Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO. 87 of 2009

Dated: 23rd March, 2010.

PRESENT : HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. H.L. BAJAJ, TECHNICAL MEMBER

In the matter of:

Himachal Pradesh State Electricity Board. …Appellant
Vidyut Bhawan, Kumar House,
Shimla-171004.

Versus

1. Central Electricity Regulatory Commission
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi-110 001.

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

3. Delhi Transco Limited,
   Kotla Road, New Delhi- 110003.

4. Punjab State Elecy. Board,
   The Mall, Patiala- 147001, Punjab.

5. Haryana Power Gneerating Co. Ltd.,
Shakti Bhawan, Sec. VI, Panchkula,
Haryana-134109.

6. Jaipur Vidyut Vitran Nigam Ltd.,
Vidyut Bhawan, Janpath,
Jaipur Road, Ajmer-305 001.

7. Ajmer Vidyut Vitran Nigam Ltd,
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305 001.

8. Jodhpur Vidyut Vitran Nigam Ltd,
New Power House, Industrial Area,
Jodhpur-342 003.

9. Power Development Deptt,
Govt. of J&K,
Mini Sectt, Jammu.

10. .Engineering Deptt,
Chandigarh Admn,
Sector 9, Chandigarh-160009.

11. .Uttar Pradesh Power Corpn. Ltd.,
Shakti Bhawan, 14, Shoka Marg,
Lucknow-226001.

12. Govt. of Himachal Pradesh
Through the Principal Secretary (Energy),
Shimla-174 001.

13. Northern Regional Power Committee,
18 –A, Qutab Institutional Area,
Shaheed Jeet Singh Marg,

Katwaria Sarai, New Delhi-110016.

… Respondents

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan,
Ms. Swapna Seshadri
Mr. Sumit Pushkaran

Counsel for the Respondent: Mr. Nikhil Nayyar for CERC.
Mr. R.K. Agarwal for R. 2,
Mr. V.K. Gupta for R. 6
Mr. Rajesh Katpalia for R-6.

Per Hon'ble Mr. Justice M. KARPAGA VINAYAGAM, Chairperson

JUDGMENT

Himachal Pradesh State Electricity Board (HPSEB/Appellant) is the Appellant.

2. Aggrieved over the order passed by the Central Commission dated 02.01.2009 dismissing the petition filed by the Appellant praying for removing the difficulty which arises out of Regulation 48 and also for relaxation of the said Regulation, the Appellant has filed this Appeal.

3. The short facts which are required for the disposal of this Appeal are as follows.

4. Himachal Pradesh State Electricity Board is a deemed licensee constituted by the State of Himachal Pradesh. Satluj Jal Vidyut Nigam Limited (R-2) herein is a generating company engaged in the generation and supply of electricity to the Appellant Electricity Board and other beneficiaries. The R-2 has been jointly promoted both by the Government of India and the Government of Himachal Pradesh. Therefore, the tariff of R-2 is being determined by the Central Commission.

5. The Central Commission notified Regulation 48, regulating the tariff of the generating company such as the R-2 and others which deal with the billing and payment of Capacity Charges for the Hydro-electric Stations. The scheme of Regulation 48 is to provide for the Capacity Charges to be applied in a manner so as to progressively recover the charges every month, i.e. to separate the Capacity Charges during the financial year. It also provides for the

methodology for recovery of the said Capacity Charges in clause-4 of the Regulation 48. Accordingly, the said Capacity Charges payable by the beneficiaries including the Appellant were calculated on annual basis for the purpose of determining the Capacity Charges payable every month. The annual Capacity Charge is apportioned by a formula which is applied on cumulative basis every month. As per the calculations of the Appellant, the total Capacity Charges payable by the Appellant to the R-2 have been worked out as Rs. 1,024.88 crores and out of this the Appellant has to share 3.31% of Rs. 825.77 crores and 28.31% of Rs. 199.10 crores, aggregating to Rs. 84 crores. Since the Appellant has been asked to pay Rs. 139.88 crores i.e. in excess of the amount liable to be paid as per Regulation 48, the Appellant has filed a petition before the Commission seeking for the removal of the said difficulty and relaxation of Regulation 48. This petition was dismissed by the Central Commission by the order dated 02.01.2009 rejecting the prayer sought for by the Appellant. Hence this Appeal.

