

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

Appeal No. 64, 212 and 237 of 2006

Dated 20th April, 2007

**Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A. A. Khan, Technical Member**

Under Section 111 (2) of Electricity Act, 2003

In the matter of:

Appeal No. 64 of 2006

1. Madhya Pradesh State Electricity Board
(Erstwhile Madhya Pradesh Electricity Board)
P.O. Box No. 34, Rampur, Jabalpru – 482008 (M.P.)

...Appellant

Versus

1. National Thermal Power corporation Ltd.
NTPC Bhawan-7,
Institutional Area, SCOPE Complex
Lodhi Road, New Delhi – 110003
2. Maharashtra State Electricity Board
Prakashgad, 4th Floor, Bandra (East)
Mumbai – 400052 (Maharashtra)
3. Gujarat Electricity Board
Vidyut Bhawan, Race Course
Baroda – 390013 (Gujarat)
4. Chhattisgarh State Electricity Board
P.O. Sunder NAgar, Dangania
Raipur – 403210

5. Electricity Department
Govt. of Goa, Vidyut Bhawan
Panjim, Goa – 403001
6. Electricity Department
Administration of Dadra Nagar Haveli,
U.T. Silvassa – 396230

For the Appellant: Mr. Rohit Singh, Mr. Sakesh Kumar, Advs.
Mr. Deepak Srivastava DGM, MPPTC, Mr. D.
Khandelwal & Mr. A.K. Garg (Rep.)

For the Respondent : Mr. M.G. Ramachandran, Ms. Taruna S. Baghel,
and Mr. Anand K. Ganeshan, Advs. for NTPC
Mr. Rohit Srivastava and Ms. Suparna Srivastava,
Ms. Nidhi Minocha, Ms. Pooja, Advs. for GEB
Ms. Yogmaya Agnihotri, Adv. for CSEB
Mr. Ajit Bhasme, Adv. for MSEDCL
Mr. P.J. Jain & Mr. K.P. Jangid (Rep.)

Appeal No. 212 & 237 of 2006

1. Punjab State Electricity Board,
The Mall, Patiala-147001.
2. Delhi Vidyut Board, Shakti Bhawan,
Nehru Place, New Delhi-110 019.

...Appellants

Versus

1. Central Electricity Regulatory Commission,
Core 3, 6th Floor, Scope Complex, New Delhi-110003.
2. National Thermal Power Corporation Ltd.,
NTPC Bhawan, Core 7, Scope Complex,
Lodhi Road, New Delhi-110003.
3. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.,

- Room No. 220, Vidyut Bhawan, R.C. Dave Marg,
Jaipur, Rajasthan.
4. Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Simla.
 5. Haryana Vidyut Prasaran Nigam Ltd.,
Shakti Bhawan, Sector-6, Panchkula,
Haryana-134 109.
 6. Power Development Department (J&K),
Lottery Building, Behind Civil Secretariat,
Srinagar.
 7. Chief Engineer, Chandigarh Administration,
U.T. of Chandigarh, Addl, Office Building,
Sector – 9 D, Chandigarh.
 8. Uttaranchal Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Dehradun.
 9. U.P. Power Corporation Ltd.,
Shakti Bhawan, 14 Ashoka Marg,
Lucknow, U.P.
- ...Respondents
- For the appellant : Mr. Pradeep Misra, Adv.
Mr. Manoj Kumar, Adv.
Mr. T.P.S. Bawa, rep. of PSEB.
- For the respondents : Mr. M.G. Ramachandran &
Mr. Anand K. Ganesan.
Mr. A.T. Rao, Mr. Sanjay Sen, Advs.
Mr. Vishal Anand and Mr. P. Sri Raguhuram, Adv.

JUDGEMENT

Per Hon'ble A.A. Khan, Technical Member

Appeal no. 64 of 2006 is preferred by the appellant, Madhya Pradesh Electricity Board (for brevity hereinafter called as 'MPSEB') against the order of the Central Electricity Regulatory Commission (for short referred to as the 'Central Commission') in Review Petition Nos. 100 and 101 of 2005 arising from the tariff orders of the Central Commission dated 01.04.2005 and 07.04.2005, for the tariff period 01.04.2001 to 31.03.2004, in respect of the Gas based Power Stations at Gandhar and Kawas respectively. In the impugned order the Central Commission disallowed the claim of the appellant for interest on the payment made by the appellant to the respondent in excess of the final tariff determined by the Central Commission. Appeal nos. 212 and 237 of 2006 are filed by the Punjab State Electricity Board (hereinafter called as 'PSEB') against the orders of the Central Commission dated 02.06.2006 and 19.06.2006. These appeals also relate to the claim of interest on the amounts paid by the appellants to the respondent, NTPC, in excess of the final tariff fixed by the Central Commission in respect of Rihand Thermal Power Station for the period 2001 to 2004 and 2004 to 2006.

