CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram:

1. **Shri Bhanu Bhushan, Member**
2. **Shri R. Krishnamoorthy, Member**

Review Petition No. 46/2008
in Petition No. 149/2004

In the matter of

Redetermination of the FERV component of Rs.142.95 crore for the year 2003-04 claimed by NTPC (Simhadri TPS) from AP Discoms.

And in the matter of

1. Transmission Corporation of Andhra Pradesh Ltd, Hyderabad
2. APEPDCL(AP Eastern Power Distribution Company Ltd.) Visakhapatnam,
3. APSPDCL(AP Southern Power Distribution Company Ltd), Tirupathi,
4. APNPDCL(AP Northern Power Distribution Company Ltd), Warrangal
5. APCPDCL(AP Central Power Distribution Company Ltd), Hyderabad … Petitioners

Vs

National Thermal Power Corporation Ltd., New Delhi … Respondent

The following were present:

1. Shri Sanjay Sen, Advocate, AP Transco
2. Ms Ruchika Rathi, AP Transco
3. Shri B. Bhanu Prasad, ADE, AP Discom
4. Shri C. Mohan Chander, AP Discom
5. Shri S.N. Goel, NTPC
6. Shri S.K. Aggarwal, NTPC
7. Shri Balaji Dubey, NTPC
8. Shri Vivake Kumar, NTPC
9. Shri D. Kar, NTPC

ORDER
(DATE OF HEARING: 22.5.2008)

The petitioners in this application have prayed for the following reliefs, namely:

"(a) direct that NTPC Simhadri TPS should revise its capital cost by taking out the FERV component of Rs.142.95 Crores which has been capitalized in the manner shown in para 21 & 30 of the tariff order dated 22.9.2006 passed by the Hon'ble CERC.

(b) direct NTPC Simhadri TPS to adjust the amount of Rs.60 Crores paid by AP Transco/AP Discoms up to 2007-2008 on account of FERV against the outstanding original amount of Rs.142.95 crores and thereafter direct payment of balance amount of Rs.82.95 crores by AP Transco/AP Discoms to NTPC Simhadri TPS within reasonable period.

(c) pass such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. Before dealing with the prayers made in the application, we advert to the background facts, in brief.

Background Facts

3. Simhadri Thermal Power Station (hereinafter referred to as "the generating station") owned by the respondent, National Thermal Power Corporation Ltd, comprises of two units of 500 MW each. The first unit was commissioned on 1.9.2002 and the second unit on 1.3.2003. The tariff for the generating station for the period 1.9.2002 to 31.3.2004 was determined by the Commission based on the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 (hereinafter referred to as "the 2001 regulations") by order dated 19.5.2004 in Petition No.2/2002. Thereafter, tariff for the period commencing on 1.4.2004 was decided by the Commission by its order dated 22.9.2006 in Petition 149/2004, under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (hereinafter referred to as "the 2004 regulations"). While deciding tariff by order dated 22.9.2006, the Commission allowed capitalization of FERV of Rs.14295 lakh for 2003-04 as claimed by the respondent in terms of the 2001 regulations. The

Commission also considered capitalization of an amount of Rs.12836 lakh on account of the additional expenditure on works. The capital base of Rs.345207 lakh for determination of tariff by order dated 22.9.2006 was arrived at after accounting for additional capitalization on account of FERV (Rs.14295 lakh) and on works (Rs.12836 lakh) over the capital base of Rs.318076 lakh considered vide order dated 19.5.2004 ibid. Additional capitalization on account of FERV and on works was so adjusted as to arrive at debt and equity in the ratio of 70:30. The petitioners, through this application have challenged capitalization of FERV since in their contention, the methodology adopted by the Commission for capitalization is contrary to the 2001 regulations as also the judgment of the Appellate Tribunal for Electricity dated 4.10.2006 (wrongly stated as '30.10.2006') in Appeal Nos. 135-140 of 2005. It has been stated that in the process of apportioning debt and equity, the Commission has considered Rs.712 lakh as debt and Rs.13583 lakh as equity as claimed by the respondent which, according to them, is contrary to the Appellate Tribunal's judgment dated 4.10.2006 ibid. The petitioners have contended that the entire amount of FERV allowed to be capitalized should be taken out of the capital cost.

4. The application was listed for hearing the petitioners on admission. At this stage, Shri S.N. Goel appearing for the respondent accepted notice of the application. We heard Shri Sanjay Sen, Advocate for the petitioners on admission and Shri S.N. Goel for the respondent.

Maintainability

5. In the first instance, the question of maintainability of the application is to be considered as the preliminary issue.

