

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 168/GT/2013

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Hearing: 11.3.2016

Date of Order: 21.4.2016

IN THE MATTER OF

Direction of the Hon'ble High Court of Himachal Pradesh dated 29.2.2016 in Writ Petition No. 2355/2015 (Govt of HP Vs SJVNL) in the matter of tariff of Nathpa Jhakri Hydroelectric Project (6x250 MW) for the period 2009-14.

AND

IN THE MATTER OF

Satluj Jal Vidyut Nigam Limited,
Himfed Building, Below BCS,
New Shimla, Shimla-171009

...Petitioner

Vs

1. Punjab State Power Corporation Ltd.
The Mall, Patiala – 147001

2. Haryana Power Purchase Centre,
Shakti Bhawan, Sector VI,
Panchkula - 134019,

3. Delhi Transco Ltd,
Shakthi Sadan, Kotla Road
New Delhi -110002

4. Tata Power Delhi Distribution Ltd.
33 kV Sub-station, Hudson Lines,
Kingsway Camp, Delhi – 110009

5. BSES Rajdhani Power Ltd.
2nd Floor, B Block, Nehru Place,
New Delhi 110019

6. BSES Yamuna Power Ltd.
Shakti Kiran Building, Karkardooma,
Delhi – 110092

7. Ajmer Vidyut Vitran Nigam Ltd.
Old Power House, Hathi Bhasta,
Jaipur Road, Ajmer



8. Jaipur Vidyut Vitran Nigam Ltd.
Vidyut Bhawan, Janpath,
Jaipur – 302005
9. Jodhpur Vidyut Vitran Nigam Ltd.
New Power house, Industrial Area, Jodhpur
10. Himachal Pradesh State Electricity Board Ltd,
Vidyut Bhawan, Shimla – 171004
11. Power Development Department (J&K),
Government of J&K,
Mini Secretariat, Jammu
12. Power Department,
Union Territory of Chandigarh,
Additional Office Building, Sector 9D,
Chandigarh
13. Uttar Pradesh Power Corporation Ltd.
Shakti Bhawan, 14, Ashoka Road,
Lucknow – 226001
14. Uttranchal Power Corporation Ltd.
Urja Bhawan, Kanwali Road,
Dehradun- 248001
15. Government of Himachal Pradesh,
H.P. Secretariat,
Shimla -171002

... Respondents

Parties Present:

Shri M.G. Ramachandran, Advocate, SJVNL
Ms. Anushree Bardhan, Advocate, SJVNL
Shri Romesh Kapoor, SJVNL
Shri Rajiv Aggarwal, SJVNL
Shri Manish Mahajan, Govt. of H.P
Shri Shanti Swaroop, Govt. of H.P
Shri R.B. Sharma, Advocate, BRPL

ORDER

SJVN Ltd filed Petition No.168/GT/2014 for determination of generation tariff of the Nathpa Jhakri Hydroelectric Power Station (*hereinafter referred to as "the generating station"*) for the period from 1.4.2009 to 31.3.2014, in accordance with the provisions of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 ("the 2009 Tariff Regulations"). The Commission by order dated 20.6.2014 determined the tariff of the generating station for the period 2009-14. Pursuant to the issue of said order dated



20.6.2014, SJVNL raised the arrear bills on the beneficiaries of the generating station which included the Government of Himachal Pradesh. The Government of Himachal Pradesh has challenged the arrear bills raised by the SJVNL in CWP No.2355 of 2015 before the Hon'ble High Court of Himachal Pradesh, principally on the ground that the tariff order dated 20.6.2014 passed by this Commission is a provisional tariff order and the arrears of tariff shall be payable after the final tariff of the generating station is determined. SJVNL in its counter reply has contended that the order dated 20.6.2014 is a final order and therefore, in terms of Regulation 5(3) of the 2009 Tariff Regulations, the arrears are payable alongwith interest by the Government of Himachal Pradesh. Hon'ble High Court in the order dated 29.2.2016 has observed as under:

"It appears that the dispute between the parties revolves around the issue as to whether the tariff determined is final or provisional, in terms of the mandate of The Electricity Act, 2003 (for short "the Act") read with Annexure P-5, particularly para 66.

