

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

**IA NO. 1400 OF 2018 IN
APPEAL NO. 216 OF 2018**

Dated: 29th October, 2018

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

Raj West Power Limited

.... Appellant(s)

Versus

Rajasthan Electricity Regulatory Commission & Ors.

.... Respondent(s)

Counsel for the Appellant(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. Aman Anand
Mr. Aman Dixit
Mr. Geet Rajan

Counsel for the Respondent(s) : Mr. P.N.Bhandari for R-2, 3 & 4

ORDER

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. The present Application is filed by Appellant seeking interim directions pending final adjudication of the Appeal. The Appellant has sought the following reliefs in the instant IA, being IA No. 1400 of 2018 in Appeal No. 216 of 2018:

A. Direct the Respondents no. 2 to 4 to refund an amount of Rs. 75,27,09,333/- , being the amount of the difference between the interim variable charges allowed vide interim tariff order dated 27.04.2018 and provisional variable charges as calculated in the Impugned Order, for FY 2017-18, which has

been mischievously, illegally and unilaterally adjusted by them, along with interest, to the Appellant forthwith;

- B. Restrain the Respondents no 2 to 4 from taking any coercive action, including by carrying out any unilateral adjustments, for recovery of the difference in variable charges as granted by State Commission, till final determination of transfer price of lignite, final variable cost and final tariff of the Appellant's Generating Station by the State Commission;
 - C. Direct the Respondents to ensure completion of the bidding process, for selection of MDO for Kapurdi & Jalipa lignite mines, the determination of final transfer price of lignite and the determination of final variable charges, in a time bound fashion; and
 - D. Pass any other order/s, as deemed fit and proper, in the interest of justice.
2. The facts of the present Application as presented by the Appellant are as under:
- 2.1. The capital cost of the generating station has been finally determined by the State Commission and the Appellant has challenged certain capital cost disallowances before this Tribunal and the Hon'ble Supreme Court of India. However, the transfer price of lignite, which will determine the variable charges payable to the Appellant, has not yet been determined by the State Commission. As such, though finality, subject to the outcome of

the appeals filed by the Appellant, can be said to have been attained, as far as determination of fixed charges by the State Commission is concerned, there cannot be any dispute regarding the provisionality of the variable charges determined by the State Commission.

- 2.2. The variable charges for the Project are yet to be determined finally, and therefore, as per the provisions of Regulation 42(6) of the Tariff Regulations, since the order determining final tariff is yet to be passed by the State Commission, no adjustment between interim tariff and provisional tariff can be carried out. In this regard the following history of the case may be noticed:

Financial Year	Directions in the interim tariff orders	Directions in the provisional tariff orders	Remarks
FY 2011-12 to FY 2013-14	Interim tariff subject to adjustment as per further orders of the State Commission,	No adjustment of differential between interim tariff and provisional tariff directed in the provisional tariff order dated 24.02.2016	No adjustment of differential tariff.
FY 2014-15 to FY 16-17	Interim tariff subject to adjustment after determination of final transfer price of lignite and final tariff.	Direction to adjust the differential of interim and provisional tariff in the provisional tariff order dated 19.06.2017. In review, the State Commission	Differential Fixed charges offered to be adjusted by the Appellant. Regarding adjustment of differential variable charges, the Tribunal protects the

		vide order dated 04.09.2017, defers recovery of differential variable charges for 4 months, expecting that the final transfer price of lignite would be determined in such time.	Appellant against any coercive steps for recovery.
FY 2017-2018	Interim tariff subject to adjustment after determination of final transfer price of lignite and final tariff	No adjustment of differential between interim tariff and provisional tariff directed in the provisional tariff order dated 18.05.2018 (Impugned Order)	Respondent Discoms mischievously illegally & unilaterally carry out the adjustment of differential fixed as well as differential variable charges.

2.3. As would be noticed, the differential of variable charges have either not been directed to be adjusted at all, and where they have been so ordered, this Tribunal has protected the Appellant against such adjustment. None of these orders have been questioned by the Respondents 2 to 4 and have thus attained finality. Despite this being the history of the case, the Respondents 2 to 4 have mischievously, illegally and unilaterally carried out the adjustment of differential variable charges for FY 2017-18.

