

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Petition no. 04 of 2008 dated 10.12.2008 filed by Uttarakhand Jal Vidyut Nigam Limited, UJJWAL, Maharani Bagh, GMS Road, Dehradun.

.....Petitioner

And

Himachal Pradesh State Electricity Board

Through-Chief Engineer (Comm),

HPSEB, Vidyut Bhawan,

Shimla - 171004

.....Respondent

And

In the matter of:

Determination of Hydro Generation Tariff for supply of electricity to Himachal Pradesh State Electricity Board from Chibro, Khodri, Kulhal, Dhakrani and Dhalipur generating stations of UJVNL for the financial years 2004-05 to 2008-09 under Section 62, 64 and 86 of the Electricity Act, 2003 read with relevant Regulations and guidelines of the Commission.

Coram

Shri V.J. Talwar

Chairman

Shri Anand Kumar

Member

Date of Order: 28.08.2009

ORDER

This Petition has been filed by Uttarakhand Jal Vidyut Nigam Limited (UJVNL) (hereinafter referred to as "Petitioner") under section 62, 64 and 86 of the Electricity Act, 2003 (hereinafter referred to as "Act") read with relevant regulations and guidelines of the Commission for determination of tariff for supply of electricity to Himachal Pradesh State Electricity Board from Chibro, Khodri, Kulhal, Dhakrani

and Dhalipur generating stations of UJVNL for the financial years 2004-05 to 2008-09.

1 Background and Procedural History

- 1.1. The Petitioner Company was incorporated on 12.02.2001 pursuant to the provisions of the Companies Act, 1956. The Government of India (GoI) vide its order dated November 5, 2001 transferred all the hydropower generating assets located in the State of Uttarakhand to UJVNL, with effect from November 9, 2001 (hereinafter referred to as "the GoI Order"). The said GoI Order also defines the basis for the division of assets & liabilities between Uttar Pradesh Jal Vidyut Nigam Limited (UPJVNL) and the Petitioner, UJVNL.
- 1.2. The Electricity Act, 2003 which became effective from 10.06.2003, transferred the functions of determination of generation tariff from the State Government to the Commission.
- 1.3. The Commission notified its Uttarakhand Electricity Regulatory Commission (Terms and Conditions for Determination of Hydro Generation Tariff) Regulations, 2004 (hereinafter referred to as Regulations) specifying the terms and condition for determination of tariff for all the hydro generating stations of capacity more than 25 MW in the State of Uttarakhand.
- 1.4. The Petitioner filed a Petition dated 15.09.2004 with the Commission for fixation of tariff in respect of the completed units of its generating stations for 2004-05, on which the Commission issued its orders on December 16, 2004. Aggrieved by certain aspects of the said order, the Petitioner filed a writ petition in the Hon'ble High Court of Uttarakhand. The Hon'ble High Court had stayed the operation of the tariff order for FY 2004-05 subject to certain terms and conditions contained in interim orders dated March 23, 2005 and April 29, 2005 (hereinafter collectively referred to as "the said High Court Order").
- 1.5. As per the agreement dated 21.11.1972 between the Government of Himachal Pradesh (GoHP) and Government of Uttar Pradesh (GoUP), the Petitioner being successor of UPSEB was required to supply electricity to Himachal Pradesh State Electricity Board (HPSEB) at cost of generation at

bus bar as specified in the agreement from its five Generating Stations comprising Yamuna Scheme as follows:

Generating Station	HPSEB's Share in Generation
Chibro	25%
Dhakrani	25%
Dhalipur	25%
Khodri	25%
Kulhal	20%

- 1.6. The Petitioner had also filed the petition with the Hon'ble Central Electricity Regulatory Commission (CERC) for admitting the tariff Petition of the Petitioner for financial years 2005-06 to 2008-09. The Hon'ble CERC vide its order dated 29.03.2006 disposed off the above referred petition and directed that the approval of generation tariff of five hydro generating stations owned and operated by UJVNL does not come under the jurisdiction of the CERC.
- 1.7. The Petitioner had also filed five petitions before Himachal Pradesh Electricity Regulatory Commission (HPERC) for determination of Tariff for Supply of Electricity to HPSEB for Himachal Pradesh's share from five Hydro Generating Stations for the financial years 2004-05 under provisions of section 62, 64 & 86 of the Electricity Act 2003 on 12.10.2004.
- 1.8. HPERC issued an Interim order on the above referred petitions of UJVNL on 25.05.2005 where the Commission directed that without any prejudice to the proceedings before the Commission and the order dated 29.04.2005 of Hon'ble High Court of Uttaranchal, UJVNL was provisionally allowed to bill HPSEB at the rate of 37 paise/unit till the final decision. The Commission also held that it would pass the final order on the UJVNL's petitions, after the Hon'ble High Court of Uttaranchal disposed off the writ petition filed by UJVNL against the UERC tariff order and UJVNL would inform the Commission of the same.
- 1.9. Subsequently, HPERC passed another order dated 03.10.2005 stating that the provisional rate of 37 paise/unit as determined in the order dated 25.05.2005 shall be applicable from 16.12.2004 until final decision of the case.
- 1.10. UJVNL filed a Petition in the matter of dispute between UJVNL & HPSEB relating to payment of arrears towards energy supplies @ 35 paise/kWh

- w.e.f. 01.04.2004 to 15.12.2004 in line with HPERC's order on ARR of HPSEB for the financial year 2004-05.
- 1.11. HPERC in its order dated 17.06.2006 stated that the Petition moved by UJVNL was allowed and ordered HPSEB to release payment of Rs.1,32,52,395/- to the Petitioner being the arrear amount on the basis of 35 paise/per unit tariff for the period from 01.4.2004 to 15.12.2004 in line with the tariff order of HPERC for the financial year 2004-05, on the undertaking to be given by the UJVNL that it will pay the difference of the amount, if any, which would be payable on the determination of tariff in relation to the hydro-generating stations at Dhakrani, Dhalipur, Chibro, Khodri and Kulhal.
- 1.12. UJVNL had also submitted five petitions before HPERC for determination of Tariff for inter state supply of electricity for Himachal Pradesh share from five hydro generating stations, referred to in the Table above for FY 2005-06 to FY 2008-09. The said petitions were admitted by HPERC, although later HPSEB and UPJVNL raised the question of jurisdiction of HPERC to determine the tariff of such supplies by UJVNL to HPSEB and submitted before HPERC that in this matter the jurisdiction for determination for such tariff lied with UERC. Hence, HPERC disposed of the Petitions as withdrawn.
- 1.13. Hence, the Petitioner filed the Petition on 10.12.2008 before this Commission, wherein it requested the Commission to determine the tariff for supply of electricity from its five plants comprising Yamuna Valley scheme to HPSEB for FY 2004-05 to 2008-09.
- 1.14. The Petitioner had submitted that HPERC vide its order on ARR of HPSEB dated 30.05.2008 had derived the pooled cost of power payable to UJVNL, by reducing the Return on Equity and interest charges from the total annual fixed charges approved by UERC for FY 2008-09 in FY 2008-09 by HPSEB.
- 1.15. Accordingly HPSEB, w.e.f. 01.04.2008 is making payment for energy supplies from 5 LHPs of UJVNL at the HPERC's approved pooled average rate of 34.76 paise/unit.
- 1.16. The Commission had already determined the tariff for the financial year 2004-05 to 2008-09 vide its order dated 12.07.2006, 14.03.2007 & 18.3.2008

for supply of electricity to UPCL from the 9 LHPs including the above referred five LHPs comprising Yamuna Scheme. The Commission in its tariff orders had directed that the rates determined will continue to be the approved rates for sales to UPCL till revised by the Commission.

- 1.17. The Petitioner also submitted that since the supply of electricity to HPSEB as per the agreement referred to earlier were required to be made at cost of generation at bus bar, all the elements of cost as considered and allowed by the Commission in its Tariff orders (namely, O&M expenses, interest on working capital, interest on loan, depreciation and Return on Equity) in determination of the AFC may be considered and allowed while determining the tariff for supplies to HPSEB and allow the same tariff as determined for energy sales to UPCL.
- 1.18. The Petition was admitted by the Commission on 23.12.2008 and UPCL and HPSEB were asked to submit their responses/comments on the same. HPSEB filed its response to the Petition on 12.01.2009, however, there was no response from UPCL in the matter. The Petitioner was asked to submit its comments on HPSEB's response which was filed by it on 24.02.2009. These have dealt by the Commission in the next section.

2 Response of HPSEB on the Petition and UJVNL's reply

2.1. Background

2.1.1. HPSEB's Response

HPSEB has contended that the Government of Himachal Pradesh has the right to get the specified quantum of electricity from the generation projects as per the agreement between the Government of Himachal Pradesh and the Government of Uttar Pradesh (now Uttarakhand). It has stated that HPSEB has been designated by the Government of Himachal Pradesh to deal with the above including to take delivery of the electricity, pay charges etc. and it is filing this reply in this capacity. The charges for the electricity supplied to Himachal Pradesh from the above generating stations were to be determined in accordance with the agreement entered into between the Governments of Himachal Pradesh and Uttar Pradesh whereby the Government of Himachal Pradesh was entitled to get electricity generated from the above generating stations at cost in consideration of providing

uninterrupted supply of water in the rivers emanating from the State of Himachal Pradesh into Uttar Pradesh.

