

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 41 of 2005

Dated the November 14, 2006.

Present: - Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. H.L. Bajaj – Technical Member

Chhattisgarh Cement Manufacturers' Association, RaipurAppellant
Versus

1.Chhattisgarh State Electricity Board
Daginiya, Raipur

2. Chhattisgarh State Electricity Regulatory Commission, RaipurRespondents

Counsel for Appellants : Mr. Gobardhan Pujari
Ms. Anindita Pujari

Counsel for Respondents : Ms Suparna Srivastava for CSEB
Respondent No. 1
Mr. M.G. Ramachandran with
Ms Taruna Singh Baghel and
Mr. Anand K. Ganesan for CSERC
Respondent No. 2.
Ms Pooja Matlani,Advocate for CSEB
Mr. Valmiki Mehta,
Ms Saumya Sharma
Mr. Arun Bhatnagar, Addl.SE,CSEB
Mr. D.K. Dewan, Director,CSERC
Mr. Sakesh Kumar, Advocate
Mr. D.K. Khandelwal. ACE
Mr. Deepak Shrivastava, EE for
MPSEB
Mr. S.B. Khyalia,GM and
Mr.K.P.Jangid,
CA for GUVNL

JUDGMENT

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

This appeal is directed against the order dated June 15, 2005 of the Chhattisgarh State Electricity Regulatory Commission (CSERC) for the determination of tariff for the year FY 2005-06. The facts giving rise to this appeal are as follows:-

2. The appellant, Chhattisgarh Cement Manufacturers' Association is a body corporate registered under the Societies Act operating in the state of Chhattisgarh in which Cement manufacturers of the state are members.

3. Respondent No. 1, Chhattisgarh State Electricity Board (CSEB) is a body corporate constituted under the Electricity (Supply) Act, 1948 and came into being on November 15, 2000 on bifurcation of the erstwhile state of Madhya Pradesh and the creation of the state of Chhattisgarh. CSEB is a vertically integrated power utility engaged in generation, transmission and distribution of electricity in the state of Chhattisgarh and is a deemed licensee under The Electricity Act, 2003.

4. The first respondent filed an application, being petition No. 5/2005, before the second respondent CSERC for approval of Annual Revenue Requirement and Determination of Retail Supply Tariff for FY 2005-06. CSERC, after conducting series of hearings with applicant, interveners, consumers and after several formal

interactions with the officers of the first respondent and after having considered the views expressed by the State Advisory Committee and all documents filed, determined the tariff vide its order dated June 15,2005. Aggrieved by the aforesaid order the appellant filed the appeal seeking the following reliefs:-

- (i) to declare that the State Commission is not competent to determine tariff without framing complete regulations for the purpose as provided under Section 61 of The Electricity Act, 2003;
- (ii) to declare that the application of the respondent No. 1 for revision of tariff is not maintainable as it is not supported by any reliable data;
- (iii) to quash the impugned order as the principles of natural justice have been grossly violated and there is failure to ensure transparency while passing the order;
- (iv) to fix a bench mark on T&D loss;
- (v) to pass order not to increase tariff in cement industry; and
- (vi) to pass such order(s) to which the appellant are entitled to under law and equity.

5. Extensive arguments were advanced by the learned counsel for the rival parties. Written arguments have also been submitted by both sides. ***We may recount the points raised by the learned counsel for the appellant:***

- i. Tariff was determined by the commission without framing the regulations. This being so, the tariff determination made by the commission is bad in law.***
- ii. The first respondent filed additional information before the regulatory commission on May 6, 2005, after the conclusion of the***

hearing without giving any opportunity to the appellant to have its say with regard thereto. Therefore, the commission acted in violation of the principles of natural justice.

iii. The impugned tariff order is based on conjectures and surmises as the relevant operational information and data was not filed by the first respondent. The tariff determination therefore, stands vitiated. The commission has allowed 14% return on net worth of the Board at the beginning of the year in question instead of allowing 14% return on equity. This is clearly contrary to law.

6. We now proceed to consider the various points which were raised before us in the appeal.

Tariff determination without framing proper regulations whether bad in law?

7. Learned counsel for the Chhattisgarh Cement Manufacturers' Association vehemently argued that the tariff for the year 2005-06 has been determined by CSERC without framing tariff regulations under Section 61 of The Electricity Act, 2003 and is, therefore, bad in law. In this context the learned counsel drew our attention to the following provisions of The Electricity Act, 2003 and Regulation No. 20(7) of Chhattisgarh State Regulatory Commission (Conduct of Business) Regulations, 2004 reproduced hereunder:

“ 61 Tariff regulations:- *The appropriate Commission shall, subject to the provisions of this Act, specify the terms & conditions for the determination of tariff and while making the regulation it should be guided by the following:*

a) The principles and methodologies specified by the central Commission for determination of the tariff applicable to generating companies and transmission licensees.

b) The generation, transmission, distribution and supply of electricity are conducted on commercial principles.

- c) *The factors which would encourage competition efficiency economical use of the resources, good performance and optimum investments.*
- d) *Safeguarding of consumers' interest and at the same time recovery of the cost of electricity in a reasonable manner.*
- e) *The principles regarding efficiency in performance*
- f) *Multiyear tariff principles*
- g) *That the tariff progressively reflects the cost of supply of electricity and also reduces and eliminates cross subsidies within the period to be specified by the appropriate Commission.*
- h) *The promotion of co-generation and generation of electricity from renewable sources of energy*
- i) *The National Electricity Policy and tariff policy*

Section 86 (3) *The State Commission shall ensure transparency while exercising its powers and discharging its function.*

Section 94 (3) *The appropriate Commission may authorize any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.*

Section 181(1) *The state Commission may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.*

Section 181(3) *All regulations made by the state Commission under this Act shall be subject to the condition of previous publication.*

Section 182. *Rules and regulations to be laid before state Legislature: Every rule made by the State Government and every regulation made by the State Commission shall be laid, as soon as may be after it is made, before each house of the State Legislature where it consists of two House, or where such Legislature consists of one House, before that House.*

Regulation No. 29(7) of the Chhattisgarh State Regulatory Commission (Conduct of Business) Regulations, 2004 reads as hereunder:

"29(7) The Commission shall take into consideration while determining the tariff of a Distribution Licensee as per this regulation and as

per the tariff regulations to be framed by the Commission under Section 61 of the Central Act.”

8. Appellant contended that since the Commission has determined the tariff without framing appropriate Regulations the tariff order is liable to be set aside. Appellant further pleaded that the Commission was conscious of the requirement of framing Regulations and it is, therefore, that the Commission has made provisions in the aforesaid Regulation 29(7) of the Chhattisgarh State Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 that it will be guided by the tariff Regulations that the Commission is going to frame. Once the Commission's own Regulations require that it will be guided by the Regulations to be framed by it for determination of tariff, it does not have the authority to act contrary to the provisions made in the Regulations.

The issue of determination of tariff in the absence of the Regulations has been considered by a Full Bench of this Tribunal in the case of M/s Siel. Ltd. V/s Punjab State Electricity Regulatory Commission & Others, where it has been, inter alia, held as under:

- (i) *Framing or existence of the Regulations is not a condition precedent or a sine qua non for determination of tariff by the Regulatory Commission;*
- (ii) *Tariff determination undertaken in the absence of the Regulations does not contravene the provisions of the Act of 2003;*

In view of the decision of the Full Bench in the aforesaid case, we reject the submission of the learned counsel for the appellant and hold that

the tariff determination in the absence of the regulations is not contrary to the provisions of the Electricity Act, 2003 and consequently not bad in law.

Did the CSERC act in violation of the principles of natural justice in entertaining the communication from CSEB after conclusion of hearing without giving an opportunity to the appellant?

9. The appellant contended that the Board had submitted additional filing on Annual Revenue Requirement on May 6, 2005 which has been taken into account by CSERC which was neither notified for inviting objections nor was the appellant heard on this. Therefore, the right of hearing granted by the Act has been grossly violated and the impugned order is, therefore, liable to be set aside.

10. Per contra the learned counsel for the respondent argued that the Commission, while exercising regulatory power and in particular, in dealing with the ARR and tariff determination under the functions and powers vested under The Electricity Act, 2003 exercises inquisitorial powers. Jurisdiction of the Commission to determine tariff after scrutinizing the revenue requirements of a licensee including the tariff design is not a process to decide a lis or dispute between the two contesting parties. ***The proceedings before the commission are not adversarial in nature, where the commission is to consider only the material which is placed before it by the parties or the commission is to accord hearing to all the objectors with regard to the entire material placed***

before it. The learned counsel for the respondents further contended that in exercise of its inquisitorial function to approve the ARR of the licensee and determination of tariff, the Commission can and is required to go farther than the case presented to it in the proceedings and seek out the truth of whatever is the issue. The Commission can carry out its own research, call its own witnesses and follow a spectrum of possible course to effectively discharge its functions. In this context several authorities in support have been cited some of which are reproduced below:-

Authorities in support

(1) *Corpus juris secundum Vol.29 (compilation pages 1-9)*

« In acting with respect to rates for electricity, the Regulatory Commission may and must afford adequate procedure and comply with statutory requirement(s). Ordinarily, the Commission should not act without giving notice and holding a hearing but it may suffice the interested parties are offered an opportunity of hearing”

(Foot Note)

Statute requiring public hearings does not preclude informal private conference.

NC- State ex rel. North Carolina Utilities Commission V/s Municipal Corporation of Scotland Neek, 90 SE 2nd, 519, 243 N.C. 193

4.15 S- Georgia power & Light Co. V/s Georgia Public Service Commission, DC Ga, 8 F. Supp 603

Va- Western Power Co. 106 S.E. 400, 129 Va 377

Consumers- Since the Commission represents the public, it is only the electric company that is entitled to a hearing and it rests within the discretion of the Commission to grant or refuse a hearing to consumers.

H.Y- Campo Corp V/s Feinberg, 110 N.Y.S. 2d 250, 279 App.,Div.302 affirmed 106 N.E. 2d 70, 303 N.Y. 995

Additional hearing after requesting certain reports from company is not required.

N.D- Application of Montana- Dakota Utilities CC Minneapolis, Minnesota, 111 N.W. 2d 705

*R. V Chief Registrar of Friendly Societies ex p. New building society (1984)
2 ALL ER 27 at page 4
(compilation pages 53-90)*

“.....In making his inquiries the Registrar is not conducting an adversarial inquiry in which two sides before him the evidence they wish him to take into account. The registrar makes his own inquiries and he has extensive powers and a larger department at his disposal to do so. The registrar is engaged in an inquisitorial and not an adversarial process....”

Union of India V/s Cynamide India Ltd. 1987 (2) SCC 720 at pages 735 (paras 6 and 7) and pages 749-752 (paras 27,28 AIR 1987 SC 1802 (Compilation pages 91-129)

At page 735 para 6 – “ Occasionally, the legislature directs the subordinate legislating body to make such enquiry end as it thinks fit before making the subordinate legislation. In such a situation, while such enquiry by the subordinate legislative body as it deems fit is a condition precedent to the subordinate legislation, the nature and extent of the enquiry is in the discretion of the subordinate legislating body and subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been. The provision for “such enquiry as it thinks fit” is generally an enabling provision, intended to facilitate the subordinate legislating body to obtain relevant information from all whatever source and not intended to vest any right in anyone other than the subordinate legislating body. It is the sort of enquiry which the legislature itself may cause to be made before legislating, an enquiry which will not confer any right on anyone”.

Oil and Natural Gas Commission V/s Association of Natural Gas Consuming Industries of Gujarat 1990 (Supp) SCC 397 at page 439 (e) AIR 1990 SC 1851 (Compilation pages 130-173)

At page 439 (e) “.....Having reached the conclusion that the cost plus was the only proper basis of fixation of price, the High Court should perhaps have directed the ONGC to charge prices on that basis and given a reasonable time to work out the said price and implement the direction. Instead the High Court appears to have, by its directions in para 36, left the matter at large for it asks the ONGC to get the price fixed” according to the reasonable and rational norms “We do not see any justification for providing that the price fixation should be done in consultation with, or after giving

an opportunity to the respondents. It is for the ONGC to fix the prices and there can be no requirement of a prior consultation with the present respondents or with prospective customers....” (emphasis supplied).

11. During the hearing, the counsel for the respondents also pointed out that after the ARR was submitted by the first respondent, CERC determined tariff for the central generating power stations which had to be necessarily accounted for as power purchase cost for the ARR and there was no role that any objector could have anyway played.

12. ***We have considered the submissions of the learned counsel for the parties. The additional filing by the first respondent on May 06, 2005 was mainly for bringing on record the tariff determination of the CERC for the Central Generating Stations due to change in allocation by Government of India and employee cost, which had to be taken into consideration by the CSERC for determination of retail supply tariff of the first respondent for the year 2005-06. it has not been urged on behalf of the appellant before us that in case the appellant was given an opportunity it would have shown that determination of tariff by the CERC for central generating stations was irrelevant for the determination of retail supply tariff of the first respondent. In the process of determination of tariff, an opportunity to the interested parties to have a say in the matter is not to be an empty formality. Opportunity is not given as a ritual to a party. The appellant ought to have shown before us that in case hearing was accorded by the Commission it may have been possible to persuade the commission to take a different view***

than the one which it has taken. But the appellant has not brought out as to how it has been prejudiced by the aforesaid filing by the first respondent. We agree with the contentions advanced on behalf of the respondent Commission that the additional filing mainly regarding tariff of central generating stations determined by the CERC and the employee's cost could not have been altered by giving a hearing to the appellant. In this view of the matter it is not necessary to decide the extent and the nature of the opportunity of hearing which may be accorded to an interested party in the proceeding for determination of tariff. Accordingly, we reject the contention of the appellant based on the alleged violation of principles of natural justice.

Is the tariff order based on surmises and not on facts and, therefore, liable to be set aside?

14. The counsel for the appellant contended that the ARR filed by the first respondent does not contain reliable data and therefore, it can neither be approved nor the tariff can be revised. The Commission itself while determining the tariff has observed as under:

“ The commission had a serious handicap while considering this application due to the lack of relevant operational information and data. There is no historic data available with the Board and although in operation more than 4 years, the Board is yet to build up a reliable management information

system. The annual accounts of the Board had not yet been finalized for FY 04 and for FY-05 reportedly because of the delay in division of assets and liabilities between (erstwhile) MPEB and CSEB. Under these circumstances the Commission had to rely on certain projection made by the Board and had to look into its performance in determining allowable costs for FY 05-06.

Page 12, para 1.6.2:

“ In a nut shell the major discrepancies pointed out by the Commission earlier were more or less not removed and the Board had only tried to justify the same”

Page 14, para 1.6

“Even after reminder, the Board did not provide some of the information sought by the Commission viz. availability factor for transmission and CWIP”

Page 21, para 2.5

“The CSEB has not submitted its annual financial statement in proper formats prescribed by the Electricity Supply (Annual Accounts) Rules, 1985. The Commission has been informed that neither the above statements had been prepared by CSEB for any of the five previous financial year since its inception (2000-01) nor Audit of the Accounts has been done so for the financial statements in the formats prescribed by ESAAR and the Schedules thereof should form the base data for regulatory and tariff determination purposes”.

15. The learned counsel for the appellant asserted that since the Commission itself was satisfied that the first respondent has not furnished any reliable data and hence the order is based on surmises which is not in conformity with the provisions of the Act and is, therefore, liable to be set aside.

16. Per contra the learned counsel for the first respondent pleaded that even if there have been deficiencies and lack of data the determination of tariff under The Electricity Act, 2003 cannot indefinitely be postponed or otherwise refused because of the deficiencies. The first respondent was filing the revenue requirements and tariff petition for the first time and, therefore, some amount of imperfections at nascent stages are bound to occur, **but they were not such that tariff determination ought to have been deferred..**

17. Taking into consideration the predicament in which the second respondent was placed in dealing with a newly created Electricity Board and given the fact that the ARR was being filed for the first time, we decide not to interfere with the order of the Commission. In any case the truing up exercise by the Commission based on the actual data will put right the effect of lack of data by adjustment during next tariff period. At this point we direct the respondent Board to furnish the requisite data in time to enable the Commission to take decisions based on actual data.

18. The appellant contended that as per norms fixed for tariff Regulations return of 14% on equity has been allowed to all central generating stations and utilities. As per Section 61(a) of The Electricity Act, 2003 the state Commission shall be guided by principles and methodology of CERC. Further under Section 61 (i) of the Act, the state Regulators are to be guided by the National Electricity Policy and the Tariff Policy. The then draft tariff policy of Government of India also provided that the rates of tariff would be adopted by state Regulators. In view of this, the

first respondent should have been allowed 14% return on equity. Against this the Commission has erroneously allowed 14% return on the net worth of the Board at the beginning of the year. In view of this statutory violation, the impugned order is liable to be modified and the respondent Board needs to refund the amount already realized at the enhanced rates.

19. Per contra the learned counsel for the respondents contended that the Commission has allowed return on the net -worth of CSEB as, in addition to the equity contributions, CSEB also had retained earnings and reserve surpluses. For the purposes of allowing the rate of return, the retained earnings and reserve surpluses should be taken into consideration which is consistent with the provisions of The Electricity Act, 2003, on the guidelines issued by the Commission, the then draft tariff policy and the practice adopted in the Electricity Industry.

20. At this juncture it will be pertinent to refer to the relevant part of Para 5.3 pertaining to Return on Investment, of the tariff policy issued by the Government of India on January 6, 2006:

“ Para 5.3. Tariff policy lays down following framework for performance based cost of service regulation in respect of aspects common to generation, transmission as well as distribution. These shall not apply to competitively bid projects as referred to in para 6.1 and para 7.1 (6). Sector specific aspects are dealt with in subsequent sections.

a) *Return on Investment*

Balance needs to be maintained between the interests of consumers and the need for investments while laying down rate of return. Return should attract investments at par with, if not in preference to, other sectors so that the electricity sector is able to create adequate capacity. The rate of return should be such that it allows generation of reasonable surplus for growth of the sector.

The Central Commission would notify, from time to time, the rate of return on equity for generation and transmission projects keeping in view the assessment of overall risk and the prevalent cost of capital which shall be followed by the SERCs also. The rate of return notified by CERC for transmission may be adopted by the State Electricity Regulatory Commission (SERCs) for distribution with appropriate modification taking into view the higher risks involved. For uniform approach in this matter, it would be desirable to arrive at a consensus through the Forum of Regulators. While allowing the total capital cost of the project, the Appropriate Commission would ensure that these are reasonable and to achieve this objective, requisite benchmarks on capital costs should be evolved by the Regulatory Commission.

Explanation: For the purposes of return on equity, any cash resources available to the company from its share premium account or from its internal resources that are used to fund the equity commitments of the project under consideration should be treated as equity subject to limitation contained in (b) below.

The Central Commission may adopt the alternative approach of regulating through return on capital.

The Central Commission may adopt either Return on Equity approach or Return on Capital approach whichever is considered better in the interest of the consumers.

The state Commission may consider 'distribution margin' as basis for allowing returns in distribution business at an appropriate time. The Forum of Regulators should evolve a comprehensive approach on "distribution margin" within one year. The considerations while preparing such an approach would, inter-alia, include issues such as reduction in Aggregate Technical and commercial losses, improving the standards of performance and reduction in cost of supply.

b) *Equity Norms*

For financing of future capital cost of projects, a Debt: Equity ratio of 70:30 should be adopted. Promoters would be free to have higher quantum of equity investments. The equity in excess of this norm should be treated as loans advanced at the weighted average rate of interest and for a weighted average tenor of the long term debt component of the project after ascertaining the reasonableness of the interest rates and taking into account the effect of debt restructuring done, if any. In case of equity below the normative level, the actual equity would be used for determination of Return on Equity in tariff computations.

(Emphasis supplied)

21. Taking cognizance of the fact that the guidelines issued by the CSERC, CERC Regulations, the draft tariff policy and the tariff policy, for the purpose of return on equity, allows cash resources available to the company from its share premium account or from its internal resources that are used to fund the equity commitment of the project under consideration, could be treated as equity, we agree with the contentions of the respondent Commission. In the circumstances, we hold that 14% return allowed on the net-worth by the commission is in order.

22. In the result, we conclude that we do not find any merit in this appeal and the same is, therefore, dismissed. The parties shall bear their respective costs.

23. Before parting with the matter we would direct the respondent Board to ensure that sufficient and accurate data is made available in time to enable the Commission to determine tariff in more scientific manner. We order accordingly.

(Mr. H.L. Bajaj)
Technical Member

(Mr. Justice Anil Dev Singh)
Chairperson

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