

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal No. 187 of 2005

Present : Hon'ble Mr. Justice E Padmanabhan, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

U.P. Power Corporation Ltd.

Appellant

Versus

1. Central Electricity Regulatory Commission
2. National Thermal Power Corporation Ltd.
3. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.
4. Himachal Pradesh State Electricity Board
5. Punjab State Electricity Board
6. Haryana Vidyut Prasaran Nigam Ltd
7. Power Development Department (J&K)
8. Delhi Vidyut Board
9. Chief Engineer, Chandigarh Administration (Power Department)
10. Uttaranchal Power Corporation Ltd

Respondents

Counsel for the Appellant
Counsel for the Respondent

Mr. Pradeep Misra
Mr. M. G. Ramachandran
Mr. Sudhir Mishra, Ms. T.S. Baghel &
Ms. Saumya Sharma, Advocates

Dated : 10th day of January 2006

JUDGMENT

This Appeal has been preferred seeking for the following reliefs :

- (a) allow the present appeal and set aside the order dated 06.10.2005 passed by Central Electricity Regulatory Commission, New Delhi whereby it adjourned the interlocutory application filed by the Appeal for fixation of ad hoc tariff sine die,
- (b) further direct CERC to determine the tariff in respect of Rihand Super Thermal Power Station for the period from 2001-2004 and for 2004-2009 as early as possible within a time bound period as directed by this Hon'ble Tribunal, and
- (c) pass such other order or orders which this Hon'ble Tribunal may deem fit and proper in the interest of justice.

2. The appeal has been preferred against the order passed by the first respondent made in IA No.24 of 2003 in petition No.38 of 2001 on the file of the first respondent. The said order reads thus:

“ORDER

(DATE OF HEARING: 29.8.2005)

The Interlocutory Application is filed by the respondent, UPPCL for reduction in fixed charges in respect of Rihand STPS. A Civil Miscellaneous Appeal No.133/2002 has been filed by the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. for the Rajasthan High, Jaipur Bench, against the Commission's order dated 4.10.2002 and that Rajasthan High Court has already stayed on 10.1.2003 operation of the said order.

2. Heard the parties. Shri K.K.Mittal appearing for RRVPNL, Respondent No.2 submitted that another Miscellaneous Application has also been filed before the High Court of Rajasthan for modification of the stay order. This application had not been taken up for hearing by the High Court so far.

3. In view of the above circumstances, hearing of the Interlocutory Application is adjourned sine die and may be taken up after modification/vacation of stay order dated 10.1.2003 or disposal of the appeal, for which the parties may approach the High Court.”

3. In our considered view no appeal is maintainable against the said order under Section 111 of The Central Electricity Act 2003, as it is a mere adjournment of the pending proceedings by the first respondent. When this was pointed out to the learned counsel for the appellant, the learned counsel pleaded that this Appellate Tribunal may exercise powers under Section 121 of The Electricity Act 2003 and issue appropriate directions to the first respondent. Without admitting the appeal, liberty was given to the counsel for the appellant to serve the respondents as to why this Appellate Tribunal should not exercise the powers under Section 121 of the Electricity Act 2003.

4. Accordingly, respondents were served by the counsel for the appellant. Affidavit of service was filed in the Registry by the counsel for the appellant.

5. Heard Mr. Pradeep Misra, learned counsel appearing for the appellant, Mr. M.G.Ramachandran, Mr. Sudhir Mishra, Ms. T.S. Baghel and Ms Saumya Sharma, Advocates for respondent No.2. Other respondents have not chosen to appear despite service of notice.

6. Mr. M.G. Ramachandran, learned counsel appearing for the respondent No.2 solidly supported the counsel for the appellant to the limited extent and submitted that suitable directions may be issued to the first respondent to dispose of the pending petition No.32 of 2001 as well as IA No.24 of 2003 within a time frame.

7. The learned counsel for the appellant as well as the second respondent fairly and jointly represented that the orders of stay granted by the Jaipur Bench of the Hon'ble Rajasthan High Court has to be confined only in respect of order dated 4.10.2002 made in petition No.30 of 2002 on the file of the first respondent and that there is no impediment for the first respondent from proceeding with the pending petition No.38 of 2001 which is for the subsequent years.

