by the beneficiaries to the amounts claimed on these counts, they may file an appropriate petition before the Commission.”

9.3 There is no issue on the capitalization of Foreign Exchange Rate Variation (FERV) as such. This aspect has been duly approved by this Appellate Tribunal in the Powergrid Corp. Case and decision dated 04.10.2006 in Appeal No.135-140 of 2005 in the Powergrid Corp. Case when this Appellate Tribunal had occasion to consider Accounting Standard. Thus Regulation 1.13 of Tariff Regulations 2001 clearly provides for FERV. Further saying that every utility shall follow the method as per Accounting Standard level 11 level issued by Institute of Chartered Accountants of India to calculate the impact of exchange rate variation on loan repayment. We have carefully gone through the judgment of this Appellate Tribunal dated 04.10.2006 and this Appellate Tribunal in paragraph 12 thereof notes that the CERC has followed the Accounting Standard 11 level according to which FERV is to be capitalized every year at each balance sheet on accrual basis. Further in paragraph 13 of the judgment the Tribunal notes that CERC has followed the method for calculating the extra rupee liability by following Accounting Standard 11 and even if two interpretations of Regulation 1.13 of Tariff Regulations 2001 are possible, the CERC, undoubtedly, has followed one of the interpretations, which interpreted made by CERC cannot be flawed.

9.4 According to the appellant the foreign exchange rate variation methodology was adopted by the learned Central Commission vide its order dated 21.12.2000 holding that apportionment of the FERV between loan and equity shall be in proportion of 50:50. The said methodology was implemented by the Central Commission in its tariff order dated 04.08.2005. These orders dated 21.12.2000 and

04.08.2005 passed by Central Commission had come final on the issue of allocation of FERV as these orders had not been challenged by the respondent MPPTCL or its predecessor MPSEB, the respondent. The said orders could not be revised/reviewed/modified by Central Commission and that too in the Review Petition on the ground that a contrary view was taken by this Appellate Tribunal in its afore mentioned judgment dated 04.10.2006 in appeal Nos. 135-140 of 2005 in the matter of TNEB Vs. PGCIL and judgment dated 22.12.2006 in Appeal No.161 of 2006, clearly holding that the calculation of FERV on normative basis made by the Central Commission is correct, however, if equity is not in foreign currency, the amount of FERV will be capitalized only towards loan. The main contention of the learned counsel of the appellant is that these two decisions of this Appellate Tribunal were pronounced in the matter of calculation of FERV in regard to Powergrid Corp. of India Ltd. and the same analogy cannot be applied in the matter of NTPC, the appellant herein, because in the case of the appellant, NTPC, the Government of India Notification dated 09.12.1998 did not provide for any such stipulation that the equity shall remain constant upto the technical life of the asset and therefore, in the Powergrid Corp. of India Ltd. case there was no apportionment of equity prior to 01.04.2001. In fact, such apportionment in Powergrid Corp. of India Ltd. case was introduced for the first time by the Central Commission's order dated 21.12.2000 effective from 01.04.2011. Further, the Government of India Notification dated 09.12.1998 provides for treatment of FERV on interest on loan, loan repayment due, depreciation and return on equity to be paid to/by NTPC/beneficiary would be determined by the Central Government at the end of each FY and thus Government of India Notification dated 09.12.1998 is clearly different in the case of NPTC as compared to the Government of India Notification dated 16.12.1997 issued with regard to the case of Powergrid Corp. of India

Ltd. where equity shall remain constant up to the technical life of the asset. According to the appellant, in facts and circumstances of the case before this Appellate Tribunal, the judgment dated 04.10.2006 in Appeal No. 135-140 of 2005 passed by this Appellate Tribunal is quite different from the present case of appellant, NTPC because this Appellate Tribunal adopted the methodology of allocating the FERV entirely to loan in the case of Powergrid Corp. of India Ltd. and the judgment is based on the Government of India Notification dated 16.12.1997 issued with regard to Powergrid Corp. of India Ltd.

