

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA No. 666 of 2017 in
DFR No. 2361 of 2017

Dated: 30th November, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:

Mr. Rama Shanker Awasthi
301, Surbhi Deluxe Apartments,
6/7 Dalibagh, Lucknow – 226001

.... Appellant(s)

Vs.

1. R.K.M. Powergen Private
Through Executive Director,
14, Dr. Giriappa Road,
T. Nagar, Chennai – 600017

2. Uttar Pradesh Power Corporation Ltd.,
(through its Chairman),
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow – 226001

3. Uttar Pradesh Electricity Regulatory Commission
Through its Secretary,
II Floor, Kisan Mandi Bhawan,
Gomti Nagar, Vibhuti Khand,
Lucknow – 226010

.... Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Shubham Arya

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Mr. Aman Gupta for R-1
Mr. Rajiv Srivastava
Ms. Garima Srivastava
Ms. Gargi Srivastava for R-2
Mr. C. K. Rai
Mr. Umesh Prasad
Mr. Mohit Rai for R-3

ORDER

IA No. 666 of 2017

(Appln. for condonation of delay)

1. The Appellant who is a consumer residing in the State of Uttar Pradesh has filed this appeal challenging order dated 11/02/2016 passed in Petition No.1078/2015 by the Uttar Pradesh Electricity Regulatory Commission ("**the State Commission**") . There is 485 days' delay in filing this appeal and hence in this application the Appellant has prayed that the said delay be condoned.

2. It is stated in the application that the delay in filing the appeal is not deliberate. The Appellant was not made a party in the proceedings leading to the order dated 11/02/2016. It is further stated that the State Commission did not conduct any public hearing before passing order dated 11/02/2016 restoring the cancellation of Letter of Intent issued in favour of Respondent No.1-R K M Powergen Private Ltd.("**RKM**"). It is further averred that the Appellant became aware of the order dated 11/02/2016 while participating in the proceedings in Petition No.1106 of 2016 at the time when the Appellant had represented to the State Commission that the tariff discovered in the Competitive Bidding Process held in 2012 at a levelised tariff of Rs.5.088 Kwh ought not to be adopted

and the PPA entered into between RKM and Uttar Pradesh Power Corporation Ltd. (“**UPPCL**”) ought not to be approved.

3. It is further stated in the application that if the State Commission had not adopted the tariff and had not approved the PPA, there would have been no occasion for the Appellant to challenge the order dated 11/02/2016. The restoration of Letter Of Intent would have become academic and of no implication. It is further stated that the Appellant was pursuing the above aspect by participating in proceedings in Petition No.1106 of 2016 so that the order of the State Commission dated 11/02/2016 would not take effect. In any case the order of the State Commission restoring the Letter of Intent could take effect only after the order dated 01/02/2017 passed by the State Commission. According to the Appellant, in view of the above circumstances the Appellant did not file appeal against order dated 11/02/2016 at any time before the disposal of Petition No.1106 of 2016.

4. It is further averred that after passing of the order dated 01/02/2017 in Petition No.1106 of 2016, on 17/03/2017 the Appellant filed common appeal against the order dated 11/02/2016

along with challenge to the order dated 01/02/2017 as both the orders are inter-linked. The appeal being DFR No.916 of 2017 came up for hearing before this Tribunal on 19/04/2017, 18/05/2017 and 10/07/2017 when RKM and UPPCL raised objection as to the maintainability. In order to avoid any delay, the Appellant has amended the existing appeal so as to confine its challenge to order dated 01/02/2017 passed in Petition No.1106 of 2016 and has filed the present appeal against order dated 11/02/2016 in Petition No.1078 of 2015 with an application for condonation of delay. The Appellant has urged that the consumers in the State of Uttar Pradesh will suffer irreparably if RKM is allowed to have the PPA at the levelised tariff of Rs.5.088/KwH discovered in the Competitive Bidding Process held in 2012 when in subsequent Tariff Based Competitive Bidding Process, the tariff discovered is only Rs.3.94/KwH to Rs.4.63/KwH. In the circumstances it is submitted that there are sufficient *bonafide* reasons for not filing the appeal earlier and as the delay is not intentional it may be condoned.

5. We have heard Mr. Ramachandran learned counsel appearing for the Appellant. Counsel has reiterated the above submissions.

We have perused the written submissions filed by him. Gist of the submissions is as under:

- a) The Appellant has offered acceptable reasons as to why there is delay in filing the appeal.
- b) It is evident that from 28/03/2016 till 27/10/2016 (213 days) the Appellant was not aware of the order.
- c) From 27/10/2016 till 01/02/2017 (97 days) the Appellant was *bona fide* pursuing the objection to the relief sought in Petition No.1106 of 2016 for adoption of tariff. If the tariff was not adopted by the State Commission in Petition No.1106 of 2016 there would have been no impact of the impugned order dated 11/02/2016.
- d) From 01/02/2017 till 17/03/2017 (45 days) the Appellant prepared common appeal being DFR No.916 of 2017 and filed it.