"Without marshalling the facts and merits of the case, we deem it proper to direct the Central Electricity Regulatory Commission (for short "the Commission") to return findings as to whether the tariff is final or provisional in view of Annexure P-5 read with the laws applicable and the Regulations occupying the field. The entire exercise be made within four weeks. Parties to appear before the Commission on 11th March, 2016. List this writ petition on 23rd April, 2016."

2. In compliance with the direction of the Hon'ble High Court, the parties namely, SJVNL and Government of Himachal Pradesh appeared before the Commission on 11.3.2016. Learned Counsel for SJVNL filed a written submission dated 11.3.2016 and stated the following in his submission:

(i) By order dated 20.6.2014, the Commission had determined the final tariff of the generating station for the period from 1.4.2009 to 31.3.2014, considering the various components of tariff and based on the approved RCE-III by the Central Government.

(ii) The tariff order dated 20.6.2014 is an order under Regulation 5 (1) read with Regulation 5 (3) of the 2009 Tariff Regulations and is not a provisional tariff issued under Regulation 5 (4).



(iii) The determination of tariff in order dated 20.6.2014, subject to submission of RCE-IV which is pending, does not render the said order provisional, under Regulation 5(4) of the 2009 Tariff Regulations.

3. The representative of the Govt. of Himachal Pradesh made the following submissions:

(i) The tariff order 20.6.2014 is a provisional tariff order as the same is subject to submission of RCE-IV by SJVNL, which is pending. The said tariff order dated 20.6.2014 has been issued only to address cash flow problems faced by SJVNL.

(ii) Some of the assets capitalized and put to use have not been allowed in order dated 20.6.2014 on the ground that the same are covered under RCE-IV;

(iii) In respect of the tariff period 2004-09, the additional capitalization for 2007-09 has also not been considered as the same is covered under RCE-IV pending for approval of Central Government.

(iv) The tariff order dated 20.6.2014 though issued under Regulation 5 (3) cannot have retrospective operation as the same is subject to submission of RCE-IV and is provisional.

4. The Hon'ble High Court has referred the dispute between SJVNL and Government of Himachal Pradesh to this Commission for a finding as to whether the tariff determined vide order dated 20.6.2014 is provisional or final and the said issue has to be considered in accordance with the laws applicable and the regulations occupying the field. Accordingly, the issue whether the tariff order dated 20.6.2014 is final or provisional has been examined in the light of the provisions of the Electricity Act, 2003 and the applicable regulations issued by this Commission.

5. The Central Commission is a statutory body under the Electricity Act, 2003 which has been vested with various functions under section 79 of the Act. One of the functions of the Central Commission is to regulate the tariff of the generating companies owned or controlled by



the Central Government and to regulate the tariff of the generating companies other than those owned or controlled by the Central Government which have a scheme for generation and supply of electricity in more than one State. SJVNL is a Central Public Sector Undertaking under the control of the Central Government and therefore its tariff is to be regulated by the Central Commission. Section 61 of the Electricity Act, 2003 provides that the Central Commission shall specify the terms and conditions for determination of tariff and while doing so, shall be guided by the principles provided in the said section. Section 178 (2) (s) provides that the Commission may by notification make regulation on the terms and conditions for determination of tariff under section 61. The Commission in exercise of its power under section 178 (2) (s) read with section 61 of the Act has been specifying the regulations for terms and conditions of tariff. The Central Commission has specified the regulations regarding terms and conditions of tariff for three control periods, namely 2004-09, 2009-14 and 2014-19. The actual determination of tariff in accordance with the tariff regulations and the provisions of the Act are carried out by the Central Commission in terms of Sections 62 and 64 of the Act.

