

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 106/2011

**Coram: Dr. Pramod Deo, Chairperson
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member**

Date of Hearing: 28.6.2011

Date of Order: 21.10.2011

IN THE MATTER OF

Miscellaneous petition for reimbursement of water usage charges for generation of electricity and levy of license fee by the State of J&K under the Jammu & Kashmir Water Resources (Regulation and Management) Act, 2010 enacted by the State of J&K.

AND

IN THE MATTER OF

NHPC Ltd, Faridabad

.....Petitioner

Vs

1. Punjab State Power Corporation Ltd, Patiala
2. Haryana Power Generation Corporation Ltd., Panchkula
3. BSES-Rajdhani Power Ltd., New Delhi
4. Uttar Pradesh Power Corporation Ltd, Lucknow
5. BSES-Yamuna Power Ltd., New Delhi
6. Rajasthan Rajya Vidyut Prasaran Nigam Ltd., Jaipur
7. North Delhi Power Ltd., Delhi
8. Uttaranchal Power Corporation of Ltd., Dehradun
9. Jaipur Vidyut Vitaran Nigam Ltd., Jaipur.
10. Himachal Pradesh State Electricity Board, Shimla
11. Jodhpur Vidyut Vitaran Nigam Ltd., Jodhpur
12. Engineering Department, UT Secretariat, Chandigarh
13. Ajmer Vidyut Vitaran Nigam Ltd., Ajmer
14. Power Development Department, Govt of J&K, Jammu

....Respondents

The following were present:

1. Shri Amit Kumar, Advocate, NHPC
2. Shri R.Raina, NHPC
3. Shri Md. Faruque, NHPC
4. Shri S.K.Meena, NHPC
5. Shri Amrik Singh, NHPC

ORDER

The petitioner, NHPC Ltd, has filed this petition for reimbursement of water usage charges and licence fee levied by the State Water Resources Regulatory Authority, Jammu under the provisions of the Jammu & Kashmir Water Resources (Regulations and Management) Act, 2010.

2. The petitioner has submitted that it is operating four hydro power stations in the State of Jammu & Kashmir, namely, Salal (690 MW), Uri (480 MW), Dulhasti (390 MW), Sewa-II (120 MW), on ownership basis with effect from November 1987, July 1997, April 2007 and July 2010 respectively. These hydro power stations have been constructed in the State of Jammu & Kashmir with the consent of the State Government and techno economic clearance by the Central Electricity Authority. The State Government of J&K, being the home state in respect of the above power generating stations is getting 12% free power as per the power sharing formula of the Central Government.

3. The petitioner has submitted that during October 2010, the State Government of Jammu & Kashmir passed the Jammu & Kashmir Water Resources (Regulation & Management) Act, 2010 (hereinafter referred to as “the J & K Act”). In terms of the said Act, water usage charges have been levied on usage of water including generation of electricity by any user and the user of electricity is required to obtain a licence. State Water Resources Regulatory Authority which has been established under Section 138

of the J & K Act has by its order dated 1.2.2010 has notified the water usage charges and has fixed the water usage charges for generation of electricity @ 0.25/cu.mtr of water valid for a period of two years. The petitioner has also submitted that the annual impact of water usage charges for the four hydro power stations works out to Rs.545.94 crore upto annual design only (Salal:Rs.331.32 crores; Uri: Rs.109.95 crores; Dulhasti: Rs.95.35 crores and SEWA II: Rs.9.33 crores). The petitioner has further submitted that a licence is required to be obtained from the Government of Jammu & Kashmir for which a licence fee of Rs.5 lakh is to be paid for each hydro power stations.

4. The petitioner has submitted that the matter has also been brought to the notice of the beneficiaries in the meeting of Northern Regional Power Committee held on 24.12.2010 and 28.2.2011 and to the notice of Government of India, Ministry of Power vide its letter dated 17.2.2011. The petitioner has submitted that the expenditure on water usage charges and licence fees on actual basis be allowed to be reimbursed by the beneficiaries of each of the hydro power stations in proportion to their annual capacity charges.

