

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

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

Petition No.107/2007

In the matter of

Petition for direction to U.P Power Corporation Ltd (UPPCL) for payment of compensation amount to M.P Power Trading Co. Ltd (MPTRADECO) due to retention of MP's share of power/non-supply of it from Rihand and Matatila Hydel Power Stations to MPSEB and resumption of MP's share of power from Rihand and Matatila Hydel Power Stations.

And in the matter of

Madhya Pradesh Power Trading Company Ltd.

.... Petitioner

Vs

1. Principal Secretary, Energy Department, Govt. of UP, Lucknow
2. Chairman, UP Power Corporation Ltd., Lucknow
3. Chairman, UP Jal Vidyut Nigam Ltd., Lucknow

.... Respondents

The following were present:

1. Shri G. Umapathy, Advocate, MPPTCL
2. Shri D. Khandelwal, MPPTCL
3. Shri Dilip Singh, MPPTCL
4. Shri Sitesh Mukherjee, Advocate, UPPCL
5. Shri Sapan Kumar Mishra, Advocate, UPPCL
6. Shri Vishal Anand, Advocate, UPPCL
7. Shri. B.S. Goel, UPJVNL

**ORDER
(DATE OF HEARING: 22.1.2008)**

The petitioner has filed this petition with the following directions to the respondents, namely:-

- (a) To release MP's full legitimate share of supply from Rihand Hydel Power Station (Rihand HPS) (45 MW) and Matatila Hydel Power Station (Matatila HPS) (10 MW) immediately.
- (b) To pay the outstanding amount of Rs. 365.704 crore, towards retention of MP's share of power from the two power stations.
- (c) To pay interest at the borrowing rate of MPSEB plus 2% extra as decided in the MoM dated 27.7.1993

2. Briefly, the case of the petitioner is as under:

- (a) Rihand HPS having total installed capacity of 300 MW is stated to have come into commercial operation in the year 1962 and Matatila HPS having total installed capacity of 30 MW in the year 1965. In this order Rihand HPS and Matatila HPS are collectively referred to as "the power stations".
- (b) The power stations are situated in the State of Uttar Pradesh, and were developed by the erstwhile Uttar Pradesh State Electricity Board (UPSEB), the predecessor of the second and third respondents.
- (c) Central Zonal Council (under the Ministry of Home Affairs, Government of India) in its 6th meeting held on 1st and 2nd July 1963 decided that Madhya Pradesh State Electricity Board, (MPSEB), the predecessor of the petitioner, would have 15% share based on energy available at Rihand HPS and one-third share of energy available at Matatila HPS, from year to year at cost plus 5%; cost was to be worked out by a Committee headed by Shri M.R. Sachdeva, the then Chairman, Central Water & Power Commission.

(d) Detailed modalities for implementation of the above decision were evolved in the meetings held on 13th and 14th March 1964 at New Delhi. However, the arrangement could not be put into operation despite a number of subsequent meetings.

(e) In the meetings held on 7th and 8th June 1977, it was *inter alia* decided that in case MPSEB was not provided its entire share of power, balance units would be treated as overdrawal by UPSEB and would be paid for accordingly by UPSEB.

(f) The above arrangement was accepted and acted upon by UPSEB who had supplied power at varying volumes during certain periods. A sum of Rs. 28.61 crore is stated to have been paid by the State of Uttar Pradesh from 1990-91 to 1999-2000 for non-supply of power from the power stations to the State of Madhya Pradesh.

(g) During the period from 1962-63 to 2005-06, the State of Madhya Pradesh is stated to have received power supply of 626.84 MUs, which works out to about 12% of its total share of 5263.55 MUs, for the said period.

(h) A sum of Rs. 365.704 crore is reportedly outstanding against the respondents towards retention of the share of power of the State of Madhya Pradesh from the power stations.

(i) In the meetings held on 8th and 9th September, 2005 between the two State Governments together with their respective unbundled utilities, the second respondent is stated to have committed that MP's share of power

supply from Rihand HPS would be commenced by 15.10.2005, supply from Rihand HPS to be enhanced by 15% to clear accumulated outstanding balance.