6. The generating station of SJVNL has an installed capacity of 1500 MW with six units of 250 MW each. The units of the generating station declared their commercial operation with effect from the dates mentioned against each:

| Unit | Date of Commercial Operation |
|----------------------------------|------------------------------|
| Unit- 5 | 6.10.2003 |
| Unit – 6 | 2.1.2004 |
| Unit – 4 | 30.3.2004 |
| Unit – 3 | 31.3.2004 |
| Unit – 2 | 6.5.2004 |
| Unit – 1 (generating station) | 18.5.2004 |

According to Regulation 31(ix) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (2004 Tariff Regulations), the date of commercial operation in relation to a generating station means the date of commercial operation of the last unit of the generating station. Therefore, the generating station of SJVNL has achieved its commercial operation during the first year of the Tariff Period 2004-09.



8. The 2004 Tariff Regulations which were the applicable regulations for determination of tariff during the period 2004-09 provided that application for determination of tariff shall be made in two stages, namely, for determination of provisional tariff in the first stage and determination of final tariff in the second stage. Clause (3) of Regulation 5 of 2004 Tariff Regulations provided as under:

“(3) In case of a generating station or the transmission system declared under commercial operation on or after 1.4.2004, an application for fixation of tariff shall be made in two stages, namely:

(i) A generating company or a transmission licensee may make an application as per Appendix I to these regulations, for determination of provisional tariff in advance of the anticipated date of completion of the project based on the capital expenditure actually incurred up to the date of making of the application or a date prior to making of the application, duly audited and certified by the statutory auditors, and the provisional tariff shall be charged from the date of commercial operation of the respective unit of the generating station or the line or sub-station of the transmission system;

(ii) A generating company or the transmission licensee shall make a fresh application as per Appendix I to these regulations, for determination of final tariff based on actual capital expenditure incurred up to the date of commercial operation of the generating station or the transmission system, duly audited and certified by the statutory auditors.”

9. Subsequently, Regulation 5A was inserted through an amendment notified on 8.6.2006 which provided for adjustment of tariff on determination of final tariff. Regulation 5 A is extracted as under:

“5A. Provisional tariff: Provisional tariff or provisional billing of charges, wherever allowed by the Commission based on the application made by the generating company or the transmission licensee or by the Commission on its own motion or otherwise, shall be adjusted against the final tariff approved by the Commission”.

10. After the commercial operation of the generating station, SJVNL filed Petition No.184/2004 for determination of provisional tariff for the period 1.4.2004 to 31.3.2009. The Commission vide order dated 17.6.2005 allowed provisional tariff @ Rs.2.35/kWh for two years i.e. 2004-05 and 2005-06, based on the consensus reached between SJVNL and the beneficiaries at the Northern Regional Electricity Board forum. Thereafter, SJVNL filed IA No. 38/2006 in Petition No.184/2004 seeking approval for provisional two-part tariff in respect of the generating station for the period from 1.4.2006 to 31.3.2007 @ Rs 2.56/kWh. However, the



Commission vide order dated 20.6.2006 extended the provisional tariff of Rs. 2.35/kWh till 31.3.2007. SJVNL could not file the petition for determination of final tariff on account of the delay in approval of the Revised Cost Estimates-III (RCE-III) and sought provisional tariff for the period 2007-08 by filing IA No.13/2007 in Petition No.184/2004 based on the cost approved under RCE II. The Commission vide order dated 5.9.2007 determined the annual fixed charges on provisional basis for the year 2007-08 based on the cost approved under RCE-II. In the said order, SJVNL was directed to file the petition for determination of final tariff.

11. SJVNL filed Petition No.20/2008 for approval of final tariff of the generating station for the period 2004-09 which was approved by the Commission vide order dated 31.12.2008. SJVNL billed the beneficiaries of the generating station at the tariff determined in the said order upto 31.3.2009.

