

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

- 1. Shri Ashok Basu, Chairperson**
- 2. Shri K.N.Sinha, Member**
- 3. Shri A.H. Jung, Member**

Petition No.103/2005

In the matter of

Petition under sections 62 and 79 of the Electricity Act, 2003 seeking permission for filing the proposed tariffs for financial years 2005-06 to 2008-09 of Uttaranchal Jal Vidyut Nigam Ltd and for the Determination of Generation Tariffs for its Hydro Electricity Generation Stations of Dhakrani, Dhalipur, Chibro, Khodri and Kulhal.

And in the matter of

Uttaranchal Jal Vidyut Nigam Ltd **Petitioner**

Vs

1. Uttaranchal Power Corporation Ltd., Dehradun
2. Himachal Pradesh State Electricity Board, Shimla **Respondents**

The following were present

1. Shri Hemant Sahai, UJVNL
2. Shri Vivek Singh, UJVNL
3. Shri Ramachandran, UERC
4. Shri Anand Kumar, UERC
5. Ms. Taruna S. Baghel, UERC

ORDER

(DATE OF HEARING: 5.1.2006)

The petitioner Uttaranchal Jal Vidyut Nigam Ltd. (UJVNL) has filed this petition under sections 62 and 79 of the Electricity Act, 2003. The Commission had earlier heard the matter and vide its order dated 10.11.2005 in Petition No. 103/2005 directed the petitioner to amend the petition with the specific prayer to decide upon the jurisdiction of the CERC for approval of generation tariff of five hydro generating stations viz. Dhakrani, Dhalipur, Chibro, Khodri and Kulhal

owned and operated by the petitioner UJVNL, for the years 2005-06 to 2008-09. Keeping in view the fact that it will involve interpretation of the provisions of the Electricity Act, 2003 having implication on the jurisdiction of UERC and HPERC, the Commission also requested the Chairman of respective Commissions to suitably advise their Secretariat to render necessary assistance to the Commission in resolving the issue.

2. The amended petition was filed subsequently by the petitioner on 19.12.2005. Uttaranchal Electricity Regulatory Commission also submitted its representation dated 02.01.2006 in the matter and was represented by the Secretary of the Commission. The petition was heard by the Commission on 05.01.2006 to decide upon the jurisdiction of the CERC for approval of generation tariff of above referred hydro generating stations owned and operated by the petitioner UJVNL.

3. The tariff of these five hydro stations was earlier determined by the Uttaranchal Electricity Regulatory Commission vide order dated 16.12.2004, against which the petitioner filed an appeal before the High Court of Uttaranchal.

Background

Status before the reorganization of the State of Uttar Pradesh

4. Before the creation of Uttaranchal State, the generation of electricity from hydro and thermal generating stations in the State of Uttar Pradesh was done by Uttar Pradesh Jal Vidyut Nigam Ltd., (UPJVNL) and Uttar Pradesh Rajya Vidyut Utpad Nigam Ltd., (UPRVUNL) respectively, both being wholly owned State Government companies. The erstwhile UP State Electricity Board (UPSEB) had

been unbundled under the UP Electricity Reforms Act, 1999. Under this Act, UP Government notified a Provisional Transfer Scheme on 14.01.2001 and, thereafter, the Final Transfer Scheme on 25.01.2001, under which the assets and liabilities of UP State Electricity Board, which had been vested in the UP Government, were in turn transferred to UPJVNL, UPRVUNL and Uttar Pradesh Power Corporation Limited (UPPCL) w.e.f. 14.01.2000.

Status after creation of Uttranchal State

5. The State of Uttranchal came into existence on 9th November, 2000 in accordance with the provisions of the Uttar Pradesh Re-organization Act, 2000 (hereinafter referred as Re-organization Act) enacted by the Parliament on 25.08.2000. Section 63 of the Re-organization Act spelt out the manner in which division of assets, rights and liability will be made between the two states of Uttranchal and Uttar Pradesh.