It further stated that UJVNL had earlier filed petitions for determination of tariff for nine of its generation stations before this Commission for the year 2004-05 which was determined by this Commission vide order dated 16.12.2004. Aggrieved by the above order, UJVNL preferred an appeal before the Hon'ble High Court of Uttarakhand. The High Court stayed the order of this Commission and allowed an interim generation rate of 37 paise per kWh pending the disposal of the appeal. Subsequent to the above, UJVNL approached the Himachal Pradesh Electricity Regulatory Commission (hereinafter called the 'HPERC') for determination of tariff for the five generating stations for the tariff year 2004-05. HPERC vide its Order dated 25.5.2005 allowed UJVNL to bill HPSEB at the provisional rate of 37 paise/unit till the final decision which would be issued by the Commission after the Hon'ble High Court of Uttarakhand had disposed off the writ petition filed by UJVNL against the UERC Tariff Order. The appeal filed by UJVNL before the Hon'ble High Court was subsequently transferred to the Hon'ble Appellate Tribunal for Electricity which was disposed by the Hon'ble Tribunal vide its order dated 14.9.2006 and the matter was remanded to UERC. In accordance with the directions of the Hon'ble Tribunal, UERC vide order dated 14.3.2007 revised the tariff of the generating stations of UJVNL by revising the return on equity, terminal benefits, depreciation and the O&M expenses allowable.

HPSEB pointed out that it has been paying the tariff at the rate of 37 paise per kWh for the period from 16.12.2004 to 31.3.2008. The actual tariff in accordance with the tariff approved by UERC for the said period is much less than the tariff as paid by HPSEB to UJVNL, which is required to be refunded by UJVNL to HPSEB with carrying cost.

2.1.2. UJVNL's Reply

UJVNL submitted that the Commission in its various tariff orders had directed that the rates determined in the tariff order would continue to be the approved rates for sales to UPCL till revised by the Commission. The Commission has not determined the rates for supply of Electricity to HPSEB in the earlier tariff orders passed.

It further stated that the Commission went into appeal before Hon'ble Supreme Court of India against the order dated 14/09/06 passed by Hon'ble ATE. Thereafter owing to meeting between the Commission, Government of Uttarakhand and UJVNL the appeal was withdrawn and the tariff was revised. In view of the above noted facts the contention of HPSEB is factually wrong and hence vehemently denied.

It is to be further submitted that based on the above sequence of events and facts the averments of HPSEB demanding the refund of excessive tariff is completely untenable. Besides this HPSEB is trying to re-open the matter which is not legally possible because these orders were passed by Hon'ble HPERC which is a different Commission and this matter of supply to HPSEB is being brought first time before this Hon'ble Commission. Therefore, there is no force either legally or factual in this contention of HPSEB.

2.2. Affidavit filed in CERC

2.2.1. HPSEB's Response

In the proceedings before the Central Electricity Regulatory Commission, UJVNL had filed an affidavit submitting that the generation of five stations in the Yamuna Valley was shared between HPSEB and Uttaranchal Power Corporation Ltd. in accordance with the agreement between the Governments of Himachal Pradesh and Uttar Pradesh to the extent specified in the agreement at costs, i.e. excluding returns (excluding cost of servicing debt, return on equity and taxes). Hence, the electricity supplied to HPSEB is at a lower rate than that for UPCL.

2.2.2. UJVNL's Reply

The Petitioner has stated that the averment of UJVNL in the affidavit before the CERC can not be resorted to by HPSEB to derive benefit since the tariff can not be determined solely on the basis of affidavit or any conjecture concession which is against the law. The Petitioner further re-asserted that the said para in the aforesaid affidavit before the CERC has been quoted out of context. No concession or satisfaction was expressed therein. Right of UJVNL to determine appropriate tariff is not scuttled or curtailed by aforesaid affidavit. UJVNL has not waived its right which is provided by law to have cost based tariff. According to the Regulations framed by the Commission, the RoE, depreciation including advance against depreciation and Interest

components are included in the determination of tariff and the same are treated as components of cost. Thus, the contention of HPSEB is, therefore, against the Regulations which have the force of law and, therefore, same are legally untenable.

The Petitioner also referred to clause (3) of the agreement dated 21.11.72 between the Government of Himachal Pradesh and the Government of Uttar Pradesh which stipulated that the share of power of HP would be made available to HP at the bus bars against payment at the cost of generation. Thus, as per the above referred clause contained in the agreement the cost of generation to be paid by Himachal Pradesh shall be pooled cost of generation at the bus-bars. The Petitioner also submitted that interest on loans, interest on working capital, depreciation and Return on Equity which is provided on normative basis as per the applicable Regulations are required to be included for determining the cost of generation since without considering these costs the tariff to be determined would be adversely affected thereby affecting the maintenance and correspondingly the generation of the plants.

The Petitioner also referred to clause 5(A) of the above referred agreement which provided that HP shall not share the capital cost of the said scheme. The Petitioner submitted that though the agreement specifically provided that HP would not share the capital cost of the said scheme it did not specify the carrying cost of capital of the said scheme which included interest, Return on Equity and depreciation. In view of the above submissions, the Petitioner requested that while determining the tariff for supply of electricity to HPSEB the cost element of interest, depreciation and RoE may also be considered and allowed.

2.3. Tariff chargeable from HPSEB

2.3.1. HPSEB's Response

In continuation with its submission made above, HPSEB submitted that UJVNL is required to charge only the actual cost of generation excluding the cost of debt servicing, return on equity and the taxes payable from HPSEB. As per the above, excess payment which was the difference between the payments actually made by the HPSEB to UJVNL and the amount payable by HPSEB in accordance with the tariff determined by UERC of Rs. 10.23 Crore was due to be refundable by UJVNL to HPSEB in accordance with the

undertaking given by UJVNL required in HPERC's order dated 17.06.2006. HPSEB has enclosed a calculation of this amount, based on the difference between 37 p/u paid by them and rate worked out by them for different years by excluding the above mentioned components of AFC.

2.3.2. UJVNL's Reply

UJVNL submitted that since Electricity Act 2003 came into force, the powers of determination of tariff are vested with the appropriate Commission as provided in Sec 62(1) of the Act. Accordingly, the Petitioner filed the Petition before the Commission for determination of tariff for energy sales to HPSEB. Till the time such tariff is determined the question of any loss to HPSEB does not arise. HPSEB has unilaterally and without jurisdiction worked out the tariff for energy supplied by UJVNL to HPSEB which was in contravention to statutes and applicable Regulations hence the issue was not be liable to considered. UJVNL further submitted that till the tariff is determined by the Commission the question of refund, if any, does not arise. In view of the above, UJVNL submitted that the supposed excess amount paid by HPSEB to UJVNL may vary and, thus, is vehemently denied.

Further, it submitted that the said undertaking cannot be stretched and unduly extended to justify and legitimize the claims of HPSEB which are against the law and militate against the regime of Regulations.

2.4. Jurisdiction of HPERC

2.4.1. HPSEB's Response

UJVNL also filed a tariff petition before the HPERC for determination of the generation tariff for supply to HPSEB from the generating stations at Dhakrani, Dhalipur, Chibro, Khodri and Kulhal for the financial years 2005-06 to 2008-09. Subsequently, the same were withdrawn by UJVNL. However, the tariff petition for the year 2004-05 filed by UJVNL before the HPERC is still pending before the HPERC. HPERC had issued a notice dated 22.10.2008 for issuance of final order on the application filed by UJVNL for determination of generation tariffs for the five generating stations for the year 2004-05. The matter is still pending before HPERC.

2.4.2. UJVNL's Reply

The Petitioner submitted that full facts had not been disclosed by HPSEB. It submitted that during the pendency of the tariff petition filed by

UJVNL for the year 2004-05, UJVNL filed another petition for the tariff determination for the years 2005-06 to 2008-09. In response to that petition, HPSEB in its reply asserted that HPERC did not have the jurisdiction for determination of tariff for the supply by UJVNL to HPSEB. It was also asserted by HPSEB that the Uttarakhand Commission was vested with this jurisdiction. UJVNL also submitted that it was an admitted fact that Hon'ble CERC had declined to determine the said tariff. Keeping in view these facts, averment and the position of law as mandated by Electricity Act 2003, UJVNL after due consideration in its rejoinder reply consented with HPSEB that HPERC did not have jurisdiction for determination of tariff for the supply made to the HPSEB. Accordingly, HPERC allowed UJVNL to withdraw the petition for the years 2005-06 to 2008-09 and to file it before the appropriate Commission. Thereafter UJVNL filed this petition for the years 2004-05 to 2008-09 before UERC and slated to file application for the withdrawal of the petition for 2004-05 before HPERC. It is, therefore, legitimately expected, in view of above facts and circumstances as well as order of HPERC for tariff withdrawal for the year 2005-06 to 2008-09 that jurisdiction now stands vested with this Commission and final order, if any, would be passed by this Commission.