12. The Commission notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (referred to as "2009 Tariff Regulations") for determination of tariff during the period 2009-14. The term "existing generating station" has been defined in Regulation 3(16) of 2009 Tariff Regulations as "a generating station declared under commercial operation from a date prior to 1.4.2009". Further, the term "existing project" has been defined as the project declared under commercial operation from a date prior to 1.4.2009." Therefore, the generating station of SJVNL is treated as an existing generating station or existing project for the purpose of determination of tariff under 2009 Tariff Regulations. In accordance with clauses (1) and (2) of Regulation 5 of 2009 Tariff regulations, the generating companies are required to make applications for determination of tariff in respect of existing projects based on admitted capital cost including any additional capitalisation admitted upto 31.3.2009 and estimated additional capital expenditure for the respective years of the tariff period 2009-14. SJVNL filed Petition No.168/GT/2013 for determination of tariff of the generating station for the period 2009-14 in accordance with Regulation 5(1) and (2) of the 2009 Tariff Regulations.



13. Clause (3) of Regulation 5 of the 2009 Tariff Regulations deals with the methodology for billing of tariff in respect of the existing projects till the approval of the tariff for the period 2009-14 under 2009 Tariff Regulations. Clause (3) of Regulation 5 is extracted as under:-

“(3) In case of the existing projects, the generating company or the transmission licensee, as the case may be, shall continue to provisionally bill the beneficiaries or the long-term customers with the tariff approved by the Commission and applicable as on 31.3.2009 for the period starting from 1.4.2009 till approval of tariff by the Commission in accordance with these regulations:

Provided that where the tariff provisionally billed exceeds or falls short of the final tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall refund to or recover from the beneficiaries or the transmission customers, as the case may be, within six months along with simple interest at the following rates for the period from the date of provisional billing to the date of issue of the final tariff order of the Commission:”

In accordance with the above quoted provisions, SJVNL was entitled to provisionally bill the beneficiaries at the tariff determined by the Commission vide order dated 31.12.2008 for the period 2004-09 period and applicable as on 31.3.2009 till the approval of final tariff in terms of 2009 Tariff Regulations. The proviso under clause (3) provides for adjustment of surplus or shortfall between the tariff provisionally billed and the final tariff determined by the Commission in accordance with 2009 Tariff Regulations.

14. The Commission after hearing SJVNL and the beneficiaries of the generating station determined the final tariff for the period 2009-14 by order dated 20.6.2014 in Petition No.168/GT/2013. In the said order, detailed prudence check of all elements of tariff was carried out based on the available Revised Cost Estimate approved by Government of India. Para 66 of the order dated 20.6.2014 provided as under:

“66. The annual fixed charges allowed above is subject to adjustment as per proviso to Clause (3) of Regulation 5 and is subject to true up in terms of Regulation 6(1) of the 2009 Tariff Regulations.”

Thus, the tariff determined vide order dated 20.6.2014 was made subject to two conditions, namely, adjustment of tariff as per proviso to clause(3) of Regulation 5 and true up in terms of clause(1) of Regulation 6 of 2009 Tariff Regulations.



15. Adjustment of tariff in terms of proviso to clause (3) of Regulation 5 of 2009 Tariff Regulations arises only after final determination of tariff and when the tariff provisionally billed either exceeds or falls short of the final tariff approved by the Commission under 2009 Tariff Regulations. After determination of the final tariff of the generating station of SJVNL for the period 2009-14 vide order dated 20.6.2014, the Commission in para 66 of the said order directed for adjustment in tariff in terms of proviso to clause (3) of Regulation 5 of 2009 Tariff Regulations.

16. One of the contentions of Government of Himachal Pradesh is that after first amendment to the 2009 Tariff Regulations notified on 2.5.2011, the Central Commission was conferred with power to grant provisional tariff upto 95% of the annual fixed cost of the project which is subject to adjustment only after determination of final tariff in terms of Regulation 5(3) of the 2009 Tariff Regulations. Government of Himachal Pradesh further contended that the tariff order dated 20.6.2014 was issued under Regulation 5(4) of the 2009 Tariff Regulations and has been made subject to Regulation 5(3). SJVNL has submitted that this contention of Government of Himachal Pradesh is not correct as Regulation 5 (4) operates under a different set of circumstances, i.e. where the generating company has been granted provisional tariff upto 95% of the annual fixed cost of the project subject to adjustment as per proviso to Clause 3 of Regulation 5 of the 2009 Tariff Regulations after the final tariff order is issued.

