

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 302/MP/2022  
along with IA No. 49/2023**

- Subject : Petition under section 79(1)(f) of the Electricity Act 2003 for (i) approval of Change in Law and (ii) seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/commercial impact of change in law events on account of imposition of water tax in relation to Tehri HEP (1000 MW) and Koteshwar HEP (400 MW) read with the CERC (Terms and Conditions of Tariff) Regulations, 2019 and Order dated 12.7.2022 passed by Hon'ble High Court of Uttarakhand.
- Petitioner : THDC India Limited
- Respondents : Rajasthan Urja Vikas Nigam Limited and 15 others
- Date of Hearing : **19.7.2023**
- Coram : Shri Jishnu Barua, Chairperson  
Shri I.S. Jha, Member  
Shri Arun Goyal, Member  
Shri Pravas Kumar Singh, Member
- Parties Present : Shri Tabrez Malawat, Advocate, THDC  
Shri Syed Hamza, Advocate, THDC  
Shri Sourajit Sarkar, Advocate, THDC  
Shri Sitiesh Mukherjee, Advocate, UPPCL  
Shri Abhishek Kumar, Advocate, UPPCL  
Shri Karan Arora, Advocate, UPPCL  
Shri Nived Veerapaneni, Advocate, UPPCL  
Ms. Swapna Seshadri, Advocate, PSPCL  
Ms. Shivani Verma, Advocate, PSPCL  
Shri Buddy A. Ranganadhan, Advocate, BRPL & BYPL  
Shri Rahul Kinra, Advocate, BRPL & BYPL  
Shri Aditya Ajay, Advocate, BRPL & BYPL  
Shri Venkatesh, Advocate, TPDDL  
Shri Shivam Kumar, Advocate, TPDDL  
Ms. Shraddha Deshmukh, Advocate, Rajasthan Discoms

**Record of Proceedings**

During the hearing, the learned counsel for the Petitioner circulated a note of arguments (containing the list of dates) and made detailed oral submissions, mainly as under:

- (a) The present petition has been filed on account of the imposition of Water tax on non-consumptive use of water for electricity generation, in terms of the Uttarakhand Water Tax on Electricity Generation Act, 2012, notified by the



Government of Uttarakhand in 2013 (which came into force from 15.8.2015).

(b) The Petitioner had earlier filed a Writ Petition challenging the Water Tax Act, before the Hon'ble High Court of Uttarakhand and the same was dismissed by the Single Bench of the Hon'ble Court, vide its order dated 12.2.2021. Against this order, the Petitioner has filed an appeal before the Division Bench of the Hon'ble High Court, wherein the Hon'ble Court on 12.7.2021 stayed the operation of the order dated 12.2.2021. Thereafter, the Hon'ble High Court on 12.7.2022 (while modifying the interim order), granted a stay of the recovery of water tax till 31.7.2022, but directed the Petitioner to commence payment of the water tax dues, from 1.8.2022, subject to final orders of the Hon'ble High Court.

(c) After the imposition of Water Tax by the State of Uttarakhand, the Petitioner has approached the Hon'ble Uttarakhand High Court, to protect the interests of the beneficiaries. As the Petitioner is liable to regularly make the payment of Water tax from 1.8.2022, as per the levy prescribed under the Water Tax Act and the directions of the Hon'ble High Court, the same qualifies as a 'change in law' event.

(d) In a similar case where, the State of J&K has imposed Water Tax on hydro Power plants, this Commission, has devised a regulatory mechanism under Regulation 44(10) of the CERC (Terms and Conditions of Tariff) Regulations, 2019 to recover the said charges from the beneficiaries (the Commission's order dated 21.10.2011 in Petition No.106/2011 was referred to);

(e) The imposition of the Water tax has considerably increased the generation costs for the Petitioner and the same needs to be compensated and recovered from the beneficiaries, to restore the Petitioner to the same economic condition.

(f) In terms of the MOP, GOI letter dated 25.4.2023, the Petitioner has already approached the Hon'ble High Court of Uttarakhand challenging the imposition of Water tax by the State Government.

2. On a specific query by the Commission, as to the amount of water tax paid to the authorities, the learned counsel for the Petitioner submitted that the Petitioner has been making payments of about Rs.12 crore per month, as water tax, in terms of the State Government notification.

3. The learned counsel for the Respondent, UPPCL raised preliminary objections and made detailed oral submissions, mainly as under:

(a) The Hon'ble High Court's order dated 12.7.2022, is an interim order and cannot be construed as a change in law event. Hence, the payment of water tax by the Petitioner, in terms of the said order, cannot be passed on to the beneficiaries. The Petition is therefore not maintainable.

(b) The claim of the Petitioner is neither covered under the provisions of the PPA nor the Regulations notified by this Commission. Moreover, the Single Bench of the Hon'ble High Court in its order dated 12.2.2021, had held that the incidence of tax is on the activity of drawing water or its use and not on



generation.

- (c) The Hon'ble High Court of Uttarakhand in its interim order dated 12.7.2022 in Special Appeal No.149/2021, has ordered the stay of the recovery of water tax liability till 31.7.2022, on the ground that the Petitioner had not collected any payment from its beneficiaries. Further, the Petitioner has only been directed by the Hon'ble High Court, in the said order, to commence the payment of water tax dues from 1.8.2022. Hence, the recovery of the same by the Petitioner, from the beneficiaries, is not warranted at this stage and will also prejudice the case of the beneficiaries.
- (d) MOP, GOI vide its letter dated 25.4.2023 addressed to the various central power generating companies has advised that any unconstitutional taxes/duties levied by any State in any guise whatsoever, may be promptly challenged in Court and no payment of such taxes/duties may be made by the Govt. of India organizations in the business of generation of electricity until after a decision by a competent Court or legality thereof. In view of this, the Commission may not adjudicate upon any increase in the project cost of the Petitioner on account of the imposition of water tax, which is subject to the decision of the Division Bench of the Hon'ble High Court, in the said Special Appeal 149/2021 filed by the Petitioner.
- (e) While the Petitioner has challenged the constitutional validity of the Uttarakhand Water Tax on Electricity Generation Act, 2012, imposing water tax, before the Hon'ble High Court of Uttarakhand, it has, on the other hand, sought relief in the present petition, stating that the payment of water tax, in terms of the said Act, is a change in law event. The Petitioner cannot be permitted to approbate and reprobate (*Judgment dated 23.10.1992 of the Hon'ble Supreme Court in SLP (C) No.4325/1992 was relied upon*)

4. On a specific query by the Commission as to whether the Hon'ble Uttarakhand High Court's interim order dated 12.7.2022 is a law that is in force or not, the learned counsel for the Respondent UPPCL clarified that the interim order is a law in force, but not a change in law.

5. The learned counsel for the Respondents BRPL & BYPL adopted the submissions made by the Respondent UPPCL above. However, in addition, the learned counsel submitted the following:

- (a) The Petitioner, has not taken any steps to mitigate the impact of the interim order dated 12.7.2022 of the Hon'ble High Court, but has only sought to pass on the burden on the beneficiaries, by seeking the recovery of the water tax imposed on it, in terms of the State Government notification. The dismissal of the SLP filed by a similarly situated generator, against the order dated 12.7.2022, by the Hon'ble Supreme Court, cannot act as *res judicata*, against the Petitioner.
- (b) The Petitioner cannot be permitted to raise the bills against the Respondents, without any decision of this Commission, on this issue.



6. The learned counsel for the Respondent TPDDL adopted the above submissions of the Respondents. He however stated that the Petitioner, in its prayer in the petition, has not sought for any relaxation or amendment of the relevant provisions of the 2019 Tariff Regulations. The learned counsel further submitted that unlike Regulation 35(6) of the 2019 Tariff Regulations, which allows the water charges in the case of thermal projects, no such provision exists under the 2019 Tariff Regulations, to allow the Petitioner's prayer, for hydro projects. The learned counsel added that the claim of the Petitioner for recovery of the water tax, under change in law, is not covered under Regulations 25 and 26 of the 2019 Tariff Regulations. He, however, stated that the Respondent has been making payments on the bills raised by the Petitioner on this count.

7. The learned counsel for the Respondent Rajasthan Discoms adopted the submissions of the Respondents above. She, however, referred to Clause 6.2 of the PPA, and submitted that since the constitutional validity of the levy of water tax by the State/Authority, is under challenge before the Hon'ble High Court, the question of consideration of the claims of the Petitioner, based on the notification issued by the authority, does not arise. The learned counsel added that in terms of the MOP, GOI letter dated 25.4.2023, the Petitioner cannot be permitted to recover the water tax from the beneficiaries.

8. The learned counsel for the Respondent PSPCL also adopted the submissions of the Respondents above. In addition, the learned counsel submitted the following:

- (a) The Petitioner cannot be permitted to recover water tax from the beneficiaries, till the declaration of the same as a change in law event, in terms of the tariff regulations notified by this Commission. There is also no clause under the PPA, providing for any change in law, for the recovery of water tax.
- (b) The Petitioner clarified during the hearing of this petition, on 21.2.2023, that the imposition of water usage charges, is recoverable as a 'change in law' event and no relief has been sought under Regulation 56 of the 2019 Tariff Regulations.
- (c) As regards the scope of interim orders, the Hon'ble Supreme Court vide its judgment dated 11.9.2009 in C.A No. 6201/2009 has observed that interim orders are passed based on prima facie findings and as a temporary arrangement to preserve the status quo, till the matter is finally decided. The present petition is premature, since the constitutional validity of the imposition of the water tax, on the Petitioner, is *sub judice* before the Hon'ble High Court.
- (d) Though the Uttarakhand Water Tax on Electricity Generation Act, imposing water tax, was notified during the year 2015, the Petitioner, had not claimed the same in its tariff petitions for the period 2014-19, filed before this Commission. The Petitioner cannot be permitted to recover the said amounts now from the beneficiaries (who had already arranged their affairs since the period 2014-19 has come to an end) as a fall back arrangement, in case it does not succeed in the said appeal (*judgment of the Hon'ble Supreme Court*



*in UPPCL v NTPC & ors [2009] 6 SCC 235 was relied upon)*

- (e) The Petitioner has the option to claim the recovery of water tax paid to the authorities, at the time of truing up of the tariff of the generating stations, for the period 2019-24, in terms of Regulation 13 of the 2019 Tariff Regulations. Therefore, the prayer of the Petitioner at this stage, is not maintainable.
9. In response, the learned counsel for the Petitioner clarified as under:
- (a) The Petitioner, in its petitions, filed before this Commission for the determination of tariff of the generating stations (Koteshwar HEP and Tehri HEP) for the periods 2014-19 and 2019-24 respectively (since disposed of by the Commission), had indicated that the tariff proposals made in the said petitions, were exclusive of the statutory taxes on consumption of water.
- (b) In addition to the tariff, the Respondents, in terms of Clause 6.2 of the PPA, are liable to pay to the Petitioner, in accordance with any law in force, all payments made or payable by it, on account of taxes, duties, cess, fees or other imposition etc., levied or levied in the future by the Government or any other authority, in respect of generation etc., as per orders/approval of this Commission from time to time. Since the interim directions of the Hon'ble High Court dated 12.7.2022 are a law in force, the present petition is maintainable.
10. On a query by the Commission as to the next date of hearing of the writ appeal by the Hon'ble High Court, the learned counsel for the Petitioner submitted that the matter is listed for hearing on 31.7.2023.
11. The learned counsel for the Respondent UPPCL submitted that it has filed an IA (Dy No.284/2023) seeking certain interim orders, including a direction on the Petitioner, to take down the supplementary invoices from the PRAAPTI portal, and prayed that the same may be taken on record. The Commission directed that the IA be taken on record.
12. The learned counsels appearing for the Respondents prayed that the interim order of the Commission (pursuant to ROP of the hearing dated 14.7.2023) directing the Petitioner not to take any coercive action, against the Respondents, may be extended until further orders. The learned counsel for the Respondents also sought three weeks' time to file their short-written submissions, in the matter.
13. The Commission, after hearing the learned counsel for the parties, directed the Petitioner not to take any coercive action against the Respondents, until further orders.
14. The Commission also directed the Petitioner and the Respondents to file their short-written submissions (not exceeding three pages), with a copy to the other, on or before **24.8.2023**.
15. The Petition along with the IAs, shall be listed for hearing on **13.9.2023**.

**By order of the Commission**

**Sd/-**

(B. Sreekumar)  
Joint Chief (Law)