2.5. Issue sub-judice before the Hon'ble Appellate Tribunal

2.5.1. HPSEB's Response

HPERC has, in the Multi Year tariff order for the first part of the control period 2008-09 to 2010-11, taken the pooled cost of power payable by HPSEB to UJVNL on the basis of the UERC's approved tariff for the financial year 2008-09 and determined the pooled cost of generation at 34.76 paise for the year 2008-09. In the said calculation, the HPERC has also considered the component of depreciation, which cannot be included as in terms of the agreement entered into between the Governments of Himachal Pradesh and Uttar Pradesh, Himachal Pradesh is not required to share the capital cost of the plant. Thus, aggrieved by the inclusion of depreciation in the pooled cost of generation payable to UJVNL, HPSEB has preferred an appeal before the Hon'ble Appellate Tribunal for Electricity, which is pending before the Hon'ble Tribunal.

In view of the above proceedings pending before the HPERC and also

the Hon'ble Appellate Tribunal for Electricity, which would have an impact in the present proceedings, HPSEB submitted that the present proceedings may not be disposed of by the Commission pending the proceedings before the HPERC regarding the tariff for 2004-05 and the excess payment made by HPSEB since 2004-05 and also the proceedings before the Hon'ble Tribunal regarding the challenge to the inclusion of depreciation cost of UJVNL in the pooled generation cost for purchase of HPSEB, which is contrary to the agreement between the Governments of Himachal Pradesh and Uttar Pradesh.

HPSEB further submitted that, without prejudice to the above, in any event the tariff to be determined for UJVNL in regard to the sale of power by UJVNL be decided component wise, separately showing the admissible O&M expenses and other operating costs, namely, only those cost excluding returns, cost of servicing debt, depreciation, taxes etc. so as to enable the decision on the cost payable by the Government of Himachal Pradesh to its share of power from the above projects.

2.5.2. UJVNL's Reply

UJVNL has contended that HPERC had allowed UJVNL to withdraw its petition for the F.Y 2005-06 to 2008-09 with the liberty to file them before the appropriate Commission. Had the HPERC considered itself the appropriate Commission, the petition would not have been allowed to be withdrawn. UJVNL submitted that it proposes to plead before the HPERC to treat the petition for the F.Y 2004-05 similar to those for the FYs 2005-06 to 2008-09 and be allowed to be withdrawn.

The Petitioner further submitted that in view of all the above, the submissions of the respondent (HPSEB) are not worthy of consideration and the Commission may determine the tariff for power supplies to HPSEB as requested in the petition.

3 Commission's Analysis

3. Having dealt with the Petition and HPSEB's comments and Petitioner's response on the comments of HPSEB, the issues relevant in the proceedings would be discussed by the Commission in the following Paras.

3.1. Issue sub-judice before the Hon'ble Appellate Tribunal

- 3.1.1. HPSEB has preferred an appeal before the Hon'ble Appellate Tribunal for Electricity against HPERC's tariff order for the period 2008-09 to 2010-11. HPERC has taken the pooled cost of power payable by HPSEB to UJVNL on the basis of the UERC's approved tariff for the financial year 2008-09 and determined the pooled cost of generation after inclusion of the component of depreciation. The said appeal is pending before the Hon'ble Tribunal. In light of the same HPSEB requested that since the appeal pending before the Hon'ble Tribunal could have an impact in the current proceedings, the present proceedings may not be disposed off by the Commission.
- 3.1.2. In this regard, a legal opinion was sought by the Commission. The legal counsel of the Commission advised that mere pendency of the appeal without a stay does not preclude the Commission from disposing off the Petition pending with the Commission. There has been no record available before the Commission that the Hon'ble Tribunal has given any direction or decision on this issue in the impugned Order of HPERC. The Commission is, therefore, deciding this case on the basis of available information, the submission of parties and the provisions of law in this regard.

3.2. Background

- 3.2.1. Before proceeding to examine the claims of Petitioner and Respondent, the Commission would like to bring out the historical background of the case and the relevant provisions of law applicable in the case at different points of time for better understanding and appreciation of the issues involved in this case.
- 3.2.2. The roots of this case date back to 21.11.1972, when an agreement (hereinafter referred to as "Agreement") was signed between the Government of Himachal Pradesh (GoHP) and Government of Uttar Pradesh (GoUP) through the Governors of the respective States (A copy of the said agreement and its re-typed version for improving its readability are annexed herewith as Annexure 1a and 1b respectively). The Agreement starts with the contention that Uttar Pradesh State Electricity Board (UPSEB) has completed two power stations namely Dhakrani and

Dhalipur under Yamuna Hydel Scheme Stage-I and is constructing Chhibro and Khodri power stations under Stage-II of the said Scheme (hereinafter collectively referred to as "Scheme"). While para 6 in initial portion of the Agreement casts a duty on the State Electricity Boards of the two States viz. HPSEB and UPSEB to do, observe or perform anything related to this Agreement, Clause 10 specifically makes the Agreement binding on the two States/their Boards and their successors, which reads as follows:

"10. The covenants herein contained shall in the case of each party hereto be binding upon and ensure for benefit of their respective successors."

3.2.3. The above Agreement was in conformity with and had the authority of sub-section (1) of section 19 read with section 21, section 35, sub-section (2) of section 43 and section 46(1), (2) & (7) of the Electricity (Supply) Act, 1948, relevant extracts of which are reproduced below:

"19. Powers of the Board to supply electricity.-

(1) The Board may, subject to the provisions of this Act, supply electricity to any licensee or person requiring such supply in any area in which a scheme sanctioned under Chapter V is in force...

21. Powers of Board in relation to water power.-

The Board or a Generating Company may with the previous approval of the State Government, take such measures as in the opinion of the Board or the Generating Company, as the case may be are calculated to advance the development of water-power in the State...

35. Supply by the Board to licensees owning generating stations.- *The Board may at any time declare to a licensee owning a generating station, other than a controlled station, situate within an area for which a scheme is in force that it is ready to make a supply of electricity available to the licensee for the purpose of his undertaking, and thereupon, but without prejudice to the provisions of section 47, the provisions of the Second Schedule shall apply in respect of the relations between the Board and the said licensee."*

(The Second Schedule provided that such sale shall be at Grid Tariff)

43. Power to Board to enter into arrangements for purchase or sale of electricity under certain conditions.-

....

(2) Where a sanctioned scheme so provides, **the Board may, on such terms as may be agree upon, enter into arrangements with any Government or person for the purchase or sale of electricity to be generated or used outside the State:**

Provided that the Board may not enter into such arrangements with any such Government or person without the consent of the State Government, or into arrangements with any such person without the consent of the Government of the State within which the electricity is to be generated or used."

46. The Grid Tariff- (1) A tariff to be known as the Grid Tariff, in accordance with any regulations made in this behalf, be fixed from time to time by the Board in respect of each area for which a scheme is in force, and tariffs fixed under this section may, if the Board thinks fit, differ for different areas.

(2) Without prejudice to the provisions of section 47, **the Grid Tariff shall apply to sales of electricity by the Board to licensees where so required under any of the First, Second and Third Schedules, and shall subject as hereinafter provided, also be applicable to sales of electricity by the Board to licensees in other cases:**

Provided that if in any such other case it appears to the Board that, having regard to the extent of the supply required, the transmission expenses involved in affording the supply are higher than those allowed in fixing the Grid Tariff, the Board may make such additional charges as it considers appropriate."

...

(7) The Grid tariff may contain such other terms and conditions, not inconsistent with this Act and the regulations, as the Board thinks fit.

47. Power to Board to make alternative arrangements with licensees.-

Notwithstanding anything contained in sections 34 to 37 and sub-section (2) of section 46 but subject to any regulations made in this behalf, the Board may make such arrangements as may be mutually agreed with any licensee whose

area of supply is situated within an area for which a scheme is in force, in regard to the purchase or sale of electricity and the price thereof, or the purchase, operation or control of any generating station or main transmission line”

- 3.2.4. In fact, para 6 of the opening part of the Agreement (Annexure 1) reflects the use of the above powers vested with the two Governments and Boards. It may also be noted that both UPSEB and HPSEB were deemed licensees under section 26 of the Supply Act subject to conditions specified therein.
- 3.2.5. In exercise of the above authority and for discharge of responsibilities of parties to the Agreement, various decisions and actions have been taken by UPSEB and HPSEB subsequent to the above Agreement at different points of time as is evident from the Minutes of Meetings between their officers given at Annexures 2 to 4 (both original and re-typed). In fact, HPSEB in its submission has stated that it is representing the Government of HP also. The authorisation by Government of Uttarakhand to the Petitioner in the Case before HPERC for sale to HP has also been given vide their letter no. 266/I/2009-02(1)19/2007 dated 24.02.2009.
- 3.2.6. It is clear from the above quoted provisions of the Supply Act that the tariff for sale by Board under section 35 was to be determined under section 46 as per Regulations to be framed by it and was to be called the Grid Tariff, whereas for sale under section 43 it was to be at mutually agreed terms. The tariff for sale to Board by a Controlled Station was to be Grid tariff as per Second Schedule. Similarly, the tariff for supply by Controlled Generating stations owned by licensees to the Board was to be determined under section 34 read with section 47 of the Supply Act as per First Schedule which required the Cost of Production of the generating station to be calculated on the principles given in Eighth Schedule. Relevant extracts of the Supply Act on Controlled stations are reproduced below:

*“34. **Controlled stations.**- (1) Where a generating station situate within an area for which a scheme is in force has been designated in the scheme as a controlled station, the relations between the Board and the licensee owning the station shall, subject to any arrangements agree under section 47, be regulated*

*by the provisions of the **First Schedule**.*

(2) Notwithstanding anything contained in this Act or any scheme made thereunder, no generating station owned by a Generating Company shall be designated as a controlled station."

