

**BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Shri D.P. Sinha, Member**
2. **Shri G.S. Rajamani, Member**
3. **Shri A.R. Ramanathan, Member**

Petition No.51/2000

In the matter of

Application for amendment of Chamera-I HE Project Tariff Notification.

And in the matter of

National Hydroelectric Power Corporation Ltd.

- Petitioner

Vs.

1. Union of India through Secretary, Ministry of Power
2. Chairman, Punjab State Electricity Board.
3. Chairman, Haryana Vidhut Prasaran Nigam Ltd.
4. Chairman, Delhi Vidyut Board,
5. Chairman, U.P. Power Corporation Ltd.,
6. Chairman, Rajasthan Rajya Vidyut Prasaran Nigam Ltd.
7. Chairman Himachal Pradesh Electricity Board,
8. Principal Secretary, Power Development Department,
Srinagar.
9. Chief Engineer & Secretary, Engineering Deptt.,
UT Secretariat , Chandigarh

- Respondents

Petition No.55/2000

In the matter of

Application for amendment of Tanakpur HE Project Tariff Notification.

And in the matter of

National Hydroelectric Power Corporation Ltd.

- Petitioner

Vs.

1. Union of India through Secretary ,Ministry of Power

2. Chairman, Punjab State Electricity Board.
3. Chairman, Haryana Vidhut Prasaran Nigam Ltd.
4. Chairman, Delhi Vidyut Board,
5. Chairman, U.P. Power Corporation Ltd.,
6. Chairman Rajasthan Rajya Vidyut Prasaran Nigam Ltd.,
7. Chairman Himachal Pradesh Electricity Board,
8. Principal Secretary, Power Development Department,
Srinagar.
9. Chief Engineer & Secretary, Engineering Deptt., - Respondents
UT Secretariat , Chandigarh

Petition No.56/2000

In the matter of

Application for amendment of Uri HE Project Tariff Notification.

And in the matter of :

National Hydroelectric Power Corporation Ltd. - Petitioner

Vs.

1. Union of India through Secretary, Ministry of Power
2. Chairman, Punjab State Electricity Board.
3. Chairman, Haryana Vidyut Prasaran Nigam Ltd.
4. Chairman, Delhi Vidhut Board,
5. Chairman, U.P. Power Corporation Ltd.,
6. Chairman, Rajasthan Rajya Vidyut Prasaran Nigam Ltd.,
7. Chairman Himachal Pradesh Electricity Board,
8. Principal Secretary, Power Development Department,
Srinagar.
9. Chief Engineer & Secretary, Engineering Deptt., - Respondents
UT Secretariat , Chandigarh.

Petition No.57/2000

In the matter of

Application for amendment of Salal HE Project Tariff Notification.

And in the matter of :

National Hydroelectric Power Corporation Ltd.

- Petitioner

Vs.

1. Union of India through Secretary, Ministry of Power
2. Chairman, Punjab State Electricity Board.
3. Chairman, Haryana Vidyut Prasaran Nigam Ltd.
4. Chairman, Delhi Vidhut Board,
5. Chairman, U.P. Power Corporation Ltd.,
6. Chairman, Rajasthan Rajya Vidyut Prasaran Nigam Ltd.,
7. Chairman Himachal Pradesh Electricity Board,
8. Principal Secretary, Power Development Department, Srinagar.
9. Chief Engineer & Secretary, Engineering Deptt., UT Secretariat , Chandigarh

- Respondents

The following were present on behalf of the parties:-

1. Shri B.Datta, Sr. Advocate, NHPC
2. Shri S. Datta, Advocate, NHPC
3. Shri V.K. Kanjlia, ED (Comml),NHPC
4. Shri S.K. Agarwal, CE (Comml),NHPC
5. Shri Nain Singh, CE (O&M), NHPC
6. Shri P. Kaul, SM(E), NHPC
7. Shri S.C. Pal, SM(C), TPS, NHPC
8. Shri D.S. Ahluwalia, SM, (F&A), NHPC
9. Shri K.S. Raman, M(F&A), NHPC
10. Shri S.K. Gupta, Engr (Comml), NHPC
11. Shri S.K. Meena, TE(E), NHPC
12. Shri A. Madan, Advocate, RVPNL
13. Shri V.K. Gupta, SE, RVPNL.
14. Shri Dinesh Gupta, SE (Law), RVPNL
15. Shri A.K. Jain, CE (Comml), RVPNL
16. Shri T.P.S. Bawa, Addl SE, PSEB
17. Shri D.D. Chopra, Advocate, UPPCL

**ORDER
(DATE OF HEARING 13-2-2002)**

The petitioner, National Hydroelectric Power Corporation Ltd., filed these petitions on 7-7-2000 with a prayer that normative availability of Chamera HE Project (Petition No.51/2000), Tanakpur HE Project (Petition Nb.55/2000), Uri HE

Project (Petition No.56/2000) and Salal HE Project (Petition No.57/2000) should be fixed at 85% w.e.f. 15th May 1999 i.e. 7446 hours per year till implementation of ABT Order. As these petitions involve common questions, these have been heard together.

