Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.131 of 2006

Dated: August 28, 2009.

Present:- Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Shri H.L. Bajaj, Technical Member

IN THE MATTER OF:

National Hydroelectric Power Corporation Ltd.
NHPC Office Complex
Sector-33
Faridabad (Haryana)-121003 .....Appellant(s)

v/s

1. **Chairperson**
   Punjab State Electricity Board
   The Mall, Near Kali Badi Mandir
   Patiala-147001 (Punjab)

2. **The Chairperson**
   Haryana Vidyut Prasaran Nigam Ltd.
   Shakti Bhwvan, Sector-6
   Panchkula-134109 (Haryana)

3. **The Chairman & Managing Director**
   Delhi Transco Ltd.
   Shakti Sadan, Rouse Avenue
   Kotla Road, New Delhi-110002

4. **The Chairman**
   Uttar Pradesh Power Corporation Ltd.
   Shakti Bhavan,14, Ashoka Road
   Lucknow-226001 (U.P.)

5. **The Managing Director**
Jaipur Vidyut Vitaran Nigam Ltd.
Vidyut Bhawan, Janpath
Jaipur-302005

6. **The Chairman**
Rajasthan Rajya Vidyut Prasaran Nigam Ltd.(PRVPNL)
Jaipur Vidyut Vitaran NigaLtd.(JpVVNL)
Jodhpur Vidyut Vitaran Nigam Ltd.(JdVVNL)
Ajmer Vidyut Vitqaran Nigam Ltd.(AVVNL)
Vidyut Bhavan, Janpath,Jyoti Nagar
Jaipur-302005 (Rajasthan)

7. **Chairman-cum-Managing Director**
Power Transmission Coorpn. Of Uttaranchal Ltd.
(Erstwhile UPCL)
Urja Bhawan, Kanwali Road
Dehradun-248001 (Uttaranchal)

8. **The Managing Director**
Jodhpur Vidyut Vitaran Nigam Ltd.
New Power House, Industrial Area
Jodhpur-342003(Rajasthan)

9. **The Chairman**
Himachal Pradesh State Electricity Board
Vidyut Bhawan, Kumar House
Shimla-171004 (Himachal Pradesh)

10. **The Managing Director**
Ajmer Vidyut Vitaran Nigam Ltd.
Old Power House
Hatthi Bhatta, Raipur Road
Ajmer-305001 (Rajasthan)

11. Chief Engineer & Secretary
Engineering Deptt., Ist floor
UT Secretariat, Sector-9-D
Chandigarh-16009

12, The Principal Secretary
Power Development Department
New Secretariat
Srinigar (J&K)

13. Central Electricity Regulatory Commission
Chandrlok Building
36, Janpath
New Delhi .....Respondents

Counsel for appellant(s): Mr Sachin Datta
Ms Shaila Arora
Ms Lakshmi Ramamurthy

Counsel for respondent (s): Mr. Pradeep Misra,for Res.1,2&4
Mr. Daleep Dhayani
Mr.Manoj Kumar Sharma
Mr. Suraj Singh
Mr.B.Sreekumar, Asstt.Chief
For CERC
Mr. T.Rout, JC(Legal)

J U D G M E N T

Per Hon'ble Mr. H.L. Bajaj, Technical Member

This appeal challenges the order dated May 09, 2006 passed by the Central Electricity Regulatory Commission (CERC

or the Commission in short) in petition No. 47 of 2005 vide which the Commission has determined the generation tariff in respect of Uri Hydro Electric Project for the period from April 01, 2004 to March 31, 2009. The facts of the case are given below in brief:

1. CERC had vide its orders dated March 10, 2005 in Petition No. 61 of 2001 approved the generation tariff of URI HE Project for the period April 01, 2001 to March 31, 2004 based on the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 notified by the Commission on March 26, 2001.

2. CERC in exercise of powers conferred under Section 178 of The Electricity Act, 2003 and all other powers enabling in this behalf, issued the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2004 on March 26, 2004 which were effective for a period of 5 years w.e.f. April 01, 2004.

3. The appellant filed Tariff Petition of URI Generating Station for the period 2004-09 on May 10, 2005 by annexing the following documents to its Petition.

i) Duly filled in Forms 1 to 18 as prescribed in the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2004 notified on March 26, 2004

ii) Details of calculation of primary energy rate for the Financial Year 2004-05 and 2005-06

iii) Copy of M-series Loan Agreement

iv) Audited balance sheet and profit and loss account of the URI HE Project for the Financial Years. 2001-02, 2002-03 and 2003-04

v) Annual Report of NHPC for Financial Years 2001-02, 2002,-03 and 2003-04

vi) Copies of N-series, Bank of Maharashtra, Dena Bank and SBI, WCDL loan documents.

