

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 276 of 2006

Dated this **28th** day of **September**, 2007

Coram: Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Gujarat Energy Transmission Corporation Ltd.

Sardar Patel Vidyut Bhavan,
Race Course, Vadodra,
Gujarat.

... Appellant

Versus

1. Gujarat Electricity Regulatory Commission

Neptune Towers, Ashram Road,
Ahmedabad, Gujarat

2. Oil and Natural Gas Corporation Ltd.

Hazira Gas Processing Complex,
Co-generation Plant,
P.O. ONGC Nagar, Bhatpore,
District Surat, Gujarat

3. Gujarat Urja Vikas Nigam Ltd.

Sardar Patel Vidyut Bhavan,
Race Course, Vadodara,
Gujarat

... Respondents

For the Appellant : Mr. M. G. Ramachandran, Advocate
Mr. Anand K. Ganesan, Advocate and
Ms. Swapna Seshadri, Advocate

For Respondents : Mr. Subhash Oberoi and
Mr. C. M. Gopal, Advocates for
Respondent No.2, ONGC

Mr. S. R. Pandey, Dy. Director, GERC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

Introduction:

The impugned order dated 10th October, 2006 was passed on application No. 812 of 2004 filed by the respondent No.2, Oil & Natural Gas Corporation Ltd., before Gujarat Electricity Regulatory Commission ('the Commission' for short) in which the respondent made a prayer for refund of Rs.1,22,27,225/- which was recovered from it by the Gujarat Electricity Board (GEB), the predecessor in office of Gujarat Energy Transmission Corporation Limited, the present appellant. The main ground for asking for the refund was that the amount had been recovered by the Gujarat Electricity Board (GEB) as parallel operation charges levied before 01.09.2000, which would be in contravention of Commission's order of 31.08.2000. By the impugned order, the Commission upheld the contention of the respondent and directed the refund of parallel operation charges recovered by GEB before 01.09.2000. Hence, the appeal.

The Facts:

2) The facts leading to the filing of application No. 812 of 2004 are as follows :

a) The Electricity Regulatory Commissions Act came into force on 25.04.98. The Act enabled the State Government to establish Electricity Regulatory Commissions. However, before any Commission was appointed in Gujarat, the Government of Gujarat, adopted a resolution on 09.11.1998 regarding establishment of captive power plants subject to previous consent of GEB under Section 44(1) of The Electricity (Supply) Act 1948. The resolution, inter alia, provided that if the captive power plants intend to have parallel operation with the grid they would be allowed to reduce their contract demand up to a level of 25% of original contract demand but in case they intend to operate on standalone basis no contract demand would be insisted upon. The drawal of power by the CPPs from the State Grid were to be subjected to applicable tariff of GEB/licensee. Para 9 of the resolution dealt with fees and charges. It, inter alia, prescribed:

“9(b). “parallel operation charges shall be charged at the rate fixed by GEB/Licensee with the approval of the Government.”

b) The circular No. 687 dated 21.12.1998 had accordingly included the rate of parallel operation charges.

Clause 19: *“The parallel operation charges leviable at 7.5% of demand charges in accordance to applicable tariff.”*

c) Meanwhile the Government of Gujarat had issued two notifications dated 12.11.98 purporting to establish Gujarat Electricity Regulatory Commission and constituting a selection committee for selecting the members of Gujarat Electricity Regulatory Commission. The members were selected and appointed vide a notification dated 10.03.1999. The GERC became operational on 19.04.1999. The Commission, inter alia, had exclusive jurisdiction to fix tariff under Section 29 of The ERC Act 1998. The GEB on 28.01.2000 issued commercial circular No. 706 of 2000 to revise the parallel operational charges which were determined earlier by commercial circular No. 687 dated 21.12.1998. The Commission initiated suo moto proceedings to enquire into the validity of commercial circular issued on 28.01.2000. Vide an order dated 31.08.2000 in Case No. 24 of 2000 the Commission passed a judgment in the suo moto enquiry. It held that parallel operation charge was also tariff and therefore could be determined only by the Commission. It also held that the GEB had no jurisdiction to issue the circular No. 706 dated 28.01.2000 as the same was without the approval of the Commission in accordance of Section 29 of The ERC Act. The Commission observed that when the resolution dated 09.11.1999