17. Originally 2009 Tariff Regulations did not envisage any provision for grant of provisional tariff. The Commission through second amendment to the 2009 Tariff Regulations notified on 2.5.2011 incorporated Clause (4) under Regulation 5 and introduced the concept of provisional tariff. Clause 4 of Regulation 5 is extracted as under:-

“(4) Where application for determination of tariff of an existing or a new project has been filed before the Commission in accordance with clauses (1) and (2) of this regulation, the Commission may consider in its discretion to grant provisional tariff up to 95% of the annual fixed cost of the project claimed in the application subject to adjustment as per proviso to clause (3) of this regulation after the final tariff order has been issued:



Provided that recovery of capacity charge and energy charge or transmission charge, as the case may be, in respect of the existing or new project for which provisional tariff has been granted shall be made in accordance with the relevant provisions of these regulations.”

As per the above provisions, an existing or new project which has made an application under Regulation 5 (1) of the 2009 Tariff Regulations may be granted provisional tariff upto 95% of the annual fixed cost of the project. The provisional tariff so granted is subject to adjustment after final determination of tariff in accordance with Clause (3) of Regulation 5 of the 2009 Tariff Regulations. The order dated 20.6.2014 has not been issued under Clause (4) of Regulation 5 of 2009 Tariff Regulations. It is further pertinent to mention that wherever the Commission has granted provisional tariff in exercise of power under Clause (4) of Regulation 5 of the 2009 Tariff Regulations, the said provision has been specifically invoked in the relevant order. Since the order dated 20.6.2014 was not a provisional tariff order, there was no reference to Regulation 5(4) of 2009 Tariff Regulations in the said order. Moreover, tariff in order dated 20.6.2014 has been determined after carrying out detailed prudence check of expenditure based on the available Revised Cost Estimates as approved by Government of India. Therefore, the order dated 20.6.2014 is not a provisional tariff order and Regulation 5(4) is not applicable in this case.

18. Further, Para 66 of the order dated 20.6.2014 provides that the said order is subject to truing up in terms of Clause (1) of Regulation 6 of 2009 Tariff Regulations. It is pertinent to mention that the tariff under 2009 Tariff Regulations was envisaged to be determined on the basis of admitted capital expenditure upto 31.3.2009 and projected additional capital expenditure for each year of the tariff period 2009-14. In order to ensure that the cost of tariff reflects the actual expenditure incurred, 2009 Tariff Regulations provide for truing up of expenditure at the end of the tariff period. Regulation 6 of 2009 Tariff Regulations is extracted as under:

“6. Truing up of Capital Expenditure and Tariff

(1) The Commission shall carry out truing up exercise along with the tariff petition filed for the next tariff period, with respect to the capital expenditure including additional



capital expenditure incurred up to 31.3.2014, as admitted by the Commission after prudence check at the time of truing up.

Provided that the generating company or the transmission licensee, as the case may be, may in its discretion make an application before the Commission one more time prior to 2013-14 for revision of tariff.

(2) The generating company or the transmission licensee, as the case may be, shall make an application, as per Appendix I to these regulations, for carrying out truing up exercise in respect of the generating station a unit or block thereof or the transmission system or the transmission lines or sub-stations thereof by 31.10.2014;

(3) The generating company or the transmission licensee, as the case may be, shall submit for the purpose of truing up, details of capital expenditure and additional capital expenditure incurred for the period from 1.4.2009 to 31.3.2014, duly audited and certified by the auditors

(4) Where after the truing up, the tariff recovered exceeds the tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall refund to the beneficiaries or the transmission customers, as the case may be, the excess amount so recovered along with simple interest at the rates specified in the proviso to this regulation.

(5) Where after the truing up, the tariff recovered is less than the tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall recover from the beneficiaries or the transmission customers, as the case may be, the under-recovered amount along with simple interest at the rates specified in the proviso to this regulation.

(6) The amount under-recovered or over-recovered, along with simple interest at the rates specified in the proviso to this regulation, shall be recovered or refunded by the generating company or the transmission licensee, as the case may be, in six equal monthly instalments starting within three months from the date of the tariff order issued by the Commission after the truing up exercise.