2. Since in the above appeals identical issues have been raised, appeal No. 64 is being treated as the lead case for examination of the issues. The decision reached in appeal no. 64 of 2006 will apply *mutatis-mutandis* to the other two appeals as well.

FACTS OF APPEAL NO. 64 OF 2006

3. The respondent no. 1, NPTC Limited, was supplying electricity generated from its Kawas and Gandhar GPS to the appellant and other beneficiaries in accordance with the tariff notified by the Ministry of Power, Govt. of India valid till 31.03.2001. The first respondent, NTPC, for determination of tariff for the period 01.04.2001 to 31.03.2004 filed a tariff petition no. 31 of 2001 for Kawas GPS and petition no. 33 of 2001 for Gandhar GPS before the Central Commission on 23.05.2001.

4. The Central Commission by its notification dated 04.04.2001 directed that the tariff for the period 01.04.2001 to 31.03.2004 shall be determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 (hereinafter referred to as ‘ the Regulations 2001’). Since the determination of tariff was likely to take some time, the tariff as existing on 31.03.2001 was directed to be continued for a period of six months i.e. up to 30.09.2001, subject to adjustment on final

determination of tariff. This arrangement, however, was extended from time to time. This clearly indicates that the extension of tariff beyond 31.03.2001 was interim or provisional in nature. The relevant part of the order reads as under:

“No. L-7/25(2)2001 CERC-In accordance with the Commission’s order dated 21.12.2000 in petitions no. 4 of 2000 revised terms and conditions, for determination of tariff shall come into force on 01.04.2001. The revised terms and conditions for determination of tariff have been notified by Commission vide L-7/25(1)/20014-CERC dated 26.03.2001 under Section 28 of the ERC Act. The determination of final tariff by the Commissions under the revised terms and conditions is likely to take some time.

It is, therefore, directed that w.e.f. 1st April 1st April 2001 the billing of charges shall continue to be done on the same basis as on 31.03.2001, for a period of six months i.e. up to 30.09.2001. This shall be subject to adjustment after final determination of tariff by the commission in accordance with the revised terms and conditions already notified.”

5. On 07.12.2002 the respondent, NTPC, revised its tariff petition in line with the Regulations, 2001. It appears that the appellant had also filed an affidavit dated 12.03.2004, before the Central Commission with a view to seek interest on the over charged amount.

6. The Central Commission passed the final tariff order on 01.04.2005 in petition no. 33 of 2001 and on 07.04.2005 in petition no. 31 of 2001. The annual fixed charges as per the above named final tariff orders for both power stations are as under:

Period	2001-02	2002-03	2003-04
Gandhar GPS (Rs. Crores)	506.15	490.99	478.93
Kawas GPS (Rs. Crores)	247.97	250.57	253.41

7. The provisional tariff as allowed by the Central Commission and claimed accordingly by the respondent, NTPC, based on the pre-existing norms applicable till 31.03.2001 and extended till the determination of final tariff by the Commission for the above stations are as under:

Period	2001-02	2002-03	2003-04
Gandhar GPS (Rs. Crores)	645.536	645.536	645.536
Kawas GPS (Rs. Crores)	335.477	335.477	335.477

8. From the above tables it may be seen that the charges paid to the first respondent, NTPC, based on the 'provisional tariff' are higher than the charges payable on the basis of final tariff orders. The amount overcharged in respect of Gandhar GPS is Rs. 460.52 crores, whereas the excess amount charged in respect of Kawas GPS is Rs. 254.47 crores. The first respondent, NTPC, has submitted that the excess amount charged over and above the final tariff has already been refunded to the appellant. This fact is not in dispute. The claim of the appellant is only for grant of interest at the rate of 24% per annum on the excess amount charged and utilized by the first respondent for a substantially long period of time. According to the appellant excessive delay in the final determination of tariff has unavoidably aggravated the financial strain on it.

9. Being aggrieved by the orders of Central Commission dated 01.04.2005 and 07.04.2005, the appellant filed two Review Petitions. The Central Commission by a common order passed on 07.12.2005, admitted the

Review Petitions on the question relating to the admissibility of interest to the appellant on the amount paid to the NTPC in excess of the final Tariff determined by the Central Commission.

10. The Central Commission dismissed the aforesaid Review Petitions by a common impugned order passed on 16.02.2006.

11. It may be pointed out that there is no provision in the Power Purchase Agreement (For short “PPA”) dealing with the question of payment of interest in a situation of the kind presented by the instant case. The learned counsel for the appellant submitted that such a situation is covered by Section 62(6) of the Electricity Act 2003. Since the respondent recovered payment in excess of the tariff fixed by the Central Commission vide order dated 01.04.2005 and 07.04.2005, it was bound to pay interest on such amount as mandated by Section 62(2) of the Electricity Act, 2003. He also submitted that the Central Commission had failed to appreciate that even if Section 62(6) of the Electricity Act, 2003 may not have a retrospective application, in respect of the period prior to the commencement of the Act, Central Commission ought to have directed payment of interest in accordance with the principles of fair play, equity and justice. The learned counsel contended that Section 144 of the CPC was wrongly construed by

the Central Commission and it failed to appreciate that once doctrine of restitution is attracted interest is a normal concomitant thereof.

