

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Review Petition No. 15/10 in Appeal No. 183 of 2009

Dated : 7th December, 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, Simla-171004**

.....Review Petitioner/Appellant

Vs

- 1. Uttrakhand Electricity Regulatory Commission,
80, Vasant Vihar, Dehradun, Uttrakhand**
- 2. Uttrakhand Jal Vidyut Nigam Limited,
UJJJWAL, Maharani Bagh, GMS Road, Dehradun**

.....Respondents

Counsel for Appellant:	Mr. Anand K. Ganeshan Ms. S. Seshadri
Counsel for Respondent(s):	Mr. Amit Anand Tiwari for Respondent No.2

ORDER

Per Hon'ble Shri Rakesh Nath, Technical Member:

1. This review Petition has been filed by the Appellant, Himachal Pradesh State Electricity Board for review of judgment dated 14.09.2010 of this Tribunal passed in Appeal No. 183 of 2009.
2. In the judgment dated 14.09.2010, this Tribunal confirmed the findings of the Utrakhand Electricity Regulatory Commission (Respondent-1) regarding jurisdiction and the tariff for supply of electricity to the Petitioner/Appellant from Yamuna Hydel Scheme power plants owned by Uttranchal Jal Vidyut Nigam Limited (Respondent-2).
3. The Supply by the Respondent No.2 to the Petitioner/Appellant was relating to share of the latter in Yamuna Hydel Scheme in accordance with the agreement

signed between the State Governments of the Himachal Pradesh and Uttar Pradesh in the year 1972.

4. The Petitioner has raised the following issues in the Review Petition in order to show that there are error apparent on the face of the record in the above judgment.

(i) **Jurisdiction of the State Commission u/s 86(1)(a):**

This Tribunal has up-held the jurisdiction of Uttranchal State Commission to determine the tariff for sale to the Petitioner/Appellant and has approved the same tariff as applicable for sale to the distribution company in Utrakhand. It has been submitted by the Petitioner/Appellant that by the very fact that the tariff for the two states being the same, the sale by Respondent No.2 becomes composite for sale to two states and thus outside the jurisdiction of the State Commission. There is no finding of the Tribunal as to why the supply would not amount to a composite scheme in view of the tariff being same for the two states.

(ii) Generating stations of Respondent No.2 being “Controlled Stations”

In the judgment dated 14.9.2010, the Hon’ble Tribunal has been pleased to hold that the generating stations of the Respondent No.2 fell within the definition of a ‘Controlled Station’ under the First Schedule as the generating station was set up by a Government Utility as per Section 28 of the Electricity (Supply) Act, 1948.

The finding of the Hon’ble Tribunal is not on the basis of claim of Respondent No.2 and also as per the findings of the State Commission. Section 28 of the Electricity (Supply) Act, 1948 has no correlation to the First Schedule of the Act of 1948. Only Section 34 of the Act of 1948 defines the Controlled Station.

(iii) Order dated 1.9.2001 passed by the Uttar Pradesh Electricity Regulatory Commission

The Hon’ble Tribunal has relied on the order dated 1.9.2001 passed by the State Commission of Uttar

Pradesh to hold that the tariff for the sale of electricity by the Respondent No.2 to the Petitioner was determined by the State Commission of Uttar Pradesh including the capital cost elements and thus the contention of the Petitioner that the same was not to be included is factually incorrect.

There was no tariff determination by the State Commission of UP for sale by the Respondent 2 to the Petitioner/Appellant. The order dated 1.9.2001 passed by the State Commission of UP has no relevance to the sale of electricity by Respondent 2 to the State of H.P. The said order was to determine the revenue requirement and the tariff of the distribution licensees in the state of UP. Neither the Respondent 2 nor the Petitioner was a party to the said order.

5. We have heard the Learned Counsel for the Petitioner/Appellant and the Learned Counsel for the Respondent 2 and examined the above issues. These issues are discussed in the following paragraphs.

6. The first issue is relating to jurisdiction of Uttrakhand State Commission. The Learned Counsel for the Petitioner/Appellant has argued that in the judgment dated 14.9.2010 the Tribunal while approving the composite scheme for sale for two states with a uniform tariff has wrongly upheld the jurisdiction of the State Commission under section 86(1)(a). In our opinion, this argument is totally misconceived. This Tribunal has categorically held that Yamuna Hydel Scheme of Respondent 2 is not a composite scheme. The Yamuna Hydel Scheme was constructed primarily for supply of electricity within the state of U.P. and when the agreement between the two states was signed in the year 1972, the Stage-I of the scheme was already functional and construction of Stage-II had been taken up by U.P. State Electricity Board. However, the agreement between the two states provided for a specific share of electricity from these hydro project for Himachal Pradesh at “cost of generation”, in view of Government of H.P. agreeing not to permit any act to diminish the natural flow of river water. Government of

H.P. or H.P. State Electricity Board have not shared the capital cost of the said hydro projects.