6. The Ld. Counsel appearing for the Appellant has urged the following contentions by way of assailing the order impugned.

(i) The methodology as per the Regulation 48 of Regulation 2004 provide for the calculation and adjustment of the annual capacity charges on a cumulative basis, is applied for billing, payment and consequent recovery of the Capacity Charges in this case and the same is wrong.

(ii) The annual Capacity Charges recoverable by the R-2, the generating station from the beneficiaries including the Appellant is to be related to the allocation of capacity. It can be applied only when the percentage of the capacity allocation remains constant throughout the period. If such allocation varies during the year the necessary adjustment has to be made. In other words, if there is a change in the allocation of capacity the period of one year cannot be considered for cumulative payment of the Capacity Charges.

(iii) Regulation 48 is required to be applied in a pragmatic and purposeful manner and not in a mechanical manner. The application of the method of calculation of Capacity Charges on cumulative basis under Regulation 48 without taking into consideration of the changes in the allocation of capacity during the year will lead to anomaly situation of a purchasing beneficiary payment much higher of Capacity Charges even during the non-peak situation than the purchasing beneficiary during the peak season getting less allocation during the said non-peak season.

(iv) Regulation 48 envisages adjustment to be made to the formula in the event of the allocation of the unallocated capacity by the Central Government from time to time. Regulation 48(1)(b) provides that the total capacity share of non-beneficiary would be sum of its capacity share plus allocation out of the unallocated portion. Thus the effect of the above significant higher capacity allocated to one beneficiary out of the unallocated share

needs to be appropriately given and therefore, the formula under Regulation 48 cannot be applied in a mechanical manner.

(v) The Appellant is not asking for any undue benefit on account of any variation in the capacity related to the hydro electric project. It is merely asking for equitable determination taking into account the energy available in any hydro project varies based on lean period and peak period. Such variation would not affect the charges payable if the allocation of capacity is firm during the entire period. Under Regulation 12, the Central Commission has powers to remove the difficulty. Under Regulation 13, it has got the powers to give relaxation under Regulation 48. Even though the present case has depicted the appropriate situation where exercise of such power was called for, the Central Commission has failed to exercise the said power thereby creating the anomaly.

7. On the other hand, the Learned Counsel appearing for the Central Commission (R-1) as well as the Learned Counsel appearing for R-2 in justification of the impugned order would elaborately contend that the reasonings given by the Central Commission in rejecting the prayer of the Appellant are perfectly valid in law and there is no reason warranting any interference with the impugned order.

8. Both on behalf of the Appellant as well as Respondent several authorities of the Supreme Court have been cited in support of their respective submissions.

9 The main questions that arise for consideration in the present case are as follows:

(i) Whether the Central Commission is right in law in holding that the basic methodology for allocation of the annual Capacity Charges among the different beneficiaries under Regulation 48 is applicable in this case, even though the applicable capacity to the

beneficiaries varies during the calendar year and is not uniform throughout the year?

(ii) Whether the Central Commission was right in law in not interpreting the Regulation 48 in a correct perspective manner to apply the cumulative Capacity Charges as prescribed in the formula providing that in case of variation during the year the annual period will be considered in separate applications?

(iii) Whether the Central Commission was right in law in constituting that it cannot exercise Regulation 12 dealing with the powers to remove difficulty and it cannot exercise Regulation 13 dealing with the powers to relax. Under the circumstances of the case when the Applicant is claiming to have established the inequality of the methodology of the cumulative basis and on annual basis, even when the capacity allocation is not uniform throughout the year?