was adopted the Commission had not been established and before the establishment of the Commission the GEB could exercise power regarding revision of tariff. However, it opined that on establishment of the Commission under The ERC Act the GEB was required to get approval of the Commission in respect of Circular No. 687, therefore, while quashing circular No.706 dated 28.01.2000 it said :

“....It is made clear that by quashing of the impugned commercial circular, the earlier circular of GEB in respect of Parallel Operation Charges does not automatically become operative and it is open for GEB to approach GERC with necessary application under section 29 of ERC Act 1998. ...”

d) The GEB did not challenge this order. Nor did the GEB approach the Commission with any application under Section 29 of the ERC Act seeking approval of the tariff determined by its first circular No. 687. It issued a circular to its officers, No.713 dated 01.09.2000, discontinuing recovery of parallel operation charges under the Circular No.706 as well as under the Circular No.687. The circular No. 687 again came under challenge in the petition filed by M/s. Reliance Petroleum Ltd. (RPL), being petition No.71 of 2002.

e) The RPL, inter alia, pleaded that with a view to ensure that while power could be exported by it to the GEB's grid no power could be imported by RPL's captive generating plants. It had installed Reverse Power Relay. The relay trips and opens the circuit breaker in a period of mili seconds which prevents invert flow of power from GEB to the captive generating plant. RPL pleaded that till GEB's power supply was released to it the question of parallel operation charges would not arise. RPL informed GEB vide a letter dated 03.04.1999 that all necessary arrangements had been made to export power and sought approval for setting of the relay installation which was to be commissioned before the export of power to GEB. Accordingly, RPL requested the GEB to discontinue the parallel operation charges. The GEB however, asked for parallel operation charges at 7.5% prescribed under the commercial operation charges from the actual date of release of 5 MVA HT power supply or 01.08.1999 whichever was earlier. The GEB vide a letter dated 31.01.2000 approved cancellation of 5 MVA power supply on certain conditions without incorporating the payment of parallel operation charges. The GEB also excluded units which were not importing power and were exporting for more than ten days in a month from the parallel operation charges. RPL took the plea that it was engaged only in the export of power and were not required to pay any parallel operation charges. The Commission decided the petition No.71 filed by RPL vide a judgment dated 06.09.2002. The Commission in this judgment found that the letter dated 12.08.2000 had brought to the notice of GEB that reverse

power relay has been installed and there is no question of import of power by RPL and therefore, there could not be any question of levying and recovering parallel operation charges. Although the petition of RPL could be allowed only on this ground the Commission also chose to consider the validity of the commercial circular No. 687. It observed that the Commission came to be established on 12.11.1998 and it became functional from 19.04.1999 and therefore, the circular No. 687 dated 21.12.1998 could not be valid.

f) The Commission therefore concluded:

“Accordingly we allow this Petition which has been registered as Case No. 71 of 2002 and quash and set aside the Circular No.687. So far as the Board’s Circular No. 706 dated 28-1-2000 is concerned, we should point out that the same came to be quashed by us in our Orders dated 31-8-2000 in Case No. 24/2000.”

g) The Commission also examined the factual situation so far as the drawal of power was concerned and it found that *“... during all these months, there was transport or sale of power from the Petitioner to the GEB, at least for a period of 10 days every month. Therefore, even if the above said Circulars are to be upheld by us then also looking to the above said condition in the Commercial Circular No. 706 dated 28th January, 2000, we must hold and decide*

that the Parallel Operation Charges could not have been claimed by the GEB and that the amount in question could not have been recovered/deducted by the GEB from the bills of the Petitioner. ...”

