

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 177/2009

Coram

- 1. Dr. Pramod Deo, Chairperson**
- 2. Shri R. Krishnamoorthy, Member**
- 3. Shri S. Jayaraman, Member**
- 4. Shri V. S. Verma, Member**

DATE OF HEARING: 14.10.2009

DATE OF ORDER: 11.1.2010

In the matter of

Clarification and implementation mechanism for an “in-principle” approval of the project cost for a Hydro Power Project

And the in the matter of

Tato Hydro Power Project Limited
Siyom Hydro Power Project Limited

.. Petitioners

The following were present:

1. Shri Amit Kapur, Advocate, JKHCL
2. Shri N.K Deo, Reliance Power Ltd
3. Shri Virendra Shukla, Reliance Power Ltd
4. Shri Abishek Ranjan Reliance Power Ltd

ORDER

The petitioners have vide this petition requested the Commission to clarify and lay down the mechanism to be adopted by them for:

(a) Approval of Project/Capital Cost and Commissioning schedule

(b) Obtaining “in-principle” approval of project /capital cost.

2. The petitioners viz. Tato Hydro Power Project Ltd (THPPL) and Siyom Hydro Power Project Ltd (SHPPL) are special Purpose vehicles (SPVs) created for the following purposes:

(a) To execute and operate the 700 MW Tato II HEP and 1000 MW Siyom HEP in the State of Arunachal Pradesh on Build, Own, Operate and Transfer (BOOT) basis and

(b) To evacuate power from the above HEPS in Arunachal Pradesh to the Discoms in Delhi and Mumbai.

3. Briefly the facts of the case as submitted by the petitioners are as under:

(a) Reliance Energy Ltd (REL) approached the Government of Arunachal Pradesh (hereinafter 'GoAP') in 2005, with a proposal to undertake construction and operation of certain hydro-electric projects in the State to sell power outside the State. Similar proposals were made by other developers as well. Based on the offers received from such parties, GoAP allocated the above mentioned HEPs to Reliance Energy Ltd (REL) on BOOT basis. Accordingly, two Memoranda of Agreement (MoA) were signed between GoAP and REL on 22.2.2006.

(b) Consequent to the award of the projects by GoAP, several activities towards implementation of the projects have been completed such as incorporation of the SPVs, obtaining clearance from the Ministry of Environment & Forest and the Ministry of Defence, appointment of consultant, requesting Border Roads Organisation to work on the alignment of roads required for the projects, submission of report on Hydrological aspects to CEA/CWC, etc. Besides, the petitioners are pursuing evacuation arrangement with Power Grid Corporation of India Ltd.

(c) On 14.9.2007, all rights and obligations of REL under the MoA dated 22.2.2006 were transferred to Reliance Power Ltd (RPL) by signing of MOA between the parties concerned.

(d) On 30.5.2009, Detailed Project Report in respect of the Tato II HEP was submitted to CEA for its concurrence.

(e) On 18.7.2009, THPPL and SHPPL entered into two respective MOUs with BSES Rajdhani Power Ltd (BRPL) and BSES Yamuna Power Ltd (BYPL) for sale of 210 MW each from Tato II HEP and 300 MW each from Siyom HEP. On 24.7.2009 the petitioners entered into two MOUs with Reliance Infrastructure Ltd for supply of 280 MW from Tato II HEP to RInfra and 400 MW from Siyom HEP to BRPL and BYPL respectively.

4. In the above background of facts, the petitioners have referred to the Commission's two communiqués dated 7.7.2009 numbered No.2/2(61)/2009-Hydro-A/CERC and 2/2(61)/2009-Hydro-A/CERC vide which quotations have been called for the following purposes:

(a) Empanelment of "Designating the Independent Agencies/Institutions for vetting the Capital Cost of Hydro Electric Projects"

(b) For assignment on "Evolving guidelines for scrutiny and approval of commissioning schedule of the hydro-electric projects of a developer not being a State controlled or owned company as envisaged in the amended tariff policy dated 31.3.2008"

5. The petitioners have relied on Para 1.3 of the terms and reference, which provides as under:

"1.3 Pertinently, Section 8 of the Act envisages concurrence of the scheme by CEA from technical angle. So far as capital cost of the project/scheme is concerned, scrutiny of its reasonableness for tariff determination remains the responsibility of the Appropriate Commission. As per the tariff policy as amended on 31st March, 2008, the Appropriate Commission has also to approve the time period of commissioning of hydro projects before commencement of the construction."

6. The petitioners have contended that in the absence of clear precedents in the context of amendment to the tariff policy, the hydro-developers would undergo cost scrutiny by two different agencies, i.e. CEA and an independent agency or expert appointed by the Commission under Regulation 7 of 2009 Tariff Regulation. In this context, the petitioners have sought the following clarification:

(a) Whether CEA's scrutiny must include or exclude the capital cost approval?

