APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

Dated 1st September, 2010

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No. 58 of 2010

In the matter of:

1. NTPC Limited
NTPC Bhawan, SCOPE Complex,
Core-7, Institutional Area,
Lodhi Road, New Delhi-110 003 … Appellant

Versus

1. Central Electricity Regulatory Commission
3rd and 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 Limited
Vidyut Bhawan, Janpath,
Bhubaneshwar-751 007

6. Damodar Valley Corporation,
DVC Towers, VIP Road,
Kolkata-700 054
West Bengal

7. Power Department,
Government 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 Corporation Limited,
Shakti Bhawan, 14, Ashoka Marg,
Lucknow-226 001

12. Power Development Department,
Government of Jammu & Kashmir,
Mini Secretariat,
Jammu-180 001

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

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

13.(c) North Delhi Power Limited,
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, Anant Kanekar Marg,
Bandra (East)
Mumbai-400 005

17. Gujarat Urja Vikas Nigam Limited,
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 … Respondents

Counsel for the Appellant(s) **Mr. M.G. Ramachandran**
Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent(s) **Mr. Pradeep Mishra &**
Mr. Suraj Singh for R-11 and R-15
Mr. S. Vallinayagam for R-8

JUDGMENT

1. NTPC Limited is the Appellant herein. The Central Electricity Commission (**Central Commission)** is the first Respondent. Respondents 2 to 19 are the beneficiaries.

2. NTPC Limited has filed this Appeal challenging the order dated 11.01.2010 passed by the Central Commission. By this order, the Central Commission revised its own earlier order passed on 23.11.2006 in regard to allocation of Foreign Exchange Rate Variation to loan and equity at 50:50 and modified directing the entire Foreign Exchange Rate Variation should be allocated only to loan and not to loan and equity. The necessary facts are as follows:

3. The Appellant is engaged in the business of generation and sale of electricity. It operates 22 generating stations all over India. The Kahalgaon Station in Bihar is being owned, operated and maintained by the Appellant. The power generated from this Kahalgaon Station by the Appellant is supplied to the beneficiaries Respondents 2 to 19. The Appellant filed a Petition in Petition No. 120/05 praying for the determination of tariff for the period 01.04.2004 to 31.03.2009. Accordingly, the tariff was fixed by the Central Commission by the order dated 23.11.2006.

4. In the said order, the Central Commission took into account the additional capitalisation of Rs. 1207.27 lakhs on account of Foreign Exchange Rate Variation against the foreign currency loan for the period ended 31.03.2004 by apportioning the same between loan and equity in the ratio of 50:50. Accordingly, the tariff was determined. The methodology adopted in this case by the Central Commission was on the basis of its earlier order passed on 21.12.2000 in the Petition No. 4/2000 filed by the NTPC. On the basis of the said methodology adopted through the order dated 21.12.2000, the same was followed by the Central Commission in the order dated 04.08.2005 also in the Petition No. 37/2001 filed by the NTPC. Thus, the methodology of apportioning of the Foreign Exchange Rate Variation between loan and equity in the ratio of 50:50 had been followed from the beginning. The last order was dated 23.11.2006. All these orders namely, order dated 21.12.2000, order dated 04.08.2005 and the order dated 23.11.2006 had never been challenged before the Appellate Tribunal.

5. At that stage, the Madhya Pradesh Power Trading Company Limited, the successor of Madhya Pradesh State Electricity Board (Respondent-19) filed a Review before the Central Commission in Review Petition No. 86/07 for review of the order dated 23.11.2006 on the issue of apportionment of Foreign Exchange Rate Variation between loan and equity. This Review Petition was originally dismissed by the Central Commission on the ground of delay on 21.05.2008.

6. Challenging this order dated 21.05.2008 passed in the Review Petition, Madhya Pradesh Power Trading Company filed an Appeal before this Tribunal in Appeal No. 127/08. This Tribunal, after hearing the counsel for the parties, by the order dated 16.12.2008 remitted the matter to the Central Commission to reconsider on the issue of condonation of delay.

7. Accordingly, the parties were heard afresh by the Central Commission on the condonation of delay and ultimately the delay was condoned. Then the main Review Petition 86/07 was taken up

for consideration. The Central Commission considered the materials and argument advanced by the respective parties, In the meantime, the Appellant filed a Petition in Petition No. 27/07 on the issue of additional capitalization for the tariff period for FY 2004-05 and FY 2005-06 and also for revision of fixed charges. Accordingly, on 29.09.2008 and 11.12.2008 the said petition was allowed and order was passed. In addition to this, the Appellant filed another petition in 126/2009 for revising the fixed charges on the basis of impact of additional capitalization in respect of FY 2006-07, 2007-08 and 2008-09 and this matter is pending before the Central Commission.

8. The Central Commission heard the Review Petition seeking for review of the order dated 23.11.2006 in the Review Petition No. 86 of 2007 on the issue of allocation of Foreign Exchange Rate Variation and passed the order dated 11.1.2010, modifying the earlier order and holding that the said Foreign Exchange Rate Variation should be apportioned to loan only and not against loan

and equity in the ratio of 50:50. This order dated 11.01.2010 was passed on the strength of the Order passed by this Tribunal on 04.10.2006 in Appeal No. 135 to 140 of 2005 and the Order passed by this Tribunal on 22.12.2006 in Appeal No. 161/06 in the matter relating to tariff of Power Grid Corporation of India. Challenging this order dated 11.01.2010, the present Appeal has been filed by the Appellant/NTPC.