3.2.7. The Agreement recognises the fact that certain components/portions of the Scheme come under and utilise waters contributed partly from catchment areas in Himachal Pradesh. The agreement is, therefore, entered into in consideration of HP having agreed not do any act which diminished the natural flow of water, safeguarding the right of HP for enjoying the existing facilities and future development of power in its territory, and UP having agreed to share and supply 25% of the total energy generated (less energy consumed in operation and maintenance) by the power stations of the Scheme at the bus-bars of the said power stations (Clause 1 and 2 of the Agreement). From minutes of meetings dated 29.09.1982 to 02.10.1982 and 15.10.1994 placed at Annexure 3 & 4, it is gathered that Kulhal and Khara power stations were also added in the Scheme with 20% share of HP in each of them making a total of 6 stations under water/power sharing arrangement with HP.

3.2.8. The Agreement also had in place the mechanism of resale of power not consumed by HP on preferential basis to UP at a price equal to cost of generation plus a margin of 1.5 paise/kWh. Moreover, the Agreement also provided for preferential supply to UP from Giri Bata station of HP as integral part of this Agreement. The relevant clauses 4, 5(b), 6 and 7 for this arrangement are reproduced below:

"4. As Himachal Pradesh is not in a position to utilize its share of power as aforesaid, it will make this power available to Uttar Pradesh till March 31, 1979, in the first instance whereafter Himachal Pradesh, if it is still not in a position to consume its share itself, will continue to make it available to Uttar Pradesh on a preferential basis and at the rate determined in accordance with clause 5(b) and 6 hereinafter.

.....

5(b) For the power made available to Uttar Pradesh out of the share of Himachal Pradesh as aforesaid from Yamuna Hydel Scheme, Stage I, Uttar Pradesh shall, with effect from February 8, 1972, pay Rs. 15 Lacs (Rs. Fifteen

Lacs) per annum to Himachal Pradesh for the anticipated availability of 100 million units of power i.e. 1.5 paise/unit which represents the fixed and agreed difference between the purchase rate which is the cost of generation referred to in clause 3 herein above and the resale rate of the said electrical energy by Himachal Pradesh. Should, however, the actual quantum of energy made available to Uttar Pradesh fall short of or exceed 100 million units, the actual amount to be paid shall be pro-rata reduced or increased, as the case may be.

6. The amount to be paid by Uttar Pradesh to Himachal Pradesh for the latter's share of power made available to Uttar Pradesh from the power stations of Yamuna Hydel Scheme Stage II shall be determined on the same principles as aforesaid, after the commissioning of the power stations of that stage and the determination of the pooled cost as in clause 3 herein above.

7. Himachal Pradesh shall make available to Uttar Pradesh power from their Giri Bata Hydel Project on a preferential basis."

3.2.9. Another important feature of the Agreement is Clause 5(a), which stipulates that HP shall not share the Capital Cost of these stations. This clause clearly establishes the intention of the parties that absolute ownership and, hence, control of these power stations shall vest with UP or more precisely UPSEB. Accordingly, the power of determination of cost of generation under the above quoted sections of the Supply Act was agreed to be vested with UPSEB alone. Thus, UPSEB was determining the cost of generation each year and was sending its details to HPSEB. This position was being recognised by HPSEB and accepted by HPSEB in all its MoMs with UPSEB. In fact, the claims of HPSEB for share of power not consumed by HP were based on the price that was equal to cost of generation as determined by UPSEB plus 1.5 paise per unit (margin agreed to in the Agreement). This fact is validated by the various paras of MoMs as detailed below:

"MoM dated 29.9.82 to 2.10.82 and 10.3.83 to 11.3.83

5. RATE RESALE OF POWER TO UPSEB FROM HP POWER HOUSE AT YAMUNA HYDEL PROJECT STAGE-I AND -II.

(a) Stage-II

UPSEB INDICATED THAT SO FAR AS RATE FOR RESALE of power to UPSEB by HPSEB from Stage - II of Yamuna Project is concerned, the same had been worked out as 3.6 paise per unit based on the pooled cost of

generation at Yamuna Stage – I and II vis-à-vis Obra (A). This rate was payable by HPSEB for Stage – II power house w.e.f. 01.04.1975 till the next power house at Khodri is commissioned, when the rate would be worked out afresh as based on the pooled cost of generation at all the power houses of stage – I & II commissioned till then, and revised accordingly. HPSEB agreed to this rate subject to verification of the calculations leading to the above rate of 3.6 paise per unit as made available to them.

(b) Stage – I

UPSEB referred to clause 4 and 5(b) of the agreement dated 21.11.1972, wherein it had been clearly laid down that for the power made available to UPSEB out of the share of HPSEB from Stage-I, the rate shall be 1.5 paise per unit which represented the fixed and agreed difference between the purchase rate and resale rate. No revision in this rate was accordingly called for. The HPSEB agreed to this.”

3.2.10. It was, therefore, undisputed and accepted fact that only UPSEB would work out the cost of generation and HPSEB was only required to verify such working.

3.3. Appropriate Commission to determine the generation tariff

3.3.1. The Agreement continued to be operated under the provisions of the Supply Act till enactment of the Electricity Regulatory Commissions Act, 1998 (ERC Act). The ERC Act paved the way for constitution of Central and State Electricity Regulatory Commissions and empowered the State Governments to unbundle the existing vertically integrated State Electricity Boards (vested with generation, transmission and distribution functions) into separate companies on functional lines. Prior to enactment of the ERC Act, the generation tariff for Central/State Generating Companies was determined under section 43A of the Supply Act by the Central/State Government as the case may be and by the Board for supply made by it to licensees. One important feature of ERC Act was that the power tariff determination, whether generation, transmission or distribution tariff, was taken away from the Government (section 43A was omitted for UP vide notification dated 11.09.2000 placed at Annexure 5) and the Board and was vested with Appropriate Commission. The Central Commission (CERC) was entrusted with tariff determination of Central

utilities and inter-State generation/transmission of electricity as defined in this Act, which were earlier determined by the Central Government.

3.3.2. Subsequent to enactment of UP Electricity Reform Act, 1999 under the ERC Act, constitution of the State Commission in UP (UP Electricity Regulatory Commission) and unbundling of UPSEB into two generation (thermal-UPRVUNL and hydro-UPJVNL) and one transmission/distribution (UPPCL) companies, the function of determination of tariff was transferred from Board/Government to UPERC. Therefore, for the years 2000-01 and 2001-02, UPERC determined the tariff payable by UPPCL for supply of power from these stations to UPJVNL, the successors of UPSEB. The tariff was based on the principle of cost of generation, which included the components of O&M expenses, depreciation, return on equity and interest on loans & working capital. These principles were the same as those in erstwhile Eighth Schedule of Supply Act, except that instead of Return on Entire Capital Employed (depreciated cost) the concept of interest on loan part of the capital and return on equity part of the capital were employed. In effect, however, it only meant that interest on actual loans were allowed as in the Eighth Schedule and return on equity was allowed at rate approved by UPERC instead of the rate mentioned in Eighth Schedule. This, however, did not change the principle of cost of generation as stipulated in the Agreement and, hence, still remained applicable. Nevertheless, the authority to fix the tariff stood transferred from UPSEB to UPERC and, therefore, the rates determined by UPERC were applicable to sale of power from these stations to UPPCL as well as to HP. The authority of UPERC for determination of such tariff for period till this Commission came into being on 5.9.2002 has not been challenged till date.

3.3.3. Upon creation of Uttaranchal State (now Uttarakhand) and formation of separate generation company for the State, the ownership and operational control of five of these stations namely, Dharkrani, Dhalipur, Chhibro, Khodri and Kulhal, the stations in question in the present Petition, were transferred to the Petitioner, the successor of UJVNL, w.e.f. 9.11.2001 in terms of the GoI order No. 42/7/2000-R&R dated 5.11.2001 (Annexure 6). The control of Khara power station was transferred to UPJVNL within the

regulatory jurisdiction of UPERC.

- 3.3.4. On 10.6.2003, the Electricity Act, 2003 (Act) was enacted, which repealed all earlier legislations on the subject, including the Supply Act and ERC Act, however saving the actions taken in those law.
- 3.3.5. The Act had similar provisions as existed in the ERC Act with regard to powers of the Central and State Commissions and recognised that the Commissions constituted under the ERC Act would continue to function as Commissions under this Act.
- 3.3.6. UJVNL had filed a petition before Central Electricity Regulatory Commission for admitting the tariff Petition of the Petitioner for financial years 2005-06 to 2008-09. CERC vide its order dated 29.03.2006 in Petition No. 103/2005 deciding upon the jurisdiction of the Central Commission to determine the tariffs of the said 5 generating stations, had held that the 5 hydro-stations do not qualify to be a 'composite scheme', as required under clause(b) of sub-section (1) of section 79(1) (b) of the Act. Further, in the said Order the Central Commission opined that:

"The intention of the Act as passed by the Parliament also does not seem to transfer power from States to the Centre."