6. The Government of Uttranchal registered a company on 12.02.2001 by the name of Uttranchal Jal Vidyut Nigal Limited (UJVNL) in accordance with sub-section (4) of section 63 of the Re-organization Act. Government of India, in exercise of its powers under section 63 of the Re-Organization Act, 2000 issued an order on November 05, 2001 dividing certain assets, rights and liabilities of UPJVNL between UP and Uttaranchal.

Power Generation in Uttranchal

7. Total installed capacity of Hydro generating stations in undivided UP was about 1520 MW comprising of thirteen medium/large generating stations, thirteen small and twenty eight micro hydro generating stations. Out of these nine large/medium, nine small, and 23 micro-hydel generating stations are said to have been transferred to Uttaranchal Jal Vidyut Nigam, the balance remaining with UP. The details of these generating stations are given in the table below:

Sl. No.	Category	Region	Year of Commissioning	No	Capacity (MW)	Aggregate Capacity (MW)
1.	Large Hydro Project			4	100 MW and above	702.00
	i) Chhibro	Yamuna Stage - II	1974-76	1	4x60	240.00
	ii) Chilla	Garwal - Rishikesh	1980-81	1	4x36	144.00
	iii) Ramganga		1975-76	1	3x66	198.00
	iv) Khodri	Yamuna Stage - II	1983-84	1	4x30	120.00
2.	Medium Hydro Projects (5)				More than 25 MW and up to 100 MW	
	i) Maneri-Bhali	Stage-I	1984-85	1	3x30	90
	ii) Dhakrni	Yamuna Stage -I	1965-70	1	3x11.25	33.75
	iii) Dhalipur	Yamuna Stage-I	1965-70	1	3x17	51.00
	iv) Kulhal	Yamuna Stage -IV	1974-76	1	3x10	30.00
	v) Khatima	Stage -I	1955-56	1	3x13.8	41.40
3.	Small Hydro Projects			9	More than 1 MW and	47.55

					upto 25 MW	
4.	Micro Hydel Projects			23	Before 1 MW	8.58
	Total			41		1004.28

Tariff determination so far in respect of these projects:

Prevailing Tariff

8. At the time of transfer of these generating stations to Uttranchal, the pooled rate of power purchase approved by UPERC was 37.2 p/ unit. Notwithstanding this, UJVNL raised this rate to 55 p/ unit on 09.11.2001 without obtaining regulatory approval. The Uttranchal Electricity Regulatory Commission while considering petition found UJVNL'S action of increasing the approved rate of power purchase on its own to be without authority and in violation of law and , therefore, did not allow the same. Instead, it ordered continuance of the rate of 37 paise / unit already approved by UPERC, as adhoc rate and directed that the updated rate for such purchases may be worked out and submitted for Commission's approval. Further, it was stated that the updated rate, as approved by the Commission, will replace the above adhoc rate of 37 p / unit. No such updated rate has so far been submitted before the Commission for approval. Thus, presently power continues to be purchased from UJVNL at this ad hoc rate of 37 p/ unit.

Tariff approved by the Uttranchal Electricity Regulatory Commission.

9. The Uttranchal Electricity Regulatory Commission notified the terms and conditions for determination of hydro generation tariff Regulation 2004, dated

14.05.2004. Subsequently UJVNL filed petitions on 15.09.2004 with the Uttranchal Electricity Regulatory Commission for determination of tariff of nine generating stations for the year 2004-05. UERC vide its order dated 16.12.2004 determined generation tariff of petitioner's total generation in nine generating stations, which include tariff of 5 hydro stations in question of UJVNL, the power from which is sold to Uttaranchal Power Corporation Limited (UPCL) after allowing share to HPSEB.

10. An important aspect of this tariff order relates to recovery of excess charges which were being recovered by UJVNL for the period 09.11.2001 to 31.03.2003. Uttranchal Electricity Regulatory Commission ordered that total excess recovery of Rs. 86.78 crores is to be put in a specially established "Renovation & Modernization Fund (RMF), which would be utilized for R&M of hydro generating stations of UJVNL.