9. The grounds urged by the Learned Counsel for the Appellant to hold that the impugned order dated 11.01.2010 is erroneous are as follows:

(i) The Foreign Exchange Rate Variation methodology was adopted by the Central Commission by the order dated 21.12.2000 holding that apportionment of the Foreign Exchange Rate Variation between loan and equity shall be in the proportion of 50:50. The said methodology was implemented in the tariff order

dated 04.08.2005. These orders had become final on the issue of allocation of Foreign Exchange Rate Variation. As these orders had not been challenged by the Respondent Madhya Pradesh Power Trading Company or its predecessor Electricity Board, these orders become final and they are binding. The said order cannot be revised by the Central Commission that too in the Review Petition on the ground that a contrary view was taken in the Power Grid Corporation of India case by the Tribunal.

(ii) In fact, a similar issue was raised before the Tribunal in the case of Simhadri Station of NTPC in Appeal No. 25/09. In that case, the Andhra Pradesh Transmission Corporation challenged the methodology adopted by the Central Commission with reference to the same issue and

the same had been dismissed by the Tribunal on 05.05.2009. As per this order, the methodology adopted through the orders dated 21.12.2000 and 23.11.2006 are valid and the same have to be followed. Thus, it is clear that the order impugned passed in the Review Petition revising its own decision is contrary to the ratio decided by the Tribunal in Appeal No. 25/09.

(iii) The case of Power Grid Corporation of India decided by the Tribunal in Appeal No. 135 to 140, etc., of 2005 and Appeal No. 161/06, dated 04.10.2006 and 22.12.2006 respectively stand completely in a different footing. The case of Power Grid Corporation of India is clearly distinguishable as compared to the NTPC case in regard to the methodology to be adopted for apportionment of foreign exchange rate

variation which was upheld by this Tribunal by the order dated 05.05.2009 in Appeal No. 25/09.

(iv) There is a valid justification for upholding Foreign Exchange Rate Variation between the loan and equity in the case of NTPC. Foreign Exchange Rate Variation is a necessary consequence of the borrowed foreign currency loan being converted to Indian rupee. When the capital cost is determined in the beginning, the total capital cost is apportioned between loan and equity in the proportion of 50:50. It is true that the equity component in the case of NTPC was more than 50% and consequently the excess amount is treated as notional loan. If the Foreign Exchange Rate Variation in future was then known, the adjustment of fluctuation would also have been taken into account. In other words, part of the excess equity being treated as a notional loan would have been reduced or

increased at that time itself. Since it was not possible to know about such variation, appropriate adjustment is made on annual basis in future.

(v) In the case of NTPC where equity contribution is more as compared to loan, part of equity apportioned is treated as deemed loan or as notional loan. If the foreign exchange rate variation is not apportioned in the ratio of 50:50 and is entirely apportioned to loan only, the Appellant would be seriously prejudiced as in the beginning, part of this equity is treated as deemed loan and at a later stage the Foreign Exchange Rate Variation is entirely treated as loan.

10. In short, the crux of the submissions made by the Learned Counsel for the Appellant is, the impugned order changing the methodology adopted earlier relating to the period 1.04.2001 to 31.03.2004 while dealing with the tariff for the subsequent period,

that too in the Review Petition seeking for revising its own decision, is patently erroneous, particularly when the earlier orders passed by the Central Commission became final.

11. In reply to these submissions, the Learned Counsel for the Respondent have made the following contentions:

(i) The order dated 21.12.2000 passed by the Central Commission was before the framing of the statutory regulations. Therefore, the methodology referred to in that order cannot be made applicable at the present stage in the light of the regulations framed subsequently.

(ii) It cannot be debated that the order dated 21.12.2000 by which the methodology was fixed need not be challenged since the subsequent legislation dated 26.03.2001 supersedes the earlier order dated 21.12.2000.

(iii) In the judgment rendered by the Tribunal in Appeal Nos. 135-140 of 2005, the Tribunal has clearly held that the equity can be effected by Foreign Exchange Rate Variation only when the equity is in foreign exchange. This decision would squarely apply to the present case. On the other hand, the decision taken by the Tribunal in Appeal No. 25/09 would not apply to the present case as it did not deal with this issue.

(iv) Under Section 61 of the Electricity Act, the Central Commission has to specify the terms and conditions for determination of tariff. In doing so, the Central Commission shall be guided by the stipulations laid down in that section. Section 61 (d) provides for the recovery of cost of energy in a reasonable manner. The Central Commission had already framed Tariff Regulations, 2001 for recovery of cost of energy in a reasonable manner. The claim of the Appellant for

apportionment of the capitalized Foreign Exchange Rate Variation between loan and equity is unreasonable since there is no provision with regard to the same in the existing Tariff Regulations. Hence, impugned order is justifiable.

12. In the light of the rival contentions of the parties, the following questions would arise:

(i) Whether the Central Commission was right in law in allocating Foreign Exchange Rate Variation entirely to loan as against allocating the same between the debt and equity in the ratio of 50:50 consistent with the methodology adopted from the beginning?

(ii) Whether the Central Commission is correct in stating that the methodology for treating the Foreign Exchange Rate Variation in the case of NTPC ought to be the same as in the case of Power Grid Corporation of India after

ignoring the salient differences between the NTPC case and Power Grid Corporation of India case?