7. This Tribunal has only decided the principles of determination of 'cost of generation'. This Tribunal has held that cost of generation shall include taxes, depreciation, interest on working capital and loan and Return on Equity rejecting the contention of the Petitioner/Appellant that it should not include the capital cost elements. The Tribunal has also upheld the determination of tariff by Utrakhand State Commission according to its tariff Regulations. If by application of the principles of determination of the "cost of generation", which is the rate for supply of electricity to the Petitioner/Appellant as per the agreement between the two states, becomes equal to the tariff for supply of electricity to Utrakhand, then it cannot be concluded that Yamuna Hydel Scheme becomes a composite scheme. The relevant abstracts of the judgment dated 14.9.2010 are reproduced below:

“17.

(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 Uttrakhand State Commission.

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(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.”

8. In view of above, we hold that there is no error apparent on the face of records as far as the issue of jurisdiction is concerned.
9. The Second issue is relating to Controlled Stations. According to the Petitioner/Appellant Yamuna Hydel Projects are not Controlled Stations within the meaning of Chapter V of the Electricity (Supply) Act, 1948.
10. It is correct that the State Commission in its order dated 28.8.2009 did not hold that Yamuna Hydel stations were Controlled Stations and it is true that this Tribunal has held that these stations are “Controlled Stations’ within the meaning of Chapter V of the Electricity (Supply) Act.

1948 and therefore, Eighth Schedule of the said Act would be applicable to these stations. Actually this Tribunal had only tried to find out the meaning of the term “cost of generation” which was used in the agreement of 1972 between the states of U.P. and Himachal Pradesh relating to rate of supply of electricity to the latter. Relevant abstracts of the judgment are reproduced below:

“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.”

11. However, in para 18(c) of the judgment , it was erroneously recorded that these stations were Controlled Stations within the meaning of Chapter V of the Electricity (Supply) Act 1948 and therefore, the Eighth Schedule would be applicable to these stations. It is correct that the Eighth Schedule is applicable with respect

to Controlled Stations as applicable to First Schedule and closing down of generating stations other than Controlled Stations as applicable to Third Schedule. For example payment by State Electricity Board for energy received from Controlled Stations owned by the licensee will be as per the provision of the Eighth Schedule. However, the intention as would be evident from para 18 (a) & (b) of the judgment, was basically to find out the meaning of the word ‘cost of generation’ and not the application of the Eighth Schedule of the Electricity (Supply) Act, 1948 for determination of the tariff. In fact the Uttarakhand State Commission in its order dated 28.8.2009 has only used the principles of the Eighth Schedule to determine the ‘cost of generation’ and has not determined the tariff as per the Eighth Schedule, but has determined the tariff as per its own Regulations. The Tribunal also held that the tariff determined by Uttaranchal State Commission as per its regulations would be applicable for supply of power to Petitioner/ Appellant.

12. Accordingly, This Tribunal's judgment dated 14.09.10 is amended to the following extent:

The last sentence of para 18(b) "Contention of the Appellant..... by any factual foundation" may be deleted. Para 18(c) may be deleted and subsequent paras from 18(d) to 18 (j) may be renumbered as 18(c) to 18(i).

13. However, the above amendment would not make any change in our findings relating to the tariff determined by Uttarakhand State Commission regarding supply of electricity to H.P.

14. The next issue is relating to order the of State Commission of U.P. regarding sale of electricity to HP, the Petitioner/Appellant. The contention of the Petitioner/Appellant is that the order dated 1.9.2001 passed by the State Commission of UP has no relevance to the sale of electricity by Respondent-2 to the Petitioner/ Appellant and they were paying lower than the tariff paid by the licensee in UP/Uttarakhand. Further, H.P. State

Commission had also allowed lower tariff for electricity to be purchased from Respondent-2.

15 We have examined this issue. We find that the Tribunal's judgment has only reproduced the findings of State Commission of UP in its order dated 1.9.2001 and there is no error apparent on the face of the records. Thus, no clarification/amendment needs to be carried out in our judgment in this regard. Even if the Petitioner's contention is accepted that in the order dated 1.9.2001 of UP State Regulatory Commission the Petitioner/Appellant was not a party and hence it was not applicable to supply to HP, the finding of the State Commission of UP or the interim order of the State Commission of H.P. for the prior period will have no impact on our findings. Thus, we feel that there is no need for an amendment or clarification in the Tribunal's judgment on this point.

16. Accordingly the Petition is disposed off with order for amendment in this Tribunal's judgment dated 14.9.2010 to the extent indicated in para 12 above. We make it clear

that this amendment will not have any impact on the findings of this Tribunal relating to jurisdiction and the tariff determined by the Utrakhand State Commission.

17. With These observations, this Review Petition is disposed off. No costs.
18. Pronounced in the open court on this 7th day of Dec., 2010.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

INDEX : REPORTABLE / NON-REPORTABLE.

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