10. Before dealing with these questions, it would be appropriate to refer to the Regulation 48 which is sought to be relaxed. As mentioned earlier, the scheme of Regulation 48 is to provide for the Capacity Charges to be applied in a manner so as to progressively recover the charges during every month, i.e. to separate Capacity Charges during the financial year. Regulation 48 provides as under:

> "Each beneficiary shall pay the Capacity Charges in proportion to its percentage share in total saleable capacity of the generating station. Saleable capacity shall mean total capacity minus (-) free capacity to home State, if any. The Capacity Charges shall be paid by the beneficiaries including those outside the region to the generating company every month in accordance with the formula and in proportion to their respective shares in the concerned generating stations."

11. Thus, the above Regulation clearly shows that each of the beneficiaries should contribute to the Capacity Charges to

the extent of their entitlement in the electricity generated and supplied from the project on annual basis. Similarly, it provides that each of the beneficiaries shall take electricity throughout the year at the same specific percentage share in the total saleable capacity of the generating station and that the allocation of the total capacity of the generating station as per the agreement between the parties shall be uniform throughout the year. In the same very Regulation it is also provided for the methodology for recovery of the said charges.

12. Accordingly, the Capacity Charges i.e. fixed charges payable by each of the beneficiaries including the Appellant are calculated on annual basis. For the purpose of determining the Capacity Charges payable every month the annual capacity charges is apportioned by a formula which is applied on cumulative basis every month.

13. Bearing in mind the above concept, let us now discuss the issues that arise for consideration in the present case.

(i) At the outset it shall be stated that this Appeal has been filed by the Appellant aggrieved over the provision of the Regulation 48 of the Central Commission. According to the Regulation the cumulative Capacity Charges payable by the beneficiary like the Appellant are worked out up to the month of the account on the basis of the cumulative primary energy charges up to the said month. This cumulative charge is payable corresponding to the cumulative capacity index up to the said month.

ii) According to the Appellant, if the allocated capacity to the beneficiaries remained constant throughout the year it may be appropriate to determine the capacity charges payable on a cumulative basis i.e. Weighted Average Basis as the beneficiaries will share the benefits and

disadvantages of the variant saleable energy proportionately and if the capacity allocated is significantly different. If the beneficiary takes more quantum during the lean period such beneficiary will be placed in a disadvantageous position to suffer unfair monetary loss by application of the formulae contained in Clause (iv) of Regulation 48 will be arbitrary, unjust and irrational and therefore Regulation 48 (iv) should interpreted in a purposeful manner and not to be interpreted in narrow and literal manner.

iii) The grievance of the Appellant is that it has drawn 363.31 MUs during 2004-05 out of the total saleable energy of 4468 MUs but it is required to pay Rs. 165.37 crores towards capacity charges, primary energy charges and incentive which works out to Rs.4.55/kwh which is higher than the average tariff of Rs. 2.99/kwh for the year. Under those circumstances, he has sought the relief for not calculating the capacity charges in a cumulative manner.

iv) The second Respondent is a hydro generating station. By virtue of use of hydro power for power generation it consists of only the fixed cost elements and no variable cost element. Therefore, generators would be only interested in the recovery of the fixed cost inclusive of cost of investment, return on investment and running cost. On the other hand, the beneficiaries would like that there should be maximum utilization of hydro power during monsoon season. Therefore, the tariff structure should be such that it ensures and encourages generators to operate the station in such a manner that the above objectives are fulfilled. At the same time the generator should be able to recover its full fixed cost in case of hydrology failures in a particular year. The Central Commission has adopted a two part tariff for the recovery of annual fixed cost of a hydro electric power station consisting of Primary Energy charges and balance as capacity charges. This is intended to achieve the objective. Accordingly, the Central Commission

framed Regulation 37 (i). This Regulation provides as under:-

"(i) ***Capacity Charges****:- The capacity charges shall be computed in accordance with the following formula:*

Capacity Charges = (Annual Fixed Charges – Primary Energy Charges).

