

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Coram**

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

**Petition No. 153/2009  
With IA No. 52/2009**

**In the matter of**

Petition invoking the inherent powers of the Commission seeking exercise of jurisdiction related to revised capital cost approval for 1000 MW Karcham Wangtoo Hydro Electric Project in Himachal Pradesh.

**And the in the matter of**

Jaypee Karcham Hydro Corporation Ltd ... Petitioner

Vs

PTC India Ltd ... Respondent

**The following were present:**

1. Shri Amit Kapur, Advocate, JKHCL
2. Shri Suresh Kumar, JKHCL
3. Shri Suneet Juneja, JKHCL
4. Shri Sanjiv K. Goel, JKHCL
5. Shri Apoorva Mishra, Advocate, JKHCL
6. Shri Abhishek Munot, Advocate, JKHCL
7. Shri M G Ramachandaran, Advocate, PTC
8. Ms. Suman Ghosh, PTC

**ORDER**

**(Date of Hearing: 14.10.2009)**

The petitioner, Jaypee Karcham Hydro Corporation Limited, a generating company promoted by Jaiprakash Industries Limited (subsequently name

changed to Jaiprakash Associates Limited) incorporated on 29.4.2002 for implementation of 1000 MW Karcham Wangtoo Hydro Electric Project (hereinafter “the generating station”) in the State of Himachal Pradesh has, through this petition, sought approval for the revised capital cost amounting to Rs. 7080.30 crore incurred or to be incurred for its completion, in exercise of power of relaxation under Regulation 44 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter “the 2009 regulations”) and also for a declaration and confirmation that the Commission shall, based on an appropriate filing, consider and approve the final capital cost and/or tariff.

2. The techno-economic clearance under the Electricity (Supply) Act, 1948(hereinafter “the Supply Act”) for the generating station was accorded by CEA on 31.3.2003. As per the techno-economic clearance, the construction of the generating station was to commence in January 2004 and was to be completed by December 2009. The techno-economic clearance provided that in case of time gap between its issue and actual start of work for the generating station by the generating company was more than three years, a fresh techno-economic clearance from CEA was to be obtained before start of work. On the request of the petitioner, CEA vide its letter dated 29.4.2004 granted extension up to 31.3.2005 for submission of Firm Financial Package in respect of the generating station. The petitioner by its letter dated 5.3.2005, made a fresh request for extension of time till 31.3.2006 for submission of the Firm Financial

Package. The Government of Himachal Pradesh vide its letter dated 23.12.2007 is said to have recommended extension of validity of the techno-economic clearance up to 31.3.2006, even though the extension of time asked for had expired when the State Government took up the matter with CEA.

3. The Supply Act was repealed with effect from 10.6.2003 when the Electricity Act, 2003 (hereinafter "the Act") came into force.

4. CEA vide its letter dated 18.3.2008 conveyed that after the Act came into force, fixation of tariff of the generating stations was vested in the Regulatory Commissions and, therefore, Firm Financial Package/ final completion cost was not required to be approved by CEA. However, it was stated that the techno-economic clearance already granted remained valid in terms of para 9 of CEA's OM dated 31.3.2003.

5. In view of the above communication from CEA, the petitioner is said to have assigned to a consultant firm, CC Patel & Associates, the task of scrutiny and analysis of the increase in price for EPC contract with JAL. The consultant submitted its report on 18.5.2009 concurring with the analysis of the petitioner. The revised estimated completion cost of the generating station is stated to Rs.7080.38 crore as against Rs.5909.59 crore as per the techno-economic clearance of CEA. The revised starting date as per the EPC contract is 18.11.2005 and the scheduled date of commercial operation of the generating station is 18.11.2011. Thus, apart from increase in the completion

cost, there is likely to be a delay of about 23 months in completion of the generating station, as per the revised estimates.

6. The petitioner entered into a Power Purchase Agreement (hereinafter "PPA") with PTC, the respondent herein, on 21.3.2006 for sale of 704 MW of power from the generating station. PTC has in turn entered into Power Supply Agreement (hereinafter "PSA") with the distribution companies in the States of Uttar Pradesh, Punjab, Haryana, and Rajasthan. Both, PPA and PSA, provide that the tariff for sale of electricity from the generating station is to be approved by the Commission, based on the capital cost approved by CEA/CERC.

7. According to the petitioner, CEA's refusal to approve the revised estimated completion cost in its letter dated 18.3.2008 has created a legal vacuum regarding the determination of tariff for the sale of power from the generating station. Against the above background, the petitioner has filed the present petition with the substantive prayers noted in the opening para of this order.

8. At the hearing on 8.9.2009, the Commission directed to issue notice to the respondent, PTC on admission and maintainability of the present petition. PTC has filed its reply to the petition wherein it has supported the case of the petitioner as regards its maintainability. According to PTC, the Central

Commission is the Appropriate Commission to decide on the matter since ultimate sale of power is to be in more than one State. PTC has also filed an interlocutory application, being IA No. 52/2009 wherein it has prayed that the distribution companies in the States with whom PTC has entered into PSA be also impleaded as parties to the petition, they being the necessary party as the tariff is to be borne by them

9. We have gone through the pleadings and heard learned counsel for the parties.

10. According to learned counsel for the petitioner in view of Section 185 of the Act read with Section 6 of the General Clauses Act, 1897, the right of getting the capital cost approved which accrued in favour of the petitioner under the Supply Act before its repeal cannot be taken away after the Act came into force. Learned counsel submitted that the petition was filed under clause (b) of sub-section (1) of Section 79 of the Act, and the Commission had the power to determine the tariff of the generating station as the electricity generated thereat is to be sold to more than one State and also to approve the capital cost.