9.5 We may very briefly state the facts which have clearly emerged from the total facts and circumstances of the present case, which are as under:

a) the appellant NTPC filed a Petition No. 120 of 2005 before the Central Commission for approval of tariff in respect of Kahalgaon Super Thermal Power Station Stage I (840 MW) for the period from 01.04.2004 to 31.03.2009 based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2004 (Tariff Regulations 2004) and the Central Commission vide its main order dated 23.11.2006 disposed of the said petition holding that the petitioner NTPC is entitled to recover other charges like incentive, claim for reimbursement of income tax and other taxes, cess levied by the statutory authority and other charges in accordance with Tarrif Regulations 2004 as applicable and since the NTPC is already billing the respondents on provisional basis in accordance with the Central Commission's interim directions the provisional billing of tariff shall be adjusted in the light of the final tariff approved by its order dated 23.11.2006. <u>The learned Central Commission in this very order dated 23.11.2006 held that in the present case the normative loan</u>

is more than the actual loan, the interest on loan is allowed on the normative loan and hence, computation of FERV is based on normative loan. Based on the normative loan outstanding, FERV was worked out to Rs.1207/- Lacs, which had been admitted for tariff calculation:

(Rs.in Lakh)

Particulars	**2001-02**	**2002-03**	**2003-04**	Total
FERV	(-)143	1339	11	**1207**

Based on the above, the gross block as on 01.04.2004 comes to Rs.202704.41 Lacs as per the details given hereunder:

(Rs. In Lakh)

Capital cost admitted as on 1.4.2004	195974.71
FERV admitted for the tariff period 2003-2004	1207.27
Additional capitalization approved by the Commission for the period 2001-04	5522.43
Opening Capital cost as on 1.4.2004	**202704.41**

b) It is the case of NTPC, the appellant, that in its order dated 23.11.2006 in Petition No.120 of 2005, the Central Commission had only followed the methodology already implemented and there was no fresh adjudication or decision on the methodology.

c) The MPPTCL, the successor of the then erstwhile MPSEB filed a Review Petition, being No.86 of 2007 before the Central Commission seeking review of the order dated 23.11.2006 on the issue of apportionment of FERV between debt and equity contending that as per the judgment dated 04.10.2006 of this Appellate Tribunal in Appeal Nos.135-140 of 2005 (TNEB Vs. CERC & Ors.) and subsequent judgment dated 22.12.2006 in Appeal No.161 of 2006 in the case of Madhya Pradesh State Electricity

Board Ltd. Vs. Powergrid Corp. Of India Ltd. & Ors. the allocation of FERV on account of foreign currency loan should be adjusted only against the debt and not apportioned between debt and equity. The said Review Petition No. 86 of 2007 was dismissed holding the same to be barred by limitation vide order dated 21.05.2008 passed by Central Commission. This Appellate Tribunal vide its judgment dated 16.12.2008 passed in Appeal No.127 of 2008 filed by Madhya Pradesh Power Trading Co. Ltd. against the order dated 21.05.2008 directed Central Commission to reconsider the issue on delay condonation in filing the review petition and the Central Commission vide its order dated 29.09.2009 allowed the delay condonation application in Review Petition No.86 of 2007 and also vide order dated 29.09.2009 allowed the Review Petition. Subsequently the Central Commission vide Impugned Order dated 11.01.2010 modified its order dated 23.11.2006 passed in Petition No. 120 of 2005.

d) In the aforesaid facts and circumstances of the present matter, the learned Central Commission allowed the aforesaid petition being Petition No.120 of 2005 and modified its earlier order dated 23.11.2006 vide the same4 impugned order dated 11.01.2010 which is under challenge before us in this instant appeal.

9.6 NTPC, the appellant on an earlier occasion had challenged the impugned order dated 11.01.2010 passed by the Central Commission in the aforesaid Petition No.120 of 2005 by filing the Appeal No.58 of 2010 before this Appellate Tribunal challenging the foreign exchange rate variation methodology by the Central Commission. This Appellate Tribunal heard at length the contentions of the appellant, NTPC to the effect that the foreign exchange rate variation methodology was adopted by Central

commission vide its order dated 21.12.2000 holding that the apportionment of the FERV between loan and equity shall be in the proportion of 50:50 and the said methodology was also implemented in the subsequent tariff order dated 04.08.2005. The Central Commission's orders dated 21.12.2000 and 04.08.2005 had attained finality as they were never challenged before any higher forum. The crux of the submissions made by the learned counsel for the appellant before this Appellate Tribunal against the impugned order was that the impugned order had changed the methodology adopted earlier relating to the period 01.04.2001 to 31.03.2004 while dealing with the tariff petition for the subsequent period and that too in the Review Petition seeking review of Central Commission's earlier tariff orders.