Para 34

"It is well established that tariff for these projects was earlier decided by UPERC and then by UERC even though the Electricity Regulatory Commissions Act, 1998 had similar provision with regards to functions and powers of CERC...."

Para 35

"Provisions with regard to this matter as contained in the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003 remaining similar, we are of the view that nothing has changed in the law to materially affect the jurisdiction of State Commission in this matter."

Para 36

"In view of above, approval of generation tariff of five hydro generating stations viz. Dhakrani, Dhalipur, Chibro, Khodri and Kulhal owned and operated by the Uttaranchal Jal Vidyut Nigam Ltd. does not come under the jurisdiction of the CERC."

Para 37

3.3.7. Two important conclusions drawn by CERC were (i) the sale to HPSEB is not a commercial sale but merely a water sharing arrangement and (ii) the scheme is not covered under composite scheme under section 79(1)(b) of the Act. Thus, the Central Commission disposed off the above referred petition holding that the approval of generation tariff of five hydro generating stations does not come under the jurisdiction of the CERC. In fact, CERC had also in the said Order opined that tariffs for supply from these stations were determined by UPERC and after constitution of UERC by UERC. This is in consonance with the conclusion drawn by this Commission earlier in the Order.

3.3.8. The Act through specific provisions empowered the State Commission to determine the generation tariff for sale to distribution licensee within the State under sections 62(1)(a) and 86(1)(a). The relevant extract is reproduced below:

“62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee.....”

“86. (1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State....”

3.3.9. This provision unequivocally stipulates that the generation tariff for sale to a distribution licensee has to be determined by the Commission having jurisdiction of the State in which the generating station is situated. In the present case, the Appropriate Commission for UJVNL’s plants is UERC. It is to be noted that determination of generation tariff under section 62(1)(a) and 86(1)(a) by the State Commission is totally different function from regulation of power purchase of distribution licensee within the jurisdiction of the State Commission. Section 86(1)(b) and 64(5) empower the State Commission to regulate the power purchase process, including its price, for supply to the distribution licensee of that State. These sections are extracted below:

“Section 86(1).....

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.....”

“Section 64.....

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor:”

3.3.10. Since the Central Commission does not have jurisdiction to decide tariff in this case, only two Commissions viz. UERC or HPERC can have jurisdiction over the tariff determination issue. Since there cannot be jurisdictional conflict in the scheme of the Act, only one of these two Commissions can determine the generation tariff. As major portion of the generation from these plants is sold to UPCL, this Commission would only have jurisdiction to determine tariff for such sale. It would be illogical to have the tariff determined for the balance portion by another Commission, which would lead to a jurisdictional conflict. On a similar issue regarding determination of tariff for Central/Other Generating Stations, GoI through Rule 8 of Electricity Rules 2005 (Annexure 7) has prescribed that the tariff determined by CERC for generating companies under clause (a) or (b) of sub-section 1 of section 79 of the Act shall not be subject to re-determination by SERC and with this condition, the State Commission may determine whether a distribution licensee in the State should enter into PPA or procurement process such generating companies based on the tariff determined by CERC. Further, MoP's letter no. DO No. 23/23/05-R&R dated 28th August 2006 (Annexure 8) addressed to Director(Fin), KPTCL in para 3 clarifies that the concerned SERC has the jurisdiction to regulate electricity purchase and procurement process or the distribution licensee under section 86(1)(b) of the Act except the tariff and tariff related matters of the PPA. On this analogy also only this

Commission would have jurisdiction to determine the generation tariff of these stations.

- 3.3.11. HPERC has the jurisdiction to regulate the quantum of electricity by deciding on whether HPSEB should take the share of power from these plants and, if yes, to what extent upto the entitled share on the basis of its price. It can also decide on maximum allowable price of such purchase to HPSEB in case HPSEB decides to take higher than approved quantum.
- 3.3.12. The Petitioner had also filed the Petition before HPERC for determination of the generation tariff for supply to HPSEB from the said five generating stations for the financial years 2004-05 to 2008-09. Subsequently the Petitions, except for the year 2004-05 were withdrawn by UJVNL for filing before the Appropriate Commission. HPERC had rightly allowed withdrawal of this Petition considering the objections raised by UPPCL and HPERC that the jurisdiction of determination of tariff for these plants lied with UERC and that HPERC had no jurisdiction to decide the tariffs. The submission made by Chief Engineer (O&M), UPJVNL before HPERC in this regard and its relevant extract is reproduced below:

“That consequent to the implementation of Reforms Act the power of determination of the cost of generation of the power stations was vested in U.P. Electricity Regulatory Commission (UPERC). The UPERC vide its Tariff Order dated September 1, 2001 determined the rates of Electricity being generated at these power stations as under.....”

“That as per clause 2.01 of the PPA dated 18th December, 2000 it was incumbent upon the UPPCL to bill the Himachal Pradesh State Electricity Board (HPSEB) at the rate determined by the UPERC in respect of each power station in which the share of power to Himachal Pradesh was mutually agreed upon and in case of lesser supply the balance could be retained as buy-back of electricity from HPSEB at the higher rate so determined less the rate so fixed by the UPERC plus 5% thereon.”

- 3.3.13. It may be noted that the jurisdiction of UPERC as established by it in the above Order for supply to HP has never been questioned. The record or reason for change in the provision of margin for resale to UP from 1.5

paaise/unit stated in the Agreement to 5% of cost of generation (i.e. rate fixed by UPERC as per above Order) is not available with this Commission.

3.3.14. HPERC has also respected this Commission's jurisdiction for determination of generation tariff by accepting the components of generation tariff considered by this Commission for 2008-09 and in its above jurisdiction u/s 86(1)(b) has approved power purchase cost for these stations disallowing some of the components. The said decision of HPERC is presently before Hon'ble Appellate Tribunal being challenged by HPSEB. The Commission feels that while HPERC is well within its jurisdiction to allow or disallow purchases by HPSEB, UJVNL shall not be under an obligation to supply power to HP if HPSEB is not in a position to pay to it the cost of generation as per the Agreement, which is the tariff determined by this Commission. The tariff petition for the year 2004-05 filed by UJVNL before the HPERC is still pending before the HPERC.

3.3.15. Thus, it is amply clear from the above readings that neither CERC nor HPERC had the jurisdiction to determine the generation tariffs for these 5 stations under the control of UJVNL. The sole jurisdiction to determine the generation tariff lies with UERC in accordance with the requirements of Section 86(1)(a) read with Section 62(1) of the Act. HPERC can only approve the power purchase agreements between UJVNL and HPSEB, including the quantity and rate at which power is procured by HPSEB. But in no way that power would imply the determination of generation tariffs of the stations of UJVNL.

3.3.16. Before coming to the next issue, the Commission would like to present the findings of CERC in above mentioned Orders dated 27.2.2008 and 12.11.2008 in Petition No. 107/2007 where the jurisdiction of this/UP Commission for determination of generation tariff for their respective states has been recorded. It will not be out of place to mention here that Order dated 27.2.008 was challenged before Hon'ble Tribunal, who have upheld the Order of CERC in their Order dated 9.1.2009 in Appeal No. 35 of 2008. Appeal No. 151 of 2008 against CERC's Order dated 12.11.2008 is still pending before Hon'ble Tribunal. The relevant extracts of CERC's

Orders are:

"28. We make it clear that while deciding the issue of jurisdiction, the applicability of the ratio of the Commission's order dated 29.3.2006 in Petition No.103/2005 to the case on hand has not been examined since that case, with prayer for determination of tariff of the generating stations situated in the State of Uttaranchal, and contested between intra-State parties of the same State, was decided on its own facts. The facts and issues in the present case are prima facie very different."

Order dated 27.2.2008

"55. We, therefore, direct as under-

.....

(e) For giving credit to the second respondent, the cost of generation based on audited accounts of the generating stations or those taken into account by UPERC from the year 1999 onwards shall be considered."

Order dated 12.11.2008

3.4. Responsibility for exercising Rights and discharging Liabilities regarding Share of HP from these Stations in terms of the Agreement

3.4.1. Since UPSEB was vertically integrated entity, the entire scheme of supply of power generated from its abovesaid stations and resale of power to it by HP for supply to consumers in UP as envisaged in the original Agreement could be handled by UPSEB on behalf of the Government of UP as it was not only generating power but also distributing the same to consumers in UP. As per Clause 5 (4) of the UP Electricity Reform Transfer Scheme, the rights and liabilities of the erstwhile UPSEB stood transferred to the respective unbundled entities. The relevant extract of the Transfer Scheme is reproduced below:

"4. On such transfer and vesting of the Undertaking in terms of sub-clause (1) to UPRVUNL or sub-clause () to UPJVNL or sub-clause (3) to UPPCL, as the case may be, UPRVUNL or UPJVNL or UPPCL, as the case may be (the Transferee), shall be responsible for all contracts, rights, deeds, schemes, bonds, agreements and other instruments of whatever nature relating to the respective Undertakings transferred to it to which the board was a party, subsisting or having effect on the date of the transfer, and the same be in force

and effect against or in favour of the Transferee and may be enforced effectively as if the Transferee had been a party thereto instead of the Board.

