

BEFORE THE H.P. ELECTRICITY REGULATORY COMMISSION AT
SHIMLA

Petition No. 151/2004

In the matter of:-

Filing of petition by Uttaranchal Jal Vidyut Nigam Ltd. for determining the generation tariff for inter-State supply of electricity for HP share in the five hydro generating stations of Dhakrani, Dhalipur, Chibro, Khodri and Kulhal for the financial year 2004-05.

Uttaranchal Jal Vidyut Nigam Ltd;
(UJJWAL) Maharani Bagh,
GMS Road, Dehradun.

...Petitioner

Vs.

1. H.P.State Electricity Board,Shimla-04
2. HP Government through its Principal Secretary,
Power Shimla-171002.
3. Uttaranchal Power Corporation Ltd. Dehradun.
4. U.P. Jal Vidyut Nigam Ltd; Lucknow.

...Respondents

Petition No.151/2004
(Date of Decision 11.12.2009)

CORAM
YOGESH KHANNA
CHAIRMAN

Counsel:

for the Petitioner

Sh. T.S.Chauhan
Advocate

for H.P.State Electricity Board

Sh. Anand K. Ganesan
Advocate

for U.P. Jal Vidyut Nigam Ltd.Lucknow.

Sh.B.S.Goel

for Uttaranchal Power Corporation
Dehradun

Order

(Last heard on 07.11.2009 and order reserved)

Facts in brief involved in this case are that an agreement was signed between the erstwhile State of Uttar Pradesh and the State of Himachal Pradesh on 21.11.1972 for supply of power from its 5 inter-State Hydro Power Stations, which inter-alia states that -

- (i) certain components/portions of the Yamuna Hydel scheme come under the territory of the State of Himachal Pradesh and the Uttar Pradesh Govt. utilize the waters contributed partly from the catchment area in Himachal Pradesh;
- (ii) the usage rights of water of the Yamuna, and its tributaries (including the river Tons) emanating from the Himachal Pradesh territory, upstream of Yamuna Hydel Scheme will be conveyed by H.P. exclusively to UP for the purpose of power development, but subject to any existing facilities of irrigation, running of water mills and transport of timber enjoyed by the people of HP being safeguarded. The H.P. Govt. reserves the rights to develop power themselves from any river or stream inside their own territory, provided such development does not reduce the natural flow and supply of water or otherwise adversely affect the said Yamuna Hydel Scheme;
- (iii) the H.P. shall share 25% of the total energy generated from the power stations of Yamuna Hydel Scheme stage-I and stage-II (Dhakrani, Dhalipur, Chibro, Khodri hydro project), less energy consumed in the maintenance and operation of these power stations;
- (iv) the share of energy of H.P. of Yamuna Stage-I will be made available to H.P. at the bus bars against payment at the cost of generation of power stations of Yamuna Hydel Scheme Stage-II, the cost of generation to be paid by H.P. shall be the pooled cost of generation at the bus bars of both Stage-I & II.
- (v) the H.P. shall not share the capital cost of the said scheme.

2. An important aspect of agreement between the States of Uttranchal (erstwhile U.P.) and the State of Himachal Pradesh is that H.P. Government reserves the right to develop power from any river or stream inside its own territory, provided such development does not reduce the natural flow and

supply of water or otherwise adversely affects the Yamuna Hydel Scheme.

The said agreement clearly stipulates that -

- (i) the Himachal Pradesh shall not share the capital cost of the said scheme, and
- (ii) the share of energy of Himachal Pradesh from these 5 stations of Yamuna Hydel Scheme will be made available to HPSEB at the bus bars at the cost of generation.

3. None of the aforementioned power stations is within the territory of H.P., but the power in pursuance of the agreement is to be supplied/released in the areas falling in the State of H.P. Thus apart from the provisions of sections 62 and 86, the provisions of sub-section (5) of section 64 of the Electricity Act, 2003 (hereinafter referred as “the Act”) reads as under, has also been invoked:-

“(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.”

4. The petitioner Uttranchal Jal Vidyut Nigam Ltd (UJVNL), UJJWAL, Maharani Bagh, GMS Road Dehradun, which is a registered company constituted by the Govt. of Uttranchal (hereinafter referred as “the petitioner”) under section 63 (4) of the U.P. Reorganisation Act,2000, has moved five petitions for determination of the generation tariff in relation to five hydro generating stations viz Dhakrani, Chibro, Khodri, Dhalipur and Kulhal, owned and operated by the petitioner UJVNL, for the financial year 2004-05, under sections 62 and 86 of the Act with the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred as “the Commission”) on 12th October,2004. At the admission stage the Commission directed the petitioner to implead the Himachal Pradesh State Electricity Board; the Government of Himachal Pradesh; the Government of Uttar Pradesh; the Government of Uttranchal and the UPJV Nigam Ltd (UPJVNL), being essential parties. The Commission invited the suggestions and objections from the public through public notices published in three newspapers on 17th January,2005. The objections/comments were received from the Himachal Pradesh State

Electricity Board and UP Power Corporation Limited (UPPCL) and also from Sh. P.N.Bhardwaj, the Consumer Representative, appointed under sub-section (3) of section 94 of the Act. Thereafter on 9th March, 2005, during the hearing based on the presentation by the UJVNL and additional issues raised by the objectors, the Commission sought additional information/ clarifications from the petitioner UJVNL. Further to work out the tariff, the consultants were too appointed .