5. Reply to the petition has been filed by Uttar Pradesh Power Corporation Limited, the respondent No.4 in the petition. The respondent has submitted that the water usage charge imposed under the J & K Act is inherently embedded in the Water Royalty included in 12 % free power being received by the State Government of J&K from each of the hydro generating stations of the petitioner. Hence, charging of water usage charge separately would mean double charging for the said commodity which is not legally permissible. The respondent has submitted that the petitioner has not applied due diligence in the matter and has tried to mechanically pass over the burden

of water charges on the beneficiaries. The respondent has submitted that the petitioner should have taken legal recourse in the matter. As regards the licence fee, the respondent has submitted that it is in the nature of eligibility fee which has to be paid by the licensee for the privilege of being licensed i.e. to acquire the qualifying right of a licensee. The respondent has requested to disallow the billing and reimbursement of licence fee by the petitioner from the beneficiaries of Salal HEP, Uri HEP, Dulhasti HEP and Sewa II HEP.

6. The petitioner in its rejoinder has submitted that NHPC has already filed a Writ petition vide OWP No.604/2011 in the High Court of Jammu & Kashmir challenging the vires of the Jammu & Kashmir Water Resources (Regulation & Management) Act, 2010. The Hon'ble High Court in its order dated 4.5.2011 has directed the petitioner to apply for licence and deposit the water usage charge raised by the State Water Resources Regulatory Authority. The High Court has directed the State Water Resources Regulatory Authority to keep the amount collected from the petitioner on account of water usage charges in a separate account subject to the outcome of the writ petition. The petitioner has further submitted that this does not bar the petitioner to approach the Commission for in-principle approval of reimbursement of licence fee and water usage charges. The petitioner has also submitted that as per the Power Purchase Agreement between the petitioner and the beneficiaries of its hydro power plants in J & K, the beneficiaries shall be liable to pay to NHPC in accordance with any law in force all payments made or payable by it on account of taxes, duties, cess, levy, fees or other impositions etc. to be levied in future as a new tax, by the government or other authority in respect of generation, transmission and supply of

energy including activities incidental and ancillary thereto as per the orders of the Commission.

7. The Commission had directed the petitioner in the Record of Proceeding for the hearing held on 19.5.2011 to cite the provision of the regulations under which the petitioner is seeking recovery/reimbursement of the water usage charges. The petitioner in its affidavit dated 21.6.2011 has submitted that hydro power plants have historically no fuel cost on account of water usage for power generation and as such there was no requirement of variable cost for hydro generations. By enactment of the J & K Act, the Government of J & K has imposed usage charges on water for hydro generation for the first time. This being a new development after notification of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter "2009 regulations"), the said regulations do not include any provision on the input cost of water for hydro generating stations. However, in case of thermal power stations, there is provision of recovery of such expenses on fuel cost in 2009 regulations. Moreover, in the tariff petitions filed by the petitioner in respect of its hydro power stations including those in J & K, the O & M expenses claimed/allowed do not include any expenses on account of water usage charges as levied by the Government of J & K. The petitioner has further submitted that the estimated impact of the water usage charges would be of the order of ₹564 crore per annum. The petitioner has also submitted that being a newly introduced variable charge for hydro generation and in the absence of any specific provision for fuel cost of hydro generation, reimbursement of water usage charge is being claimed as relief under Regulation 44 of 2009 regulations dealing with "power to relax" and Regulation 115 of Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 dealing with "power to remove difficulties". The petitioner has prayed that the actual

bills raised by the State Water Resources Regulatory Authority of Jammu & Kashmir be allowed as reimbursement under Regulation 44 of 2009 regulations treating it as a special case. The petitioner has also submitted that water usage charges may be allowed to be billed on the basis of the demand raised by concerned authority and shall be recoverable on the basis of the saleable share allocation of the concerned beneficiary in the total saleable capacity of the generating station.

8. The Commission in the Record of proceedings of the hearing on 28.6.2011 had directed the petitioner to submit the following information:

(a) Copy of the order dated 4.5.2011 of the High Court of J&K in the writ petition filed by the petitioner;

(b) Copy of the bill received from the J&K Water Resource Regulatory Authority; and

(c) Calculation of water usage in respect of the four generating stations situated in the State of J&K.