3.4.2. Accordingly, in the changed scenario, the liability of sharing generation in these stations with HP and right of re-purchase of the HP's surplus share should have been vested with UPJVNL (being the generation company) and UPPCL (being the distribution company) respectively, both being Government owned successor companies of UPSEB. This position was also reflected in the MoU dated 7.3.2000 signed between UPJVNL and UPPCL at Clause 1, which is reproduced below:

"1. SUPPLY OF POWER

After honouring commitments (as per previous agreement) of supply of power upto share entitlements to Himachal Pradesh in HEP Projects and to Madhya Pradesh in Rihand Hydro and Matatila Hydro Power Stations, balance total power as generated by UPJVNL will be supplied to UPPCL."

3.4.3. The arrangement was revised in the PPA dated 18.12.2000 between UPPCL and UPJVNL according to which entire generation from these projects was to be first supplied to UPPCL and UPPCL was required to discharge the liability of making the share of HP available to it. This was done probably to avoid interface of two utilities with regard to supply to HP. Clause 2.01 of the PPA dated 18.12.2000 is reproduced below:

"2.01 Allocation of Power:

Subject to and in accordance with the terms of this Agreement, UPJVNL agrees to sell and UPPCL agrees to purchase the entire Net Electrical Output of the generating units covered by this agreement. The obligations of supply of Power to some other state, as per the mutual agreement entered into or to be entered in future would be discharged by UPPCL."

3.4.4. The above anomaly was also pointed out by CERC in a similar matter on share of Madhya Pradesh in hydro stations of Uttar Pradesh in paras 4(d), 4(e), 11, 12, 21 and 22 of its Order dated 27.2.2008 read with paras 18 and 19 of its Order dated 12.11.2008 in Petition No. 107/2007. CERC has, however, accepted the realignment of responsibilities as per above revisions.

3.4.5. The question of re-assignment of responsibilities under this arrangement again arose when after separation of Uttarakhand State, the functions of

UPJVNL and UPPCL in the State of Uttarakhand were vested with their respective successors in Uttarakhand namely UJVNL (Petitioner) and UPCL. It is understood that after this date, for some time the billing for these stations was being done by the successor distribution licensee of the State namely Uttarakhand Power Corporation Limited (UPCL), which was the successor company of UPPCL. However, after a short span of time, the responsibility of supply of HP's share and raising bills therefore is being discharged by the Petitioner. Government of Uttarakhand's decision at para 1 in the D.O. No. 240/SIP/PS-2002 dated 03.04.2002 (Annexure 9), provided that the duties of erstwhile corporations shall be discharged by respective successor companies in Uttarakhand.

- 3.4.6. Accordingly, UPCL was responsible for supply and billing to HPSEB for its share for some time. However, the GoI Order dated 5.11.2001 (Annexure 6) in para 2(d) has clearly stipulated that the contracts shall be assigned to the Corporations to whom the scheme or assets have been transferred. This clause is reproduced below:

“(d) Contracts:

The Contracts shall be assigned to the Corporations to whom the scheme or assets, for which contract has been entered into have been transferred.”

- 3.4.7. In a subsequent notification dated 24.11.2003 (Annexure 10) the Government of Uttarakhand made it clear that the power generated from UJVNL's stations (except the share of HP) shall be made available to UPCL. This meant that the share of HP was to be supplied by UJVNL and, accordingly, UJVNL has been supplying and billing HPSEB for its share.
- 3.4.8. Since these generating stations were first vested with UPJVNL and then the Petitioner, the responsibility of supply to HP should have been of UPJVNL till 8.9.2001 and that of the Petitioner thereafter. However, since this is not an issue under consideration in the present case, the Commission is not going into further detail of it. The Commission has accepted the present position, but would like to point out that the responsibilities of parties need to be re-looked and agreed upon in the changed circumstances for which they may have to make suitable arrangement to meet the objectives of the Agreement in letter and spirit.

3.5. Tariff chargeable from HPSEB

- 3.5.1. The Petitioner in its present Petition has submitted that the Commission may determine the tariff for supply to HPSEB as considered in its various tariff orders and allow the same tariff as determined for energy sales to UPCL. However, HPSEB has contended that the tariffs may be fixed by the Commission in line with the Agreement entered into between GoHP and GoUP. The Commission will discuss this issue in the following paragraphs.
- 3.5.2. HPSEB has submitted that the Petitioner was required to charge only the actual cost of generation excluding the cost of debt servicing, return on equity and the taxes payable from HPSEB and the excess payment realised by the Petitioner was refundable to it. The Petitioner has, however, submitted that the power to determine tariffs lies with the appropriate Commission, i.e. UERC, as provided in section 62(1) of the Act. Hence, till the time such tariff is determined the question of any loss to HPSEB does not arise.
- 3.5.3. There is no dispute among parties with regard to the right of Himachal Pradesh to get the specified quantum of electricity from the 5 generation projects now under the control of UJVNL in accordance with the Agreement between the Government of Himachal Pradesh and the Government of Uttarakhand. The rate for the electricity supplied to Himachal Pradesh from the 5 generating stations are also required to be determined in accordance with the said Agreement.
- 3.5.4. Clause 3 of the Agreement, which is relevant Clause for this case, stipulates the principle for payment of HP's share of power to UP as the **pooled cost of generation at the busbars of these power stations to be determined for each financial year.**
- 3.5.5. Although under the Supply Act, the Board was invested with the powers to supply electricity to any person outside the State at mutually agreed terms, Clause 3 of the Agreement uses the principle of "**cost of generation**" for calculation of rate for such supply. There is only one place in the Supply Act where this principle has been specified. This principle was specified for calculating "**cost of production**" in the Supply Act for sale of power by Board to licensee or Controlled Stations owned by a licensee.

3.5.6. Clause (1) in paragraph I read with paragraph IV of the First Schedule of the Supply Act lays down an obligation on the controlled station to supply all the electricity generated at the station to the Board at the **cost of production** ascertained for a financial year in accordance with the provisions of **Eighth Schedule** namely "Determination of Cost of Production of Electricity at Generating Stations". Further, as per paragraph VI of the First Schedule, the point of delivery for such supply is the generating station i.e. bus-bars as is the case in the present Agreement. It shall, therefore, be safe to conclude that the parties to the Agreement consciously agreed for scheme of sharing the cost of the generation that was the same as that enshrined in the Eighth Schedule to the Supply Act. Relevant extracts of the First Schedule are reproduced below:

"I. (1) The Board shall by notice in writing to the licensee fix a date (hereafter in this Schedule referred to as the date of control), being the first day of a year of account of the licensee and from such date the licensee shall, except where prevented by causes beyond his control; be under obligation-

....

(d) to supply to the Board all the electricity generated at the station

*IV. The Board shall pay to the licensee, whether or not any electricity is generated at the station, the costs ascertained in accordance with the provisions of the **Eighth Schedule**.*

VI. The points at which electricity to be supplied under this Schedule shall be delivered by the Board and the licensee respectively shall, unless otherwise agreed between the Board and the licensee, be at the generating station, and the pressure of the supplies shall be such as the Board and the licensee may agree"

3.5.7. Clauses (b), (c) and (d) of paragraph XII specify the methodology for separating fixed and running costs in cost of production, while paragraph XIII of the said Schedule outline the methodology for recovery of fixed and running costs.

3.5.8. From the above, it is clear that the cost of generation agreed to be paid at bus-bars for supply to HP was to be based on the principles laid down in

Eighth Schedule (copy enclosed as Annexure 11) as long as the relevant provisions of the Supply Act were in force. Paragraph I of this Schedule stipulates the following costs attributable to the station to be taken for calculating the cost of production of electricity:

- (a) fuel, oil, water and stores consumed, employees cost and repairs & maintenance cost;
- (b) insurance, rents, rates and taxes (including taxes on income and profits)
- (c) management and general establishment charges;
- (d) any other expense on revenue account
- (e) interest on a principal equivalent to depreciated cost of the station (whether defrayed out of capital or revenue) and interest on working capital excluding any interest capitalised
- (f) depreciation chargeable as per Sixth Schedule

3.5.9. Further, Clause (ii) of paragraph II of the Eighth Schedule specifies the rate of interest to be paid on the principal amount as follows:

"II. For the purpose of clause (e) of paragraph I-

...

(ii) the rate of interest shall be,-

(a) on such part of the principal which is equal to the loan advanced by Board, the actual rate charged by the Board plus half percent

(b) on the balance of the said principal-

(i) for a local authority, the average rate payable on money raised

(ii) for others, RBI rate at the beginning of that year plus two percent"

3.5.10. A perusal of the above provisions of the Eighth Schedule clearly brings out that cost of production apart from taking into account the operational expenses also include depreciation and interest on capital employed (depreciated cost) for the year. The interest, which is the servicing cost of the capital, is payable irrespective of source of financing whether through capital (as loan) or revenue account (own sources). Interest on the part of capital that is equal to loan is linked to the actual rate of interest, while on the other part of the capital employed (through own funds or equity) it is linked to RBI rate with two percent premium. These provisions, therefore,

allow not only depreciation but also interest on loans, return (interest plus premium) on equity/own funds and taxes.