h) The respondent, Oil & Natural Gas Corporation Ltd. (ONGC), in its petition No. 812 of 2004 referred to the judgment of the Commission dated 31.08.2000 and to the circular No. 713 of 2000 under which parallel operation charges from September 2000 onwards were directed to be re-funded. It is aggrieved that despite the re-fund the GEB/the appellant again recovered the charges vide its bill dated March 2002. The GEB allegedly took the plea that the parallel operation charges had been discontinued w.e.f. 01.09.2000 but that the charges recovered for the period prior to 01.09.2000 were not refundable. The ONGC also took the plea that the Commission had held that the GEB was not entitled to recover the charges fixed under its circular No. 687 without the approval of the Commission and so it followed that the GEB was liable to refund whatever parallel operation charges had been recovered by it.

Impugned order:

3) The Commission noted the order dated 31.08.00 as well as the order dated 06.09.2002. As stated earlier the order dated 31.08.2000 set aside the Circular No. 706 as it had been issued by GEB after the Commission had come into existence. The order dated 06.09.2002 quashed the Circular No.687 as well. The

Commission noted that the order dated 06.09.2002 exempted the CPP of RPL because it did not import any power from GEB grid. However, it noted that Circular No.687 was also quashed by the same order. The understanding of the Commission, however, is that the parallel operation charges became un-recoverable by virtue of order dated 31.08.2000 itself which said that on account of quashing the circular of 706 the earlier order did not automatically become operative. The Commission accordingly found that the interpretation given to order dated 31.08.2000 by the GEB, that the GEB could not recover the parallel operation charges after 31.08.2000 but could recover charges falling due before that date was in-correct. The Commission accordingly directed that the amount recovered by way of parallel operation charges from the respondent, ONGC, be re-funded to it along with interest.

Decision with reasons:

4) The Circular No. 706 was quashed and set aside vide the order dated 31.08.2000. The appellant did not challenge this order in any Appellate Forum. The order dated 31.08.2000 also suggested that the appellant could approach the Commission for approval of the earlier Circular No. 687. The appellant did not avail of this course of action either. The appellant is satisfied with the situation that after 31.08.2000 it is not entitled to recover any amount by way of parallel operation charges. However, it insists that prior to

31.08.2000 the parallel operation charges recovered can be retained by it. Now let us examine the legal situation.

5) The Circular No. 687 was issued on 21.12.1998. This was based on the resolution of Government of Gujarat adopted on 09.11.1998. The resolution of 09.11.1998 permitted imposition of parallel operation charges but rate of such charge was left to be determined by GEB. The GEB determined the rate on 21.12.1998. Before the resolution of 09.11.1998 the ERC Act 1998 had been passed and had been brought into force on 25.04.1998. The Act gave the power and responsibility to fix the tariff to the ERCs. However, on the date, when the resolution was adopted, there was no Commission in place. Although one notification of 12.11.98 declared establishment of GERC, the other notification appointed only the members of the selection committee. Naturally the establishment of GERC by notification on 12.11.98 did not take effect till the members of GERC were actually selected and appointed and those appointed actually took charge of their office. Admittedly the Commission became operative on 19.04.99. Thus there was no Commission in place on 21.12.1998 when the Circular No. 687 was issued. The Commission came into existence on 19.04.1999. The Commission's order dated 06.09.2002 holds the commercial circular No. 687 to be bad because the Commission had come into existence on 12th November, 1998 which was a mistake of fact. This Tribunal had an opportunity to consider the position of tariff fixation during the period after the enforcement of ERC Act

and the establishment of the Regulatory Commission. In *Benani Zinc Ltd. Vs. Kerala State Electricity Board and Others*, Appeal No. 154 of 2005 *Energy Law Reports 2007* APTEL's 868 the Honorable Chairperson had this to say:

“25. Section 29(1) of the ERC Act, 1998 envisages determination of Tariff by the State Commission in accordance with and subject to the provisions of the Act. This is borne out from the language of Section 29(1), which reads as under:

29.(1) Notwithstanding anything contained in any other law, the Tariff for intra-State transmission of electricity and the Tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the “Tariff”), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

26. Thus, the Tariff can be determined subject to and in accordance with the provisions of the ERC Act, 1998. In other words, first the Commission is to be constituted and only then the tariff is to be determined by it. In case the Commission is not constituted under Section 17 of the ERC Act, 1998, the Tariff cannot be determined under

Section 29(1) thereof. Operation of Section 29(1) of the ERC Act, 1998 is dependent upon the Constitution of the Regulatory Commission under Section 17(1). If there is no Commission, the non obstante Clause in Section 29(1) of the ERC Act, 1998 will not operate as it is subject to other provisions of the Act. Therefore, till the Commission was constituted by the State of Kerala the power remained vested in the Board to determine the Tariff.

27. Reliance placed by the learned Counsel for the Appellant on the decisions of the Supreme Court in WBERC v. CESC (supra) and BSES Ltd. v. Tata Power Co. Ltd. (supra), are of no avail to the Appellant. It appears to us that in both the cases the observations of the Supreme Court to the effect that under the ERC Act, 1998 the Regulatory Commissions alone were authorized to determine the Tariff, were made in the backdrop of the fact that Regulatory Commissions had been set up by the respective State Governments under the ERC Act, 1998 and therefore, after their constitution, the power to determine tariff no longer vested with any other authority. However, in the instant case when the board revised the Tariff the Regulatory Commission had not been constituted. Till such time the Regulatory Commission was not constituted by the State of Kerala, the power to determine Tariff remained with the Board under the

Electricity Supply Act, 1948, as it was not repealed by the Electricity Regulatory Commission Act, 1998. The Parliament could not have intended a situation where no authority would be empowered to determine the tariff, between the date of coming into force of the ERC Act, 1998 and the constitution of the Commission. It is only after the Regulatory Commission is constituted that it will be the sole authority to determine the Tariff.”

6) This being the legal situation the Circular No. 687 cannot be said to be hit by Section 29 of The ERC Act 1998. As stated earlier when the Circular No. 687 was issued there was no Commission in place.

7) The subsequent Circular No. 706 was issued when the Commission was in existence. The GEB could not have any jurisdiction to alter the parallel operation charges which was in the nature of tariff and had been fixed by GEB in exercise of authority vesting in it. The Circular No. 706 altered the established tariff situation and was therefore, invalid unless approved by the Commission. There is no quarrel that the Circular was invalid and was liable to be quashed.

8) There is no dispute over the legal situation that till the Commission issued its tariff orders the tariff regime, as prevalent on the date of constitution of the Commission, continue to remain in

force. The Circular No. 687 had imposed one such tariff and therefore had to continue in force till it was superseded by another tariff order or was specifically set aside. The Circular No. 687 is quashed, rightly or wrongly, vide the order dated 06.09.2002. The Circular 687 of 2006 was not void *ab initio*. Therefore, it continued to remain in force till order dated 06.09.2002.

9) When the Circular No. 706 is struck down, the Circular No. 687 naturally has to hold the field. The Commission itself was aware of this situation when it passed the order dated 31.08.2000. It did not strike down Circular No. 687. Nor did it approve the Circular No. 687. It suggested that approval under Section 29 could be obtained by GEB for this Circular. As stated earlier, this approval was not required to be taken as the circular was not *ab initio* void and continued to remain in force till it was superseded by another order or was specifically set aside. The appellant is however, satisfied with the amount recovered towards parallel operation charges up to 31.08.2000 itself. We need not consider the situation about the entitlement of the appellant after 31.08.2000.

10) In view of the above analysis the appellant was certainly entitled to recover parallel operation charges as fixed by circular No.687 at least up to 31.08.2000. The claim for refund made by the respondent No.2 was not sustainable. The impugned order allowing refund of parallel operation charges paid during this period

cannot therefore be sustained. Accordingly, we allow the appeal and set aside the impugned order.

Pronounced in open court on this **28th** day of **September**, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member

The End