(iii) Whether the Central Commission was right in law in changing the methodology adopted for treatment of Foreign Exchange Rate Variation for the earlier period 01.04.2001 to 31.03.2004 while dealing with the tariff determination for the subsequent tariff period 01.04.2004 to 31.03.2009 for the Appellant when there was no challenge to the said methodology?

(iv) Whether the Central Commission was right in holding that the Tariff Regulations, 2001 deal with the methodology of allocation of Foreign Exchange Rate Variation as per the interpretation of this Tribunal in the decision relating to Power Grid Corporation of India when that case stands completely in a different footing?

13. On these questions, we have heard the arguments advanced by the Learned Counsel for the respective parties at length. We have given our thoughtful consideration to various aspects dealt with by the Learned Counsel for the parties. Let us now deal with each one of the questions referred to above.

14. There is no dispute in the fact that in the earlier order passed on 23.11.2006 in respect of tariff for the Kahalgaon Station for the period 01.04.2004 to 31.03.2009, the Central Commission held that the Foreign Exchange Rate Variation be apportioned between debt and equity in the ratio of 50:50 as earlier decided in the order dated 21.12.2000. This order of the Central Commission was sought to be revised in the Review Petition filed by the Madhya Pradesh Power Trading Company (Respondent) on the ground that the Tribunal in Appeal No. 135-140, etc., of 2005 in the case of Power Grid Corporation of India on 4.10.2006 and in Appeal No. 161/06 dated 22.12.2006 had held that the Foreign Exchange Rate Variation be allocated entirely to loan and not apportioned

between loan and equity. Accepting this contention, the Central Commission by the impugned order dated 11.01.2010, revised its own order dated 23.11.2006 and held that Foreign Exchange Rate Variation should be apportioned entirely to loan and not to the loan and equity in the ratio of 50:50.

15. In view of the above, it is clear that the only ground on which the Central Commission has decided the matter as against the Appellant in the impugned order dated 11.01.2010, revising its own decision dated 23.11.2006 is in view of the decision of the Appellate Tribunal dated 4.10.2006 and 22.12.2006 in the Power Grid Corporation case.

16. The short question is this whether the Central Commission could review and revise its own order dated 23.11.2006 wherein it was held that the foreign exchange rate variation should be apportioned between loan and equity in the ratio of 50:50 and take a contrary view to hold that the Foreign Exchange Rate Variation

should be entirely to loan merely because, the Tribunal took such a view in some other case?

17. Let us now refer to the relevant facts again while dealing with this question.

18. As mentioned above, on 21.12.2000, in the Petition filed by the NTPC, the Central Commission specifically held that the methodology followed by NTPC for the past so many years namely capitalization of Foreign Exchange Rate Variation and apportioning the amount capitalized to debt and equity in the ratio of 50:50 is the appropriate course. It further decided that all the utilities under the regulatory control of the Central Commission should follow the same methodology.

19. Thereupon, the NTPC filed a Petition in Petition No. 37/2001 for tariff fixation for the period 01.04.2001 to 31.03.2004. In this case, by the order dated 04.08.2005, the methodology decided by the order dated 21.12.2000 of apportioning the Foreign Exchange

Rate Variation in the proportion of 50:50 was adopted and implemented. Admittedly, these orders had never been challenged by the Respondents before the Appellate Tribunal.

20. Similarly, the NTPC filed an application for determination of tariff for Kahalgaon Station for the period 01.04.2004 to 31.03.2009 on 05.10.2005 including praying for Foreign Exchange Rate Variation adjustment for the period 2001-04 in Petition No. 125/05. The final order was passed in this Appeal 125/05 on 23.11.2006. In this order, the Central Commission decided the tariff and included Foreign Exchange Rate Variation for the period 2001-04 apportioned between loan and equity in the ratio of 50:50 as decided earlier through the order dated 21.12.2000.

21. In the meantime Tamilnadu Electricity Board, one of the respondents, filed an Appeal in 135-140 of 2005 relating to Power Grid Corporation of India before the Tribunal. In that case, the

Tribunal passed an order on 04.10.2006 holding that in the case of Power Grid Corporation of India as per the Government of India Notification dated 21.12.1997, the Foreign Exchange Rate Variation to be allocated entirely to loan. However, the order passed on 23.11.2006 by the Central Commission with reference to the finding of apportionment between loan and equity in the ratio of 50:50 had not been challenged before the Appellate court by the Respondents.

22. Thereafter, the Madhya Pradesh Power Trading Company, one of the respondents, filed an Appeal in Appeal No. 161/06 against the order in relation to the order of Power Grid Corporation for transmission tariff for the period 1.4.2001 to 31.3.2004. The final order dated 22.12.2006 passed by the Tribunal in the case of Power Grid Corporation of India decided that the Foreign Exchange Rate Variation was to be allocated entirely to loan and not to be apportioned between the loan and equity if the entire equity was sourced from domestic resources following earlier

Judgment of the Tribunal passed on 4.10.2006. At that stage, Madhya Pradesh Power Trading Co. the successor of the Madhya Pradesh Electricity Board instead of filing an Appeal as against the order dated 23.11.2006, allowed in favour of NTPC in respect of Foreign Exchange Rate Variation had chosen to file a Review Petition before the Central Commission after a long delay on 25.06.2007 seeking for the review of the said order on the ground that the orders of the Tribunal dated 04.10.2006 and 22.12.2006 relating to Power Grid Corporation case would apply to NTPC also and, therefore, the order passed by the Central Commission dated 23.11.2006 had to be revised and to be held that the Foreign Exchange Rate Variation should be apportioned not in the ratio of 50:50 but the entire amount should be allocated to loan.