3. The second respondent has filed a short reply objecting to the jurisdiction of the Commission to adjudicate the dispute. The gist of the submissions of the second respondent is as under:

(a) Since the power stations are under the control of and are run by the third respondent and are not owned or controlled by the Central Government, the Commission does not have jurisdiction to regulate their tariff under clause (a) of sub-section (1) of Section 79 of the Electricity Act, 2003 (the Act).

(b) In terms of clause (b) of sub-section (1) of Section 79 of the Act, the Commission has jurisdiction to regulate tariff of the generating companies, other than those owned or controlled by the Central Government having composite scheme of generation and sale of electricity in more than one State. It has been contended that the power stations are not covered under the 'composite scheme' and accordingly, the Commission does not have power of regulation of tariff under clause (b) of sub-section (1) of Section 79 of the Act. In support of its submission, the second respondent has relied upon the order of the Commission dated 29.3.2006 in Petition No.103/2005.

(c) Accordingly, it has been submitted that the Commission does not have jurisdiction to adjudicate upon the dispute under clause (f) of sub-section (1) of Section 79 of the Act, for want of jurisdiction to regulate tariff of the power

stations either under clause (a) or clause (b) of sub-section (1) of Section 79 of the Act.

(d) The Central Zonal Council is already seized of the matter and it is making efforts to resolve the dispute inter-parties which includes the claim of the second respondent for 50% of its share of the power generated from Rajghat Power Station in the State of Madhya Pradesh, jointly promoted by the States of Uttar Pradesh and Madhya Pradesh. It has been stated that the last meeting of the Central Zonal Council was held on 18.6.2005.

(e) No formal agreement was entered into between the parties and the agreed terms have been referred only in the minutes of meetings.

4. Besides, the third respondent has also filed its reply to the petition. The gist of its submissions is as under:

(a) The third respondent was created as a result of unbundling of UPSEB and the assets and liabilities in respect of the hydro-electric power stations were transferred to and vested in it with effect from 14.1.2000.

(b) No liability on account of the amount claimed by the petitioner was incorporated in the balances finally transferred by the Government of Uttar Pradesh, vide notification dated 25.1.2001.

(c) No power purchase agreement between erstwhile MPSEB and erstwhile UPSEB was made available to it.

(d) As per the Memorandum of Understanding dated 18.12.2000 effective from 14.1.2000 between the second and third respondents, the entire energy generated by the power stations is to be supplied to the second respondent.

(e) The issue of honouring the commitment to supply power to Himachal Pradesh and Madhya Pradesh as their share in the generation from certain power stations has been left at the discretion of the second respondent, under clause 2.01 of the Memorandum of Understanding.

5. We have heard the learned counsel for the parties and have gone through the pleadings. We also heard Shri D. Khandelwal, who further supplemented the submissions made by the learned counsel for the petitioner.

6. As the second respondent has raised the issue of jurisdiction of the Commission to adjudicate the dispute raised in the petition, it becomes necessary for us to decide this issue first.

7. As noted above, the objection of the second respondent is based on the premise that since the Commission does not have jurisdiction to regulate the tariff of the power stations under clause (a) or (b) of sub-section (1) of Section 79 of the Act, and that the tariff of the power stations is being fixed by the UP State Electricity Regulatory Commission, the jurisdiction to adjudicate dispute is not vested in this Commission under clause (f) of sub-section (1) of Section 79.. Per contra, the petitioner has contended that this is a case falling under clause (c) of sub-section (1) of Section 79 of the Act and, therefore, the dispute arising in the matter squarely falls within the ambit of clause (f) of sub-section (1) of Section 79 of the Act.

8. Sub-section (1) of Section 79 of the Act is reproduced hereunder:

“79. (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.”