2.4. The Appellant had initially filed a Petition before the State Commission under section 86(1)(f) of the Electricity Act, 2003

seeking refund of the entire amount Rs. 189,51,65,557/-. However subsequently, upon advice, the Appellant has filed an application for withdrawal of the said Petition and filed the present Application before this Tribunal.

- 2.5. The adjustment carried out by the Respondents 2-4 on 08.08.2018 is on account of differential of fixed charges as well as the differential variable charges. However, the subject matter of the present application is restricted to the illegal adjustment of Rs. 75,27,09,333/- carried out by the Respondents 2-4 on account of differential variable charges.
- 2.6. Though the Impugned Order itself contains no direction to carry out any adjustment, it has been the position of the Respondent Discoms that the adjustment is directly relatable to the order impugned in the instant appeal. Thus, the present application for interim directions has been filed by the Appellant before this Tribunal.
- 2.7. After passing of the Impugned Order dated 18.05.2018, the SE Billing, RUVNL, for and on behalf of the Respondent Discoms, vide letter dated 28.05.2018 called upon the Appellant to raise revised invoices as per tariff approved vide order dated 18.05.2018.
- 2.8. The Appellant responded to the said letter on 01.06.2018, clearly stating that the order dated 18.05.2018 did not direct any raising of revised invoices at this stage; and that the raising of adjustment invoices, if any, has to be done only after the determination of the

final tariff, as per Regulation 42(6) & terms of the interim order dated 27.04.2017 for FY 2017-18.

- 2.9 This Tribunal, in relation to adjustments on differential variable charges for FY 2014-2017, which were directed specifically to be carried out by the State Commission, had also directed the Respondent Discoms not to take any coercive steps. As such, the request for raising adjustment invoices for the differential amount at this stage was unwarranted.
- 2.10 The Monthly bill for May 2018 was cleared by the Respondent Discoms, and there was no communication on the issue of raising adjustment invoices. The Appellant therefore, legitimately believed that in view of the response dated 01.06.2018, the controversy had been put to rest.
- 2.11 However, RUVNL, on 10.07.2018, once again called upon the Appellant to raise revised invoices as per tariff approved vide order dated 18.05.2018. It may be noted that this letter was issued without noticing or referring to the Appellant's response dated 1.06.2018. The Appellant accordingly, responded to the said letter on 20.07.2018, in line with its earlier response dated 1.06.2018.
- 2.12 Thereafter, the Monthly bill for June 2018 was cleared, and there was no further communication on the issue till 06.08.2018. On 06.08.2018, RUVNL suddenly, issued another letter (received by the Appellant through an email at 2002 hrs i.e. after office hours of 06.08.2018) calling upon the Appellant to clarify the legitimate reasons, within 2 days, as to why the revised invoices for FY 2017-

18 have not been raised. It is pertinent to note that in this letter, RUVNL stated that the clarification offered by the Appellant for not raising revised invoices does not pertain to FY 2017-18; and that the interim protection by this Tribunal is only with relation to the adjustment of tariff for FY 2014-15 to FY 2016-17.

2.13 However, RUVNL completely shut its eyes to the entire history of the case on the issue of adjustments, particularly the fact that (a) the interim order for FY 2017-18 clearly directed that the adjustment would take place after determination of final tariff (b) the provisional tariff order dated 18.05.2018 for FY 2017-18 does not contain any direction for adjustment, in contrast to the provisional tariff order for FY 2014-15 to FY 2016-17 where also this Tribunal had protected the Appellant against any adjustment of differential variable charges; and (c) the provision of Regulation 42(6) which explicitly envisages adjustment only at the time of determination of final tariff.

2.14 The Appellant, vide its letter dated 08.08.2018 i.e. within the two days of the letter dated 06.08.2018, once again offered its justification for legitimately not raising the revised/adjustment invoices at this stage, in absence of any direction to this effect in the Impugned Order dated 18.05.2018 and in absence of final tariff having been determined.

2.15 However, RUVNL on behalf of the Respondent Discoms, on 08.08.2018, without even waiting for the 2 days as stipulated in their own letter of 06.08.2018 and without taking cognizance of the explanation offered by the Appellant on 08.08.2018 for not raising

revised invoices at this stage, has gone ahead and straight away adjusted a sum of Rs. 189,51,65,557/- from the Monthly Bill of July 2018, in total and gross violation of the PPA terms, orders of the State Commission and the law. The fact that 06.08.2018 letter was a mere empty formality is clear from the fact that the decision for making the adjustment had already been taken, and the letter dated 08.08.2018 of RUVNL does not even refer to the justification letter dated 08.08.2018 of the Appellant. The letters refer to some decision of the Chairman of RUVNL, a copy of which has not been shared with the Appellant, despite requests.