23. This Review Petition was earlier dismissed by the Central Commission on the ground of long delay. As against this order, the Madhya Pradesh Power Trading Co. filed an Appeal in Appeal No. 127/08 before this Tribunal. This Tribunal remitted the matter to

the Central Commission for reconsideration on the issue of condonation of delay. In accordance with this order, the Review Petition was heard afresh after condonation of delay on 29.09.2008.

24. In the meantime, the Transmission Corporation of Andhra Pradesh filed an Appeal in Appeal No. 25/09 relating to Simhadri Thermal Power Station raising the same issue relating to foreign exchange rate variation. In that case, the ground was raised that in the Power Grid Corporation of India case, a different decision had been taken by the Tribunal with reference to Foreign Exchange Rate Variation. In the said appeal 25/09, the Tribunal while dismissing the Appeal on 5.5.2009 held that in the case of NTPC, the said decisions would not apply merely because some other decision had been taken in the Power Grid Corporation of India case by the Tribunal.

25. Thereupon, the Review Petition 86/07 was heard afresh on 22.9.2009 and ultimately on 11.1.2010, the Central Commission decided the issue and held that the Foreign Exchange Rate Variation should be apportioned entirely to the loan only and not to the loan and equity in the ratio of 50:50 mainly on the basis of the decision taken by the Tribunal in Appeal Nos. 135-140 etc., of 2005 and Appeal No. 161/06 relating to the Power Grid Corporation of India case. The perusal of the impugned order, as stated above, would clearly reveal the Central Commission has revised its own order dated 23.11.2006 by holding that the apportionment of Foreign Exchange Rate Variation should be to loan only and not to the loan and equity by the order dated 11.1.2010, merely on the strength of the Power Grid Corporation case decided by the Tribunal.

26. In the light of the above situation, the present question arise as to whether the Central Commission could review and revise its own order dated 23.11.2006 in the Review petition in respect of

the issue of Foreign Exchange Rate Variation merely because the superior forum have in some other case given a contrary view to the view taken by the Central Commission?

27. It is contended by the Appellant that in the case of Simhadri Station of NTPC, the Transmission Corporation of Andhra Pradesh, as Appellant in Appeal No. 25/09 as against NTPC had raised the same issue, but this Tribunal by the order dated 05.05.2009 had dismissed the same and hence the contrary view cannot be taken by the Central Commission merely because some other view was taken by the superior forum in some other case. In the context of this submission, it is worthwhile to refer to the relevant portion of the judgment of the Tribunal in Appeal No. 25/09 dated 05.05.2009, as under:

> "***(E) The main ground on the basis of which the Review of the order dated 22.09.2006 was sought for by the Ld. Counsel for the Appellants was on the strength of the Order subsequently passed by this Tribunal on 04.10.2006 in the***

case involving TNEB and PGCIL. The Order 47 Rule 1 puts a specific bar on considering subsequent Orders as a ground for Review. The said Order 47 Rule 1 provides thus:

Explanation.

The fact that the decision on a Question of Law on which a Judgment of the Court is based has been reversed or modified by the subsequent decision of the Superior Court in another case shall not be the ground for the Review of the said Judgment.

A reading of the above rule would indicate that the fact that the subsequent Order passed by the Superior Court taking a different view from that of the subordinate Court, with regard to the issue shall not be the ground for Review. Therefore, there was no legal ground for Review."

***"(vii) It is a well settled principle of law that once a matter gets settled between the parties before the judicial forum, the same cannot be reopened and re-agitated even if a different view has been taken by the superior Court as per the relevant provisions of Rules. This is also laid down by the Supreme Court in 2001 (10) SCC 93 Mohd. Alam & Ors vs. Union of India. The relevant observation in this case is as follows*:**

"Once the matter on the Appellants reached finality, it could not be opened merely on the ground that in some other matter filed at the behest of some other similarly situated-persons, the Tribunal or the Court has granted some relief".

28. In view of the above dictum laid down by the Tribunal on the strength of the decision taken by the Hon'ble Supreme Court in *Mohd. Azim Alam & Ors Vs. Union of India* as reported in 2001

(10) SCC 93, the Central Commission is not empowered by its Order passed in Review Petition on 11.01.2010 to cancel its own order dated 23.11.2006 with reference to Foreign Exchange Rate Variation merely because a different view had been taken, subsequently on 22.12.2006 by the Tribunal being the superior forum in some other case. Even with regard to the order earlier passed by the Tribunal on 4.10.2006 it is to be stated that the Order cannot be taken as a ground for review of its own Order as it cannot be the ground to hold that there is an apparent error on the face of record to revise its own Order.