9. There is no denying the fact that this Commission can adjudicate on the disputes relating to any of the matters falling under clauses (a) to (d). The adjudication of disputes is not limited to clauses (a) and (b) but also extends to the matters under clauses (c) and (d). Therefore, for the purpose of examination of the issue of jurisdiction of the Commission to adjudicate the dispute raised in the petition, it is not necessary for us to decide whether or not the Commission has authority to

regulate tariff of the power stations. Accordingly, we propose to examine as to whether the dispute can relate to any matter other than clause (a) and (b) under subsection (1) of Section 79 of the Act leaving open the question of jurisdiction of the Commission to regulate tariff of the power stations, though the learned counsel for the petitioner has contended that the dispute falls under clause (c).

10. For adjudication of the dispute, it is essential to consider whether there exists an agreement for supply of power from the power stations to the State of Madhya Pradesh. The second respondent in its short reply has denied existence of any formal agreement. However, there is plethora of evidence in the form of minutes of the meetings which are the public records to support the petitioner's contention that the two States and the State Electricity Boards concerned had agreed to sharing of electricity generated at the power stations. In fact, the second respondent itself in its reply has conceded that

“In 1962 it was agreed between the erstwhile UPSEB and the erstwhile MPSEB that UPSEB will supply 15% from its Rihand Power Station and 1/3 from its Matatila Power Station to the petitioner on cost plus 5% thereof.” (Emphasis supplied)

11. Similarly, the third respondent in its reply, has stated that under the transfer scheme of U.P Govt. the entire energy generated by the power stations was to be supplied to the second respondent on whom the responsibility for honouring of commitment to supply power to Madhya Pradesh as its share in generation from the power stations was vested. The third respondent has placed on record the extracts of the transfer scheme formulated by the State Government of Uttar Pradesh in exercise of its powers under the Uttar Pradesh Electricity Reforms Act, 1999, as under:

“Supply of Power:

After honouring commitment (as per previous agreement) of supply of power up to share entitlement of the Himachal Pradesh in HEP Project and to Madhya Pradesh in Rihand Hydro and Matatila Hydro Power Stations, balance total power as generated by UPJVNL will be supplied to UPPCL”.

12. The above facts on record testify that the State of Uttar Pradesh had agreed to share electricity generated at the power stations with the State of Madhya Pradesh. The absence of any formal agreement in this regard does not change the position in any manner, whatsoever. It is noted that the transfer scheme which is statutory in nature, notified by the State Government of Uttar Pradesh enjoins upon the third respondent to honour commitment of the State Government for supply of power to Himachal Pradesh and Madhya Pradesh and only the “balance total power as generated by UPJVNL (the third respondent) will be supplied to UPPCL (the second respondent)”. The petitioner had been supplied electricity from the power stations, though intermittently. In fact, the learned counsel for the second respondent at the hearing could not deny that the State of Uttar Pradesh had not agreed to share power in the given proportion. Thus, we are satisfied that there exists an open-ended obligation on the part of the present utilities in the State of Uttar Pradesh, the successors of UPSEB to supply power from the power stations to the State of Madhya Pradesh.

13. The next question to be considered for adjudication of dispute is whether the supply of power to the State of Madhya Pradesh involves inter-State transmission. The expression “inter-State transmission” though extensively used in the Act has not been defined. In order to examine the issue, we may first have a look at the

expression “inter-State transmission system” defined under sub-section (36) of Section 2 of the Act, extracted hereunder:

“(36) “ inter-State transmission system” includes –

(i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;

(ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;

(iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by Central Transmission Utility.”

14. From clause (i) of sub-section (36) of Section 2 of the Act it follows that any system used for conveyance of electricity by means of main transmission line from the territory of one State to another State qualifies to be categorized as the inter-State transmission system. It, therefore, follows that conveyance of electricity from the territory of one State to the territory of another State amounts to inter-State transmission within the meaning of the term used in the Act. In the present case, based on our above analysis there is no doubt that supply of electricity from the power stations located in the State of UP to State of Madhya Pradesh involves inter-State transmission.

15. Based on the above discussion, we sum up our conclusions as under:

(a) The State of Uttar Pradesh has an obligation to supply electricity from the power stations to the State of Madhya Pradesh, in the agreed proportion.

(b) Supply of power as aforesaid involves inter-State transmission of electricity.