2. The Central Government in exercise of powers under Section 43A(2) of the Electricity (Supply) Act, 1948 (for short, the Supply Act) issued a Notification dated 30-3-1992 laying down the factors in accordance with which tariff was to be determined. The said notification dated 30-3-1992 covered all generating stations, including Thermal and Hydro. The scope of application of the notification was provided in paras 3.3 and 3.4. According to para 3.3, the notification applied to such generating stations whose financial package was approved by CEA on or after its publication in the official gazette. As regards Hydro stations, however, para 3.4 introduced on 12-1-1995 specifically stated that the notification was applicable to stations whose commercial operation had commenced on or after 1-1-1997. In the notification dated 30-3-1992, a normative availability was fixed at 90% for recovery of capacity charges in respect of hydro stations.

3. Ministry of Power issued an Office Memorandum No. 2/9/NHPC/Tariff/Vol. II dated 1-4-1997 (Annexure 2 to the petition). This Office Memorandum provides that w.e.f. that date the tariff of the existing NHPC Stations "may" be fixed as per the Government of India tariff notification dated 30-3-1992, as amended.

4. According to the petitioner, recognizing the problems in operation of Hydro Power Stations, in its Policy of Hydro Power Development issued during August,

1998, Central Government proposed to reduce the normative availability of the hydro projects to 85% from the then prevalent availability of 90%.

5. Ministry of Power in exercise of powers notified the terms and conditions of tariff of these projects Chamera-I and Tanakpur HE Projects on 8-2-1999, Uri HE Project on 14-5-1999 and Salal HE Project on 26-3-1999 valid from 1-4-1997 to 31-3-2002 and in these notifications, it prescribed the normative availability of 90% for recovery of capacity charges.

6. Vide notification dated 13-5-1999, the Central Government made an amendment to the principal notification dated 30-3-1992, in which the normative availability was reduced from 90% to 85% for recovery of full capacity charges. However, no changes were made to the project specific notifications applicable to the Chamera-I, Tanakpur and Salal HE Projects. As the function of regulation of tariff in respect of the generating companies owned or controlled by the Central Government stood entrusted to the Commission w.e.f. 15-5-1999, consequent to omission of Section 43A(2) of the Supply Act vide Ministry of Power notification dated 22-3-1999, these petitions were filed before the Commission praying that the normative availability of the Stations be reduced from 90% to 85% for recovery of capacity charges as stated above.

7. These petitions were initially heard on 21-9-2000 for admission and were dismissed at admission stage itself in terms of order dated 10-10-2000. The primary ground for dismissal of these petitions was that the Office Memorandum dated 1-4-1997 was not published in the "like manner and subject to the like

sanction and conditions as the Notification dated 30-3-1992." The Commission took a view that by virtue of the Office Memorandum dated 1-4-1997, paras 3.3 and 3.4 of the notification dated 30-3-1992 could not get superseded or amended or varied and hence this notification as amended on 13-5-1999 did not apply to the generating stations owned by the petitioner. The petitioner filed review petitions against the order of dismissal of its petitions. These review petitions were allowed vide order dated 6-7-2001 and the original petitions were directed to be re-heard. In the review order dated 6-7-2001, the Commission held that the tariff of the generating stations belonging to the Central Government used to be fixed under proviso to Section 43A(2) of the Supply Act and not under the main section. Therefore, amendment of paras 3.3 and 3.4 of the notification dated 30-3-1992 was not necessary for giving effect to the decision of the Central Government as contained in the Office Memorandum dated 1-4-1997.

8. The replies to these petitions have been filed on behalf of Haryana Vidyut Prasaran Nigam Ltd (HVPNL), Uttar Pradesh Power Corporation Ltd. (UPPCL) and Rajasthan Rajya Vidhyut Prasaran Nigam Ltd. (RRVNL). These respondents have opposed the relief sought by the petitioner. According to them, the machine availability cannot be lowered from 90% to 85% retrospectively and that lowering of machine availability would be against the hydro policy of the Government of India which contemplates lowering of normative availability to 85% in respect of future power stations and that too in initial years of operation. The applicability of the Office Memorandum dated 1-4-1997 has been questioned on the ground that an executive or administrative decision cannot override the statutory notification dated 30-3-1992.

9. RRVPNL in its reply has pointed out that even after issue of notification dated 13-5-1999, the Central Government did not take any steps to amend the project specific notifications in respect of Chamera, Tanakpur and Salal HE Projects which were already in existence. It is further stated that tariff notification in respect of Uri HE Project was issued on 14-5-1999 but the normative availability was retained at 90%. According to RRVPNL, the Office Memorandum dated 1-4-1997 is not mandatory but only directory since it states that the tariff of hydroelectric projects belonging to the petitioner "may" be fixed under the notification dated 30-3-1992. RRVPNL in its written statement has further submitted that Ministry of Power issued a notification dated 11-9-2000 whereby, in partial modification of the notification dated 22-3-1999, Section 43A(2) of the Supply Act stood omitted w.e.f. 24-7-1998. It is submitted that after the notification dated 11-9-2000 the power to regulate tariff in respect of generating companies owned or controlled by the Central Government became vested in the Commission w.e.f. 24-7-1998. Therefore, the notification dated 13-5-1999 was *de hors* the powers of the Central Government and therefore, cannot be given effect. It is also urged that the Commission should simultaneously decide the other factors for determination of tariff and it should not confine itself to lowering of normative availability as prayed for by the petitioner. According to RRVPNL, retrospective lowering of normative availability of 90% to 85% would put the respondent under additional financial burden which may prove disastrous for the respondents since the additional liability arising out of the revision of normative availability cannot be passed on to the consumers.

10. We heard Shri B.Dutta, Sr. Counsel on behalf of the petitioner. Shri Aditya Madan, Advocate was heard on behalf of the RRVPNL. Shri D.D.Chopra, Advocate appearing on behalf of the UPPCL has adopted the arguments made by Shri Madan. Similarly Shri T.P.S. Bawa, appearing on behalf of the PSEB, also adopted the submissions made on behalf of the RRVPNL.

11. In our order dated 6-7-2001 in review petition No.119/2000 arising out of the Commission's order dated 10-10-2000 in petition No.51/2000, the Commission had held that the terms and conditions of tariff in respect of generating stations belonging to the Central Government used to be determined under proviso of Section 43A(2) of the Supply Act and not under the main section. Therefore, amendment of paras 3.3 and 3.4 of the notification dated 30-3-1992 was immaterial in order to give effect to the office memorandum dated 1-4-1997. Therefore, the argument made on behalf of the respondents that the Office Memorandum dated 1-4-1997 did not supersede the provisions of statutory notification does not survive. The amendment to notification dated 30-3-1992, lowering the normative availability from 90% to 85% was issued on 13-5-1999. In accordance with the notification dated 22-3-1999 the jurisdiction to regulate tariff in respect of generating companies owned or controlled by the Central Government came to be vested in the Commission w.e.f. 15-5-1999. Therefore, there was hardly any time left with the Central Government to review the earlier notifications after issue of notification dated 13-5-1999 and take appropriate steps for lowering the normative availability in respect of the stations in question.

12. It was argued by Shri Madan, learned Counsel on behalf of RRVPNL that use of word "may" in the Office Memorandum dated 1-4-1997 does not signify that

the Central Government envisaged applicability of the factors contained in the notification dated 30-3-1992. On consideration of the intention of the Central Government, as contained in the Office Memorandum dated 1-4-1997, we are satisfied that use of word "may" does not in any manner preclude the application of factors contained in the notification of 30-3-1992 to the generating stations owned by the petitioner even if the provision is considered directory and not mandatory. Further, it is not necessary for us to re-determine all the factors of tariff since no grounds for doing so have been urged before us by any of the parties.

13. The question regarding jurisdiction of the Central Government to issue notification dated 13-5-1999 requires a detailed examination. It was argued on behalf of RRVPNL that by virtue of notification dated 11-9-2000, which has the effect of omitting Section 43A(2) of the Supply Act w.e.f. 24-7-1998, the Central Government was denuded of its power to issue the said notification dated 13-5-1999. According to the learned counsel appearing for RRVPNL, the said notification dated 13-5-1999 was, therefore, void *ab initio* and therefore, the petitioner could not be permitted to take any advantage of the said notification dated 13-5-1999. Shri B. Dutta, learned Counsel has placed reliance on Section 6 of the General Clauses of Act and has argued that the notification dated 11-9-2000 cannot affect any of the petitioner's rights that accrued under Section 43A(2) of the Supply Act prior to its omission.