29. Nextly it is contended by the Appellant that the Foreign Exchange Rate Variation methodology of apportionment between the loan and equity was decided by the Central Commission in the order dated 21.12.2000 and this order had never been challenged by any of the beneficiaries and, therefore, the same became final and binding and consequently the same issue cannot be reopened merely because the Tribunal in the some other case took a different

view. We find force in this contention. As indicated above, all the orders dated 21.12.2000 and 04.08.2005 were never challenged. It is pointed out by the Appellant that both these orders dated 21.12.2000 and 04.08.2005 have been challenged on other aspects in many Appeals filed against those orders. By virtue of those orders dated 21.12.2000 and 04.08.2005, the methodology of apportionment of Foreign Exchange Rate Variation between loan and equity in the ratio of 50:50 was implemented and consequently Foreign Exchange Rate Variation amount of Rs. 3634.99 lacs was considered in the opening capital gross block as on 1.4.2001 and also apportioned between loan and equity for tariff determination. As mentioned above, these Orders were never challenged. Similarly, in the Petition Filed on 05.10.2005 by the Appellant/NTPC for determination of tariff in respect of Kahalgaon for the period 1.4.2004 to 31.3.2009, the final order had been passed by the Central Commission as early as on 23.11.2006 following the same methodology adopted earlier by apportioning the foreign exchange rate variation between loan and equity in the

ratio of 50:50 as earlier decided in the order dated 21.12.2000. This was also not challenged in the Appeal. On the other hand, Trading Company chose to file the Review in Petition No. 86/07 on 25.6.2007 belatedly on the issue of Foreign Exchange Rate Variation methodology and sought review of its order on the strength of the orders of the Tribunal passed in the Power Grid Corporation of India case dated 4.10.2006 and 22.12.2006.

30. According to the Appellant, the Power Grid Corporation case decided by the Tribunal by the orders dated 4.10.2006 and 22.12.2006 is entirely different from the case of NTPC and there are distinguishing features to show that the decision in the Power Grid Corporation case taken by the Tribunal is not applicable to NTPC. The principal reason projected by the Appellant as to why the Tribunal adopted the allocation of Foreign Exchange Rate Variation in Power Grid Corporation case totally to loan was because of the Notification dated 16.12.1997 issued by the

Government of India wherein it was held that in Power Grid Corporation case the equity shall remain constant upto the technical life of the asset and further in that case there is no apportionment to equity. According to the Appellant, the Foreign Exchange Rate Variation incurred on loan prior to 1.4.2001 was recovered on yearly basis and capitalization of FERV was introduced for the first time for Power Grid Corporation by the Central Commission for the period 2001-2004.

31. In the case of NTPC/Appellant, the Government of India notification did not provide for any such stipulation on the equity being constant as in the case of Power Grid Corporation but on the other hand, the said notification provide for capitalisation of Foreign Exchange Rate Variation on annual basis and the apportionment of the same between debt and equity. According to the Appellant, in the case of NTPC, the capitalisation of Foreign Exchange Rate Variation was provided right from the beginning which had been to the benefit of the respondents and this is unlike

in the case of Power Grid Corporation of India. The other distinguishing features between the Power Grid Corporation of India case and the NTPC case are given by the Appellant in the following chart:

	POWERGRID	**NTPC**
i)	Government of India Transmission Tariff Notification issued on 1612.1997 provided that a. Extra rupee liability on account of FERV on interest and loan repayment shall be recovered on yearly basis. b. In regard to the existing Transmission Systems, the equity and loan component of the transmission systems commissioned on or before 1.4.97 shall be notionally divided 50:50 on the book value of the transmission system at the end of the financial year of	In the case of NTPC, Government of India provided for capitalization of FERV on annual basis and thereafter treated this as debt and equity based on normative debt:equity ratio of 50:50, irrespective of actual loan or actual equity deployment. The effect of these annual adjustments on depreciation, interest and return was adjusted in the tariff. CERC continued the practice followed by Govt. of India in case of NTPC. To maintain the normative debt equity ratio of 50:50, FERV has to be capitalized and thereafter divided into debt:equity.

	1996-97. The 50% of the book value of the transmission system as on 1.4.1997, shall be deemed as equity for computation of tariff with effect from 1.4.97 and shall remain constant upto the technical life of the asset. In case FERV is divided into debt:equity, it would have resulted in increase in equity. Since Government of India notification provided for constant equity, Appellate has held that FERV adjustment should be treated only as debt.	
ii)	Upto 2001, actual FERV as incurred by POWERGRID was paid by the beneficiaries. No additional financing required by POWERGRID.	Since the entire FERV is financed out of the equity and no loan was taken for discharge of FERV liability, it should have been treated as equity in tariff and serviced by rate of return. As per Government of India notification by dividing FERV into debt and equity, benefit has already been given to the beneficiaries.
iii)	In case of POWERGRID	In case of NTPC, capitalization

	before 2001, actual FERV incurred on loan repayment was recovered on yearly basis to facilitate cash flow for the utility. Capitalization of FERV was allowed by CERC only for the period 2001-04. As a result of this, capitalization of FERV in the foreign loan outstanding as on 01.04.2001 was very substantial since it was on account of exchange rate variation from COD of the asset upto 01.04.2001, e.g: Loan outstanding as on 1.4.01 =$10 cr. Exchange rate on 1.4.02 = Rs.47/$ Exchange rate on date of = Rs.20/$ COD of trans. Asset(1.4.91) FERV capitalized (rounded off) = 10 x (47-20) = Rs. 270 crores. Against outstanding loan of $ 10 Crs. at exchange rate of Rs. 20/$, i.e. Rs. 200 cr., FERV capitalization on 1.4.2001 was Rs. 270 crores making total outstanding loan as Rs. 470 crores.	of FERV was taking place since beginning, i.e. from 1983 and there was no such tariff shock.