16. The second respondent has contended that the matter ought have to be left to a civil court. We are not moved by the argument. Once it is established that the Commission has jurisdiction to adjudicate the dispute, it is improper to relegate the parties to civil proceedings since that will amount to abdication of statutory function by the Commission. A view similar to the above was taken by the Commission in its order dated 18.10.2007 in Petition No.9/2003, as extracted below:

“24. In view of the provisions of Section 175 of the 2003 Act, we do not find any merit in the contention of the learned counsel for the respondents that the provisions of sub-section (1) of Section 79 are to be narrowly interpreted since otherwise it would affect the jurisdiction of the civil courts. The remedy provided under clause (h) of sub-section (1) of Section 79 of the 2003 Act is in addition to the remedies available to the parties under any other law. The jurisdiction conferred on the Commission is concurrent with the jurisdiction of the civil court. The exercise of the jurisdiction by the Commission, does not in any manner oust jurisdiction of the civil courts to adjudicate upon the dispute. It is left to the parties to choose the forum for redressal of their grievances. The application cannot be thrown out merely on the ground that the petitioner has sought to avail of an alternative remedy. Therefore, this contention of the learned counsel by the respondents is to be rejected.

25. It is undoubtedly true that normally, the function of adjudication of disputes is vested in the courts and the Constitution of India provides for establishment of a well-defined hierarchical judicial system. However, the courts are not the exclusive instrumentalities for adjudication of disputes. The Parliament by law has created a large number of quasi-judicial bodies (including the Commission) for discharge of adjudicatory functions and for settlement of disputes, in view of expansion in governmental operations. The reasons for establishment of quasi-judicial bodies are not far to seek. If all the disputes arising out of the new legislations are to be adjudicated exclusively by the courts, they will be over-loaded with work. This will make the matters worse as the courts are already faced with mounting backlog of cases. The quasi-judicial bodies apart from being quicker and cheaper means of dispute settlement are less formal and have developed expertise into the particular fields of adjudication. These seem to be the objectives behind enactment of clause (f) of sub-section (1) of Section 79 of the 2003 Act. When the matter is viewed against this background, view taken by the Commission in the preceding paras gets reinforced.

26. Clauses (c) and (d) of sub-section (1) of Section 79 of the 2003 Act entrust the Commission with functions of regulation of inter-state transmission of electricity and determination of tariff therefor. The term "inter-state transmission system" has been defined under sub-section (36) of Section 2 of the 2003 Act as under:

.....

27. As has been noted above, the petitioner's transmission system was utilized for conveyance of power from the generating stations of NTPC located in the Eastern Region to the first respondent in Southern Region. The utilization of this transmission system was necessary for transmission of power to the first respondent. So long as the transmission system owned by the petitioner was being used, it formed part of the inter-State transmission system in terms of clause (ii) of sub-section (36) of Section 2 of the 2003 Act, the regulation of which and determination of tariff for which is exclusively within the jurisdiction of the Commission in terms of clauses (c) and (d) of sub-section (1) of Section 79 of the 2003 Act. Therefore, there is no force in the first respondent's argument that the matter falls within the jurisdiction of the State Regulatory Commissions."

17. The pendency of the matter before the Central Zonal Council, which has been adopting the conciliatory approach cannot take away the jurisdiction of the Commission to adjudicate the dispute under the Act. We also take note of the fact that the Central Zonal Council held its last meeting on 18.6.2005 and has not met since then.

18. The second respondent has raised indirectly and obliquely the issue of its share of power from Rajghat power station jointly developed by the parties. We clarify that in these proceedings we are not concerned with that dispute. There is no factual background for taking note of the dispute. However, the second respondent may, if so advised, initiate appropriate proceedings to enforce its right, if any, in accordance with law.

19. While delineating the functions of the Commission, the Act distinguishes between the function of regulating inter-State transmission of electricity and determination of tariff of various utilities. It is obvious that there are issues other than determination of tariff which are germane to inter-State transmission of electricity. The Act assigns to the Commission the overall responsibility of overseeing and facilitating the smooth transmission of electricity from one State to another State (inter-State transmission).