Note

Recovery through primary energy charges shall not be more than Annual Fixed Charges".

v) Primary energy charge is linked to the lowest energy charges. This is to ensure that hydro power station get must-run-status i.e. priority in the merit order dispatch on availability of the water obviating any undue spillage of water and maximizing its utilization. The secondary energy charge is an incentive which encourages generator to make use of available water to the maximum extent.

vi) The recovery of capacity charge is linked to the capacity index which ensures and encourages higher

availability of machines to maximize generation with the available water and avoid any water spillage. It also takes care of the risk of generator on hydrology failures.

vii) In this context the learned counsel appearing for the Central Commission has quoted the relevant observation made by the Central Commission in its ABT order dated 8.12.2000 in which norms for hydro electric stations were decided in the following principles:-

"19. The Commission has decided to implement the conceptof Capacity index in place of 'Availability'. The basic criteria for capacity index are:

a) Water spillage must be minimized.

b) As far as possible, the peak capacity of each plant must be available when most required by the system.

20. Availability of a hydro station for any period shall be based on the Capacity Index (CI) declared for the day.

The annual capacity index is the average of the daily capacity indices over a full year.

21. The various aspects of capacity index during monsoon and dry season are:

i) During the monsoon, full capacity of each type of station is required for the full day.

ii) For the dry season, run-of-river plant (without pondage) is required to the extent that no water is spilled. This means that provided turbine/generators are available for all the water in the river, the plant is considered 100% available.

22. To summarize, during the monsoon period all machines are required to be available 24 hours per day for all types of plants. Apart from the run-of-river plant, during the dry season all machines are required to provide maximum capacity for at least 3 hours per day

14. Regulation 48 “on billing and payment of capacity charges” is result of above principles of hydro tariff recovery on month to month basis on cumulative principle of recovery of capacity charges. Since the recovery of primary energy charges on month to month basis would depend upon the primary energy scheduled in a month, hence during the peak seasons it would be higher and correspondingly the capacity charge recovery would be less. On the other hand during lean seasons, the primary energy charge would be lower as compared to the peak seasons. This methodology of capacity charge is based on sound principles and has been in force since 1.4.2001which is applicable during the tariff period 2004-09.

15. The Regulation 48 of the 2004 Tariff Regulations and analogous provisions in 2001 tariff regulations have been governing the billing and payment of capacity charges since the introduction of ABT. The object of the provision is that the fixed charges comprises capacity charges and energy charges of a generating station covered under the ABT are determined on

annual basis for each financial year. In order to ensure continuous cash flow to the generating company, the system of recovery of annual capacity charges on monthly basis and to avoid year-end adjustment in the billing, the method of recovering charges on cumulative basis have been provided in the 2004 Tariff Regulation.

16. Even according to the Appellant, the State Government had a share of 34% consisting of 12% as free power and 22% in lieu of equity participation in the project. The State Government has been selling its share of 34% of power in the project through the SJVNL, Respondent No. 2. Excluding the free power, the State Government is liable for payment of the capacity charges for its share of 22% unless allocation is transferred in favour of other beneficiaries. In such an event, Regulation 48 provides for sharing of charges by the beneficiaries who have been re-allocated the share of State Government.

17. Having fully known about the contents of the Regulation 48, the Appellant had approached the State Government through the

letter dated 26.3.2004 for diversion of allocation of their 34% share in its favour during the period November 2004 to March 2005. As a matter of fact, the Appellant had refused to take the power from the State Government from April 2005 to October 2005. The Appellant ought to have assessed the implications of Regulation 48 in a matter of billing while it was contracted the power from the State Government from 1.11.2004 to 31.3.2005. This was not done by the Appellant. Having failed to assess the capacity charges as a result of the application of Regulation 48 before seeking allocation, the Appellant could not use this as a basis to make an argument that the Regulation 48 is arbitrary and unjust. As a matter of fact, the Appellant has virtually waived its rights to question the operation of Regulation 48.