2.16 The Monthly Bill for July 2018 was submitted on 06.08.2018 and the adjustment has been made within 2 days of bill submission, without paying any heed to the procedure agreed in case of a disputed bill under the PPA.

2.17. The adjustment of the Differential Amount, if any, for FY 2017-18 was directed to be carried out, after determination of the final transfer price of lignite & final tariff by the State Commission, vide order dated 27.04.2017. This direction was totally in line with the terms of Regulation 42(6) of the RERC Tariff Regulations, 2014. The direction for adjustment of the Differential Amount for FY 2017-2018, after determination of final tariff, has become final and has not been assailed by the Respondent Discoms. In fact, the adjustment of differential variable charges was not directed by the State Commission in the provisional tariff order dated 24.02.2016 for FY 2011-12 to FY 2013-14; and when such direction was given by the State Commission in order dated 19.06.2017 for FY 2014-15 to FY 2016-17, this Tribunal was pleased to restrain the

Respondent Discoms from taking any coercive action to adjust the differential variable charges. None of the above orders have been questioned by the Respondents Discoms, and thus have attained finality. The adjustment of differential variable charges for FY 2017-18 has clearly been carried out by the Respondent Discoms mischevously, in contravention of the orders dated 27.04.2017 and 18.05.2018 of the State Commission, the orders of this Tribunal and the entire history of the case. Further, the said adjustment is against the mandate of Regulation 42(6) of the RERC Tariff Regulations, 2014 as also the provisions of the PPA in respect of disputed bills have been given a complete go-bye, and the illegal and unilateral adjustment has been carried out in undue haste i.e. within 2 days of submission of the Monthly Bill for July 2018. The mischief of the Respondent Discoms which has left the Appellant financially crippled deserves to be undone & the adjustment on account of differential variable charges for FY 2017-18 deserves to be set aside; and the Respondent Discoms directed to pay the illegally adjusted sum of Rs. 75,27,09,333/- , along with interest to the Appellant forthwith.

2.18 Further, the issue of adjustments on the differential of variable charges will keep arising till such time the transfer price of lignite and the variable cost of the generating station is finalized. There can be no dispute that finality of transfer price of lignite and final variable charges is the need of the hour for this project, which will also serve the paramount consideration of consumer interest. This Tribunal as well as the State Commission have in the past given directions for time bound finalization of transfer price of lignite and the variable charges. The transfer price of lignite for the mining

entity (Barmer Lignite Mining Company Limited) has not been finalized pending the finalization of the tender for selection of Mine Developer-cum-Operator (MDO) for Kapurdi and Jalipa lignite mines. It is stated that the tender has been rejected twice and the present is the third attempt for selection of the MDO through a tender process, which is being conducted by the Respondent Discoms and the mining entity under the aegis of the State Commission. Thus, the Appellant under the present circumstances is also requesting this Tribunal to give appropriate directions to the State Commission to ensure that the bidding process is completed and the transfer price of lignite and the variable charges are finally determined in a time bound fashion. However, till such final determination, the Appellant is entitled to protection from any unilateral adjustments on account of differential variable charges from its Monthly Bills for the reasons detailed hereinbefore, as also to protect that Appellant from such periodic insurmountable revenue/cash flow shocks which leave the Appellant financially crippled.

2.19 The Appellant claims to have good prima facie case on merits in the matter. The balance of convenience lies in the favour of the Appellant and the Appellant shall suffer irreparable harm and injury if the present Application is not allowed.

3. Contentions of the Respondents:

3.1 The learned counsel Mr. P.N. Bhandari appearing for the Respondent No. 2,3 and 4 (Rajasthan Discoms) submitted that as per the orders of the State Commission determining the fixed and variable charges for the project of the Appellant, the differential

amount arising out of the actually paid and the entitled amount, have been deducted. He further contended that the said action of Discoms is duly based on the standard practice in such matters where the excess amounts paid are adjusted based on the State Commission's prevailing orders. When his attention was drawn towards the provisions of Regulation 42(6) of the Tariff Regulations which provide adjustment between the actual/final tariff and the interim tariff, he defended that though the charges decided by the State Commission were interim/provisional in nature but the same have been computed by the State Commission after taking into account actual inputs and applying prudence check. He was quick to submit that as the charges/tariff determined by the State Commission were as good as final tariff, the Discoms preferred to adjust the amount being difference between the previous order and the present one.