8. After due consideration of the facts, the submissions made by the learned counsel appearing on either side, interim order of the Hon'ble Rajasthan High Court and the subsequent petition No.38 of 2001 filed by the second respondent herein before the first respondent seeking for fixation of tariff for the subsequent years, we are persuaded to issue and well justified in issuing the directions in exercise of powers under Section 121 of The Electricity Act to the first respondent herein. The point that arises for consideration is:

Whether on the facts placed this Appellate Tribunal is justified in issuing directions to the Central Electricity Regulatory Commission in exercise of powers conferred under Sec 121 of The Electricity Act 2003?

9. Concedingly by order dated 4.10.2002, the first respondent determined the tariff for the period 1.11.1997 to 31.3.2001 and also accorded approval of revised fixed charges for the period 1.4.1997 to 31.10.1997 in respect of Rihand Super Thermal Power Station. The last six paragraphs of the order of the first respondent dated 4.10.2002, which are relevant for the present, are set out hereunder for immediate reference:

“24. The impact of additional capitalization & FERV in the fixed charges for the period 1-4-1997 to 31-10-1997 (date of expiry of validity period of Ministry of Power tariff notification dated 2-11-1992) is as under:

Impact of additional capitalization & FERV on
Annual Fixed charges for 1997-98

(Rs. in lakhs)

	Addl Capitalisation	FERV
Depreciation	0	0
Interest on loan	63	27
Return on Equity	60	26
Total	123	53

25. The Commission, therefore, allows the following impact of fixed charges for the period 1.4.1997 to 31.10.1997: (Rs. in lakhs)

Impact due to additional capitalization	123 x 7/12
Impact due to FERV	53 x 7/12

26. Annual fixed charges for the period 1.11.1997 to 31.3.2001 are allowed as below:

(Rs. in lakhs)

	Particulars	01.11.1997	1998-99		1999-2000	2000-01
		01.11.1997 to 31.3.1998	1.4.1998 To 31.10.1998	1.11.1998 To 31.3.1999		
1	2	4	5	6	7	8
1	Interest on Loan	0	0	0	0	0
2	Intrest on Working Capital	2187	2069	2196	2061	2002
3	Depreciation	17665	17886	17886	17955	8167
4	Return on Equity	13869	13982	18642	18789	18939
5	O&M Expenses	8127	8940	8940	9834	10817
	Total	41848	42877	47664	48639	49925

The payments for part of the year shall be made on pro-rata basis.

27. The fixed charges decided by us in the preceding paras shall be shared by the respondents in the ratio of energy drawn from Rihand STPS during the relevant period. The petitioner has already recovered fixed charges from the respondents in view of continuation of tariff notification dated 2.11.1992 on ad-hoc basis beyond 31.10.1997. the amount already recovered shall be adjusted against the fixed charges decided by us through this order.

28. The petitioner has not indicated energy charges payable in the respective year and it has been stated that it is not required as the tariff is for the past period and recalculation will have no effect because operational norms remains unchanged. The respondents also did not raise the issue during the pleadings. In view of this, petitioner/respondents shall not have the option to reopen this issue later on.

29. This order disposes of Petition No.30/2002.”

10. As against the said order dated 4.10.2002, the third respondent herein has preferred an appeal on the file of the Jaipur Bench of the Hon’ble Rajasthan High Court and it is pending in S.B. Civil Misc. Appeal No. 133 of 2002 and an interim order has been passed by the Hon’ble High Court. The interim order reads thus “This appeal shall be listed on 12.02.2003 and till then the order passed by the Central Electricity Regulatory Commission dated 04.10.2002 is stayed” - (Translated from Hindi). Concedingly efforts have been taken by the either side for modification of the interim order as well as for disposal of the appeal but the parties are not successful so far.