18. According to the Appellant, Clause (v) of the Regulation 48 can be applied only in two conditions (i) there is a firm allocation of the capacity by the Central Government or under the agreement in favour of different purchasers (ii) the firm allocation of capacity is uniform throughout the year. It is submitted on behalf of the

Appellant that no such conditions can be read into Regulation 48 (v) which provides for the procedure for calculation of the capacity charges. This contention is baseless. Note 2 under clause (1) provides for the surrender and re-allocation of allocated shares by the beneficiaries. Under this provision re-allocation of power can be made for a specific period which may be one year or more or less than one year. It is incumbent upon the beneficiary who has been reallocated the share to pay the capacity charges for the re-allocated capacity. Its failure to weigh the liability to pay a higher capacity charges during lean seasons under Regulation 48 can not be a ground for challenging the Regulation 48. Further the Applicant could have very well negotiated with the State Government for the transaction for utilization of its share at favourable terms and in that situation the liability to pay the charges would have been fastened on the State Government. But this was not done. The Appellant has suggested that the most appropriate way to deal with the determination of capacity charges payable is to consider the two periods separately. In other words, the Appellant suggests that the capacity charges should be linked to

the generation of power by the hydro generating station. This suggestion virtually hits at the very root of the two part tariff introduced through ABT and the concept of Annual Fixed Charges. The prayer of this sort made by the Appellant would amount to rewriting the Regulation 37 and 48 which is not permissible under law.

19. The Appellant has cited various judgments Girnar Traders V State of Maharashtra, KP Vergeshe V Income Tax Officer{(1981) 4 SCC 173)} and Surjit Singh Kalra V Union of India{(1991) 2 SCC 87} to establish that the Regulation has to be interpreted in a purposeful manner having regard to the intention behind the said Regulation. This Regulation of purposeful construction and the method of interpretation can not be pressed into aid where the language of the statute itself is clear. Note 1 to Regulation 48 (i) clearly contemplates allocations from "time to time", thus signifying variable allocations in a given year. With the introduction of two part tariff under the ABT, the concept of capacity index was introduced for hydro generating stations and

recovery of capacity charge was linked to the capacity index which sought to ensure higher availability of machines to maximize generation with available water. Accordingly, the Regulation 37 of the Tariff Regulation 2004 has been framed for computation of annual charges as comprising of annual capacity charge and primary energy charge. Regulation 48 provides for the formula for billing and recovery of annual capacity charges. According to the learned counsel for the Central Commission the provision of these Regulations have worked satisfactorily in respect of all the Hydro electric projects and in variation of the allocation.

20. As correctly pointed out by the learned counsel for the Central Commission the Regulation 48 is unambiguous and made applicable to all hydro generating stations being regulated by the Central Commission. As such the procedure of computation of capacity charges as provided under Regulation 48 can not be changed. Virtually the Appellant seeks for the relief in change of procedure of computation of capacity charge which would amount to amendment to the Regulation as well as to distortion of ABT

mechanism apart from having wide ranging impact on the billing and recovery of capacity charges of all ISGS in the country. In other words, it will unsettle the settled issue and reopen billing of all generators during the tariff period 2004-09. As referred to earlier the Appellant has already willingly and consciously sought allocation of power from the State Government during the lean season and got the relief and acted according to Regulation 48. Therefore, the Appellant has no case on merit and as such he is liable to make payment of capacity charges as per Regulation 48 which flows out of its decision to seek reallocation during the lean season.

21. Appellant instead of challenging the Regulation in appropriate forum namely High Court under Article 226 of the Constitution has approached the Tribunal virtually asking for the quashing of the Regulation. This is not permissible as laid down by the recent judgment of Constitution Bench of the Hon'ble Supreme Court in Power Trading Corporation Vs Central

Electricity Regulatory Commission Civil Appeal No. 3902 of 2006 dated 15.3.2010.

22. In view of the above discussion there is no merit in this Appeal. The Appeal is dismissed. No costs.

(H.L. BAJAJ)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 23rd March, 2010.

REPORTABLE / NON-REPORTABLE.