Review petition by UJVNL

11. Aggrieved by several aspects of UERC order dated 16.12.2004, UJVNL filed a writ petition against the said order before the Uttranchal High Court and the High Court issued an interim order dated 29.04.2005 staying the operation of said UERC order but allowing the tariff to be charged at the rates approved earlier by UPERC i.e., 37 p/Kwh. The said order dated 23.03.2005 of the Uttaranchal High Court was subsequently modified by interim order dated 29.04.2005.

12. On 25.08.2005, Uttaranchal High Court after hearing all parties concerned and with the consent of all decided to transfer the entire matter to the Appellate Tribunal for electricity for treating it as a statutory appeal while keeping the aforesaid interim orders in force.

Present Petition before this Commission.

13. Present Petition before the CERC is on the question of its jurisdiction under section 79 of the Electricity Act, 2003 with regard to the generation tariff of five hydro generating stations viz. Dhakrani, Dhalipur, Chibro, Khodri and Kulhal owned and operated by the petitioner UJVNL.

14. Clause (b) of sub-section(1) of section 79(1) (b) of the Electricity Act, 2003 reads as under-

“Section 79. (Functions of Central Commission):

(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;

.....”

15. The petitioner has submitted that an agreement was signed between the State of Uttaranchal (erstwhile U.P) and the state of Himachal Pradesh on 21.11.1972 for supply of power from its 5 nos. inter-state hydro stations, which inter-alia, state as under:

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 HP 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 HP Govt. reserves the right 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) HP 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 projects) and 20% of the electricity generated at Kulhal hydro project, less energy consumed in the maintenance and operation of these power stations.

iv) The share of energy of HP of Yamuna stage -I will be made available to HP at the bus bars against payment at the cost of generation of stage-I as determined for each financial year. After completion of the 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) HP shall not share the capital cost of the said scheme.

16. **The main issues to be deliberated in the present petition are:**

a) Whether the supply of share of energy from these five hydro plants, under the said agreement between the state of Uttranchal and the state of Himachal Pradesh can be termed as **inter-state "sale"** in the commercial sense OR

the sharing of power from these five hydro plants is some sort of compensation given to Himachal Pradesh in lieu of the usage of rights of water of river Yamuna and its tributaries (including the river Tons) emanating from Himachal Pradesh State, which have been conveyed by the State of Himachal Pradesh exclusively to the then State of UP and now Uttaranchal for the purpose of power development in Uttaranchal;

- b) Whether the five hydro plants (Dhakrani, Dhalipur, Chibro, Khodri and Kulhal) have a **composite scheme for generation and sale of electricity** in more than one State i.e. Uttaranchal and Himachal Pradesh in the present case, as per the provisions of clause(b) of sub-section(b) of section 79 (1) (b) of the Electricity Act, 2003, and
- c) Since the tariff for these Hydro Station was determined by State Government/State Commission all along whether the intention of the legislature while enacting the Electricity Act, 2003 was to transfer power from the State to the Centre in respect of such projects.

The issue of inter-State 'sale' in commercial sense:

17. An important aspect of agreement between the state of Uttaranchal (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 further stipulates that-

- i) 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.

18. As regards the principle of charging the cost of generation from these hydro plants, UJVNL which is responsible to supply the share of energy to HP under the agreement, in its submission to the Commission vide affidavit dated 19.12.2005 has stated as under:

“ The generation of five stations in the Yamuna Valley is shared between HPSEB and Uttaranchal Power Corp. Ltd. This is because UJVNL is bound by the agreement between the governments of Himachal Pradesh and Uttar Pradesh that requires it to supply electricity to HPSEB from the plants in the Yamuna Valley to the extent specified in the agreement. The agreement specifies that UJVNL will supply 25% of the electricity generated in Dhakrani, Dhalipur, Chibro and Khodri plants and 20% of the electricity generated in Kulhal plant to HPSEB at costs, i.e. excluding returns (excluding cost of servicing debt, return on equity and taxes). Hence the electricity supplied to HPSEB is at a lower rate than that for UPCL”.

19. From the above submission of UJVNL it is observed that the rate at which electricity is supplied from each of these 5 inter-state hydro plants to HPSEB is to be different from the rate at which it supplies to the UPCL, other beneficiary of these stations.