- e) From 17/03/2017 till 26/07/2017 (129 days) common appeal was pending before this Tribunal with an application for exemption from filing two separate appeals. Upon objection being raised separate appeal was filed against impugned order on 26/07/2017. Thus the reasons for not filing the appeal within the period of limitation are genuine and *bona fide*.
- f) No vested right accrued in favour of RKM when order dated 11/02/2016 was passed and investment was made based thereon. The rights in RKM get crystallized only when the tariff is adopted (**Energy Watchdog v. Central Electricity Regulatory Commission¹**)
- g) The contention that the Appellant took a chance in pursuing the objection in Petition No.1106 of 2016

¹ (2017) 4 SCALE 580

and hence condonation of delay should be denied is incorrect. (See : **Balakrishnan v. Ayyasami**²)

- h) Decision of this Tribunal dated 21/09/2017 in **Loudan Properties (Pvt.) Ltd v. West Bengal Regulatory Commission** in IA No.316 of 2017 in DFR No.1065 of 2017 is not applicable to this case. That was a case of lack of *bona fides*. Such is not the case here.
- i) The application for condonation of delay therefore deserves to be granted.

6. We have heard Mr. Ranganadhan learned counsel appearing for RKM Respondent No.1 herein. We have perused the written submissions filed by him. Gist of the submissions is as under:

- a) A party is required to explain delay day by day (**Ram Lal v. Rava Coalfields Ltd.**³, **Kumar & Ors v. Karnataka Industrial Cooperative Book**

² AIR 1983 Mad 17

³ AIR 1962 SC 361

Ltd. & Anr.⁴) The Appellant has not explained the cause of delay.

- b) Though the Appellant became aware of order dated 11/02/2016, the Appellant took a conscious, deliberate and calculated decision not to challenge the order dated 11/02/2016. The Appellant took a chance of proceeding with the tariff adoption proceedings.
- c) Deliberate inaction has been held by this Tribunal to constitute a clear ground for denial of condonation of delay in **M/s Loudon Properties (Pvt) Ltd v. West Bengal Regulatory Commission**⁵ .
- d) The Appellant has not shown sufficient cause. The application is silent as to when the Appellant became aware of order dated 11/02/2016(**Esha**

⁴ (2013) 11 SCC 668

⁵ (judgment dated 29/01/2017 in IA No.316 of 2017 in DFR No.1065 of 2017)

Bhattachargee v. Raghunmathpur Nafar Academy⁶.

- e) The Appellant elected to participate in the Tariff Adoption Process. Having elected a particular course of action, the doctrine of election would apply and the Appellant would be estopped from challenging order dated 11/02/2016 (**C. Beepathumma v. Velsari Shankaranarayana Kadambolithya⁷, Mumbai International Airport v. Golden Chariot Airport⁸**).
- f) The Appellant has not sought application of Section 14 of the Limitation Act, hence oral submissions made on the same are not being dealt with.
- g) RKM has made investment of Rs.1300 crores. Supply has commenced from 02/04/2017. Equities are created in favour of RKM. Hence delay ought not to be condoned (**Loudon Properties**)

⁶ (2013) 12 SCC 649

⁷ 1964(5) SCR 836

⁸ (2010) 10 SCC 422

h) The period of limitation to file an appeal under Section 111 of the Electricity Act 2003 (“**the said Act**”) has to be strictly construed as against period of limitation under the Limitation Act(**Chhatisgarh State Electricity Board v. Central Electricity Regulatory Commission & Ors**)⁹

i) In the circumstances the application be dismissed.

7. Mr. Srivastava learned counsel for Respondent No.2 has also vehemently opposed the application for condonation of delay.

8. We must first note the sequence of events which led to the filing of this appeal. On 22/05/2013, Letter of Intent was issued by UPPCL to RKM for supply of 350 MW power at the levelised tariff of Rs.5.088/KwH. This tariff was discovered through a Competitive Bidding Process initiated in the year 2012. On 19/12/2013 UPCL

⁹ (2010)5 SCC (23)

cancelled the said Letter of Intent due to failure of RKM to submit Contract Performance Guarantee. UPPCL filed Petition No.1078 of 2015 for restoration of Letter of Intent issued to RKM. In this petition impugned order dated 11/02/2016 was passed by the State Commission giving approval to the restoration of Letter of Intent issued to RKM. UPPCL then filed Petition No.1106 of 2016 before the State Commission for adoption of tariff. On 27/10/2016 the State Commission issued public notice in this petition. It is the Appellant's case that at that stage he came to know about the proceedings regarding the restoration of Letter of Intent and adoption of tariff. The State Commission passed order dated 01/02/2017 in Petition No.1106 of 2016 adopting the tariff of Rs.5.088 per unit as quoted by RKM for a period of 25 years. On 17/03/2017, the Appellant filed a common appeal being DFR No.916 of 2017 against the order dated 11/02/2016 and order dated 01/02/2017. When DFR No.916 of 2017 came up for admission RKM and UPPCL raised objection regarding the maintainability of the common appeal. It is the case of the Appellant that to avoid any delay, the Appellant filed present appeal being DFR No.2361 of 2017 on 26/07/2017.