9.7 This Appellate Tribunal in its judgment dated 01.09.2010 against the same impugned order, found that there is no dispute that in the earlier order dated 23.11.2006 in respect of tariff for Kahalgaon Station for the period 01.04.2004 to 31.03.2009, the Central Commission held that the FERV be apportioned between debt and equity in the ratio of 50:50 as earlier decided in Central Commission's order dated 21.12.2000.

9.8 This Appellate Tribunal in its judgment dated 01.09.2010 in Appeal No.58 of 2010 observed as under:

"*that the contention of the respondents that foreign exchange rate variation liability for the period 01.04.2001 to 31.03.2004 was capitalized only on 23.11.2006 and therefore, the cause of action accrued thereafter is wrong.*"

9.8.1 While determining the tariff for the period 01.04.2004 to 31.03.2009, the FERV during the said period was considered and an amount of Rs.1207.27 Lacs was taken into account for

determination of open capital cost as on 01.04.2004 by the Central Commission.

9.8.2 The respondents' contention to the effect that there has been a double accounting due to this methodology is also baseless as amount of FERV being Rs.1207.27 Lacs was never raised as the issue and this amount towards FERV had been referred to even in the order dated 23.11.2006. The only issue was on the apportionment namely, whether the entire amount of Rs.1207.27 Lacs should be apportioned to loan or should be apportioned on 50:50 on loan and equity?

9.8.3 The respondent TNEB's contention to the effect that FERV was excluded in its order dated 09.05.2006 in Petition No.146 of 2005 by the Central Commission has also no merit because in the order dated 09.05.2006 the Central Commission decided on the additional capital expenditure to be allowed to the appellant, NTPC for the period from 01.04.2001 to 31.03.2004 for Kahalgaon Station. In terms of clause 1.7 of the Regulations, the FERV impact was allowed to be billed automatically without any requirement to file a petition. Accordingly, the FERV was billed and collected by the appellant.

9.8.4 That the decision taken by Central Commission vide impugned order dated 11.01.2010 revising its own earlier orders with reference to FERV is wrong for the following reasons:

a) that Order 47, Rule 1 of CPC puts a specific bar on considering the subsequent order passed by superior court as a ground for review. In this case, the Central Commission modified its earlier order dated 23.11.2006 by way of impugned order mainly on the

basis of this Appellate Tribunal's judgment in some other appeals, which is a violation of Order 47 Rule 1 of CPC.

b) That the decision taken by this Appellate Tribunal in Appeal No.135-140 of 2005 and Appeal No.161 of 2006 relating to the Powergrid Corp. of India Ltd. would not apply to the appellant, NTPC. On the other hand, this Appellate Tribunal in Appeal No.25 of 2009 passed an order dated 05.05.2009 in which NTPC was a party, would apply to appellant, NTPC.

c) In addition to the bar contained in Order 47 Rule 1 of CPC, since the Hon'ble Supreme Court has taken the view that once the matter gets settled between the parties before a judicial forum, the same cannot be reopened simply on the ground that in some other matter filed at the instance of some other parties who is similarly situated, that Tribunal or Court had provided same relief. Therefore, the impugned order dated 11.01.2010 passed by the Central Commission is against the dictum laid by Supreme Court in *Mohd. Azim Alam V. Union of India* reported in 2001 (10) SCC 93.

d) Admittedly, the respondent MPSEB had not challenged the order dated 21.12.2000 nor the Tariff Regulations 2001 Notified on 26.03.2001 before any competent forum and as such the said orders and tariff regulations had become final, as such cause of action for challenging the decision/order dated 21.12.2000 arose at that time itself and cannot be said to be accrued after a long gap.

e) That the contention of the respondent MPSEB or its successor MPPTCL to the effect that cause of action accrued only on

23.11.2006 when the order of the Central Commission was passed is not correct.

f) When the FERV was apportioned at initial stage between loan and equity at 50:50 the respondent beneficiaries got more interest as interest rate was higher namely, 16 to 18% while the return on equity was 12%. Thus, the respondent beneficiaries, in fact, had obtained benefits from FERV apportioned when the interest regime was higher by getting the 50% of the FERV adjustment towards equity.