20. It is observed that there are two beneficiaries of the five projects - HPSEB & UPCL. HPSEB without sharing cost of even single component of the project is getting its share of energy at a lower rate and the other beneficiary UPCL is getting its share at the higher rate and is also compensating the differential amount which HPSEB is not paying as per the terms of the agreement.

21. The whole arrangement thus 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 U.P.) and Himachal Pradesh.

22. In the above context, we have studied certain similar inter-state agreements which are also in force on the river valley projects and some of them are discussed below, which would supplement the above fact:

23. Agreement between Himachal Pradesh & Punjab regarding their Dam Project - The inter-state agreement dated 19.01.1979 between Government of Himachal Pradesh and Government of Punjab regarding Ranjit Sagar HE project (Thein Dam Project). Ranjit Sagar HE project (4x150 MW) has been constructed on river Ravi in Gurdaspur district of Punjab. The agreement inter-alia state the following :

- i) The Punjab Government will use the water of the river Ravi for the purpose of power development and irrigation subject to the exercise by the people of Himachal Pradesh of their existing rights to these waters for irrigation, driving of water mill, transport of timber.

- ii) In full settlement of the Himachal Pradesh Government's claim on the Project the Punjab Government shall supply, free of cost to the Government of Himachal Pradesh 4.6% of the total energy generated at Rangit Sagar HE project (Thein Dam).

24. Agreement between Punjab and Jammu & Kashmir regarding Ranjit Sagar Project -

20 % of the energy generated at Rangit Sagar project is to be supplied to J&K at the cost of energy generation at Bus bars.

25. Agreement between Government of Sikkim and Government of West Bengal regarding Ramman Hydro Electric scheme -

The Ramman river forms the boundry between Sikkim and West Bengal states. The potential to be developed in Ramman Hydro Electric stage - II lies in the border of these States. Out of total catchment area about 209 sq Kms., 81 sq kmx. Lies in Sikkim, and the remaining in the West Bengal. West Bengal and Sikkim Governments have executed an agreement on 16.11.1976, the details of which is as follows:

- i) The usage rights of water of the Ramman river and its tributaries emanating from the Sikkim territory will be conveyed by the Government of Sikkim exclusively to the Government of West Bengal for the purpose of power development as herein before mentioned, but subject to any existing facilities of irrigation, running of water mills and transport of timber and similar other facilities enjoyed by the people of Sikkim being preserved.

- ii) The Sikkim Govt. reserve the right 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 Ramman Hydel Project.
- ii) The Government of Sikkim shall share 20% of the total energy, as well as seasonal generations at the power stations of Ramman hydel projects stage II, less the energy consumed in the maintenance and operation of these power stations, such energy to be supplied by West Bengal at the busbars at the said power stations.
- iii) The share of power of the Government of Sikkim will be made available to the Government of Sikkim at the busbars against payment at the cost of generation as determined by the Government of West Bengal for each financial year.
- iv) The Government of Sikkim will not be liable for any portion of the capital costs of the said scheme for the generation and supply of power.

26. In all the above agreements (including that of Yamuna hydel scheme concerning five projects of UJVNL, the subject matter of present petition), the usage rights of waters of the main river and its tributaries emanating from the upstream state have been conveyed by the upstream state exclusively to the downstream state in which the hydro project has been constructed and is in operation. The agreement binds the upstream state not to reduce the natural flow and supply of water which would otherwise adversely affect the said hydel

project. In lieu of allowing usage rights of waters of the main river and its tributaries emanating from the upstream state, the state in which the hydro station has been constructed is supplying mutually agreed percentage of energy to the up stream State at the rate equivalent to the cost of generation at the bus bars.

27. Since the up stream State is not sharing the cost of the hydro project, the rate of supply of energy to the non-participating state (HP, J&K, Sikkim in above agreements) would be lower than that to the owner state of hydro station. Thus it appears to us to be some sort of compensation for usage rights of water rather than sale on purely commercial sense.