9. The petitioner vide its affidavit dated 2.8.2011 has placed on record a copy of the order of the High Court dated 4.5.2011, copy of the bills received from the State Water Resources Regulatory Authority of Jammu & Kashmir in respect of four of its generating stations, and detailed calculation of water usage charges.

10. We have heard the representative of the petitioner and perused the documents on record. The petitioner has approached the Commission for reimbursement of water usage charges and the licence fee which have been introduced by the Government of Jammu & Kashmir through a state legislation. The State of Jammu & Kashmir has enacted the Jammu & Kashmir Water Resources (Regulations and Management) Act, 2010 in October 2010. Section 2 (zz) of the J & K Act defines 'water' as natural

resource flowing in any river, stream, tributary, canal, nallah or any other natural course of water or situated upon the surface of any land like lake, running of water mills, agriculture, or any other purpose from any source of water”. Section 2 (zx) of J & K Act defines ‘user’ as “any person, group of persons, local body, Government Department, board, company, corporation, society etc. using water for drinking purposes, commercial, industrial or institutional, irrigation, power generation, running of water mills, agriculture, or any other purpose from any source of water.” Section 2 (zzh) of J & K Act defines ‘water usage charge’ as the rates levied or charged for use of water and fixed under section 128. Section 139 of the J & K Act provides for the establishment of the State Water Regulatory Authority whose functions amongst others shall be to establish a water tariff system and fix water usage charges for use of water for generation of electricity. The State Water Regulatory Authority vide its order No. WRRRA/01/2011 dated 1.2.2011 has notified the water usage charges valid for two years with effect from 10.11.2010, for generation of electricity @ ₹0.25/cu mtr of water. Similarly, Section 96 of the Act provides that no person shall install a unit requiring usage of water for construction of dams on any water source unless he is authorized to do so by a license. The petitioner is required to obtain licence from the State Government and pay the licence of ₹ 5 lakh per licence. Thus in view of the above provisions in the J & K Act, the petitioner being a corporation owned by the Central Government and using the water for power generation within the State of J & K has been asked to pay the water usage charges and licence fee for its four hydro power stations.

12. UPPCL has opposed reimbursement of water usage charge imposed under the J & K Act on the ground that the same is inherently embedded in the Water Royalty

included in 12 % free power being received by the State Government from each of the hydro power stations of the petitioner and charging of water usage charge separately would mean double charging for the said commodity which is not legally permissible. We are of the view that the water usage charges and licence fee have been imposed by the State Legislature through legislation and it is not open to us to consider whether the water usage charges and licence fee levied by the State Government under the J & K Act are justified or not in view of the 12% free power received by the Government of J & K. We have noted that the petitioner has filed a writ petition, namely OWP No.604/2011 in the High Court of Jammu & Kashmir challenging the *vires* of the Jammu & Kashmir Water Resources (Regulation & Management) Act, 2010 under Article 226 of Constitution of India and section 103 of the Jammu & Kashmir Constitution. Notices on the OWP and CMP have been issued. The Hon'ble High Court in its interim order dated 04.05.2011 has directed as under:

“It is contended that the petitioner is required to file an application for grant of licence under the Act, within the stipulated period. Petitioner seeks two weeks time to file the application in this behalf. It is further contended that the petitioner is being harassed by the official respondents for non filling of application for grant of the licence. Further contention raised is that certain bills have been raised by the respondents against the petitioner.

It is directed that the petitioner shall file an application within a period of two weeks from today. No coercive measures shall be taken against the petitioner or its employees by the respondents till then. The amount raised through various bills shall be deposited with respondents, who shall maintain a separate Account in this behalf. The deposits so made shall be subject to the outcome of this writ petition. This order is subject to modification or variation on motion.”

13. It is apparent from the above that the Hon'ble High Court of J & K is seized with the matter and has directed the petitioner to deposit the amounts raised through

various bills with the J & K authority which shall be subject the outcome of the writ petition. Therefore, the petitioner has taken available legal recourse to protect the interests of the beneficiaries of the four hydro power stations. However, in compliance with the directions of the Hon'ble High Court, the petitioner is required to deposit the amount raised through the various bills by the Government of J & K. The additional expenditure on account of water usage charges and licence fee has accrued to the petitioner on account of enactment of the J & K Act. Since the tariff of the generating stations of the petitioner are determined on cost plus basis, additional expenditure which are in the nature of input cost for generation of the hydro power stations should be borne by the beneficiaries.