11. According to learned counsel, clause (1) of Regulation 5 of the 2009 regulations provides for filing of tariff petition of the units of the generating stations completed or projected to be completed within six months from the date of application. He submitted that the projected commercial operation date of the generating station was 17.11.2011 and therefore, the petitioner could

approach the Commission for determination of tariff any time after 17.5.2011 in accordance with the 2009 regulations. According to him, the capital cost was to be determined as and when the petition for approval of tariff was filed by the petitioner in terms of clause (1) of Regulation 5 of the 2009 regulations. However, in this case the petitioner had approached the Commission for approval of the estimated completion cost in advance which may be approved by the Commission by relaxing the provisions of Regulation 5 in exercise of power under Regulation 44 the 2009 regulations. Learned counsel placed reliance on the judgments of the Hon'ble Supreme Court in DLF Power Limited vs Central Coalfields Ltd & Anr (2007)10 SCC 588 and the Appellate Tribunal in Central Coalfields Ltd Vs. JSERC and DLF Power (2007 APTEL 880) which upheld the power of the Appropriate Commission to determine tariff founded and premised on clauses of the PPA.

12. Learned counsel further submitted that the Commission had inherent powers under Regulations 111, 112 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 to deal with any matter or exercise any power under the Act for which no specific provision had been made. The petitioner has further sought to invoke the principle of the "ubi jus ibi remedium", and therefore, according to the petitioner, it has the right of getting the capital cost approved. The petitioner has also pressed the provisions of paras 5.2.5, 5.2.6, 5.8.1 and 5.8.9 of National Electricity Policy, to seek approval for the project capital cost for smooth completion of the project.

13. As stated above, the respondent PTC has not disputed the maintainability of the petition.

14. The question of maintainability of the petition is to be decided first. According to Section 61 of the Act, the Commission is to specify the terms and conditions for determination of tariff. Clause (a) of sub-section (1) of Section 62 of the Act empowers the Appropriate Commission to determine tariff for supply of electricity by a generating company to a distribution licensee. Under clause (b) of sub-section (1) of Section 79 of the Act, the Commission is further empowered to regulate tariff of the generating companies, other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. Clause (a) of sub-section (1) of Section 62 of the Act does not provide for approval of capital cost but empowers the Appropriate Commission to approve tariff for supply of electricity by a generating company to a distribution licensee. The present petition is said to have been filed under clause (b) of sub-section (1) of Section 79 of the Act. It is to be noted that this statutory provision is silent on approval of capital cost as such.

15. The terms and conditions for determination of tariff for the period 1.4.2009 to 31.3.2014 have already been notified by the Commission by virtue of power under Section 61 of the Act. These regulations (the 2009 regulations)

also do not provide for determination of in principle capital cost.

16. We may also have a look at the historical aspect of approval of capital cost. The Supply Act provided for preparation of a scheme, relating to establishment of the generating stations. The scheme was to be submitted to CEA for its concurrence. CEA while according its concurrence was to take into account the capital cost, apart from considering other relevant factors. The Parliament has omitted the provisions for techno-economic concurrence. Thus, the Parliament did not consider it appropriate to retain the provisions for techno-economic clearance, including approval of the project capital cost by CEA. The Commission in the tariff regulations applicable during the tariff period 2004-09 had made provisions for 'in principle' approval of the project capital cost for thermal power generating stations. There was no corresponding provision for hydro power generating stations. While framing the 2009 regulations, the Commission has done away the provisions for 'in principle' approval of the project capital cost applicable to thermal power generating stations, through a conscious decision. Under the circumstances, granting approval to the estimated completion cost for the generating station by relaxing the provisions of the tariff regulations through invoking Regulation 44 thereof may amount to restoring the repealed provision, through back door.



17. Case law relied on behalf of the petitioner is not relevant to the issue presently under consideration. Those judgments were rendered in completely different set of circumstances.

18. In view of the above, the prayers made by the petitioner cannot be granted and, therefore, the petition is not maintainable. It is accordingly dismissed at admission stage.

**I. A. No.52/2009**

19. PTC has filed this interlocutory application for impleadment of the distribution companies in the States of Punjab, Haryana, Uttar Pradesh and Rajasthan as respondents in the petition on the ground that they are the necessary party since it has entered into back-to-back PSA with them and who will ultimately pay the tariff of the generating station as determined by the Commission. The petitioner has opposed the prayer made in the application.

20. Since the main petition is held to be not maintainable, the interlocutory application filed by PTC for impleadment of the State distribution companies is not maintainable too and accordingly stands dismissed.

Sd/-  
**(V.S. VERMA)**  
**MEMBER**

Sd/-  
**(S. JAYARAMAN)**  
**MEMBER**

Sd/-  
**(R. KRISHNAMOORTHY)**  
**MEMBER**

Sd/-  
**(Dr. PRAMOD DEO)**  
**CHAIRPERSON**

**New Delhi, dated the 26<sup>th</sup> October 2009**