	This resulted in sudden increase in the capitalized cost and hence the impact was much higher and also during this period return on equity allowed in tariff was more than the cost of debt available in the market and, therefore, the beneficiaries filed the Appeal.	
iv)	All transmission asset as on 1.4.1997 were divided into debt: equity ratio of 50:50 and for the assets capitalized thereafter since the equity contribution is much lower, they are mostly on the basis of actual debt:equity ratio. Hence, capitalization of FERV towards loan in case of POWERGRID will not have any impact on servicing of actual equity deployed.	For the purpose of tariff, Debt:Equity Ratio can be on normative basis or on actual basis. In case of NTPC, actual Debt: Equity Ratio is 49:51 and with actual Debt:Equity Ratio, FERV could be considered towards loan only. Since the Debt:Equity Ratio adopted for NTPC station is on normative basis, FERV has to be capitalized as capital cost and thereafter divided into 50:50 for working out normative Debt:Equity.
v)		In case of NTPC, normative tariff principles were adopted – normative debt:equity ratio, normative loan, FERV on normative loan. In case FERV is capitalized as loan only then it will distort the normative debt:equity ratio of 50:50,

		which will be against the order of the Hon'ble Commission. Even Appellate in its order in case of NTPC has held the principle of normative debt.
vi)		Capitalization of FERV as equity and loan was to the advantage of beneficiaries during the large part of tariff period, i.e. upto 1998 when return on equity was allowed only at 12% whereas prevailing interest rates were 16-18%.

32. It is contended by the Appellant that even though there are distinguishing features, referred to in the above chart, the Central Commission wrongly have relied upon the Power Grid Corporation case decided by the Tribunal, which stands entirely on a different footing from that of NTPC. We have considered this submission. We do not propose to go into the alleged distinguishing features as pointed out by the learned counsel for the Appellant, as we are more concerned with the question as to whether the Central Commission has followed the relevant Regulations framed by it. In this case, we are of the view that the Regulations have been

scrupulously followed in the Commission's order dated 23.11.2006. Hence, there cannot be valid ground to revise its own Order which was passed on the basis of the Regulations.

33. It is the contention made on behalf of the Respondents that the order dated 21.12.2000 is not a statutory order and this was only a recommendation and therefore, the same should be ignored while considering the tariff determination issue. This contention, in our view has no basis. The order dated 21.12.2000 was passed by the Central Commission after detailed hearing of all stakeholders including the respondents herein. Accordingly, the cause of action for challenging the decision made by the Central Commission on the apportionment of the Foreign Exchange Rate Variation had already arisen and the same was followed by Tariff Regulations, 2001 notified on 26.3.2001. Admittedly, the respondents have neither challenged the order dated 21.12.2000 nor the Tariff Regulations, 2001 framed and notified on 26.3.2001 before any forum. Thereafter, in Tariff Order for the period 2001-04 dated

4.5.2005 was issued by the Central Commission FERV of Rs. 3634.99 lakh was considered for determination of opening capital gross block as on 1.4.2001 and FERV was apportioned between equity and loan in the ratio of 50:50. The order dated 4.8.2005 was also not challenged. As a mater of fact in the case of Power Grid Corporation of India, the TNEB, had challenged the Tariff Order for the period 2001-04 which was the first order with changed procedure of capitalization of FERV and apportioning to equity and loan in 50:50 ratio in consonance with order dated 21.12.2000 and the same had been considered by the Tribunal in Appeal No. 135, 140 etc. of 2005 and decided on 04.10.2006. The relevant portion of the Tribunal orders are as follows

> ***"2. On December 21, 2000, CERC formulated terms and conditions for determination of tariff, including working out transmission charges and payment thereof by the SEBs. This also included norms relating to recovery of FERV. As a consequence of the fixing of the norms for determining***

tariff and transmission charges and payment of such charges by the State Electricity Boards, the CERC issued a notification dated March 26, 2001 for giving effect thereto."

34. In the order dated 5.5.2009 passed by the Tribunal in Appeal No. 25/09, this Tribunal considered the Foreign Exchange Rate Variation apportionment in the case of NTPC generating stations for the period 1.4.2004 to 31.3.2009 and decided the matter in favour of the NTPC on the ground that Foreign Exchange Rate Variation methodology decided by the Central Commission on 21.12.2000 was not challenged. The following is the relevant observation of the Tribunal in the said judgment:

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"(a) The issue raised by the Appellants in the Appeal related to the decision about the methodology of calculations 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 Appellant's 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*".**

35. In view of the above factual finding by the Tribunal, the argument of the respondent that the order dated 23.12.2000 is not a

statutory order and this is only a recommendation and the same should be ignored while considering the tariff determination issue is without any merit.

36. The next contention of the respondent is that Foreign Exchange Rate Variation liability for the period 1.4.2001 to 31.3.2004 was capitalized only on 23.11.2006 and therefore, the cause of action accrued only thereafter. It is also wrong. In terms of clause 1.7 of the Tariff Regulations 2001, the Foreign Exchange Rate Variation recovery for the period 1.4.2001 to 31.3.2004 based on the decision taken in the order dated 21.12.2000 was allowed automatically and was recovered by the NTPC during the said period. As a mater of fact, in pursuance of the order dated 21.12.2000, the Central Commission notified the Tariff Regulations, 2001 in regard to the tariff determination for the period 1.4.2001 to 31.3.2004. The Regulations 1.7 and 1.13 deal with Foreign Exchange Rate Variation. The Regulations 1.13 and

1.7 are quoted below:

"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 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."