5. The petitioner, after public hearing, informed the Commission that it had filed a petition before the Uttranchal Electricity Regulatory Commission (UERC) for the determination of generation tariff for its nine generating stations ,including the five of shared stations at Dhakrani, Chibro, Khodri, Dhalipur and Kulhal, The UERC issued its tariff order on 16th December,2004. The petitioner further informed the Commission that it had challenged the UERC tariff order dated 16.12.2004 in the High Court of Uttranchal. The said High Court passed an interim order and allowed the tariff charges as per the UERC order dated 16th December, 2004. Subsequently on 29.04.2005 the said High Court passed an order for provisional billing the energy sale to Uttranchal Power Corporation Ltd. at 37 paise per unit.

6. Keeping in view the fact that the tariff to be determined by the Commission for such inter-State supplies in terms of section 64 (5) of the Act, in principle, cannot be significantly different and since the UERC had determined the generation tariff and the UJVNL had challenged the same , this Commission vide its order dated 25.05.2005 considered it inappropriate to formulate any views on the various issues arising out of these petitions and decided that the Commission would pass the final order on UJVNL's petitions after the High Court of Uttranchal had disposed off the petitions filed by the petitioners against the UERC tariff order. Further without any prejudice to the ongoing proceedings before the Commission and the order dated 29th April, 2005, passed by the High Court of Uttranchal, the Commission directed the UJVNL to bill the Board at the provisional rate of 37 paise /unit till the final decision. The Commission order dated 25.05.2005, was followed by the clarificatory order dated 3.10.2005, stating that provisional rate of 37 paise per unit would be applicable w.e.f. 16.12.2004 (i.e. the date on which the High

Court of Uttranchal stayed the order and allowed interim rate of generation tariff to the UJVNL for UPC and others).

7. The Hon'ble High Court of Uttranchal disposed of the petition moved by the UJVNL by transferring the case to the Appellate Tribunal for Electricity and the said Appellate Tribunal decided the same on 14.09.2006. The UERC, in accordance with the directions of the APTEL on 14.03.2007, revised the cost of depreciation, return on equity, terminal benefits and O&M expenses component of the tariff order of 2004-05.

8. Simultaneously the petitioner UJVNL, had also filed the petition No. 103/2005 under sections 62 and 79 of the Act, before the Central Electricity Regulatory Commission for the determination of generation tariff for financial years 2005-06 and 2008-09 for its hydro Electricity generation stations of Dhakrani, Dhalipur, Chibro, Khodri and Kulhal. The Central Electricity Regulatory Commission vide its Order dated 29th March, 2006, decided that the approval of generation tariff of 5 hydro generated stations viz. Dhakrani, Dhalipur, Chibro, Khodri and Kulhal, owned and operated by the UJVNL does not fall under clauses (a) or (b) of sub-section (1) of section 79 of the Act, and does come under the jurisdiction of the CERC. The said Commission observed that the whole arrangement appears to be to provide compensation to Himachal Pradesh in lieu of it allowing the usage of rights of water of river Yamuna and its tributaries (including the river Tons) emanating from Himachal Pradesh State exclusively to Uttranchal for the purpose of power development as per the terms of agreement dated 21.11.1972 between Uttranchal (erstwhile UP) and H.P. Since the upstream State is not sharing the cost of the hydro project, the rate of supply of energy to the non-participating State, would be lower than that to the owner State of the hydro station. Thus it appears to be some sort of compensation for usage rights of water rather than sale on purely on commercial sense. Despite the said decision of the CERC the question relating to the scope of section 64 (5) is still left open for decision.

9. In the meanwhile the petitioner UJVNL, however, had filed before this Commission five more tariff petition numbering 79/2007, 80/2007, 81/2007, 82/2007 and 83/2007 for determination of generation tariff for HP share in five number HEP's of Uttaranchal Dhakrani, Chibro, Khodri,

Dhalipur and Kulhal, for subsequent FY 2005-06 to 2008-09. These petitions, after scrutiny and removal of deficiencies, were admitted for consideration and subsequently, after due process and providing opportunity to the respondents/stakeholders. The pleadings were completed. When these petitions were pending for adjudication before the Commission and proceedings were in advance stage of disposal, the Board in its application dated 14.12.2007 and UPJVNL, in its application dated 12.12.2007, specifically stated that this Commission had no jurisdiction to decide the said petitions. The applicant-petitioner, conceding the stand taken by the respondents UPJVNL and the Board prayed for withdrawal of the said petitions with the liberty to file them before the appropriate Commission.