(b) In case CEA has the domain to approve the project/capital cost, whether this Hon'ble Commission shall treat the CEA approval as a valid and legally binding approval while approving the tariff under Regulation 5(1) of 2009 Tariff Regulation.

7. The petitioners have submitted that in the light of the above provisions and the absence, in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (the 2009 regulations), of any provision for according in-principle approval, there is considerable uncertainty in the minds of the investors. Accordingly, the petition has been filed seeking the reliefs mentioned in Para 1 above.

8. We have gone through the pleadings and heard the submissions of the learned counsel for the petitioners and proceed to dispose of the petition.

9. According to the learned counsel for the petitioners, confusion arises because of two basic features. He pointed out that the terms of reference issued under the Commission's communiqué No. 2/2(61)/2009-Hydro-B/CERC dated 7.7.2009 prescribes that the Central Commission is responsible for ascertaining the reasonableness of the capital cost and for scrutiny and approval of the commissioning schedule of the hydro-electric projects developed by private investors. In this connection, he invited our attention to paras 1.3 to 1.4.2 of the terms of reference in support of his stand that reasonableness of the capital cost is entirely within the domain of this Commission. On the other hand, the learned

counsel observed that, DPR calls for filing of all financial and economic data. In this regard he pointed out para 5 (h) of the Central Electricity Authority Regulations, 2004 on the concurrence of Hydro Electric Schemes (CEA Regulations) which provides as under:

“(h) In case the scheme is found technically and economically viable with necessary inputs/clearance (TEC) to the scheme, as far as practicable, within a period of 90 days from the date of submission of DPR complete in all respects.”

10. Learned counsel for the petitioners further invited our attention to the fact that as per regulation 8 of the CEA Regulations, the clearance given by the CEA is techno-economic in nature. He also referred to paras 4(b), 4(c) and 4 (j) of the concurrence guidelines issued by the CEA which relate to cost estimates. He pointed out that any observation by the CEA while according this clearance may impair and impinge upon the views of the Commission while examining the reasonableness of the capital cost. He further pointed out that the scope of scrutiny by the CEA under section 8 of the Electricity Act, 2003 does not include examination of the capital cost. Learned counsel contended that the above mentioned provisions lead to an ambiguity and the correct position needs to be clarified.

11. Learned counsel for the petitioners submitted that the CEA is not undertaking scrutiny of the capital cost of the projects. He even submitted that in the past, the CEA had declined to go into the economic aspect of the project. However, he urged, that there is a dichotomy in the statutory provisions which needs to be clarified.

12. Heard the Petitioners. The perceived dichotomy in the statutory provisions needs to be clarified by examining the applicable statutory provisions. Section 8(1) of the Act lays down the requirement to prepare and submit to the CEA for its concurrence, a scheme estimated to involve a capital expenditure exceeding such sum, as may be fixed by the Central Government, from time to time, by notification. Therefore the requirement is to obtain the concurrence of the CEA on such a scheme. The concurrence of the CEA is to be based on its opinion with particular emphasis under Section 8(2) as to whether or not-

“(a) the proposed river-works will prejudice the prospects for the best ultimate development of the river or its tributaries for power generation, consistent with the requirements of drinking water, irrigation, navigation, flood-control, or other public purposes, and for this purpose the Authority shall satisfy itself, after consultation with the State Government, the Central Government, or such other agencies as it may deem appropriate, that an adequate study has been made of the optimum location of dams and other river-works.;

(b) the proposed scheme meets, the norms regarding dam design and safety.”

From Section 8(2)(a) and (b) of the Act, as above, it would be clear that neither the emphasis nor the requirement for concurring with the scheme as submitted to the CEA suggests “cost scrutiny”, or “capital cost approval”. Also, the functions and duties of the CEA as laid down in Section 73 of the Act does not vest any such function on CEA to undertake “cost scrutiny” or accord “capital cost approval”. Section 73(o) lays down that the Authority shall perform such functions and duties as the Central Government may prescribe or direct, and in particular to “discharge such other functions as may be provided under this Act”. And the function vested in CEA under Section 8(2) of the Act is to accord its concurrence to the schemes submitted to it basing its opinion with particular emphasis to clauses (a) and (b) of Section 8(2).

13. So far as capital cost of the project/scheme for generation and sale of electricity in more than one State is concerned, scrutiny of its reasonableness for tariff determination remains the function of this Commission.

14. With the above clarifications the petition stands disposed of.

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(V.S. VERMA) (S. JAYARAMAN) (R. KRISHNAMOORTHY) (Dr. PRAMOD DEO)
MEMBER MEMBER MEMBER CHAIRPERSON