37. While determining the tariff for the period 1.4.2004 to 31.3.2009 and in the above context of tariff, the Foreign Exchange Rate Variation during the said period 2001-04, was considered and an amount of Rs. 1207.27 lacs was taken into account for determination of opening capital cost as on 1.4.2004.

38. The next contention of the respondent is that there has been a double accounting due to this methodology. This contention also is baseless. The amount of Foreign Exchange Rate Variation being Rs. 1207.27 lacs was never raised as the issue. This amount towards Foreign Exchange Rate Variation 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 basis on loan and equity.

39. According to the Respondent (TNEB), the Foreign Exchange Rate Variation was excluded in the order passed by the Central Commission in Petition No. 146/05 dated 9.5.2006. This contention also has no merit. In the said order the Central Commission decided on the additional capital expenditure to be allowed to the Appellant for the period 1.4.2001 to 31.3.2004 for Kahalgaon Station. In terms of clause 1.7 of the Tariff Regulations, the Foreign Exchange Rate Variation impact was allowed to be billed automatically without any requirement to file the petition. Accordingly, the Foreign Exchange Rate Variation was billed and collected by the Appellant.

40. The Foreign Exchange Rate Variation adjustment is a necessary consequence of the borrowed foreign currency debt being converted to Indian rupee. When the capital cost is determined in the beginning, the total capital cost is apportioned between debt and equity in the proportion of 50:50 though the equity component in the case of NTPC was more than 50%, the

excess is treated as a notional debt. If the Foreign Exchange Rate Variation in future was then known, the adjustment of the fluctuation would also have been taken into account and apportioned between debt and equity and notional loan would have been determined after factoring the debt including Foreign Exchange Rate Variation. In other words, part of the excess equity treated as a notional loan would have been reduced or increased at that time itself. Since it was not possible to know about such variation, the appropriate adjustment is made on annual basis in future. If the Foreign Exchange Rate Variation is not apportioned in the ratio of 50:50 and is entirely apportioned to debt, the Appellant would be seriously prejudiced as in the beginning part of equity is treated as a deemed debt and at a later stage the Foreign Exchange Rate Variation is entirely treated as a debt.

41. When the Foreign Exchange Rate Variation was apportioned at the initial stage between the debt and equity at 50:50, the respondent beneficiary gets more benefits as the interest rate was

higher, namely 16% to 18% while the rate of return on equity was only 12%. Thus, the respondent beneficiaries had benefits from the Foreign Exchange Rate Variation apportioned when the interest regime was higher by getting 50% of the Foreign Exchange Rate Variation adjustment towards equity. At the time when the interest regime has fallen below the return on equity, the respondents cannot be allowed to wriggle out of the methodology originally adopted being continued.

42. According to the Appellant, the very same issue had been decided by the Tribunal in Appeal No. 25/09 in the judgment dated 5.5.2009 in the appeal filed by the Transmission Corporation of Andhra Pradesh as against NTPC and ultimately this Tribunal had rejected the contention of the Appellant raising the very same issue, as referred to above, and as such the issue stands settled and in such circumstances that the decision of Appeal No. 25/09 would apply to the present case is required to be rejected and the decision of the Central Commission reopening the unchallenged issue at a

later stage is liable to be dismissed. On the other hand, it is the contention of the respondent that the decision taken in Appeal No. 25/09 would not apply to the present facts of the case.

43. In the light of the rival pleas raised by the Learned Counsel for the parties, it would be appropriate to refer to the findings given by the Tribunal in Appeal No. 25/09 on 5.5.2009. The principle laid down in the said case are as follows:

(i) "The main ground on the basis of which review of the earlier order was sought by the Appellant [in Appeal No. 25/09] before the Commission was on the strength of the order passed by the Tribunal in the case involving TNEB and Power Grid Corporation of India. This ground is not a valid and legal ground. Order 47, Rule 1 of CPC specifically provide that the fact that the decision on a Question of Law on which a judgment of the court is based has been reversed or modified by the

subsequent decision of the superior court in another case shall not be the ground for review of such judgment. So, under this Order 47, Rule 1 Explanation, the review is itself not maintainable as there is no legal ground for review.

(ii) In this case, the methodology for calculation of Foreign Exchange Rate Variation was prescribed in the Tariff Regulations, 2001 dated 26.03.2001. On this basis, Foreign Exchange Rate Variation, calculation order was passed on 19.5.2006, following the said methodology. This was not challenged by the Appellant. Similarly the order dated 22.9.2006 passed by the Central Commission fixing the Foreign Exchange Rate Variation calculations based on the said regulations passed by the Central Commission was also not challenged. If actually the Appellant decided to challenge the order dated 22.9.2006 through an Appeal

before this Tribunal, they should have filed an Appeal within 45 days from the date of communication of the said order or in the alternative, if they decided to file a Review before the Central Commission, they should have filed the same before 60 days. The Appellants did not choose to follow either of the above two options.

(iii) The said order passed by the Central Commission fixing the methodology as well as the calculation of Foreign Exchange Rate Variation consistent with the Tariff Regulations 2001 and the order dated 22.9.2006 cannot be allowed to be challenged by the Appellants [Appeal No. 25/09] by preferring a petition for review and revising the aforesaid order for the purpose of reworking the said methodology as it amount to challenging the Regulations, i.e. subordinate legislation.