4. CERC issued the Tariff Order on May 09, 2006. Aggrieved by this order of the Commission the appellant has filed the present appeal.

The appellant has sought the following relief:

1. Allow the present appeal against the order dated May 09, 2006 passed by the Central Electricity Regulatory Commission in Petition No. 47/ 2005 and allow the Annual Fixed Charges as given in this appeal.

2. Direct the Commission that Tariff be determined in respect of URI Hydro Electric Project on the applicable norms and parameters as set out in the CERC (Terms & Conditions of Tariff) Regulations, 2004.

2. Mr. Sachin Datta learned counsel appearing for the appellant contended that the linkage sought to be drawn between depreciation and repayment of loan and the conclusion reached by the CERC in the impugned order to the effect that

"when depreciation recovered in a year is more than the amount of repayment during that year, the entire amount of depreciation is to be considered as repayment of loan for tariff computation" is in contravention of Regulation 38(i)(f) of the Tariff Regulations. He averred that the Commission itself in its order dated May 09, 2006 in Petition No. 197 of 2004 noticed this but notwithstanding the same, the Commission reached this conclusion through an interpretative process, purportedly taking into account "equitable considerations" and for the purpose of preventing any "manipulation" by the central power sector utilities. Learned counsel contended that while carrying out this interpretative exercise, the Commission has ignored that in the case of NHPC Projects, including the Uri HE Project case in the present appeal, the cumulative repayment upto any particular year has always been far in excess of cumulative depreciation (including advance against depreciation) upto the said year. He stated that this aspect had been duly pleaded before the Commission and that the appellant is seriously aggrieved with the observations made by the Commission to the effect that the

beneficiaries will be put to hardship if the excess amount of depreciation is not accounted as repayment of loans. He submitted that the Commission has not at all considered the facts and circumstances surrounding the loan repayment by NHPC in respect of the project in question. From the actual loan repayment details of the project in the past, it is evident that NHPC has been making loan repayments over and above the amount of depreciation plus the Advance Against Depreciation (AAD). As a result of such repayment schedule of NHPC, it has not only borne considerable hardships in the initial years of the project, the same has also resulted in considerable benefit for the beneficiaries in terms of lower interest charges/AAD for subsequent years. Because of pre-payment of loans, depreciation amount exceeded the actual repayment in the subsequent years. Mr. Datta stated that contention of the Commission that: "if the excess amount of depreciation is not taken as deemed repayment of loan for the subsequent years, the beneficiaries will be put to hardship" is utterly paradoxical and devoid of merit. He submitted that the Commission has not

even noticed, let alone deal with the actual record of NHPC regarding early repayment of loans. NHPC is aggrieved because it has virtually faced "double jeopardy": while in the first instance bearing financial hardships in making loan repayments over and above the depreciation amount plus AAD and later when it got to a situation where the depreciation is exceeding the actual repayment, CERC has assessed the situation as resulting in financial hardships to the beneficiary states.

3. Learned counsel submitted that the Commission, in the impugned order, has discriminated against NHPC by ignoring the hardships faced by NHPC Projects in the initial years during which period, as mentioned above, there are several instances of over repayment as a result of which considerable advantage was derived by the beneficiaries. While the Commission has expressed its concern about the potential hardships to beneficiaries in a situation where depreciation exceeds the actual repayment, it has not sought to redress or even address the hardships caused to NHPC as a result of excess repayments

during the initial periods. On the contrary, the NHPC is being made to suffer further and bear further financial hardships. He contended that the Commission has gone contrary to its own observations at para 21 of the impugned order in Petition No. 197/2004 to the effect that the 2004 regulations were based on equitable considerations. In fact, the Commission has rendered the 2004 regulations more inequitable by the above mentioned process of interpretation. He submitted that any interpretative exercise based on equitable considerations must take into account all facts of the case.

4. Mr. Datta contended that the Commission has ignored the fact that replacement of the costlier GOI loan having interest rate ranging from 15% to 17% p.a. with the significantly cheaper M-Series loans Bonds having interest rate of 9.55% p.a. took much prior to the date of framing of the relevant regulations and, therefore, there was no possibility of any manipulation by NHPC at all. Therefore, the observations of the Commission at para 21 of the order in Petition No. 197/2004 to the effect that

the contrary interpretation "may afford opportunity to the central power sector utilities for maneuvering their affairs in such a manner that they contract loans in such a manner that loan repayments, however small in amount, always remain outstanding", is not grounded in reality. It is a matter of record that the project in question started commercial operation from June 1997 and its financial package was approved much before these years and there is no scope for manipulation in the loan tie-up in the later years. In view of this there is no possibility of any manipulation by the appellant. This aspect has also been altogether disregarded by the CERC, lamented the learned counsel.