14. The tariff of the hydro power stations of the petitioner is governed by the provisions of 2009 regulations. The petitioner has claimed the expenditure under Regulation 44 of 2009 regulations which is extracted as under:

“44. Power to Relax: The Commission, for reasons to be recorded in writing, may relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person.”

However, we notice that the petitioner has not indicated the provision in the 2009 regulations in relaxation of which the petitioner has sought the relief. Therefore, we need to consider under which provision of the 2009 regulations, the petitioner can be granted relief.

15. The additional expenditure on account of water usage charges and licence fees has accrued on account of the enactment and coming into force the J & K Act. Regulation 3(9) of the 2009 regulations defines 'change in law' to mean occurrence of events like “the enactment, bringing into effect, adoption, promulgation, amendment,

modification or repeal of any law”. In the present case, after the 2009 regulations came into force, the J & K Act has been enacted and brought into effect. As a result of the implementation of J & K Act, the petitioner has been saddled with the additional liability of water usage charges and licence fees for using the water. The expenditure will be admissible to the petitioner under change in law. It is however noticed that the 2009 regulations provide for admissibility of expenditure on account of change in law for the purpose of additional capitalization under Regulation 9 of 2009 regulations. However, the expenditure on water usage charges is recurring in nature and is subject to revision by the State Water Resources Regulatory Authority after a period of two years. Considering the nature of expenditure, it cannot be capitalized as additional capital expenditure under Regulation 9 of 2009 regulations since no capital asset is created on account of water usage charges.

16. In cases of thermal generating stations, water charges form part of the O & M expenses under 2009 regulations. Therefore, it would be relevant to consider whether the water usage charges can be reimbursed to the petitioner as part of the O & M expenses. Regulation 19(f) of the 2009 regulations which pertains to the recovery of O&M expenses in tariff for hydro generating stations provides as under:

“(f) Hydro generating stations

(i) Operation and maintenance expenses, for the existing generating stations which have been in operation for 5 years or more in the base year of 2007-08, shall be derived on the basis of actual operation and maintenance expenses for the years 2003-04 to 2007-08, based on the audited balance sheets, excluding abnormal operation and maintenance expenses, if any, after prudence check by the Commission.

(ii) The normalised operation and maintenance expenses after prudence check, for the years 2003-04 to 2007-08, shall be escalated at the rate of 5.17% to arrive at the normalized operation and maintenance expenses at the 2007-08 price level respectively and then averaged to arrive at normalized average operation and maintenance expenses for the 2003-04 to 2007-08 at 2007-08 price level. The

average normalized operation and maintenance expenses at 2007-08 price level shall be escalated at the rate of 5.72% to arrive at the operation and maintenance expenses for year 2009-10:

Provided that operation and maintenance expenses for the year 2009-10 shall be further rationalized considering 50% increase in employee cost on account of pay revision of the employees of the Public Sector Undertakings to arrive at the permissible operation and maintenance expenses for the year 2009-10.

(iii) The operation and maintenance expenses for the year 2009-10 shall be escalated further at the rate of 5.72% per annum to arrive at permissible operation and maintenance expenses for the subsequent years of the tariff period.

(iv) In case of the hydro generating stations, which have not been in commercial operation for a period of five years as on 1.4.2009, operation and maintenance expenses shall be fixed at 2% of the original project cost (excluding cost of rehabilitation & resettlement works). Further, in such case, operation and maintenance expenses in first year of commercial operation shall be escalated @5.17% per annum up to the year 2007-08 and then averaged to arrive at the O&M expenses at 2007-08 price level. It shall be thereafter escalated @ 5.72% per annum to arrive at operation and maintenance expenses in respective year of the tariff period. The impact of pay revision on employee cost for arriving at the operation and maintenance expenses for the year 2009-10 shall be considered in accordance with the procedure given in proviso to sub-clause (ii) of clause (f) of this regulations.