8. We shall now analyse this explanation. The impugned order is dated 11/02/2016. Therefore the appeal ought to have been filed by 28/03/2016. The above summary of events indicates that the Appellant got to know of the proceedings initiated for restoration of Letter of Intent and adoption of tariff when the State Commission issued public notice in Petition No.1106 of 2016 filed by UPPCL for adoption of tariff on 27/10/2016. We have no reason to disbelieve this statement made by the Appellant. Thus, 213 days will have to be excluded from the time taken to file the appeal.

9. From 27/10/2016 till 01/02/2017 when the State Commission passed order in Petition No.1106 of 2016 adopting tariff of Rs.5.088 per unit the Appellant was participating in the proceedings of the said petition by objecting to adoption of tariff. However, on 01/02/2017, the State Commission passed the order adopting the said tariff of Rs.5.088 per unit and approved the PPA. The Appellant being aggrieved by this order and order dated 11/02/2016 filed a common appeal on 17/03/2017. About 45 days taken to prepare the appeal memo of the common appeal will have to be therefore excluded. According to the Appellant, since objection was raised by UPPCL and RKM about filing of the common

appeal when it came up for hearing on 19/04/2017, 18/05/2017 and 10/07/2017 in order to avoid delay the Appellant filed the present appeal on 26/07/2017. This resulted in filing of appeal being delayed by further period of 129 days. It is contended by the counsel for RKM that though this explanation is offered in the court, is not so stated in the application for condonation of delay. In order to ascertain this, we perused IA No.591 of 2017 filed by the Appellant to amend DFR No.916 of 2017. In that application it is clearly stated that on 19/04/2017, 18/05/2017 and 10/07/2017, objection was raised about the maintainability of common appeal. It is further stated that in order to avoid any delay in the matter the Appellant seeks to file a separate appeal against order dated 11/02/2016 (impugned order) and amend DFR No.916 of 2017 restricting his challenge to order dated 01/02/2017 in Petition No.1106 of 2016. Considering the objection raised, the Appellant had filed a separate appeal against impugned order on 26/07/2017. Considering the contents of the I.A. No.591 of 2017 on 31/07/2017 this Tribunal granted leave to amend the appeal to the Appellant. In our opinion, time taken in filing separate appeal will have to be condoned. Taking an overall view of the matter we

are of the opinion that the explanation offered by the Appellant is reasonable and acceptable.

10. Reliance placed by RKM on judgment of this Tribunal in **Loudan Properties** is misplaced. That was a gross case where the conduct of the Appellant therein was *mala fide*. The Appellant therein knew fully well that his remedy was an appeal to this Tribunal. Yet, he repeatedly approached the Calcutta High Court. He filed two writ petitions and one writ appeal in the High Court. The Appellant therein hoping that he would get a favourable order, did forum shopping. In the circumstances, this Tribunal refused to condone the delay. Facts of that case cannot be equated with the facts of this case. The Appellant is not guilty of forum shopping. The Appellant was *bona fide* participating in Petition No.1106 of 2016 and opposing adoption of tariff of Rs.5.088 per unit quoted by RKM. It is during these proceedings that he got to know about proceedings regarding restoration of letter of Intent issued in favour of RKM. Had the State Commission not adopted the tariff quoted by RKM restoration of Letter of Intent would have lost its meaning. Being a consumer, it was reasonable for the Appellant not to adopt another proceeding by challenging order dated 11/02/2016

approving restoration of Letter of Intent which he has now impugned. In the circumstances of the case, it cannot be said that the Appellant was waiting for a favourable order and he took a chance. The fact that the Appellant is a consumer will have to be kept in mind while dealing with this submission. Against the backdrop of facts narrated by us, it is not possible to hold that because the Appellant elected to participate in tariff proceedings, he cannot challenge order dated 11/02/2016.

11. The fact that RKM has made investment on the basis of order dated 11/02/2016 cannot prevent us from condoning delay in the interest of justice. It is not possible to accept the submission that any right accrued in favour of RKM when Order dated 11/02/2016 was passed. The rights in RKM get crystallised only when the tariff is adopted.

12. Having considered the explanation offered by the Appellant, we are of the opinion that the Appellant has made out a case for condonation of delay. The Appellant is not guilty of deliberate inaction or *mala fide* conduct. In the circumstances, we condone the delay in filing the appeal.

13. The application is disposed of in the afore-stated terms.
14. List the matter on **18/12/2017**.
15. Pronounced in the Open Court on this **30th day of November, 2017**.

S.D. Dubey
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]