(iv) Once a matter gets settled within the parties, the same cannot be reopened and re-agitated even though a

different view has been taken by the superior court, as laid down by the Hon'ble Supreme Court in *Mohd. Azim Alam & Ors vs. Union of India* reported in 2001(10) SCC 93".

44. The principles laid down, as mentioned above, in Appeal No. 25/09, in our view, would squarely apply to the present facts of the case as in the said case all the issues which have been raised before this Tribunal have already been decided in favour of NTPC.

45. **Summary of our Findings**

(i) **In the main order passed on 23.11.2006, the Central Commission decided the tariff and included Foreign Exchange Rate Variation during the period 2001-04 apportioned between loan and equity in the ratio of 50:50 as decided earlier through its order dated 21.12.2000. This order had not been challenged in the Appeal. On the other hand, the Madhya Pradesh Power Trading Company filed**

a review before the Central Commission to review its order dated 23.11.2006 and in the order impugned passed in the review on 11.01.2010, the Central Commission decided the issue to the effect that Foreign Exchange Rate Variation should be apportioned entirely to the loan only. The main order passed by the Central Commission dated 23.11.2006, apportioning FERV between loan and equity in the ratio of 50:50 was revised in the subsequent order under review dated 11.01.2010, to the effect that Foreign Exchange Rate Variation should be apportioned entirely to the loan only and not to the loan and equity in the ratio of 50:50. This decision taken by the Central Commission revising its own order earlier passed with reference to Foreign Exchange Rate Variation is wrong on account of following reasons:

(a) The Order 47 Rule 1 of Civil Procedure Code put a specific bar on considering the subsequent order

passed by the superior forum as a ground for review. Admittedly, in this case the Central Commission modified its own order dated 23.11.2006 mainly on the basis of the Tribunal order in some other Appeal, Appeal No. 161/06 dated 22.12.2006 relating to the Power Grid Corporation of India. So, this is a violation of the Order 47 Rule 1 of CPC;

(b) The decision taken by the Tribunal in Appeal No. 135, 140 etc. of 2005 and Appeal No. 161/06 relating to the Power Grid Corporation of India case would not apply to the NTPC. On the other hand, the Tribunal in Appeal No. 25/09 passed an order dated 05.05.2009 in which the NTPC is a party would apply to NTPC.

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

(ii) Even with regard to the order earlier passed by the Tribunal on 4.10.2008, it is to be stated that the said order cannot be taken to consideration for Review of the matter since that may not be ground to hold that there is an apparent error on the face of record.

(iii) The order dated 21.12.2000 fixing the said ratio as 50:50 between loan and equity was passed by the Central Commission after detailed hearing of all stakeholders including the respondent herein. As such, the cause of action for challenging the decision dated 21.12.2000 arose at that time itself. Further, this order was followed by the Tariff Regulations, 2001 notified on 26.03.2001. The order dated 21.12.2000 was not merely recommendatory but a substantive order. Admittedly, the respondent neither challenged the order dated 21.12.2000 nor the Tariff Regulations, 2001 notified on 26.3.2001 before any forum. As such the said orders and Tariff Regulations became final. Consequently, it has to be held that the contention of the respondent that the order passed dated 21.12.2000 was not a statutory order and it is only a recommendation and therefore the same should be ignored is without any merit.

(iv) According to the Respondent, the Foreign Exchange Rate Variation for the period 01.04.2001 to 31.03.2004 was capitalised on 23.11.2006 and only thereafter the cause of action accrued. This is wrong. In terms of clause 1.7 of the Tariff Regulations, 2001, the foreign exchange recovery for the period 2001-04 based on the decision taken in order dated 21.12.2000 was allowed automatically and was recovered by the NTPC during the said period. While determining the tariff for the period 01.04.2004 to 31.03.2009, the Foreign Exchange Rate Variation during the said period 2001-04 was considered and in that context, an amount of Rs. 1207.27 lacs was taken into account for determining the opening capital cost as on 1.4.2004. Therefore, it is not correct to contend that the cause of action accrued only on 23.11.2006. Moreover, in the Commission's order dated 4.8.2005, FERV of Rs. 3634.99 lakh was considered to determine the opening capital gross block as on 1.4.2001 and FERV was

apportioned to equity and loan in the ratio of 50:50. As indicated above, the order dated 4.8.2005 also was not challenged.

(v) When the Foreign Exchange Rate Variation was apportioned at the initial stage between loan and equity as 50:50, the respondent beneficiaries got more benefit as interest rate was higher namely 16-18% while the rate of return on equity was only 12%. Thus, respondent beneficiary in fact had obtained the benefits from the Foreign Exchange Rate Variation apportioned when the interest regime was higher by getting the 50% of the Foreign Exchange Rate Variation adjustment towards equity.

(vi) The same point had been raised in Appeal No. 25/09 by the Transmission Corporation of Andhra Pradesh as against the NTPC and the Tribunal ultimately rejected the

contention of the Transmission Corporation regarding the prayer that the apportionment should be given to the loan only.

46. In view of our above findings, the order impugned is liable to be set aside and accordingly the same is set aside. The Central Commission is directed to implement our findings, referred to above. The Appeal is allowed. No costs.

(RAKESH NATH)
TECHNICAL MEMBER

(JUSTICE M. KARPAGA VINAYAGAM)
CHAIRMAN

REPORTABLE/NON-REPORTABLE

Dated: 1st September, 2010