- 3.5.11. As brought out earlier, these components were unambiguously required to be included in cost of generation as per Eighth Schedule. Even as per accepted accounting practice, the capital cost is booked under the fixed assets with corresponding sources of capital on the liabilities side. The components being objected to by HPSEB for inclusion are neither of capital nature nor are in any way charged towards meeting capital cost. All these are revenue expenses being reflected in profit and loss account and are, therefore, to be charged against operational expenses. No doubt depreciation, interest on loan capital and return on equity are expenses to be incurred by UJVNL, which arise directly due to expenditure on and financing of the capital cost but none of them are used to meet the capital employed for construction/acquisition of assets. The finances for meeting the capital expenditure initially are met out of utility's own funds or through loan capital, which is financed by none of these components. These components are not capital cost per se but the servicing cost of capital employed for creation of assets. Accordingly, these are recognised as allowable expenses not only in tariff determination exercises but as prudent accounting practices in all businesses universally. In fact, HPSEB's own retail tariff is determined by HPERC on the basis of its cost of supply that in turn is derived by taking all these components. In this regard, text provided for accounting standards AS-6 and AS-16 by Institute of Chartered Accountants India regarding Depreciation Accounting and Borrowing Costs stipulate as follows:

“AS-6, Depreciation Accounting

3.1 Depreciation is a measure of the wearing out, consumption or other loss of value of a depreciable asset arising from use, effluxion of time or obsolescence through technology and market changes. Depreciation is allocated so as to charge a fair proportion of the depreciable amount in each accounting period during the expected useful life of the asset. Depreciation includes amortisation of assets whose useful life is predetermined.

4. *Depreciation has a significant effect in determining and presenting the financial position and results of operations of an enterprise. Depreciation is charged in each accounting period by reference to the extent of the depreciable amount, irrespective of an increase in the market value of the assets."*

"AS-16, Borrowing Costs

6. *Borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset should be capitalised as part of the cost of that asset. The amount of borrowing costs eligible for capitalisation should be determined in accordance with this Statement. Other borrowing cost should be recognised as expense in the period in which they are incurred."*

3.5.12. Further, Hon'ble Appellate Tribunal for Electricity in its Order dated 14.09.2007 in Appeal No. 189 of 2005 had held that depreciation and return on equity is required to be allowed as a legitimate expense while determining the tariff of generating stations of UJVNL. The relevant directions to this Commission are reproduced below:

"21. We direct the Regulatory Commission to allow depreciation for the entire value of machinery of the nine generating stations and its buildings etc. as was hither before evaluated by the U.P. Electricity Regulatory Commission in the earlier determination. That would be the appropriate procedure. There will be a direction to the Regulatory Commission in this respect and the Regulatory Commission shall allow depreciation on the normative value of the nine generating stations."

"26. The UP Electricity Regulatory Commission in its earlier proceedings, which is since being followed by Uttaranchal Electricity Commission, has fixed the capital cost / GFA for nine hydro generating plants at Rs. 503.96 crores as seen from Table 5.9, Page 48 of the tariff order. It is not only just but also appropriate to provide ROE on 30% on the said capital base, being normative equity. If such a portion of ROE on normative basis is not allowed, on the reasoning that the government has not issued a notification or allocation or fixed it either as equity or loan or subsidy or a grant, as already pointed out on a later date, this will not be possible for the Commission to put back the

clock or reopen the matter and revise the tariff retrospectively and eventually liability has to be fastened on the new generation of consumers ultimately In our view on the first principles of law, the appellant is bound to succeed and the denial, if sustained will result in miscarriage of justice. In our view there is neither reason nor logic nor basis to disallow ROE claimed by the appellant even on a normative basis. This point is answered in favour of appellant and we direct the respondent Regulatory Commission to consequently to allow ROE in terms of its Regulations."

- 3.5.13. It would be needless to add here when return on equity, which is allowed in lieu of profits on income, is allowed as the tax thereon shall have to be allowed. The components constituting the cost of generation would, therefore, effectively include the expenses incurred for generation of electricity, which would include the normal O&M expenses, interest on loans, interest on working capital, depreciation, return on equity, etc. Further, there was nothing in the agreement which said that depreciation, RoE, Interest or taxes would be excluded from the cost of generation. It merely stated that HP would not share the capital cost, entailing that since some of the stations were still to be commissioned HP would not invest any capital as its share in the project. This could also not have been the intent of the Agreement as the Supply Act was in force at that time which specified the components to be included while calculating the cost of generation as specified in Eighth Schedule that included these components. Thus, exclusion of such components would have been in contradiction of the Supply Act.
- 3.5.14. The confusion regarding the abovesaid components seems to have arisen, when UJVNL filed an affidavit before CERC in its Petition No. 103/2005 stating that these components would not be required to be loaded in tariff for HP's share. This has also been recorded by CERC in its Order dated 29.3.2006. The above submission seems to have been made without any legal authority under the provisions of law or a written understanding or agreement with HPSEB. In fact, this statement was given without any authority for the same as on one hand the power to determine the tariff and its components vested with this Commission

and on the other hand the power to modify the terms of the initial Agreement, which as stated earlier did not have such provision, lies with the original parties to the Agreement namely the Governments of HP and UP (now Uttarakhand for these 5 stations). UJVNL has now vehemently objected to HPSEB taking refuge into its own statement, which has now been stated to be not permissible in law and has now requested to allow it to recover the tariffs approved by this Commission from HP.

3.5.15. Assuming for the time being that the Agreement envisaged not inclusion of these components. Then such an intention should have been reflected in the main Clause 3 of the Agreement and not as a standalone clause 5(a) without any attendant term or condition. In this regard, let us see the water sharing arrangements and attendant terms of tariff in some other shared projects (as derived from CERC's Order dated 29.3.06 and DERC's Tariff Order for 2004-05 for Indraprastha Power Station):

Project	Share	Rate of Power
Agreement between Himachal Pradesh & Punjab regarding their Dam Project - The inter-state agreement dated 19.01.1979 between Government of Himachal Pradesh and Government of Punjab regarding Ranjit Sagar HE project (Thein Dam Project). Ranjit Sagar HE project (4x150 MW) has been constructed on river Ravi in Gurdaspur district of Punjab.	4.6% to HP Government by Punjab Government	Free of cost
Agreement between Punjab and Jammu & Kashmir regarding Ranjit Sagar Project -	20% to J&K Government by Punjab Government	Cost of Generation at bus-bars
Agreement between Government of Sikkim and Government of West Bengal regarding Ramman Hydro Electric scheme - The Ramman river forms the boundary between Sikkim and West Bengal states. The potential to be developed in Ramman Hydro Electric stage - II lies in the border of these States. Out of total catchment area about 209 sq km., 81 sq km. Lies in Sikkim, and the remaining in the West Bengal. West Bengal and Sikkim Governments have executed an agreement on 16.11.1976	20% to Sikkim Government by West Bengal Government	Cost of Generation at bus-bars as determined by Government of West Bengal. Sikkim not to share any part of capital cost.
Indraprastha Coal based power station (187.5 MW) in Delhi 66.67 % share (125 MW) - Delhi 33.33 % share (62.5 MW) - Haryana	33.33% to Haryana by Delhi	Only 33.33% of operation & maintenance expenses and interest on working capital.

3.5.16. CEA's General Review 2005 at Table 2.11 (Annexure 12) gives the share of participating States in jointly owned Stations during 2003-04 (both

hydro and thermal). It may be seen that for jointly owned plants like Indraprastha Power Plant above, the % age of ownership is decided by the amount of capital cost shared by the participating State. Since the capital cost share is met by the participating State, not being the State having the plant, from its own sources and it is servicing and making repayment of this capital itself, there is no question of charging it in tariff once again. Accordingly, the tariff for its share, as in the case of Haryana for Indraprastha above, would not include any capital servicing cost like interest, RoE etc. and hence has only operational costs in its tariff. Further, a perusal of MoMs at Annexure 4 shows that share in Kulhal and Khara power stations was agreed at a lower value of 20% owing to some catchment area falling within the territory of UP. Thus, the %age share in hydro project is based on catchment area, habitat affected and other such factors and, accordingly, cost of power is decided. For example, for a central hydro station having entire components and catchment area in one State, the home state is allowed to share 12% of net generation free of cost. Thus, even with 100% catchment area free power that is made available is only 12%. With reduction in catchment area the free power share goes down as in Ranjit Sagar Dam, HP has 4.6% free share. In case, the States agree to have higher share obviously the cost of this share shall be higher, which in most cases depicted in the Table above is cost of generation at bus-bars, which obviously is in lieu of not sharing the capital cost. There is, therefore, no reason to assume or conclude that the Agreement envisaged not sharing the capital servicing costs.

3.5.17. The tariff cannot be based on conjectures and surmises and has to be based on applicable provisions of law and facts of the case. The erroneous interpretation by UJVNL cannot be sustained for not being based on material facts. Therefore, the Commission, as concluded earlier also, finds no merit in HPSEB's claim of excluding these components from the tariff.