(v) In case of the hydro generating stations declared under commercial operation on or after 1.4.2009, operation and maintenance expenses shall be fixed at 2% of the original project cost (excluding cost of rehabilitation & resettlement works) and shall be subject to annual escalation of 5.72% per annum for the subsequent years.”

As per the above quoted provision, the O & M expenses of the hydrogenating stations would be determined in three different ways depending on the age of the generating stations. In case of the hydro power stations covered in this petition, Salal HEP and Uri HEP being 24 years and 14 years old respectively are covered under sub-clauses (i) to (iii) above whereas Dulhasti HEP is covered under clause (iv) and SEWA II HEP is covered under clause (v) above. The O & M norms have been fixed based on the actual O & M expenses for past years with suitable escalation or as a percentage of the capital cost with suitable escalation. Since the water usage charges are recurring in nature and are subject to revision by the State Water Resources Regulatory Authority

from time to time, we are of the view that water usage charges cannot be allowed to be reimbursed as part of the O & M expenses.

17. Regulation 13(1) of 2009 regulations provides that the tariff for supply of electricity from a hydro generating station shall comprise capacity charge and energy charge to be derived in the manner specified in Regulation 22, for recovery of annual fixed cost (consisting of the components referred to in Regulation 14) through the two charges. Thus, in case of hydro generating station, annual fixed cost is recovered through capacity charge and energy charge whereas in case of thermal generating stations, capacity charge is used for recovery of annual fixed cost and energy charge is used for recovery of primary fuel cost. Since water usage charge has become a basic input cost, this can be charged in the form of additional energy charge and passed on to the beneficiaries as variable cost as is the case with primary fuel cost in respect of thermal generating station. In order to reimburse the water usage charges as additional energy charge, the provisions of Regulations 13, 14 and 22 of 2009 regulations need to be suitably amended.

18. Next we consider the prayer of the petitioner for reimbursement of licence fee levied by the Government of Jammu & Kashmir under the J & K Act. The generating stations under the Electricity Act, 2003 are not licensees and therefore are not required to pay the licence fee to be in the business of generation. In the present case the petitioner is required to obtain a licence and pay the licence fee for acquiring the right to use water for the purpose of generation. UPPCL has submitted that licence fee imposed on the petitioner is in the nature of eligibility fee for acquiring the qualifying right of a licensee and therefore, should not be reimbursed. We are not in agreement

with the submission of UPPCL. Under the provisions of the J & K Act, it is mandatory for any user to obtain a licence for use of water and to pay licence fee therefor. Without obtaining a licence, the petitioner would not be able to use water of the State of J & K and generate electricity to supply to the beneficiaries to meet its contractual obligations under the PPAs. In our view, licence fee paid by the petitioner to the Government of J & K in respect of the four generating stations needs to be reimbursed.

19. The question now arises under which provision of 2009 regulations, licence fees can be reimbursed to the petitioner. Regulation 42 of 2009 regulations provides for reimbursement of filing fees and publication expenses at the discretion of the Commission. Clearly, it does not cover reimbursement of licence fees. In order to give effect to our decision to reimburse the licence fee, there is a requirement to make suitable provision in the 2009 regulations.

20. In view of our decision to reimburse the water usage charges and licence fees, we direct the staff of the Commission to move appropriate amendment to the 2009 regulations. The petitioner is pursuing the matter in the Hon'ble High Court of Jammu & Kashmir. The petitioner is directed to keep the Commission and the beneficiaries apprised about the development of the court case.

21. Subject to amendment of the 2009 regulations, the petitioner shall be entitled for reimbursement of expenditure on water usage charges and licence fee from the beneficiaries. In the event the petitioner succeeds in the writ petition, the water usage

charges and the licence fees shall be refunded to the beneficiaries.

22. Petition No.106/2011 is disposed of in terms of the above.

Sd/-
(M. DEENA DAYALAN)
MEMBER

Sd/-
(V.S.VERMA)
MEMBER

Sd/-
(DR.PRAMOD DEO)
CHAIRPERSON