11. In the meanwhile, years rolled and the necessity to fix the tariff for the subsequent period has arisen. Hence, the second respondent moved the petition before the first respondent for fixation of tariff for the subsequent years, namely, 2001-04 as well as 2004-05 and they are pending. The first respondent was moved by way of review as well as by way of a petition for direction by the parties. However, the first respondent, apparently had taken the view that since matter is pending before the Hon’ble High Court it may not be justified to take up and pass orders on the pending tariff applications in view of stay orders and it has adjourned pending matters sine die.

12. From the facts it is clear that, the subject matter of the pending appeal before the Hon’ble Rajasthan High Court relates to the earlier period and the stay / interim order has to be confined to the order under appeal. The learned counsel on the either side fairly stated that there is no stay or any prohibition or impediment for the first respondent taking up the application / tariff petition filed by the second respondent herein for the subsequent years and passing orders. It is rightly pointed out that the proceedings of the first respondent for the subsequent period are independent proceedings and the counsel appearing on either side fairly submit that the first respondent could consider the petition moved by the second respondent and pending on its file according to the provisions of The Electricity act 2003 and the relevant regulations and pass orders. The order which is under appeal before the Hon’ble Rajasthan High Court also makes it clear that it is for the particular period.

13. That apart, Sub Section (6) of Section 64 of the Electricity Act 2003 provides that a tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order. The first respondent has already specified the period for which its earlier order which is under appeal to be effective or in force. Of course, any modification by the Hon’ble High Court may have certain degree of effect on the tariff to be

fixed for the subsequent period. This could be taken care of by truing up exercise or amendment as may be required.

14. It is the settled position that stay of operation of an order means that the order which has been stayed would not be operative from the date of passing of stay order. It does not mean that the said order has been wiped out from existence. The order of interim stay granted has to be read so as to confine its effect to the order under appeal and not beyond, unless specifically ordered. Hence, we hold that there is no justification for the first respondent to stay off its hands despite the tariff period 2001-02, 2002-03, 2003-04 and 2004-05 have already rolled and tariff petition for those years are kept pending, though we are in the year 2005-06. We do not find any justification for the first respondent to stay off his hands without considering the tariff petition filed for the years 2001-04 and 2004-05 and subsequent years as well, merely because an appeal is pending with respect to tariff fixation for the years prior to 2001-02.

15. It is pointed out and claimed by Mr. Pradeep Misra, Advocate for appellant, that the appellant herein is seriously prejudiced and sustaining day to day loss. Mr. M.G.Ramachandran on figures and facts disputes the said claims of Mr. Misra and at the same time submits that the first respondent will not be justified in keeping off its hands and it has to take up pending tariff petitions before it and decide the same according to law at the earliest and without further delay.

16. In our considered view the present applications pending before the first respondent are not covered by interim order passed by the Hon'ble High Court. In the circumstances, we are persuaded to issue directions in exercise of powers conferred by Section 121 of The Electricity Act 2003 to the first respondent, the Central Electricity Regulatory Commission to take up all the applications filed by the second respondent on its file for tariff fixation for the years 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, etc., and all the connected interim applications and give expeditious disposal according to law. It is needless to add that the first respondent may give suitable priority for disposal of the tariff applications.

17. Mr. Misra, the learned counsel pressed for interim directions but in view of the dispute and serious challenge to the facts and figures, in respect of AFC proposed in tariff applications and all connected petitions for the years 2001-04 to 2004-05, we are not inclined to issue an interim direction at this stage.

18. However, we make it clear that if within a period of three months from this day, the first respondent for any reason whatsoever is unable to pass orders on the pending tariff

applications and petitions moved by the second respondent and other parties, we give liberty to the appellant herein to move appropriate interim application.

19. In the result, we direct the first respondent herein to consider and pass final orders on the pending applications and petition moved by the second respondent seeking fixation of tariff for Rihand Super Thermal Power Station for the period 2001-02 and subsequent years as expeditiously as possible according to law and after affording opportunity to all the parties concerned.

Dated at New Delhi this 10th of January 2006.

(H.L. Bajaj)
Technical Member

(Justice E. Padmanabhan)
Judicial Member