3.5.18. Let us now take a look at the tariffs that were being applied for supply to HP since unbundling of UPSEB i.e. 14.01.2000. In this regard, it would also be relevant to take a note of the findings of UPERC in its tariff orders

for 2000-01 and 2001-02 dated 27.07.2000 and 01.09.2001 respectively, which are reproduced below:

"1. The entire energy available from UPRVUNL and UPJVNL will be purchased.....The purchase price for UPJVNL has been taken at 35 paise per unit. As in the case of State Thermal Stations an MoU has been entered into and PPAs will be finalised for individual plants before the next year's Annual Revenue Requirement and Tariff filing."

Para 5.40 (Tariff Order for 2000-01)

"As per the generation plan furnished by UPJVNL, the gross generation during FY 02 is estimated to be 5115 MU. After Auxiliary consumption, the energy sent out is proposed as 5063.85 MU. The Draft Power Purchase Agreement with UPJVNL has been signed and the average rate of power from UPJVNL for FY 02 is estimated to be 37.2 paise/unit."

Para 4.10 (Tariff Order for 2001-02)

"Himachal Pradesh and Madhya Pradesh have shares in the generation from some stations of UPJVNL for which they have to pay the cost of generation plus 5%. If UPPCL wants to utilize any share of MP, it has to pay at the rate of 110% of the rate of Rajasthan Atomic Power Project (RAPP) and to utilise the share of HP it has to pay the cost of generation plus 5 paise per unit."

Para 4.11 (Tariff Order for 2001-02)

"...The price of Rs. 0.372 per unit, as proposed by UPPCL, is accepted."

Para 6.42.3 (Tariff Order for 2001-02)

3.5.19. Thus, UPERC had considered the rate of 35 paise/unit as per MoU dated 07.03.2000, effective from 14.01.2000, between UPJVNL and UPPCL. This was the weighted average rate of power purchase worked out for all plants of UPJVNL and directed them to sign a formal PPA. This PPA was signed on 18.12.2000 (calculations of tariff in this PPA are given at Annexure 13), which was based on the provisional opening balances of UPJVNL as on 14.1.2000 as reflected in their provisional transfer scheme dated 14.01.2000. These balances were finalised in the final transfer scheme dated 25.01.2001, whereafter fresh calculations for the tariffs for these plants were furnished by UPPCL before UPERC in tariff proceedings for 2001-02 and were finally reflected in the Supplementary

PPA dated 16.07.2005 between UPJVNL and UPPCL (relevant portion annexed at Annexure 14). The rate of 37.2 paise/unit referred to by UPERC was the average rate of power purchase as worked out in the power purchase agreement. The above average rates worked out by UPERC included the component of depreciation and interest also. It is understood that the rates approved by UPERC for individual stations were considered by UPPCL for raising bills for HP's share of power by working out pooled average rate of power as per allocated share from these plants from the UPERC approved rates for these plants. As per the details available in the bills for the period 14.1.2000 to October 2001, the pooled cost of generation was worked out on the basis of plant-wise tariff as reflected in MoU dated 07.02.2000, PPA dated 18.12.2000 and Supplementary PPA dated 16.07.2005 for the periods 14.01.2000-31.03.2000, 01.04.2000-31.03.2001 and 01.04.2001 to 31.10.2001 respectively (detailed calculations annexed as Annexure 15). This to the best of knowledge of this Commission has never been challenged by HPSEB on the grounds now being raised that depreciation, RoE, Interest on Loan and Taxes are not permissible to be considered for calculating cost of generation.

3.5.20. Thus, from the above readings, it is evident that HPSEB was being supplied power at the rates determined by UPERC which rightly included the components of interest, depreciation, etc. in calculation of the cost of generation. UPPCL was required to bill HPSEB at such rates approved by UPERC and this was never challenged or objected to by HPSEB. Hence, there was no need to raise the issue that was non-existent *ab-initio*.

3.5.21. The Commission notified the UERC (Terms & Conditions for Determination of Hydro Generation Tariff) Regulations, 2004 on May 14, 2004. These Regulations are based on Cost of generation and, hence, are in line with the principle followed by UPERC earlier and in fact with the principle of cost of generation stipulated in the Agreement. Therefore, the tariffs determined for each station by this Commission would be the cost of generation for that station. However, for supply to HP as per the terms of the Agreement Pooled Cost of Generation has to be worked out. In fact,

the power is presently being pooled at exchange points with HP and being accounted for in the daily drawal schedules for both the States. There is, therefore, a necessity for deriving the pooled cost of generation from the rates already approved by the Commission for individual stations.

- 3.5.22. The generation tariffs for the said 5 generating stations have already been determined by the Commission for the years 2004-05, 2006-07, 2007-08 and 2008-09 in previous proceedings before the Commission in accordance with the above Regulations. In its first tariff Order for the Petitioner's nine large generating stations, including the five stations covered in this Petition, the Commission had held as under:

*"It has been pointed out in the Petition that part of electricity generated in these generating stations is required to be sold to Himachal Pradesh State Electricity Board (HPSEB). These proceedings are for determination of generation tariff under section 86(1)(a) and for determination of tariff for supply to UPCL under section 62(1)(a) of the Electricity Act, 2003. **The generation tariff has been determined for Petitioner's total generation in these nine generating stations.** Of this generation, the part that is sold to UPCL will be on rates approved in this Order. Further, as per Regulation 20(2), for supply to UPCL, the capacity charges, if any, which is required to be paid by UPCL will be in proportion of its share in total saleable capacity of that particular generating station."*

- 3.5.23. As brought out above, this Commission had determined tariffs for all nine stations for their total generation irrespective of the beneficiary. The tariffs approved were to be applicable on both the beneficiaries viz. UPCL and HPSEB for their respective shares.
- 3.5.24. Thus, the Commission decides that the Annual Fixed Charges (AFC) already approved by it in its tariff orders for the years 2004-05, 2006-07, 2007-08 and 2008-09 for the 5 generating stations of UJVNL, covered in the present Petition, would be used to work out their pooled cost of generation and there is no cause to determine the tariffs separately for supply to HPSEB from these 5 plants of UJVNL afresh. The pooled cost is being worked out here as per HP's share and is given in the Table at Annexure 16 for the respective years. These pooled tariffs and AFCs are to be applied with attendant Regulations subject to the condition that the

combined share of HP in these plants shall be treated as one project.

3.6. Provision for re-sale of Power not utilised by HP in terms of the Agreement

3.6.1. A perusal of Clauses 4 to 7 of the Agreement, as reproduced in section 3.2.8 above, shows that the State of HP can take its share upto the specified limit from these five generating stations only for its own consumption. The power that is not utilised by HP has to be sold to UP (now Uttarakhand) on preferential basis at cost of generation plus a margin. The State of HP was authorised to use this power only for consumption within the State of HP and the first right of purchase of any surplus was available with UP. Accordingly, the power that fell short of actual export to HP through inter-connecting lines was paid for by UP to HP at this mutually agreed price (MoM dated 15.10.1994 at Annexure 4 validate this fact). This provision, as per the records available with the Commission, is valid till date. However, after implementation of ABT in the Northern Region, the maximum share of HP is being included in daily schedules for inter-State exchanges irrespective of actual consumption or supply to HP through these stations. The Commission would like to bring out here that this arrangement may result in HP having surplus availability leading to earning of high UI charges by it, the power supplied by UJVNL being at very low price. In this regard, any right/liability for the period prior to 14.01.2000 shall be that of UP Government as it had taken over the excess liabilities of UPSEB while transferring matching assets and liabilities to successor entities, thereby giving them clean slate to start their businesses. From 14.01.2000 to 08.11.2001 such rights/liabilities with regard to supply from these stations shall vest with UPJVNL and with UJVNL thereafter. The important issue here is not only the commercial gain to HP but also the lesser availability of power to the State of Uttarakhand, which in the present conditions is causing acute shortages and load shedding in the State.

3.6.2. There is a similar clause 7 in the Agreement, which talks of preferential supply from Giri Bata station of HP to UP (now Uttarakhand). MoM dated 28.06.1978 at Annexure 2 and MoM dated 29.09.1982 to 02.10.1982 at Annexure 3 establish that supply from this station, after consumption in HP, was to be given to UP (now Uttarakhand). There seems to be a need

for implementation of this Clause today similar to the above position for surplus share of HP in five plants of UJVNL.

- 3.6.3. The Commission also understands that there is an ambiguity in raising bills for wheeling charges and the utility in Uttarakhand is responsible for this. In fact, the original Agreement itself recognises the fact that the share has be delivered at bus-bars at cost of generation, which implies that wheeling charges for taking this power to HP from the generating stations through transmission network of other utilities would be required to be borne by HP. These charges were mutually agreed and were being borne by HPSEB hitherto before is evident from MoM dated 15.10.1994 in Annexure 4.
- 3.6.4. Since the Commission does not have sufficient data and information with respect to updated status on the above three issues, the Commission hereby directs UJVNL, PTCUL, UPCL, UPJVNL, UPPCL and HPSEB to submit copies of all the correspondences, notings, agreements, bills, MoMs and related documents for supply of power from these stations to HP and their stand on these issues. Government of HP, Government of UP and Government of Uttarakhand may also be requested to send their viewpoint in the matter. 45 days time from the date of issue of this Order is hereby given to all of them to file their replies.

-Sd-

(Anand Kumar)
Member

-Sd-

(V.J. Talwar)
Chairman