9.9 In view of the above findings, this Appellate Tribunal vide judgment dated 01.09.2010 allowed Appeal No.58 of 2010 captioned as NTPC V CERC & Ors. and set aside the impugned order dated 11.01.2010 further directing the Central Commission to implement the findings recorded in the appellate judgment.

9.10 We may further mention that the judgment dated 01.09.2010 passed by this Appellate Tribunal in Appeal No.58 of 2010 was challenged by MPSEB (now known as MPPTCL) which is respondent No.17 herein before the Hon'ble Supreme Court of Indian by way of Civil Appeal No.10278 of 2010 captioned as MPSEB Vs. NTPC & Ors. and the Hon'ble Supreme Court vide its order dated 09.10.2014 disposed of the appeal, which order we are reproducing as under:

> "*Having taken into consideration the order dated 29.09.2009 passed by the Central Electricity Regulatory Commission, New Delhi, we are satisfied that the Appellate Tribunal was thereupon required to adjudicate upon the controversy on its merits. Rather than doing that, a perusal of the impugned order dated 1.9.2010 reveals, that most of the issues were decided on technicality by the Appellate Tribunal.*

In the above view of the matter, we consider it just and appropriate to set aside the impugned order dated 1.9.2010, remit the matter back to the Appellate Tribunal, and direct the Appellate Tribunal to re-consider the controversy and dispose of the same on merits, in accordance with law. Ordered accordingly.

The instant appeal is disposed of in the above terms. There shall be on order as to costs."

9.11 We have deeply and consciously perused the Hon'ble Supreme Court's order dated 09.10.2014 whereby the Hon'ble Supreme Court while setting aside our judgment dated 01.09.2010 in Appeal No.58 of 2010 remitted the matter back to this Appellate Tribunal and directed us to re-consider the controversy and disposed of the same in accordance with law.

10. Before we proceed towards our conclusion, we deem it proper to have a look at the impugned order dated 11.01.2010 pased by the Central Commission in Petition No.120 of 2005 which is under challenge before us in the instant appeal. A look at the impugned order, even otherwise also is very necessary, as the Hon'ble Supreme Court in its order dated 09.10.2014 clearly held that having taken into consideration the order dated 29.09.2009 passed by Central Commission, the Appellate Tribunal was thereupon required to adjudicate upon on merits. For that purpose the Hon'ble Supreme Court while setting aside our judgment/order dated 01.09.2010 passed in Appeal No.58 of 2010 remitted the matter back to us with the direction to re-consider the controversy and dispose of the same on merits and in accordance with law. Here we may again repeat that the very impugned order, dated 11.01.2010 passed by Central Commission in Petition No.120 of 2005 was challenged before this Appellate Tribunal by the same appellant namely, NTPC Ltd. through Appeal No.58 of 2010 and this Appellate Tribunal vide judgment dated 01.09.2010 allowed the appeal and set aside the same impugned

order dated 11.01.2010 directing the Central Commission for allocation of foreign exchange rate variation to loan and equity in the ratio of 50:50. Thus this Appellate Tribunal vide the said judgment dated 01.09.2010 quashed the impugned order dated 11.01.2010 passed by Central Commission further directing the Central Commission to implement the Central Commission's order dated 23.11.2006 in regard to allocation of FERV to loan and equity in the ratio of 50:50.