6. The substantive grievance of the petitioners, as projected in the application and seen from the prayers extracted above, is that FERV of Rs.14295 lakh could not have been capitalized. The apportionment of additional capital expenditure between debt and equity is consequential. Thus, in sum, the petitioners have sought revision of tariff after removing the FERV amount from the capital cost considered in the order dated 22.9.2006. According to the petitioners, in terms of Regulation 10 of the 2004 regulations, which, according to them, is in pari materia with the provisions of the 2001 regulations is to be adjusted on re-payment basis. Accordingly, it has been urged that an amount of Rs.6000 lakh already paid by the petitioners till 2007-08 should be adjusted and the petitioners should be liable to pay a balance of Rs.8295 lakh. This means that FERV amount of Rs.14295 lakh for the year 2003-04 should be reimbursed to the respondent. In effect, in this manner, the petitioners seek amendment/modification of tariff approved by the order dated 22.9.2006. In our view it is not permissible.

7. Rule 3, Order XX of the Code of Civil Procedure (the Code) lays down that once the judgement has been signed, it “shall not afterwards be altered or added to, save as provided by Section 152 or on review”. It may be pointed out that the

proceedings before the Commission are not strictly regulated under the Code except to the extent laid down under Section 94 of the Act. Nevertheless, the basic principles are extendable to the proceedings before the Commission. The provisions of Rule 3, Order XX of the Code are based on the well known principle of civil jurisprudence that the court after passing the judgement becomes *functus officio* and has got no power to revive its own judgement. The principle has been considered by the Hon'ble Supreme Court in its recent judgment titled the Deputy Director Land Acquisition vs Malla Atchinadu and others (AIR 2007 SC 740), wherein the Hon'ble Court held as under:

> "45. The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the order is functus officio and cannot set aside or alter the order however wrong it may appear to be. That can only be done on appeal……"

8. Earlier, the Hon'ble Supreme Court in UP SRTC vs Imtiaz Hussain [(2006) 1 SCC 380] also laid down a similar proposition of law, as under:

> "The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues or remedies provided in respect of the same and the very court or the tribunal, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein".

9. In the light of the above principles decided by the Hon'e Supreme Court, the Commission cannot revisit the tariff already decided in the order dated 22.9.2006, unless it involves correction of any ministerial or clerical error or on

review. It is not the case of the petitioners that the application involves correction of any ministerial or clerical error. The petitioners have questioned the capitalization of FERV amount itself, which is a substantive issue. Therefore, we treated the application as the application for review of the order dated 22.9.2006 and proceed to examine whether any case for review has been made out.

Review of Order

10. Under Clause (f) of sub-section (1) of Section 94 of the Electricity Act, 2003, the Commission has been given the same powers as are vested in a civil court under the Code as regards review of its decisions, directions and orders. The powers of review of a civil court are regulated in terms of Section 114 read with Order 47 of the Code. Explanation below Rule 1, Order 47 of the Code provides that –

> "Explanation- The fact that the decision on a question of law on which the judgement of the Court is based has been reversed or modified by the subsequent decision of a superior court, in any other case, shall not be a ground for the review of such judgement".

11. In the present case, the petitioners seek revision of capital cost (and consequently the tariff) by decapitalisation of FERV amount, capitalized in the Commission's order dated 22.9.2006. The Appellate Tribunal's judgment dated 4.10.2006 on which reliance has been placed by the petitioners was subsequent to the Commission's order dated 22.9.2006. Therefore, in law, by virtue of Explanation below Rule 1, Order 47 of the Code, the application for review cannot be entertained on the ground that the Appellate Tribunal in a later

judgment has given an interpretation of law (the 2001 regulations, in this case) different from that earlier adopted by the Commission. The petitioners, if they were not satisfied with the interpretation given by the Commission, could independently approach the Appellate Tribunal for redressal of their grievance. The application deserves to be rejected on this ground. It is a different thing that the Appellate Tribunal's judgment dated 4.10.2008 ibid does not support the petitioners' case as it has upheld capitalization of the FERV amount, and this aspect has been considered in the later part of this order.

12. Apart from the fact that the application for review is not maintainable by virtue of Explanation below Rule 1, Order 47 of the Code, the application is also barred by limitation. As has been noted above, under Section 94 of the Electricity Act, the Commission has powers of review as are vested in Civil Court under the Code.