5. Mr. Datta contended that there is an error apparent on the face of record since there is no zero repayment in any year at all. As such, on the face of it, Regulation 38 (i)(f) is not applicable. This aspect has not even been noticed, let alone dealt with by the CERC. The review order dated February 05, 2007 (which is a common order for the Salal Tanakpur and Uri Projects)

completely misses this aspect. The said order observes in the context of the Salal HE Project (which was subject matter of Review Petition No. 46 of 2006), as under:

> *"While the petitioner laid much stress on the Commission having deviated from its own Regulation in the above respect, we find that in this particular case, there is no such deviation. As per the submissions of the petitioner, there is zero loan payment during the year 2005-06. Thus, it is a case of moratorium, for which situation the Regulation clearly provides that depreciation amount for the year should be taken as the loan repayment, for the purpose of tariff. This is exactly what the Commission has actually done"*

6. He contended that in the context of Review No. 47/2006 (for the Uri Project), the Commission ignored the submissions made to the effect that there is no zero repayment in any year and cursorily held as under:

> *"20. The Commission by its order dated May 09, 2006 in Petition No. 47/2005 had approved tariff in respect of Uri Hydroelectric Project for the period 2004-05. The petitioner seeks review of the said order on the similar grounds as urged in Review Petition No. 46/2006. For the reasons discussed above, review of order dated May 09, 2006 in Petition No. 47/2005 is not maintainable. However, the petitioner shall be entitled to recover an amount of Rs. 2,00,430/- incurred on publication of notices in newspapers in Petition No. 47/2005 in keeping para 18 above."*

7. Mr. Datta submitted that the costlier GOI loans bearing interest @ 14.5% were replaced by cheaper loans i.e. M-Series Bonds with interest @ 9.55% in January, 2002 by NHPC so that the interest on loan, which is a pass through component in tariff gets reduced which is for the benefit of the consumers. This exercise was done by the NHPC when the Tariff Regulations, 2004 applicable for the period April 01, 2004 to March 31, 2009 were not framed and the appellant was unaware of the fact as to what would be the provisions of Tariff Regulations, 2004.

8. He stated that the Regulation 38 (i)(c) of CERC (Terms & Conditions of Tariff), 2004 provides that "The generating company shall make every effort to swap the loan as long as it results in net benefit to the beneficiaries. The costs associated with such swapping shall be borne by the beneficiaries. The provision of this regulation was not existing in the tariff period 2001-04 whereas by broader vision and proper planning, NHPC had already undertaken such exercise without any mandatory provision in the Tariff Regulations applicable at that time and

that the benefit of this refinancing of loans has been passed on to the beneficiaries in the tariff period April 01, 2004 to March 31, 2009 as they have paid interest on loan @ 9.55% only on M-Series bonds instead @ 15-17% on Govt. loans which would have continued in the tariff period April 01, 2004 to March 31,2009 if the refinancing of Government loans would have not been done by the NHPC. As far as the statement of the Commission in the contents of tariff order for the period 2004-05 is concerned the respondent were already aware of this at the time of processing of the tariff order for 2004-2009 and in the hearing also and have never challenged this tariff order till date on any grounds.

9. Mr. Datta stated that there is a calculation error in working out the normative repayment of loans for the year 2004-05 onwards in the impugned order as the normative repayment during the year 2004-05 as per the formula adopted by CERC at para 28(e) of the impugned order works out as Rs. 18645.63 lacs and not Rs. 19288.55 lakhs as given in the order. Similar corrections in the amount of normative repayment of loans for

the years 2005-06 onwards will apply as a consequence of the corrections in the year 2004-05.

10. Mr. Datta submitted that the following issues have been admitted by the Commission as arithmetical mistakes and it has agreed to rectify the mistakes in the order subject to the final decision of this Tribunal through written submission filed on November 26, 2007 in ATE in this appeal:

(i) Error in considering the amount of consumption of stores and spares for the year 2002-03.

(ii) Administrative expenses- compensation of land awarded by the district judge.

11. Mr. Misra, learned counsel appearing for the respondents 2 and 4 contended that the tariff is a complete package and one or two elements of the same cannot be considered in isolation unless it is shown that the generator is not getting adequate return on equity as prescribed under the Regulations. In the present case the appellant has not shown that during the period 2004-09 it has not received adequate return on equity and,

therefore, the issues raised by the appellant may not be considered in isolation as per provisions of Section 61(d) of the Act. This being a basic issue, we proceed to analyse and decide this.