- 3.2 Advancing his arguments further, Shri P.N. Bhandari, learned counsel appearing for Discoms, submitted a list of pending Appeals filed by the RajWest Power group (Appellant) which are pending for adjudication before this Tribunal. He categorically contended that the Appellant instead of praying for such refund/adjustment should make all out efforts to pursue the decisions of this Tribunal for arriving at final logical conclusion.

4. Our consideration

- 4.1 We have considered and analysed the contentions of the learned counsels for the Appellant as well as the Respondents. It is relevant to note that the capital cost for the generating station of

the Appellant has been finally determined by the State Commission and accordingly, the fixed charges for the project has been finalised. As per the Appellant, an amount of Rs. 189,52,55,557/- has been adjusted by the Discoms of which major portion belongs to the fixed charges. The adjustment on account of variable charges amounts Rs.75,27,09,333/-. In view of the final determination of capital cost/fixed charges the Appellant has not claimed refund of adjusted fixed charges and has prayed only for the refund of adjusted amount in lieu of variable charges on the ground that variable charges are yet to be finalised by the State Commission due to the fact that the transfer price of lignite which is the main fuel in this project, is yet to be determined by the State Commission. While carefully going through the submissions/contentions of the learned counsel we observe that out of the entire adjustment of Rs. 189,52,55,557/-, the adjustment towards fixed charges appears to be justified, however, pending finalisation of the variable charges based on actual transfer price of lignite the adjustment to this account is against the settled principles of natural justice and equity. The tariff Regulations dated 24.2.2014 of the State Commission in this regard stipulate as under:-

“42.....

(6) *Any difference in provisional tariff and the final tariff determined by the Commission and attributable to the generating company may be adjusted in the tariff for the following year as directed by the Commission.”*

4.2 In view of the above Regulations, it is amply clear that adjustment if any would need to be made after determination of final tariff vis-a-vis the provisional tariff whereas in the present case, it has been done otherwise i.e. adjustment between two provisional tariff. It is also relevant to note that the differential adjustments have been done unilaterally in haste without affording adequate opportunity to the Appellant to present his case for redressal.

4.3 We are not convinced with the arguments of the learned counsel for the Respondent Nos. 2 to 4 that though the tariff orders of the State Commission are provisional but actually they are almost final or semi-final as the same have been passed after applying prudent check by the State Commission. The arguments of the learned counsel Mr. P.N. Bhandari do not sustain in law as Regulations do not provide for any interpretation regarding adjustment arising out of 'semi-final' or 'nearing final' figures relating to fixed/variable charges. Further, the disposal of pending Appeals as cited by the learned counsel for the Discoms has nothing to do with the instant Application.

ORDER

In view of above facts we are of the considered opinion that Application (i.e. IA No. 1400 of 2018 in Appeal No. 216 of 2018) filed by the Appellant deserves to be allowed and disposed of in following terms:-

- (i) Respondent No. 2 to 4 are directed to refund the adjusted amount of Rs. 75,27,09,333/- on account of variable charges

allowed vide interim order dated 27.4.2018 and provisional variable charges as calculated in the Impugned Order for FY 2017-18.

- (ii) Respondent Nos. 2 to 4 are directed to refrain from taking any coercive action till the finalisation of transfer price of lignite/variable charges/tariff.
- (iii) Respondent No. 2 to 4 are further directed to refund the above adjusted amount on account of variable charges within a period of 30 days from the date of issue of this interim direction.

Needless to mention that above directions are subject to the final outcome of the instant Appeal i.e. Appeal No. 216 of 2018 filed by the Appellant.

List the main appeal for hearing on 29.01.2019.

No order as to costs.

Pronounced in the Open Court on this 29th day of October, 2018.

(S. D. Dubey)
Technical Member

✓

REPORTABLE/NON-REPORTABLE

mk

(Justice Manjula Chellur)
Chairperson