11. As stated above, the appellant NTPC Ltd. filed Petition No.120 of 2005 before the Central Commission for approval of tariff for Kahalgaon STPC Stage-I for the period from 01.04.2004 to 31.03.2009 based on the CERC(Terms and Conditions of Tariff) Regulations 2004. The Central Commission in the impugned order cited in a table the annual fixed charges approved by the Commission by order dated 23.11.2006. The impugned order further contains the details and figures mentioned in its order dated 23.11.2006, as detailed above. The time barred petition was, after the intervention of this Appellate Tribunal, heard and delay in filing the said review petition was condoned and further the order dated 23.11.2006 was modified by the impugned order dated 11.01.2010. The respondent MPSEB sought review of the order dated 23.11.2006 by filing Review Petition No.86 of 2007 on the issue of apportionment of FERV between debt and equity contending that as per the judgments dated 04.10.2006 of this Appellate Tribunal in Appeal No.135-140 of 2005 and 22.12.2006 in Appeal No.161 of 2006, the allocation of FERV on account of foreign currency loan should be adjusted only against debt and should not be apportioned between debt and equity in the ratio of 50:50. The learned Central Commission by the impugned order dated 11.01.2010 reviewed its main order dated 23.11.2006 on the said issue and modified the main order dated 23.11.2006 directing that the FERV should be allocated

only towards loan and should not be apportioned between loan and equity in the ratio of 50:50.

12. The learned Central Commission while considering the above judgments of this Appellate Tribunal, though the judgments were pronounced in the matter of Powergrid Corp. Of India Ltd., considered the ratio of the judgments and the interpretation of relevant Regulations of Tariff Regulations in paragraph 7 of the impugned order. The main contention of the appellant petitioner NTPC before the Central Commission on the judgment of Appellate Tribunal dated 04.10.2006 was that the Appellate Tribunal had recognized that any equity component remained constant during the technical life of the transmission asset in case of Powergrid and since the payment of increased loan amount on account of FERV was made by the appellant out of its internal resources, the same had to be added to equity. But the Commission apportioned it on normative basis in debt and equity in the ratio of 50:50. The other submission of the appellant's counsel before the Central Commission was that the methodology for capitalization of FERV and apportionment consistently followed by the Commission regarding allocation of FERV in debt and equity in the ratio of 50:50 could not be changed at this stage. The respondents/beneficiaries before the Central Commission favoured implementation of judgment dated 04.10.2006 of this Appellate Tribunal on the ground that its interpretation of Regulation 1.13 of Tariff Regulations 2001 is equally applicable to the transmission system as well as generating stations. On the query by the Central Commission from the appellant at that stage, the appellant's reply was that the interpretation already adopted by Central Commission in respect of its generating stations is the correct interpretation of Regulation 1.13 and the same should not be modified.

13. The learned Central Commission passed the impugned order, the relevant part of which is being reproduced below:

"*10. Based on the provisions of Regulation 1.13 of the 2001 regulations as extracted above, the 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 issued by the Institute of Chartered Accountant of India, and capitalized the same along with the project cost. However, for the purpose of sourcing, it was apportioned between debt equity ratio for the generating stations and the transmission systems.*

11. TNEB had challenged some of the tariff orders in respect of the transmission system of PGCIL in Appeal Nos.135 to 140 of 2005, questioning the capitalization of FERV on accrual basis as on 1.4.2001, even in case of actual loan repayment taking place in the subsequent tariff period and the apportionment of FERV between debt and equity, on the ground that it was not permissible as per interpretation of the provision of Regulation 1.13 of the 2001 regulations. The Appellate Tribunal framed two issues, firstly whether the interpretation of Regulation 1.13 of the 2001 regulations by the Commission suffers from any illegality and secondly, whether the Commission was justified in apportioning FERV between loan and equity. The Appellate Tribunal in its judgment dated 4.10.2006 decided that the words "actually incurred" in Regulation 1.13 has been diluted in the second part of the regulation as extra rupee liability is to be decided by following the Accounting Standard-11 (eleven) which provides for capitalization on accrual basis on each 'balance sheet date'. As the Commission has adopted capitalization of FERV on accrual basis on the first date of each financial year during the tariff period, the Appellate Tribunal upheld the method of calculation of FERV adopted by the Commission. On the second issue, the Appellate Tribunal has concluded as under:

"Once the fixed cost has been agreed to be financed in a certain ratio of debt and equity, the equity can be effected by FERV only if the equity is in foreign exchange. The provision of FERV as a pass through has been kept to ensure that any liability or gain, if any, arising on account of any variation in foreign exchange rates (whether debt or equity) is passed on to the beneficiary. In case there is no FERV liability or gain, as the case may be, there will not be any FERV adjustment. In the instant case the additional liability arising on account of FERV shall have an impact only on the debt liability and not equity capital. In this view of the matter, we hold that FERV adjustment is to be made in respect of debt liability and not in respect of the equity. Accordingly, we

hold that the CERC is only to make adjustment in respect of debt liability and not in respect of the equity."

12. The issue has been examined and the Commission is of the view that as foreign exchange utilized for the project was in the form of debt only, any additional liability or gain arising out of FERV should be adjusted against the loan liability only and should not form part of the equity. In the present case, the FERV of Rs.1207 Lakh calculated on normative basis shall form part of the debt and accordingly, debt equity ratio changes in the subsequent years for the purpose of calculation of depreciation, interest on loan and return of equity. The opening balance as on 1.4.2004 will get changed and tariff for the period 2004-09 is revised.

13. In view of the above, we proceed to revise the tariff for the generating station for the period 2004-09 after apportionment of FERV capitalized on normative basis for the period 2001-04, against loan instead of equity, in the approved debt-equity ratio. Consequent upon this, the debt-equity ratio works out to 50.30: 49.70 and the annual fixed charges for the generating station has been computed as discussed in subsequent paragraphs."

14. It appears from the impugned order that based on the provisions of Regulation 1.13 of Tariff Regulations 2001, the Central Commission has been computing extra rupee liability arising out of FERV on account of interest payment and loan payment as per the Accounting Standard-11 issued by the Institute of Chartered Accountants of India and capitalized the same along with the project cost but for the purpose of resourcing it was apportioned between debt and equity ratio for the generating stations and the transmission systems. The TNEB had challenged some of the tariff orders in respect of transmission system of the Powergrid in Appeal No.135-140 of 2005 questioning the capitalization of FERV on accrual basis as on 01.04.2011 explaining the interpretation of the provisions of Regulation 1.13 of Tariff Regulations 2001. This Appellate Tribunal in judgment dated 04.10.2006 decided that the words "*actually incurred*" in Regulation 1.13 have been diluted in the second part of the Regulation as extra rupee liability is to be decided by following the Accounting Standard-11 which provides for capitalization on accrual basis on each balance sheet done. As the Central Commission had adopted the capitalization of

FERV on accrual basis on the first date of its FY during the tariff period, the Appellate Tribunal up held the method of calculation of FERV adopted by Central Commission.

15. After studying the judgment dated 04.10.2006 of this Appellate Tribunal, the Central Commission took the view that as foreign exchange utilised for the project was in the form of debt only, any additional liability or gain arising out of FERV should be adjusted against loan liability only and should not form part of the equity. Considering the same view, the Central Commission proceeded to revise tariff for the generating station of the appellant for the period 2004-09 after apportionment of FERV capitalized on normative basis for the period 2001-04 against loan instead of equity, in the approved debt-equity ratio.

16. It appears from paragraph 15 of the impugned order that having considered debt equity aspect, the Central Commission in the original tariff order in respect of generating station had considered debt-equity ratio of 50:50. However, consequent upon apportionment of FERV against loan, as stated above, the debt-equity ratio of 50.30 and 49.70 has been considered for revision of tariff. Accordingly, an amount of Rs.1,00,749/- Lacs has been considered as equity as on 01.04.2004, against equity of Rs.1,01,352/- Lacs considered in the main order dated 23.11.2006. Thus the learned Central Commission, by impugned order, after considering several aspects of the matter, relevant regulations and the judgment of this Appellate Tribunal on the issue of allocation of FERV, modified its order dated 23.11.2006 by the impugned order dated 11.01.2010.