Provided that the rate of interest for clauses (4), (5) and (6) of this regulation, for calculation of simple interest shall be considered as under:

(i) SBI short-term Prime Lending Rate as on 01.04.2009 for the year 2009-10.

(ii) SBI Base Rate as on 01.07.2010 plus 350 basis points for the year 2010-11.

(iii) Monthly average SBI Base Rate from 01.07.2010 to 31.3.2011 plus 350 basis points for the year 2011-12.

(iv) Monthly average SBI Base Rate during previous year plus 350 basis points for the year 2012-13 & 2013-14.”

Under Regulation 6, the tariff granted by the Commission during 2009-14 period shall be trued up alongwith the tariff petition for the next tariff period. The generating companies are under statutory obligation to file application for true-up of expenditure by 31.10.2014 alongwith the capital expenditure and additional capital expenditure incurred from 1.4.2009 to 31.3.2014



duly audited and certified by the auditors. It is pertinent to note that the scope of the provision for final determination of tariff is distinct from the scope of the provision for true up of capital expenditure. While application for determination of final tariff under clauses (1) and (2) of Regulation 5 is required to be made on the basis of capital expenditure actually incurred upto 31.3.2009 as well as the additional capital expenditure projected to be incurred from 31.3.2009 to 31.3.2014, the application for true up has to be filed based on the capital expenditure actually incurred from 1.4.2009 to 31.3.2014 supported by auditor's certificate. In other words, true-up under Regulation 6 (1) is an adjustment exercise carried out between tariff finally determined based on projected capital expenditure and the capital expenditure actually incurred at the end of the tariff period 2009-14. The final tariff of the generating station of SJVNL was determined vide order dated 20.6.2014, and the said tariff shall be trued up i.e. adjusted based on the actual capital expenditure incurred from 1.4.2009 till 31.3.2014. In para 66 of the order dated 20.6.2014, the tariff determined in the said order has been made subject to true up under Regulation 6 (1) of the 2009 Tariff Regulations which means that adjustment in tariff will take place based on the actual capital expenditure incurred during the tariff period 2009-14. This condition in para 66 of the order dated 20.6.2014 period does not render the tariff determined in the said order as provisional tariff.

18. Another contention of Government of Himachal Pradesh is that since in the tariff order dated 20.6.2014, the Central Commission has given liberty to SJVNL to file the petitions for the periods 2004-09 and 2009-14 after approval of the Revised Cost Estimates (RCE IV) from the Government of India, the order dated 20.6.2014 is not a final tariff order which is yet to be issued. We have considered the submission of Government of Himachal Pradesh. The generating station of SJVNL is a hydro generating station which was envisaged to be completed in March, 1996. For various reasons, the generating station could not be completed in time and its commissioning schedule was revised from time to time. Correspondingly, the expenditures incurred on the project underwent revision from time to time. Since, SJVNL is a Central PSU and is controlled by the Govt. of India, and therefore, the capital expenditures of the project are



approved by the Govt. of India in the form of revised cost estimates from time to time. Considering the process and time involved in getting the revised cost estimate approved by Government of India, the Commission in its various orders has granted liberty to SJVNL to seek revision of tariff based on the approved RCE IV. In our view, granting liberty to SJVNL to file petition for approval of tariff after approval of RCE IV does not render the tariff determination in order dated 20.6.2014 a provisional tariff order.

19. In the light of the above discussion, the Commission is of the view that the tariff order dated 20.6.2014 is a final tariff order in respect of the generating station of SJVNL for the tariff period 2009-14. In terms of proviso to clause(3) of Regulation 5 of the 2009 Tariff Regulations, the difference between the tariff provisionally billed in terms of the order dated 31.12.2008 and final tariff determined vide order dated 20.6.2014 shall be settled.

20. The Secretary of the Commission shall arrange to forward a copy of this order to the Registry of the High Court of Himachal Pradesh for placing the order before the Hon'ble High Court.

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson

