

**APPELLATE TRIBUNAL FOR ELECTRICITY  
(APPELLATE JURISDICTION)**

**Appeal No. 183 of 2009**

**Dated: 14<sup>th</sup> September, 2010**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,  
Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**In the matter of:**

**Himachal Pradesh State Electricity Board,  
Vidyut Bhawan, Kumar House,  
Shimla-171 004**

**...Appellant**

**Versus**

**1, Uttrakhand Electricity Regulatory Commission  
80, Vasant Vihar,  
Dehradun-248 001**

**2, Uttrakhand Jal Vidyut Nigam Limited,  
UJJWAL, Maharani Bagh,  
GMS Road,  
Dehradun-248 006**

**... Respondents**

**Counsel for the Appellant(s)**    **Mr. Anand K. Ganesan**  
**Ms. Swapna Seshadri**

**Counsel for the Respondent(s)**   **Mr. Suresh Tripathy for R-1**  
**Mr. Amit Anand Tiwari**  
**for R-2**

## **JUDGMENT**

**AS PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,**  
**CHAIRPERSON**

1. Himachal Pradesh State Electricity Board (HPSEB) is the Appellant herein. Uttarakhand Electricity Regulatory Commission (State Commission) is the 1<sup>st</sup> Respondent. Uttarakhand Jal Vidyut Nigam Limited (UJVNL) is the 2<sup>nd</sup> Respondent.

2. Aggrieved by the tariff order passed by the Uttarakhand Electricity Regulatory Commission on 28.08.2009 in the petition filed by the Uttarakhand Jal Vidyut Nigam Limited, the Respondent herein, the Appeal has been filed by the Appellant

(HPSEB). The relevant facts leading to the filing of this Appeal are as under.

3. The Appellant, Electricity Board, is a deemed licensee for transmission, distribution and trading in the State of Himachal Pradesh.

4. The Uttarakhand Jal Vidyut Nigam Limited, the 2<sup>nd</sup> Respondent herein is a generating company owning and operating generation stations in the State of Uttarkhand. The Uttarakhand Jal Vidyut Nigam Limited has been formed pursuant to the reorganization of the erstwhile Uttarakhand State Electricity Board. Prior to the formation of the Jal Vidyut Nigam Limited and bifurcation of the State of Uttar Pradesh, the generating stations situated in different centres in Uttar Pradesh were owned and operated by the erstwhile Uttar Pradesh State Electricity Board.

5. An agreement dated 02.11.1972 called Yamuna Hydel Agreement was entered into between the Government of Himachal Pradesh and the Government of Uttar Pradesh in respect of hydro power projects under Stage-I which had been completed and under Stage-II which were under construction by U.P. State Electricity Board. Under this agreement, Government of Himachal Pradesh has a right to get a specified share of electricity from these generating stations. The charges for the electricity were to be determined in accordance with the said agreement. Under this agreement, the Government of Himachal Pradesh should allow the free flow of water from Himachal Pradesh to Uttar Pradesh and in turn the Government of Himachal Pradesh was entitled to get electricity generated from the above generating stations, at the cost of generation at the bus bars of the said generating stations. Himachal Pradesh was not to share the capital cost of the said hydro projects.

6. After coming into force of the Electricity Act, 2003, the Uttarakhand Jal Vidyut Nigam Limited (Respondent-2) was

regulated by the Uttrakhand Electricity Regulatory Commission under the Electricity Act, 2003. As the majority of the electricity generated by the Respondent-2 was supplied to the distribution licensee of Uttrakhand, namely Uttarakhand Power Corporation Limited, the same was regulated by the Uttarakhand State Commission. Accordingly, the tariff was determined periodically by the Uttarakhand State Commission in the application filed by the Jal Vidyut Nigam Limited, the Respondent-2 herein.

7. With regard to supply of power by the Respondent-2 to the Uttrakhand Power Corporation, the Respondent-2, UJVNL, filed a petition before the State Commission of Uttarakhand for determination of tariff for the year 2004-05. The tariff was determined by the State Commission by the order dated 16.12.2004.

8. Aggrieved by the above order dated 16.12.2004 passed by the Uttarakhand State Commission, the Respondent-2 filed an

Appeal before the High Court of Uttarkhand. Ultimately this Appeal was transferred from the Uttarkhand High Court to the Appellate Tribunal and the same was numbered as 189/06. Ultimately on 14.09.2006 this Tribunal remanded the matter to the State Commission. In pursuance of the Remand Order, the State Commission revised the tariff of the generating stations of the Respondent-2 by the order dated 14.03.2007.

9. Thereupon the Respondent-2, UJVNL, filed a petition in Petition No. 103/05 before the Central Commission for determination of the tariff for the supply of electricity by the UJVNL to the Appellant (HPSEB). Ultimately, the Central Commission dismissed the said petition by the order dated 29.03.2006 holding that the supply of power to Himachal Pradesh State Electricity Board did not fall within the jurisdiction of the Central Commission as it did not involve sale of electricity through a composite scheme for generation and sale of electricity in more than one State.

10. Meanwhile, the Respondent-2 filed a petition before the Himachal Pradesh State Commission for determination of generation tariff for the supply of electricity to the Electricity Board of Himachal Pradesh, Appellant, for the tariff year 2004-05 to FY 2008-09. Having realised that Himachal Pradesh State Commission has no jurisdiction for the determination of generation tariff, the Respondent-2 withdrew the said petition on 07.04.2008 with liberty to file the said petition before the Appropriate Commission.

11. Consequent to this withdrawal, the Respondent-2 filed a petition for determination of tariff to be paid by the Himachal Pradesh Electricity Board before the Uttarakhand State Commission. After hearing the parties, the Uttarkhand State Commission by the impugned order dated 28.08.2009 disposed the petition holding that the supply of electricity to Himachal Pradesh Electricity Board by the Respondent-2 was to be at the same tariff and charge as supply of electricity to others and the Electricity Board is required to pay all the components including

the Return on Equity, servicing of debt, depreciation, tax, etc. However, in this order, the State Commission has not given effect to the provisions of the agreement entered into between the Government of Himachal Pradesh and Government of Uttar Pradesh for the supply of power at cost of generation from the generating stations. Aggrieved by this order dated 28.08.2009 passed by the State Commission, the Appellant has filed the present Appeal.

12. The Learned Counsel for the Appellant, while assailing the impugned order dated 28.08.2009 has raised the following grounds.

13. These grounds are three-fold (1) lack of jurisdiction of the Uttarakhand State Commission to determine the generation tariff for the supply of electricity by the Respondent-2, Jal Vidyut Nigam Limited to the Appellant, HPSEB; (2) the tariff determined by the State Commission is contrary to the agreement dated 02.11.1972 entered into between the



Governments of Himachal Pradesh and Uttar Pradesh, under which HPSEB is entitled to tariff excluding the capital cost element; and (3) The Uttarakhand State Commission has no jurisdiction to adjudicate upon any dispute with regard to the agreement dated 02.11.1972 entered into between the Governments of Uttar Pradesh and Himachal Pradesh and therefore the direction issued by the State Commission in the impugned order to the Appellant and Respondent as also to the State Governments of Himachal Pradesh and Uttarakhand to produce various informations regarding the utilisation of supply made by Respondent-2 to HPSEB is beyond its jurisdiction.

14. In elaboration of these three issues, the Learned Counsel for the Appellant would submit the following:

“(A) The State Commission of Uttarakhand has no jurisdiction to decide the tariff for supply of electricity to HPSEB, a distribution licensee in Himachal Pradesh by the Respondent-2, a generating company in Uttarakhand. The State Commission

has held in the impugned order that it has got jurisdiction to determine the tariff since the generating station is situated within the State of Uttarakhand and under section 62(1) (a), read with section 86 (1) (a) of the Electricity Act, 2003, the State Commission is empowered to determine the tariff even for the supply of electricity to distribution licensee of other States. This approach is wrong. Section 62 (1) (a) provides for determination of tariff only for the supply of electricity of generating company to a distribution licensee. The sale of electricity by a generating company to a person other than the distribution licensee is not within the jurisdiction of the State Commission. Section 86 (1) (a) cannot be interpreted to cover the determination of tariff for all generation and sale of electricity as such independent of Section 62(1)(a). Section 86(1)(a) of the Act 2003 does not confer any general power on the State Commission to determine the tariff for all generation or sale within the State. Section 86(1)(a) cannot cover those which is not covered either by section 62(1)(a) or other provisions of the section as 86(1)(b) of the Act. Section 86(1) (b) confers the

regulatory power which is wider as opposed to the power for determination of tariff under section 86(1)(a).

(B) Vesting the jurisdiction of determination of tariff at the place where the distribution licensee is regulated is consistent with the purpose of regulating tariff for procurement of electricity by a distribution licensee. It cannot be that the tariff is to be determined by a State Commission where the generating station is located. Whereas any dispute on the tariff is required to be adjudicated upon under section 86(1)(f) of the Act by the State Commission regulating the distribution licensee. In other words, the jurisdiction for regulating the tariff and the power procurement process is only with the State Commission having jurisdiction over the distribution licensee. The objection on the part of the Respondent-2 that the question of jurisdiction cannot be raised at this stage in the present proceedings in the absence of the said question having been raised before the State Commission is without any merit. The question of jurisdiction is

pure question of law which goes to the root of the matter. Therefore, the question of jurisdiction can be raised at any stage.

(C) The terms for supply of electricity from the generating stations of the Respondent-2 to the Appellant are governed by the agreement between the Governments namely Himachal Pradesh and Uttar Pradesh. In terms of the above agreement, HPSEB is entitled to a specified share of the electricity from the generating stations of Uttarakhand and that the electricity which is to be supplied to HPSEB should be at cost of generation. It is also provided in the said agreement that the HPSEB shall not contribute to any part of the capital cost.

(D) Earlier the Respondent-2 had approached the Central Commission for determination of tariff under section 79(1)(b) of the Act admitting that the tariff for the supply of electricity to HPSEB is at lower rate as compared to Uttarakhand. In that proceedings, the Central Commission held that the same did not fall within the composite scheme for generation and sale of

electricity in more than one State under Section 79 of the Act and, therefore, the Respondent-2 has to approach the Appropriate Commission namely, Uttarakhand State Commission. The admission on the part of the Respondent-2 in the proceedings regarding the tariff to be paid by the HPSEB being lower as per the agreement is binding on the parties. The contention of the Respondent-2 that the tariff regulations of the State Commission provided for various elements of tariff to be calculated and the same norms have to be accounted for in the tariff irrespective of the agreement between the State Governments, is misconceived. The tariff regulations only provide for various elements of cost and they will not prohibit the parties for agreeing to lower norms or lower tariff.

(E) The eighth Schedule of Electricity (Supply) Act, 1948 subscribes to the elements constituting the cost of production. The Eighth Schedule does not provide that in every case all the costs and expense of the generating stations should be serviced. There is nothing in the Electricity Laws which prohibit the

parties to agree that in a given case, the generating station will supply electricity at a price lower than the cost of production as determined as per the Eighth Schedule. The interpretation of agreement cannot be made by applying the principle contained in the Eighth Schedule which deals with the determination of cost of production of electricity of a particular generating station in specified situations. The Eighth Schedule deals only with specified generating stations to which First and Third Schedules apply. It is not the case of the Respondent-2 that the generating stations fall within First Schedule nor is the generating station closed down as per the Third Schedule. In any case, the agreement dated 02.11.1972 between the Governments does not provide that cost of generation shall be the cost of production in accordance with the Eighth Schedule. As the Eighth Schedule is not applicable to the Respondent-2, it is not correct to contend that after repeal of the Electricity (Supply) Act, 1948, the interpretation of the agreement ought to be based on the provisions of the Eighth Schedule of the Act, 1948. When the capital cost cannot be directly recovered from HPSEB, the same

cannot be indirectly recovered through the tariff payable by the HPSEB. In case the capital cost element including servicing of capital cost is recovered through the tariff payable by HPSEB, it would amount to HPSEB indirectly paying for capital cost of the project and the servicing of the capital cost through tariff, which would be contrary to the provisions of the agreement. A harmonious construction and interpretation of the agreement between the parties is that the tariff to be paid by HPSEB has to necessarily exclude the capital cost. Therefore, the tariff fixed by the Uttarkhand State Commission is not in accordance with the agreement entered into between the parties.

(F) The State Commission has no jurisdiction to give direction to the Appellant and the Respondent as also to the State Government of Himachal Pradesh and Uttarakhand to produce various information regarding utilization of the power by the State of Himachal Pradesh in accordance with the agreement dated 02.11.1972 after giving a finding that the Himachal Pradesh has not utilized its share of electricity. This issue was

never raised by any of the party before the State Commission. Further, this agreement is between the two governments and any adjudication in the matter arising out of the said agreement is outside the jurisdiction of the State Commission. Any dispute arising between the two State Governments under an agreement is subject to the exclusive jurisdiction of the Hon'ble Supreme Court of India under Article 131 of the Constitution of India. Under this Article, the jurisdiction of any other court is excluded in regard to any dispute arising out of an agreement between the two State Governments. Therefore, the State Commission, being a statutory authority deriving its power under the statute, has no jurisdiction to adjudicate in such matters for which it is not competent to direct the parties as well as the State Governments calling for information from them for the purpose of dealing with the issue of any restriction on the surplus power available.”

15. In reply to these submissions made on behalf of the Appellant, the Learned Counsel for the Respondent, in justification of the order impugned would elaborately argue and



contend that the impugned order is perfectly justified, pointing out various reasons given in the said order about which we will discuss in detail in the following paragraphs..

16. In view of the rival contentions urged by the Learned Counsel for the parties, the following questions would arise for consideration:

- (i) Whether the State Commission has the jurisdiction to entertain the petition filed by the Respondent-2 namely UJVNL for determination of tariff and charges to be paid by the HPSEB for the supply of power made to the Electricity Board on the basis of the location of the generating stations in the State of Uttrakhand?
- (ii) Whether the State Commission has wrongly determined the tariff by including servicing of debt,

Return on Equity and taxes payable in the generation tariff contrary to the agreement dated 02.11.1972?

- (iii) Whether the direction given by the State Commission to the Appellant and the State of Himachal Pradesh to furnish information as to how electricity supplied by the Respondent has been utilized by the Appellant is beyond the jurisdiction of the State Commission?

17. Let us now consider each issue one by one.

- (a) The first issue is relating to the question of jurisdiction of the Uttarakhand State Commission to entertain the petition to determine the tariff of electricity supplied from a generating station located in the State to a distribution licensee in the different State.
- (b) Let us first discuss the provisions of the Electricity Act, 2003 relating to jurisdiction of the Commissions

to determine the tariff for generation and supply. The jurisdiction of the Commissions is covered in Chapter-X of the Act on Regulatory Commissions indicating Constitution, powers and functions of the Commissions. Under Section 79(1)(a) the Central Commission has jurisdiction to regulate the tariff of the generating companies owned and controlled by the Central Government. Under Section 79(1)(b) the Central Commission has the authority to regulate the tariff of generating companies other than that owned by 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.

- (c) Similarly, the State Commission under Section 86(1)(a) has to determine tariff for generation and supply of electricity within the State. Section 86(1)(b) empowers the State Commission to regulate the electricity purchase and procurement process

including the price at which the distribution licensee of the State procures power from generating companies.

- (d) The Electricity Rules, 2005 notified by the Government of India under Section 176 of the Act clearly indicate under Rule-8 that the tariff determined by the Central Commission for generating stations under clause (a) or (b) of Sub-section (1) of Section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of its functions under Section 86(1)(a) or 86(1)(b). However, the State Commission regulating the Distribution licensee in the State can determine whether the Distribution Licensee should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.
- (e) Part-VII of the Act covering clauses 61 to 66 deals with tariff regulations, determination of tariff,

procedure for tariff order, etc., to be followed by the Commissions. Section 62 deals with determination of tariff by the Commission. Section 62(1)(a) envisages Appropriate Commission to determine the tariff for supply of electricity by a generating company to a distribution licensee in accordance with the provisions of the Act.

- (f) Section 64 (5) provides that notwithstanding anything contained in Part-X, the parties involved in inter-state supply transmission or wheeling of electricity can approach the State Commission having jurisdiction on the distribution licensee who procures the power for determination of tariff and the State Commission may determine the tariff.
- (g) Bare reading of the above provisions of the Act and Electricity Rules makes it clear that the tariff of a generating company, including its supply to a distribution licensee within or outside the State, not falling under the jurisdiction of the Central

Commission under Section 79(1)(a) or 79(1)(b), shall be determined by the Commission of the State where the energy is generated. However, the State Commission regulating the power purchases of the distribution licensee in the State under Section 86(1)(b) may determine whether the Distribution Licensee should enter into Power Purchase Agreement or procure power from such generating company for reasons such as price of electricity. Notwithstanding above provisions, the generating company in a state supplying power to a distribution licensee in another State and the distribution licensee can also approach the State Commission regulating the distribution company for determination of tariff and the State Commission may determine the tariff under Section 64(5) of the Act.

- (h) The hydro projects of UJVNL under the Yamuna Hydel Scheme were constructed primarily for supply of electricity to the distribution licensee within the

State. In 1972 when the Agreement between Government of U.P. and Government of H.P. was signed, the Stage-I of the Hydel scheme had been completed and was under operation and Stage-II was under construction by the U.P. State Electricity Board. However, Government of U.P. had agreed to give a share from the Hydro Projects to Himachal Pradesh in lieu of Government of H.P. agreeing not to do any act or permit any act to diminish the natural flow of river. According to the Agreement, the Government of H.P. was not to share the capital cost of the project and was to be supplied power at the cost of generation at the busbars of the hydro generating stations. Thus, the hydro projects are fully owned and operated by the UJVNL, the generating company of the State of Uttarakhand.

- (i) Yamuna Hydel Scheme is not a composite scheme constructed for the purpose of meeting the power requirements of more than one state and

determination of its tariff is outside the jurisdiction of the Central Commission. This has already been held by the Central Commission in its Order dated 29.3.2006. Himachal Pradesh Commission has already allowed UJVNL to withdraw petition for determination of tariff for supply to HPSEB. Therefore, the State Commission of Uttarakhand has the sole jurisdiction for determination of tariff of UJVNL hydro stations including supply to distribution licensee of Himachal Pradesh viz., HPSEB, under Section 86(1)(a) read with Section 62(1)(a). H.P. State Commission, however, has the authority under Section 86(1)(b) of the Act to determine whether HPSEB should procure power from UJVNL on the basis of tariff determined by the Uttarakhand State Commission.

- (j) The generating company as well as all the generating stations are situated in Uttarakhand. That apart, supply of electricity admittedly takes place within the State



of Uttarkhand and at bus-bars of these generating stations which are situated in the State of Uttarkhand and these stations do not come under the jurisdiction of the Central Commission under Section 79(1)(a) and 79(1)(b). As per section 86(1)(a) of the Act, read with section 62(1) of the Electricity Act, 2003, the State Commission within whose jurisdiction the generating stations are situated will have the jurisdiction to decide the generation tariff for such stations. Section 86(1)(a) specifically provides that the State Commission shall determine tariff for generation within the State. Similarly, section 62 provides that the Appropriate Commission shall determine tariff for the supply of electricity by a generating company to a distribution licensee. Both these provisions would make it evident that the Uttarakhand State Commission alone has the jurisdiction to determine the generation tariff for the generating stations situated in the State and

electricity generated and supplied in the State of Uttrakhand.

- (k) It is not the case of the Appellant that the Commission has no power to determine any kind of tariff. The contention of the Appellant is based upon the lack of territorial jurisdiction of the Commission to determine the tariff based upon the prohibition contained in section 64(5) of the Act 2003. This contention has no basis because section 64(5) confers discretion on the Commission who is having jurisdiction in respect of distribution licensee to determine the tariff, which is apparent from the use of the word “may” in the said sub-section. A reading of the prohibition would reveal that the Commission may decide the tariff as well as it may refuse to decide the tariff to go back to any other Appropriate Commission. In the instant case, the Himachal Pradesh State Commission has allowed the

Respondent-2 to approach the Uttarakhand State Commission to get the tariff determined.

(l) The reliance placed by the Appellant on section 86(1)(b) is misplaced since it deals with the regulation of electricity purchase and procurement process of the distribution licensee. The Commission of distribution licensee under section 86(1) (b) would be empowered to direct it to procure electricity at a price decided by such Commission. It can also direct the distribution licensee not to purchase from a particular generating station if the cost is high.

(m) A reading of the provisions of section 62(1) (a) would make it clear that before the word “distribution licensee”, what is qualified is ‘a’. In other words, section 62(1)(a) provides that Appropriate Commission shall determine the tariff for supply of electricity by a generating company to a distribution licensee. This means that for any

distribution licensee whether situated in the same State or otherwise receiving the supply from the generating company, there is no limitation put in the said provision saying that “distribution licensee” would mean distribution licensee in the same State. As indicated above, the following facts are not disputed:

- (i) The Uttarakhand State Commission determined the tariff for Respondent-2 in respect of the very plant in so far as it relates to the supply made to the Uttarakhand Power Corporation Limited.
- (ii) The generation plants in question are located in Uttarakhand and the supply is effected at Uttarakhand itself.
- (iii) Since the Appellant has no contribution to the capital cost, the ownership and control lies with the Respondent-2 in so far as the plants are concerned.

- (iv) The regulation of tariff of Hydro projects of UJVNL not being a composite scheme for generation and sale of electricity in more than one State does not fall within the jurisdiction of the Central Commission.
- (v) The conjoint reading of section 62(1) (a) and section 86(1)(a) makes it clear that the Uttarakhand State Commission has been empowered to determine the tariff for sale of electricity by generating company to any distribution licensee whether falling in its jurisdiction or otherwise.
- (n) The reliance placed by the Appellant on section 64(5) of the Act to contend that the Himachal Pradesh only has got jurisdiction to determine the tariff is misconceived because this provision envisages a situation where both the parties agree to the jurisdiction of that Commission and not

otherwise. Therefore, this section would not apply to the present case.

- (o) Further the conduct of the Appellant in the earlier proceedings does not indicate that the act of raising of the question of jurisdiction is bonafide. As a matter of fact, when the Respondent-2 approached the Himachal Pradesh State Commission, a specific objection was raised by the Appellant that the Himachal Pradesh State Commission has no jurisdiction. Thereupon, the Respondent-2 has filed a petition before the Central Commission where the same question was raised and ultimately the Central Commission directed the Respondent-2 to approach the Uttarakhand State Commission. In pursuance of this order, when the Respondent-2 approached the Uttarakhand State Commission, the Appellant, who is respondent in the said proceedings before the Uttarakhand State Commission strangely did not object to the question

of jurisdiction. However, the Appellant has raised this question only in this Appeal. In view of the above discussion, we hold that Utterakhand State Commission has got the jurisdiction to entertain the dispute.

18. In regard to the second question relating to the determination of tariff, it is contended by the Appellant that the tariff has been wrongly determined by the Commission by taking into account servicing of debt such as depreciation, interest on working capital and interest on loan, Return on Equity and taxes, etc., payable by the HPSEB. Let us now discuss this issue.

- (a) To decide this issue we are required to see as to what is the meaning of cost of generation. The agreement between the parties neither defines the term 'cost of generation' nor does it provide for any specific mechanism for calculation of cost of generation. In

such circumstances, it will be required to ascertain as to whether there is any statutory scheme existing at the time of agreement between the parties, which provides for the determination of cost of generation.

- (b) At the time of entering into agreement, the Electricity (Supply) Act 1948 was in force. The Eighth Schedule of the said Act provided for the cost of production and method of calculating such cost of production. The word “cost of production” and “cost of generation” are synonymous as in the context of electricity production, would mean nothing but generation of electricity. Even the heading of Eighth Schedule is “Determination of Cost of Production of Electricity at Generating Stations”. Therefore, it means the Eighth Schedule determines the cost of generation only. The contention of the Appellant that Eighth Schedule is not applicable to these generating stations is not correct and is not supported by any factual foundation.



- (c) These stations were erected at the cost of State Government instrumentality namely U.P. State Electricity Board which clearly brings it within the meaning of section 28 of the Electricity (Supply) Act, 1948. This means that these stations are controlled stations within the meaning of Chapter V of the Act and therefore, Eighth Schedule of Electricity (Supply) Act 1948 would be applicable to these stations.
- (d) If we go through such schedule which is applicable to the present case, it is clear that the Eighth Schedule would contain the following components for calculating the cost of production of electricity:
- (i) Taxes
  - (ii) Depreciation
  - (iii) Interest on working capital and loan
  - (iv) Return on Equity

The Eighth Schedule does not specifically uses the expression return on equity but the same has been taken into account while calculating cost where interest on cost of setting up the generating station has been taken into account for calculating the cost of production of electricity.

- (e) Since all these components have been included in the Eighth Schedule for calculating cost of generation, the contention of the Appellant is not tenable.
- (f) The Electricity (Supply) Act, 1948 was repealed in the year 2003. In pursuance of the same, now the new regulatory regime is in place. Under the Electricity Act, 2003, regulations have been framed. Both in regulations as well as in the Act the term “cost of generation” has not been defined. The charge for generation has to be calculated as per the scheme envisaged under these regulations on the basis of the components enumerated under clause 21 and 7 of the regulations. Under these regulations, the

servicing of debt, Return on Equity and tax are to be included for calculating the generation tariff. So when these regulations are imposed which have a good statutory force as part of the Act, it cannot be contended that the State Commission should ignore these regulations and determine the tariff independently merely on the mutual understanding of the parties through the agreement. In the present statutory framework, it is not correct to contend that the Appellant would not be subject to determination of tariff in accordance with regulations but it should be allowed to get electricity at a price which is lesser than the cost of generation determined for other consumers.

- (g) Under clause 18 of the regulations framed by the State Commission for determination of tariff, there is a ceiling of 30% of the equity on which 14% of annual return is worked out under clause 25 of

regulations. Therefore, it is not the profit that is being charged through return on equity but it is to protect the equity which is locked in such generating station and hence the same is necessary component of the cost of generation.

- (h) It is settled law that the method of determination of tariff is provided under the Electricity Act, 2003 and Regulations will prevail over any clause of agreement between the parties. The Regulation which is statutory in nature, provides for the method of determination of tariff. The only exception in the Regulation is contained in clause 6 of the Regulation with respect to agreeing to better norms of operation which would form the basis for calculating the separate tariff. Since in the instant case, admittedly, there are no different norms agreed to between the parties under the agreement, there cannot be separate tariff with respect to supply of electricity by the

Respondent, UJVNL to the Appellant. The reliance of the Appellant on two earlier orders of the State Commission is misplaced. These two orders were passed under U.P. Electricity Reforms Act, 1999. These orders are in fact determination of tariff which is apparent from the orders itself. In order dated 27.07.2000, relating to the hydro power in respect of stations belonging to UPJVNL, the sale price has been fixed at 35 paise per unit including these stations. In the first order dated 01.09.2001, the State Commission directed that Himachal Pradesh and Madhya Pradesh who have share in the generation in some stations of UPJVNL have to pay the cost of generation plus 5%. This direction shows that the Appellant has to pay not only the cost of generation comprising of 5 components as given in Eighth Schedule of the Electricity (Supply) Act 1948 and clause 7 and clause 21 of Regulation 2004 but also a sum amounting to 5% of the cost of generation.

- (i) The contention of the Appellant that as per past practice the Appellant was being charged lesser tariff and it was not being charged for depreciation, Return on Equity, interest on loan and taxes, is factually not correct because it is clearly mentioned in the order of the Commission that the Appellant was previously being charged these components for the electricity supplied to them.
  
- (j) The State Commission while determining the tariff is expected to take all the factors associated with the process of tariff determination. That would necessarily mean, among other legitimate components of cost, depreciation, Return on Equity and taxes etc. In case costs are not recovered for the 25% power generated by the generating stations under dispute, the same would result in under recovery of prudent cost of the generating station to

that extent. The same would be inconsistent with the provisions of law existing then i.e. Electricity (Supply) Act, 1948. Under Section 61(d) of the Electricity Act, 2003, the recovery of cost of electricity in a reasonable manner is envisaged. Therefore, any attempt by the Commission to refuse to factor them in the tariff determination would be an act of breach of the statutory provisions as contained in section 61 of the Act read with Regulations framed by the Commission. So, inescapable conclusion would be that someone has to bear the same. When such a observation is made by the Appropriate Commission, it has to be made in conformity with all the provisions of the Act and Regulations. Therefore, the contention, with reference to the applicability of the agreement independently of the Regulation involving the second issue is quite misconceived and the same is rejected.

19. The third issue would relate to the directions given by the State Commission seeking for information from both the parties as well as from the two Governments to deal with the issue with regard to surplus power available with the HPSEB which was required to be returned to the Respondent generating company in case such surplus power was not utilized within the State of Himachal Pradesh. In respect of this issue, the Learned Counsel for the Appellant submitted that the State Commission wrongly gave a direction to both the parties as well as to both the State Governments to furnish information regarding the utilization of the power by Himachal Pradesh supplied by the Respondent-2 and the same is beyond its jurisdiction. The Learned Counsel for the Respondent would make the following reply to the above contention.

“The directions given by the State Commission to the Appellant and to the two governments to give details as to the supply and consumption of such supply by the Appellant procured from the 5 generating stations of



Uttarakhand is well within its jurisdiction. Under the Act, 2003, the State Commission has been entrusted with overall responsibility to maintain the regime of electricity generation, supply, wheeling, distribution and determination of tariff. In the instant case, it is clear that the agreement has categorically envisaged that the electricity supplied to the HPSEB which has not been consumed from the share allotted under the agreement, has to be returned. Therefore, the State Commission is well within its jurisdiction to demand from the Appellant and the other Governments in regard to return of such power to the State of Uttarakhand as laid down by the Hon'ble Supreme Court in Civil Appeal No. 2926 of 2006 dated 08.07.2010.”

20. We have carefully considered the submissions made by both the Learned Counsel for the parties on this point. While we find force in the point raised by the Appellant, we are not able to accept the reply made by the Learned Counsel for the

Respondent-2. Admittedly, this issue was never raised by any of the parties before the State Commission. Even in the impugned order, this issue has never been framed by the Commission. On the other hand, the Commission dealt with the matter elaborately only in respect of the jurisdiction of the Uttarakhand State Commission and in respect of the issue relating to the determination of generation tariff on the application filed by the Respondent-2 in respect of supply of electricity made to the HPSEB. In such circumstances, we are of the view that giving directions to seek information from both the governments to give the particulars and information in order to find out whether the power supplied by the Respondent to the Appellant has been properly utilized is beyond the scope of the proceedings. In fact, the State Commission, in this case, is only concerned with the question with reference to the question whether the Uttarakhand State Commission has jurisdiction to determine the tariff for supply of electricity by Respondent-2 to the Appellant and the question whether the State Commission has correctly

determined the generation tariff for the power supplied to the Appellant.

21. Therefore, we are of the opinion that the State Commission could have avoided to give these directions to the State Governments while determining the tariff. As such, we deem it fit to set aside this portion of impugned order alone. Accordingly, the same is set aside to the extent as indicated above.

**22. SUMMARY OF OUR FINDINGS :-**

**(A) The tariff of a generating company including its supply to a distribution licensee outside the State, not falling under the jurisdiction of the Central Commission under Section 79(1)(a) and 79(1)(b), shall be determined by the Commission of the State where the energy is generated. Notwithstanding above, the generating company and the distribution licensee can approach the State Commission**

having jurisdiction over the distribution licensee for determination of tariff and the State Commission may determine the tariff for such supply under Section 64(5). Section 62(1)(a) provides that the Appropriate Commission shall determine the tariff for supply of electricity by a generating company to a distribution licensee. This means that for any distribution licensee whether situated in the same State or otherwise receiving the supply from generating company, there is no limitation put in the said provision showing that “distribution licensee” would mean distribution licensee in the same State. In this case the generation plants in question are located in Uttarakhand not having a composite scheme for generation and sale of electricity in more than one State and the supply is also effected at the bus bars at Uttarakhand. Further, Himachal Pradesh State Commission has permitted withdrawal of petition filed by UJVNL for determination of tariff for supply of electricity to HPSEB. Therefore, we are of the view that Uttarakhand State Commission has got the

**jurisdiction to determine the tariff for supply of electricity by UJVNL, the Respondent-2, to HPSEB, the Appellant.**

**(B) The method of determination of tariff is provided under the Electricity Act. 2003 and the Regulations will prevail over any clause of agreement between the parties. The Regulations which are statutory in nature provide for the method of determination of tariff. The only exception under the regulation is contained in Clause 6 of the Regulation with respect to agreeing to better norms of operation which would form the basis for calculating the separate tariff. In the instant case, admittedly, there are no different norms agreed to between the parties under the agreement. Therefore, there cannot be any separate tariff with respect to the supply of electricity by the Respondent to the Appellant. The State Commission while determining the tariff is required to take all the factors associated with the process of tariff determination. That would necessarily mean, among other legitimate component of cost,**

depreciation, Return on Equity and taxes etc. In case costs are not recovered for the 25% power generated by the generating stations under dispute, the same would result in under recovery of prudent cost of the generating station to that extent. Hence we conclude that the State Commission has determined the tariff correctly in conformity with all the factors associated with the provisions of the Act and Regulations.

(C) The directions given in the instant case by the State Commission to the parties as well as to the two State Governments to give details as to the supply and consumption of such supply by the Appellant procured from the 5 generating stations of Uttarakhand is beyond the scope of the present proceedings. Admittedly, the issue with regard to the directions was never raised by any party before State Commission nor this issue had been framed by the Commission in the impugned order. The State Commission in the instant case is concerned only with

**regard to the question of jurisdiction and with regard to correctness of the generation tariff. Therefore, we have to hold that State Commission has gone beyond the scope of the proceedings while giving these directions to the State Governments in the petition to determine the tariff. In the circumstances we deem it fit to set aside this portion alone by which directions have been given to the State Government. Accordingly, the same is set aside to the extent as indicted above.**

### **CONCLUSIONS**

23. In the light of our above finding, we confirm the findings of the State Commission with regard to the first two issues and set aside the finding with regard to the third issue relating to directions given to the parties as well as to the State Governments.

24. In the result, the Appeal is partly allowed.

25. No order as to costs.

**(RAKESH NATH)**  
**TECHNICAL MEMBER**

**(JUSTICE M. KARPAGA VINAYAGAM)**  
**CHAIRMAN**

REPORTABLE/NON-REPORTABLE

**Dated: 14<sup>th</sup> September, 2010**