20. In the light of the foregoing, we have no hesitation to hold that the dispute in the instant case is in regard to a matter connected with regulation of inter-State transmission of electricity as prescribed in clause 79(1) (c) and therefore adjudication of any dispute related thereto is within the jurisdiction of this Commission under clause 79(1) (f) of the Act.

21. Under the transfer scheme notified by the State Govt. of UP, as per relevant extract quoted in para 11, the third respondent is to supply electricity to the second respondent after honouring commitments of supply of power to the State of Madhya Pradesh in Rihand HPS and Matatila HPS. However, it transpires that under a Memorandum of Understanding signed by it with the second respondent, the entire energy generated by the power stations is being supplied to the second respondent. The third respondent has relied upon clause 2.01 of the Memorandum of Understanding dated 18.2.2000 signed between the two, and reproduced below:

“2.01 ALLOCATION OF POWER:

Subject to and in accordance with the terms of this Agreement, UPJVNL agrees to sell and UPPCL agrees to purchase the entire Net Electrical Output of the generating units covered by this agreement. The obligation of supply of

Power to some other states, as per the mutual agreement entered in to or to be entered in future would be discharged by UPPCL.”

22. Based on the above, the third respondent has contended that responsibility of supply of power to other States is that of the second respondent. Although this is not in strict conformance with the transfer scheme, which has a statutory flavour, we note that the MoU referred to above is between two organizations belonging to and controlled by the State Government which has notified the transfer scheme. We have, therefore, accepted the realignment of responsibilities as per the MoU.

23. We would not like to perpetuate the present status. There is no reason why the second respondent should not start supplying power to the State of Madhya Pradesh forthwith as agreed to by the State Government of Uttar Pradesh and UPSEB, the predecessor of the second and third respondents. This would at least stop further compounding of the problem. As of now, the Northern and Western Regions are operating in synchronized mode and the supply of electricity from the power stations does not depend any longer on the availability of and actual power flows on the transmission lines originally built for that purpose. The applicable quantum of power has only to be considered in the net drawal schedules of the second respondent and the petitioner from the respective regional grids. The power would then flow notionally through displacement. All that is necessary is that the second respondent advises NRLDC on a regular basis about the schedule and actual generation of the power stations whereupon NRLDC has to reduce the net drawal schedule of the second respondent by 15% of Rihand generation and one third of Matatila generation. WRLDC would correspondingly increase the net drawal schedule of the petitioner. In this arrangement, which is now possible, there would be no default in supply and,

therefore, no issues regarding compensation for non-supply or short-supply by Uttar Pradesh to Madhya Pradesh in future. We direct accordingly.

24. The petitioner and second respondent are also directed to immediately interact with WRLDC and NRLDC to formalize the scheduling procedure, and resume the power supply latest by 1.4.2008. In case any difficulty is foreseen or experienced in the above matter by any party, it may be brought to the notice of the Commission latest by 14.3.2008.

25. The above direction disposes of the prayer made by the petitioner for immediate release of its share of supply of electricity from the power stations. The question regarding the compensation claimed by the petitioner for non-supply of power in the past, however, is yet to be considered.

26. We are conscious of the fact that the second respondent has not so far filed its reply to the petition on merits. In its short reply opposing admission filed on 27.11.2007, the second respondent had sought liberty to file detailed counter affidavit later if required.

27. Accordingly, the second respondent may file its detailed reply to the petitioner's claim for compensation, interest, etc, with copies to other parties to the present case within four weeks of this order. The petitioner may file its rejoinder, if any, within two weeks thereafter.

28. We make it clear that while deciding the issue of jurisdiction, the applicability of the ratio of the Commission's order dated 29.3.2006 in Petition No.103/2005 to the

case on hand has not been examined since that case, with prayer for determination of tariff of the generating stations situated in the State of Uttaranchal, and contested between intra-State parties of the same State, was decided on its own facts. The facts and issues in the present case are prima facie very different.

29. A copy of this order be sent to NRLDC and WRLDC for their appropriate action.

30. List this petition on 3.4.2008.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi dated the 27th February 2008