The issue of 'composite scheme':

28. A regards the interpretation of the expression "composite scheme" as provided in clause (b) of sub-section 1 of section 79(1) (b) of the Electricity Act, 2003, although the expression has not been defined in the Act, the Commission is of the view that 'composite scheme' is one in which a generating station is originally conceived for the purpose of meeting the power requirements of more than one State. The generating station could be set up in one State but the beneficiaries would be pre-identified and be in more than one State. Traditionally the central generating stations have been set up as 'composite scheme'. Such generating stations had, at their very inception, inter-State beneficiaries identified and consequently the sale from such stations involved more than one State.

29. In this context, it would be relevant to discuss the general approach to grant of jurisdiction of the CERC across the Act and also specifically, in the context of the two clauses (a) and (b) of sub-section(1) of section 79(1) of the Act.

The basis of CERC's jurisdiction is 'inter-State' operation. Under clause (a) of sub-section(1) of section 79 of the Act, thus the powers of fixation of tariff of Central Government owned generating companies were vested in CERC largely because such generating stations were inter-State in nature, with clearly identified beneficiaries, from the very beginning, in more than one State. Clause (b) of sub-section(1) of section 79 of the Act is a complementary provision for clause (a) of the said section, with the difference that clause (a) covers the Central Government owned generating stations while clause (b) covers primarily private projects. This follows that the expression 'composite scheme for generation and sale of electricity in more than one State' in clause (b) of sub-section(1) of section 79(1) of the Act should be interpreted to mean a composite scheme on lines of central generating companies where the generating stations were envisaged from the very beginning to have generation and sale in more than one State.

30. It also follows from the above that that a composite scheme is an inter-State scheme under which tariff applicable to all the beneficiaries of a project would also be the same. However, in the case of five inter-state hydro plants of UJVNL in question, it has been submitted by the petitioner in its affidavit dated 19.12.2005 that the agreement specifies that UJVNL will supply 25% of the electricity generated in Dhakrani, Dhalipur, Chibro and Khodri plants and 20% of the electricity generated in Kulhal plant to HPSEB at costs, i.e. excluding returns (excluding cost of servicing debt, return on equity and taxes). Hence the electricity supplied to HPSEB is at a lower rate than that for UPCL".

31. In our opinion therefore, the hydro-stations in question do not qualify to be a 'composite scheme', as required under clause(b) of sub-section (1) of section 79(1) (b) of the Act.

The issue of legislative intent on centralization of power:

32. The Parliamentary Standing Committee on Energy while examining the Electricity Bill, 2001 as introduced in Lok Sabha, had observed inter alia, in the context of the autonomy of States, that "... the States remain the main players in the power sector as they are the implementing agencies in their respective States. And the success or failure of the Bill to achieve the desired results would depend on its implementation by various agencies of the State. Moreover, in the federal structure of our Constitution a feeling should not go that the Union Government is trying to put in place legislation against their wishes."

33. Further, a look at the Parliamentary debate in the context of the Electricity Act, 2003 also reveals that there was a strong sentiment amongst some of the Members of the Parliament against any move towards centralization of power at the Centre.

34. The intention of the Act as passed by the Parliament also does not seem to transfer power from States to the Centre.

35. It is well established that tariff for these projects was earlier decided by UPERC and then by UERC even though the Electricity Regulatory Commissions Act, 1998 had similar provision with regards to functions and powers of CERC. Section 13 of the Electricity Regulatory Commissions Act, 1998 is quoted below :

"13. Functions of Central Commission.- The Central Commission shall discharge all or any of 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;

.....”

36. Provisions with regard to this matter as contained in the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003 remaining similar, we are of the view that nothing has changed in the law to materially affect the jurisdiction of State Commission in this matter.

37. In view of above, approval of generation tariff of five hydro generating stations viz. Dhakrani, Dhalipur, Chibro, Khodri and Kulhal owned and operated by the Uttaranchal Jal Vidyut Nigam Ltd. does not come under the jurisdiction of the CERC.

Sd/-
(A.H. JUNG)
MEMBER

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRPERSON

New Delhi dated the 29th March, 2006