14. The Commission was constituted under Section 3(1) of the Electricity Regulatory Commissions Act, 1998 (for short, the Act) on 24-7-1998. Section 51 of the Act empowered the Central Government to omit section 43A(2) of the Electricity

(Supply) Act, 1948 with effect from such date as might be notified by that Government. A notification was issued by Ministry of Power in exercise of its powers under Section 51 of the Act on 22-3-1999 providing that Section 43A(2) of the Electricity (Supply) Act would be omitted w.e.f. 15-5-1999. A large number of tariff notifications in respect of the stations belonging to the Central Government were issued during the intervening period from 24-7-1998 to 14-5-1999. However, by a subsequent notification issued on 11-9-2000 and in partial modification of the notification issued on 22-3-1999, the Central Government notified that Section 43 A(2) of the Electricity (Supply) Act would be deemed to have been omitted w.e.f. 24-7-1998 and thus, the notification dated 11-9-2000 was given a retrospective effect.

15. It is settled law that a statutory provision which seeks to reverse from an anterior date a benefit which has been granted or availed of can be assailed to the extent it operates retrospectively. In State of Gujarat Vs Raman Lal Keshav Lal Soni (1983) 2 SCC 33, the Supreme Court held as under:

*"52..... The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. **A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history.**" (Emphasis added)*

16. The Supreme Court in a case reported as Chairman, Railway Board Vs. C.R. Rangadhamaiah [(1997) 6 SCC 623] after referring a number of earlier judgements¹ of the Supreme Court has observed that in many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Article 14 and 16 of the Constitution. (Emphasis added)

17. The notification dated 11-9-2000 has the effect of unsettling the settled position in respect of the stations where the tariff notifications were issued during the period from 24-7-1998 to 14-4-1999, which may cause vacuum in the power sector. Besides, retrospective operation of the notification issued on 11-9-2000, has the effect of taking away the rights vested in the utilities by the different notifications issued by Ministry of Power under Section 43A(2) of the Supply Act. When viewed in the light of the above noted settled legal position, we do not have an *iota* of doubt that the notification dated 11-9-2000, which omitted Section 43A(2) of the Supply

¹ K.C.Arora, Vs. State of Haryana [(1984)3SCC 281], T.R. Kapur Vs. State of Haryana [1986 Supp SCC 584], P.D. Aggarawal Vs. State of U.P. [(1987) 3 SCC 622], K. Narayanan Vs. State of Karnataka [1994 Supp (1) SCC 44], Union of India Vs. Tushar Ranjan Mohanty [(1994) 5 SCC 450] and K. Ravindranath Pai Vs. State of Karnataka [1995 Supp (2) SCC 246].

Act from the date anterior to that notified under notification dated 22-3-1999 is not enforceable. Therefore, in our considered view, the notification dated 11-9-2000 need not be given effect and deserves to be ignored.

18. The learned Counsel for RRVPNL vehemently argued before us that the lowering of normative availability as notified on 13-5-1999 was unjustified. He urged that the Central Government may be called upon to place on record the circumstances leading to issue of the notification on 13-5-1999. It was also urged before us that the Commission should take a view only upon the consideration of the views of the Central Government. We do not feel it necessary to give directions to the Central Government as prayed for by learned Counsel for RRVPNL for more reasons than one. There are no allegations that the Central Government while notifying the lowering of the normative availability did not act bonafide. There is also evidence available on record that normative availability was lowered considering the National Hydro Policy prepared by the Central Government in 1998. Even otherwise, we, as Commission in discharge of functions under the Act, do not sit in judgement over the decisions taken by the Central Government in lawful exercise of its statutory powers. The Central Government has already notified that the normative availability be reduced to 85% for recovery of capacity charges and we are inclined to accept. Under these circumstances, no further inquiry into the matter, as argued on behalf of RRVPNL is called for.

19. In case the prayer of the petitioner is rejected, the different stations may have different normative availability for recovery of capacity charges. This does not seem to be justified since all the generating stations form one class and there exist

no valid reasons or intelligible differentia for classifying them differently for the purpose of recovery of capacity charges.

20. In view of the forgoing discussions, we are satisfied that the normative availability for recovery of capacity charges needed to be reduced from 90% to 85% in respect of Chamera-I, Tanakpur, Uri and Salal HE Projects. However, the reduced normative availability shall be applicable w.e.f. 7-7-2000 when petition No.51/2000 was filed. We are not inclined to allow the petitioner the benefit of revision of normative availability for recovery of fixed charges w.e.f. 15-5-1999 as prayed for, as we are not in favour of retrospective revision of tariff.

21. With the above directions these petitions stand disposed of. A copy of this order may be placed in each of the relevant case file.

Sd/-
(K.N. Sinha)
Member

Sd/-
(G.S. Rajamani)
Member

Sd/-
(D.P. Sinha)
Member

New Delhi dated: 19th February, 2002.