13. Neither the Electricity Act nor the Code lays the period of limitation for making an application for review. However, the Commission in Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, (hereinafter referred to as "the Conduct of Business Regulations") specified under the Electricity Regulatory Commissions Act, 1998 and presently in force, has specified period of limitation of 60 days of making of the decision, direction or order sought to be reviewed. Regulation 116 of these regulations, however, empowers the Commission to extend or abridge, for

sufficient reason, the time prescribed under Regulation 103 whether or not such time has already expired. Thus, Regulation 116 permits the Commission to extend by an order, the period of limitation in individual cases for "sufficient reason", at any stage. The relevant provisions of the Conduct of Business Regulations are extracted below:

> **"Review of the decisions, directions and orders**
>
> 103. (*1*) The Commission may at any time, on its own motion, or on the application of any of the persons or parties concerned, within 60 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit.
>
> (*2*) An application for such review shall be filed in the same manner as a Petition under Chapter II of these Regulations.
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> …….
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> **Extension or abridgement of time prescribed**
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> 116. Subject to the provisions of the Act, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission."

14. It would be seen that limitation for making an application for review in 60 days of making of the order. However, this period can be extended or abridged by the Commission for "sufficient reason". The expression "sufficient reason" needs be interpreted in the same manner as the expression "sufficient cause" under Section 5 of the Limitation Act, 1963.

15. The present application was made on 7.4.2008, that is, after more than 1 ½ years of the making of the order dated 22.9.2006, modification or review of which has been sought. The Commission under Regulation 116 ibid is duly authorized to condone delay in appropriate cases on an applicant showing "sufficient reason". However, the petitioners do not seek condonation of delay on the ground of "sufficient reason" as they have not made any attempt to explain the inordinate delay in making of the present application. On the contrary, it has been contended on behalf of the petitioners that the order dated 22.9.2006 gives rise to a continuous cause of action, which arises every time a bill for recovery for FERV in terms of the order dated 22.9.2006 is issued to the petitioners by the respondent.

16. We are unable to persuade ourselves to accept the petitioners' contention. The interpretation, as advanced by the petitioners, will render Regulation 103 of the Conduct of Business Regulations to a nullity. By accepting the contention, no finality can be attached to any judicial or quasi-judicial order since, by inventing some fault with the order, it will always be possible for a party to argue that its adverse effect would continue for a long time and thus there will be a recurring cause of action for taking the further proceedings. In our opinion, a distinction need always to be maintained between 'cause' and 'effect'. The cause for taking further proceedings arises immediately after an order, considered to be adverse by a party, is made and communicated. The long-enduring or long-lasting or perennial adverse effect of the judgment or order cannot be a cause for taking

the proceedings after lapse of the specified period of limitation. Therefore, in the present case, the cause for the application arose on 22.9.2006 or immediately thereafter when the certified copy of the order was communicated and received by the petitioners. The effect of the order may continue, thereafter year-after-year, but it cannot be said that the cause of action for making the application for review also continued. Therefore, in our considered opinion, in the facts of the present case it cannot be said that there is a recurring or continuous cause of action for making the application. Therefore, the application is barred by limitation.

17. Learned Counsel for the petitioners, while arguing in favour of maintainability of the application on the ground of continuity of cause of action, heavily relied upon the provisions of clause 1.7 of the 2001 regulations. It was urged that since the petitioners, as the beneficiaries of the generating station, are objecting to the amounts claimed by the respondent on account of FERV, it also gives rise to a cause whenever a claim, inclusive of FERV, is received.

18. Clause 1.7 of the 2001 regulations is extracted below:

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

19. It is noticed that Clause 1.7 of the 2001 regulations permits the utilities like the respondent to recover FERV directly from the beneficiaries, the petitioners, without involving the Commission or making an application before it. However, in case of objections by any of the beneficiaries to the amount claimed, they have been granted liberty to make an appropriate application before the Commission. In the instant case, the respondent's claim for capitalization of FERV has already been adjudicated by the Commission. It is not a case where the respondent raising claims, including for FERV directly with the beneficiaries. The respondent's claim for tariff after considering impact of FERV, has the approval of the Commission. Therefore, clause 1.7 of the 2001 regulations has no application. The capitalisation of the amount of FERV has been ordered in terms of clause 1.13 of the 2000 regulations.

20. Based on the above, we have no hesitation to conclude that the application does not meet the criteria for review laid down under the law.