17. We have cautiously and carefully gone through this Appellate Tribunal's judgment dated 04.10.2006 in Appeal No.135-140 of 2005 when this

Appellate Tribunal considering the issue of apportionment of FERV liability made the following observations:

"15. As regards the apportionment of FERV liability, it should not have been apportioned between debt and equity. As per note to Explanation-2 of clause-4 of the Government of India Notification dated December 16, 1997, the equity and loan component of the transmission systems commissioned on or before April 1, 1997 shall be notionally divided in the ratio of 50:50 on the book value of the transmission system at the end of the financial year of 1996-97. The note further provides that 50 percent of the book value of the transmission system as on April 1, 1997 shall be deemed as equity for computation of tariff effective from April 1, 1997 and shall remain constant upto the technical life of the asset and the remaining 50% of the book value shall be deemed as notional loan amount and shall be progressively reduced by the corresponding depreciation provision till it becomes zero.

16. According to Explanation 1 to clause 4.4(c), the premium raised by the Transmission Utility while issuing share capital and investment of internal resources created out of free reserve of the existing utility, if any, for the funding of the project, shall also be reckoned as paid up capital for the purpose of computing the return on equity subject to fulfilment of certain conditions. Explanation also makes no provision for increasing the equity beyond 50% of the book value of the transmission system. Once the fixed cost has been agreed to be financed in a certain ratio of debt and equity, the equity can be affected by FERV only if the equity is in foreign exchange. The provision of FERV as a pass through has been kept to ensure that any liability or gain, if any, arising on account of any variation in foreign exchange rates (whether debt or equity) is passed on to the beneficiary. In case there is no FERV liability or gain, as the case may be, there will not be any FERV adjustment. In the instant case the additional liability arising on account of FERV shall have an impact only on the debt liability and not equity capital. In this view of the matter, we hold that FERV adjustment is to be made in respect of debt liability and not in respect of the equity. Accordingly, we hold that the CERC is only to make adjustment in respect of debt liability and not in respect of the equity.

17. In view of the aforesaid discussion, the appeal is partly allowed to the extent indicated above. The Central Electricity Regulatory Commission shall re-calculate the effect of FERV on the debt liability."

18. Further, this Appellate Tribunal in its another judgment dated 22.12.2006 in Appeal No.161 of 2006 in the matter of MPSEB, Jabalpur Vs. Powergrid Corp. Of India Ltd. & Ors. While considering the Government of India Notification dated 16.12.1997 and also the

Regulation 1.13 of Tariff Regulations 2001 affirming the previous judgment dated 04.10.2006 observed as under :

"*10. We are of the opinion that once cost incurred has been recovered through tariff it ought not to be capitalized for recovering the same cost again through future tariff. We observe that the Respondent No.1, PGCIL has recovered additional FERV incurred for the period up to 31.03.2001 in terms of the notification dated 16.12.1997 and that portion of FERV if added back to the capital cost it would allow the entitlement to recover it through depreciations in subsequent years. This would lead to recovery of the same cost, twice.*

11. In order to provide the continuity with the related matters, it may be mentioned that this tribunal in its judgment passed on 4th October 2006 in Appeal No.135 to 140 of 2005 had concurred that the methodology adopted by the Central Commission for calculation of FERV as actually incurred read with AS-11. The said judgement also provide that any increase on account of FERV is not to be allocated to equity if the entire equity was sourced from the domestic resources only and not through foreign currency.

12. In view of the above the appeal is allowed. The FERV for the period up to 31.03.2001 already paid should not be added to the capital cost and the same be considered for the purpose of determination of tariff only for the subsequent period.

13. The Central Commission is directed to re-compute the affect of FERV on the debt liability in terms of the above judgement. With above observations & directions the appeal is disposed of."

19. The learned Central Commission, in its impugned order dated 11.01.2010, has taken the said view that foreign exchange utilized for the project of the appellant was in the form of debt only, any additional liability or gain arising out of FERV should be adjusted against the loan liability only and should not form part of the equity as mentioned above.

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.

ORDER

21. The present appeal, being Appeal No.58 of 2010 is hereby dismissed and the impugned order dated 11.01.2010 in Petition No.120 of 2005 is hereby upheld. No costs.

Pronounced in the open court on this ***18th day of August, 2015.***

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~