10. The said petitions were moved under sections 62 & 86 of the Act and the jurisdiction of this Commission was questioned by the Board and UPJVNL and petitioner also conceded that fact and prayed for withdrawal of the petitions. The Commission vide its order dated 7th April, 2008 dismissed the petitions Nos. 79 to 83 of 2007 as withdrawn.

11. Sh. T.S. Chauhan, Advocate, appearing for the petitioner, has moved the petition for the permission to withdraw the tariff petition, for year 2004-05 in relation to Chibro, Khodri, Dhakrani, Dhalipur and Kulhal generating stations, with the orders for refund of the part of the fee, on the analogy of the order dated 7.4.2008 passed by this Commission in similar tariff petitions in relation to the said generating stations for FY 2005-06 to 2008-09. The respondent Board has counteacted and moved petition No. 233/08, requesting the Commission, not to dismiss the tariff petition, as withdrawn, for the reason that during the course of hearing of the tariff petition the petitioner UJVNL had given undertaking to pay the difference of the amount, if any, which would be payable on the determination of tariff in relation to the aforesaid generating stations. The interim order of this Commission for payment of tariff of 37 paise/unit still stands and is in force and the Board on the basis of the said order had made the payment of generating tariff @ 37 paise per unit to UJVNL from 16.12.2004 to 31.3.2008, whereas actual tariff to be paid by the Board on the basis of the approved tariff of UERC of the preceding years is of very much lesser amount. Per calculations of the respondent Board a sum of

Rs. 12,48,96,803 is claimed to be refundable by the UJVNL to the respondent Board.

12. Keeping in view the hefty claim of the Board, arisen out of the orders made by the Commission during the pendency of the petition i.e. petition No. 151/04, and now sought to be withdrawn by the petitioner, the parties were given sufficient time to negotiate and complete negotiation process. Though the issue was discussed in the negotiation meeting of officers of both parities at Dehradun on 11.6.2009, but, in the absence of unanimity, it was decided by the representatives of the UJVNL and the Board to refer the matter to the respective authorities for further deliberations. When the process of negotiations was still going on, Sh. T.S. Chauhan, Learned Counsel for the petitioner, intimated this Commission that the UERC has determined the generation tariff in relation to these generating stations for the FY 2004-05 on 28.8.09 and in pursuance thereof a revised and differential amount of Rs. 6,18,750-18 is required to be remitted by the Board. He further states that in view of the order of the UERC, this Commission ceases to have jurisdiction in matter, and hence no useful purpose is likely to be served by further adjourning this matter. He, therefore, prays that the petitioner UJVNL be permitted to withdraw the petition due to jurisdictional defect and the filing fee deposited by it be refundable to it. Sh. Anand K. Ganesan, Advocate, appearing for the respondent Board, submits that the Board has challenged the UERC order by way of appeal before the APTEL and in view of APTEL decisions in **appeal No. 71 of 2008 – Lanco Amarkantak Power Ltd; V/s MPERC and others dated 21st October, 2008 and in Appeal No. 7/09 – Lanco Amarkantak Power Pvt. Ltd V/s M.P.ERC & others dated 6th August, 2009** there are sufficient reasons to believe that this Commission has the jurisdiction to determine the tariff under section 64(5) of the Act and the UERC tariff order may be set aside. He strenuously submits that this Commission, when section 64(5) provides that in case of inter-State supply involving the territories of two States, the tariff is to be determined by the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment therefor. In the instant case the power to be generated by the petitioner in Uttranchal is to be supplied to H.P, as such he

has stressed that the withdrawal petition moved by the petitioner may not be allowed.

13. The APTEL decisions in appeal No. 71 of 2008 – Lanco Amarkantak Power Pvt. Ltd V/s M.P.ERC and other, decided on 21.10.2008 and in appeal 7/09 – Lanco Amarkantak Power Pvt. Ltd V/s M.P.ERC and others decided on 6.8.2009 are distinguishable as in both these cases the adjudication of disputes under section 86 (1)(f) was involved and in the present case the Commission is to determine the tariff under section 86(1)(a) read with other provisions of Act. Thus the submissions made by the Learned Counsel for the Board do not appear to have any much force.

14. Since the UERC has already determined the tariff generation tariff, the operation of which has not been stayed by the APTEL, no useful purpose is likely to be served by withholding the withdrawal of the petition. Moreover the decision of the Hon'ble APTEL likely to be taken on the appeal of the Board, will also be applicable to the similar tariff petitions of the petitioner UJVNL for the FY 2005-2009, already permitted to be withdrawn by this Commission. This Commission, therefore, permits the petitioner to withdraw the petition No. 151/2004 seeking determination of the generation tariff for inter-State supply of the electricity for H.P. share in the five hydro generating stations owned and operated by the petitioner at Dhakrani, Dhalipur, Chibro, Khodri and Kulhal for the financial year 2004-05 and dismisses the petition No. 151/2004, as withdrawn with the liberty to file the same before the appropriate Commission. Keeping in view the extensive and time commencing exercise made by the Commission for determination of the generation tariff and appointment of the Consultants etc. no refund is envisaged

It is so ordered.

(Yogesh Khanna)
Chairman