Applicability of the Appellate Tribunal's judgement

21. Before concluding, we may point out that the methodology adopted by the Commission for capitalization of FERV amount has been reviewed by the Appellate Tribunal in the judgment dated 4.10.2006 which judgment is the basis for the petitioners present application. In the said judgment dated 4.10.2006 the Appellate Tribunal has not found any fault with the Commission's interpretation of

clauses 1.7 and 1.13 of the 2001 regulations. The relevant parts of the judgment are extracted below:

> "9. We have considered the submissions of the learned counsel for the parties in regard to the first question. We are of the view that the interpretation placed by CERC on clause 1.13 of the notification is a possible interpretation.
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> 10. At this stage, it will be necessary to refer to Clause 1.13 of the Notification, which reads as under:
>
> > "1.13 **Extra Rupee Liability**
> >
> > (a) Extra rupee liability towards interest payment and loan repayment actually incurred, in the relevant year shall be admissible; provided it directly arises out of foreign exchange rate variation and is not attributable to Utility or its suppliers or contractors. Every utility shall follow the method as per the Accounting Standard 11 (Eleven) as issued by the Institute of Chartered Accountants of India to calculate the impact of exchange rate variation on loan repayment".
>
> (emphasis supplied)
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> 11. Clause 1.13 is in two parts. According to the first part, extra rupee liability towards interest payment and loan repayment which is actually incurred in the relevant year is admissible. As per the second part, every utility is required to follow the method for calculating the impact of exchange rate variation on loan repayment as per the Accounting Standard 11 issued by the Institute of Chartered Accountants of India.
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> Clauses 7 and 10 of the Accounting Standard 11 are relevant for resolving the controversy. These clauses are set out below:-
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> > "7. At each balance sheet date:
> >
> > a. monetary items denominated in a foreign currency (e.g. foreign currency notes, balances in bank accounts denominated in a foreign currency, and receivables, payables and loans denominated in a foreign currency) should be reported using the closing rate. However, in certain circumstances, the closing rate may not reflect with reasonable accuracy the amount in reporting currency that is

likely to be realized from, or required to disburse, a foreign currency monetary item at the balance sheet date, e.g., where there are restrictions on remittances or where the closing rate is unrealistic and it is not possible to effect an exchange of currencies at that rate at the balance sheet date. In such circumstances, the relevant monetary item should be reported in the reporting currency at the amount which is likely to be realized from, or required to disburse, such item at the balance sheet date;

b. non-monetary items other than fixed assets, which are carried in terms of historical cost denominated in a foreign currency, should be reported using the exchange rate at the date of the transaction;

c. non-monetary items other than fixed assets, which are carried in terms of fair value or other similar valuation, e.g. net realisable value, denominated in a foreign currency, should be reported using the exchange rates that existed when the values were determined (e.g. if the fair value is determined as on the balance sheet date, the exchange rate on the balance sheet date may be used); and

d. the carrying amount of fixed assets should be adjusted **as stated in paragraphs 10 and 11 below**.

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".

12. As is apparent from above, clause-7 opens with the words 'at each balance sheet date'. It is well known that balance sheet is prepared at the close of each year. In accordance with the aforesaid provision of the Accounting Standard 11 of the Institute of Chartered Accountants, the FERV has been determined by the CERC. The CERC has followed the

Accounting Standard 11 according to which the FERV is to be capitalized every year at each balance sheet date on accrual basis.

13. It seems to us that the words 'actually incurred' in the relevant year occurring in the first part of clause 1.13 have been diluted by the second part of the clause. In any event, CERC has followed the method for calculating extra rupee liability by following Accounting Standard 11. Even if two interpretations of clause 1.13 are possible, the CERC undoubtedly has followed one of the interpretations. Therefore, interpretation placed by the CERC cannot be flawed.

14. By this methodology, the payment is staggered over a period of time and the entire actual liability towards interest payment and loan repayment incurred is not recovered in one go but in instalments. In case the entire liability is recovered at one point of time it will be quite burdensome for the party, who is required to pay. The dependence of the appellant on the change brought about in Accounting Standard 11 is of no avail to it, as the amendment was carried out after the period April 1, 2001 to March 31, 2004, which is the period in question".

22. Even based on the Appellate Tribunal's judgement extracted above, and from which the petitioners have drawn prop, the question of taking out the amount of FERV capitalized out of the capital cost does not arise.

On merits

23. The combined effect of clause 1.13 of the 2001 regulations, read with AS 11, as applicable up to 31.3.2004, is that the exchange rate differences of FERV are to be capitalized at the end of each financial year. After such capitalization the utility can claim impact of such capitalisation in the form of return on equity, interest on loan and depreciation, from the beneficiaries in terms of clause 1.7 of the 2001 regulations. Thus, any reliance by the petitioners on Regulation 10 of the 2004 regulations is wholly misplaced. The 2004 regulations do not contain

any provisions corresponding to clause 1.13 of the 2001 regulations for capitalization of FERV amount.

Conclusion

24. In the light of above discussion, the application stands dismissed at admission stage.

Sd/-	**Sd/-**
(R KRISHNAMOORTHY)	**(BHANU BHUSHAN)**
MEMBER	**MEMBER**

New Delhi dated 10th June 2008