Analysis and decision on Basic Issue

12. In order to advert to this basic issue we set out Section 61(d) below:

> *" 61. Tariff Regulation- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following namely;*
>
> *(a)……*
>
> *(d) Safeguarding of consumers" interest and at the same time recovery of the cost of electricity in a reasonable manner"*

13. In a cost plus regulatory regime, tariff is to be determined by the Commission as per the Regulations which set out *inter alia* various components of tariff. The generator is entitled to each component; Interest on Loan, Return on Equity, Depreciation, Interest on Working Capital etc. all have to be worked out separately. It cannot be argued that once the

generator has recovered its return on equity, it may be denied interest on loan admissible as per the Tariff Regulations. In view of this we are not able to agree with the aforementioned contention that the tariff is a complete package and the appellant cannot agitate one or two elements of the tariff if it has recovered adequate return on equity. Issues raised by the appellant may not be considered in isolation.

14. Mr. Misra contended that the appellant himself in Form No. 8 has given the period of moratorium and the date which has become effective. Form No. 13A submitted by the appellant to the Commission regarding calculation of interest on loan inter-alia gives details of actual repayment and normative repayment of loan which shows that no repayment was made during the year 2005-06 and therefore, this period was rightly held by the Commission as moratorium period.

15. Mr. Misra submitted that the issue of errors in calculation of loan amount, depreciation etc, if found prima facie incorrect

by this Tribunal, the same may be referred to the Commission for re-computation of the same.

16. Mr. Misra contended that the benefit of swapping of the loan amounting to Rs. 1378.58 lakhs which was refinanced with M-series Bonds has not been passed on to the beneficiaries and therefore the appeal should be rejected.

17. The Commission in its written submission has submitted that as regards consumption of stores and spares, the Commission has allowed Rs. 20.45 lakh as against the claim of the appellant for Rs. 56.46 lakh during the year 2002-03. The appellant is aggrieved by disallowance of Rs. 36.01 lakh. The Commission has submitted that the amount of Rs. 36.01 lakh under the head "Consumption of Stores and Spares" was considered and decided to be allowed by the Commission. However, the amount was left out inadvertently while passing the order dated February 05, 2007 in Review Petition No. 47/2006 and that the Commission will take necessary action to

rectify the arithmetical mistake in the order subject to the final decision of the Tribunal in this appeal.

18. The Commission has further submitted that as regards the administrative expenses, the appellant is aggrieved on account of disallowance of expenses towards compensation for land acquisition amounting to Rs. 3.45 lakh in terms of the Award passed by the Learned District Judge. It is submitted by the Commission that while considering the Review Petition No. 47/2006, the Commission had decided to allow the administrative expenses for payment for compensation of Land under the head "O&M expenses". However, the same was inadvertently left out while passing the order dated February 05, 2007 in the said Review Petition. The Commission will take necessary action to rectify the arithmetical mistake in the order subject to the final decision of the Tribunal in this appeal.

Analysis and decision

19. The appeal lies in a narrow compass. The appellant is aggrieved by the order of the Commission whereby the year 2005-06 for Uri Project has been considered as an year of zero loan payment and therefore, the Commission has considered it as a case of moratorium. In view of this the Commission, considering its Regulations, has considered that depreciation amount for the year should be taken as the loan repayment for the purpose of tariff. However, factually in the case of Uri Project even during the year 2005-06 a repayment of Rs. 14408.49 lakh has been made by the appellant as evidenced in Form 13A submitted by the appellant to the Commission. Hence the year 2005-06 cannot be treated as a year of Moratorium. Nor can the depreciation amount be taken as loan repayment.

20. We also note that the benefit of refinancing of loan has been passed on to the beneficiaries in the tariff period April 01, 2004 to March 31,2009 as the interest on loan is @ 9.55% M-

Series Bonds instead of 15-17% interest rate on Government loans which would have continued during this tariff period if the refinancing of Government loan was not done by the appellant.

21. The Commission in the impugned order has stated that Government loan amounting to Rs. 29847.46 lakhs has been refinanced with M-Series Bonds and WMB loan has been refinanced with Bank of Maharashtra N-Series Bonds and WCDL and that as this refinancing has been found to be beneficial to the beneficiaries, the effect of refinancing has been considered notionally in 2001-04 tariff period to arrive at the cumulative repayment as on March 31, 2004 and cumulative depreciation/AAD. However, the actual tariff for the period 2001-04 has not been re-determined. Respondents have pointed out that this is not equitable. However, that the order for 2001-04 was not challenged by the respondents.

22. In view of the foregoing analysis we allow the appeal and direct the Commission to re-determine the tariff of the appellant

for Uri Power Station in the light of the observations in para 21 above correcting the errors and omissions conceded by the Commission in its written submissions.

23. No order as to costs.

24. Pronounced in the open court on 28th day of August, 2009.

(H.L. Bajaj)
Technical Member

(Mrs. Justice Manju Goel)
Judicial Member

No. of corrections
GB