12. The learned Counsel for the first respondent, NTPC submitted that the claim for interest made by the Appellant is contrary to the practice followed in the past where on similar revision of tariffs at a subsequent stage, amounts had become due and payable to the NTPC by the Appellant and other beneficiaries but no interest was paid along with such amounts. Furthermore, it was contended that at the request of the Appellant and other beneficiaries even the excess amount arising out of such retrospective tariff revisions was recovered in easy instalments and no interest was levied either retrospectively for the period during which such tariff revision was pending or during the period of payments through instalments. The first respondent has quoted specific incidents of such non-levy of interest by it.

13. The learned counsel for the first respondent pointed out that the Central Commission has amended the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 by a notification dated 01.06.2006 and has recognized the appropriateness of allowing interest on the differential amount between the provisional tariff and final tariff by inserting Regulation 5A which reads as under:

“5A. Provisional tariff or provisional billing of charges, wherever allowed by the Commission based on the applicable made by the generating company or the transmission licensee of by the Commission on its own motion or otherwise, shall be adjusted against the final tariff approved by the Commission.

Provided that where the provisional tariff charged exceeds the final tariff approved by the Commission under these regulations, the generating company or the transmission under these regulations, the generating company or the transmission licensee, as the case may be, shall pay simple interest at the rate of 6% per annum, computed on monthly basis, on the excess amount so charged, from the date of payment of such excess amount and up to the date of adjustment.

Provided further that where the provisional tariff charged is less than the final tariff approved by the Commission, the beneficiaries shall pay simple interest at the rate of 6% per annum, computed on monthly basis on the deficit amount from

the date on which final tariff will be applicable up to the date of billing of such deficit amount.

Provided also that excess / deficit amount along with simple interest at the rate of 6% shall be adjusted within three months from the date of the order failing which the defaulting utility/beneficiary shall be liable to pay penal interest on excess/deficit amount at the rate as may be decided by the Commission.”

14. We have considered the submissions advanced by the learned counsel for the parties.

15. The following issues arise in the matter:

- (i) **Whether provisions of Section 62(6) of the Electricity Act, 2003 are attracted to the facts of the case? If so to what effect.**
- (ii) **Whether the Appellant is entitled to claim interest on the excess tariff recovered by the first Respondent, NTPC de hors Section 62(6) of the Electricity Act, 2003? And if so, at what rate?**

16. In so far as the Issue No. (i) is concerned, we are of the view that the provisions of Section 62(6) of the Electricity Act are not attracted in the instant case. It is only when a licensee or a generating company deliberately recovers or exacts from a person a price or charge in excess of the price determined under Section 62(6), that such person can claim the excess price or charge paid by him along with interest from the licensee or generating company as the case may be. In the instant case, the Central Commission, as an interim measure continued the tariff as existing on 31.03.2001. This tariff was paid by the appellant and the beneficiaries. It is another matter that the tariff as existing on 31.03.2001 was higher than the tariff demanded by the NTPC and also higher than the final tariff determined by the impugned orders dated 01.04.2005 and 07.04.2005 for the aforesaid stations. But it is not the case where the beneficiaries were made to pay the excess tariff at the instance of the first respondent through force, coercion or threat. In the circumstances, therefore, Section 62(6) of the Act is not attracted to the facts of the instant case. Therefore, strictly speaking the interest on the excess tariff recovered by the first respondent cannot be claimed under Section 62(6) of the Electricity Act, 2003.

17. In order to answer issue number (ii) we need to recount that the Central Commission on being constituted continued the tariff as existing on 31.03.2001, as an interim measure, by its notification dated 04.04.2001. The provisional tariff continued until the final tariff was determined by the Central Commission by its order dated 01.04.2005 and 07.04.2005. As already pointed out the final tariff determined by the Central Commission was lower than the provisional tariff demanded by the NTPC in its petition for fixation of tariff. In the circumstances, therefore, the NTPC was obliged to refund the excess amount so charged from the beneficiaries. There is no dispute that the NTPC refunded the excess amount received by it but without payment of interest, even though the excess amount was utilized by the NTPC for over a period of 4 years.

18. Normally an interim or provisional order is not based on extensive and indepth examination of all the pros and cons of the matter. It is usually grounded on a prima-facie consideration of the facts and circumstances of the case. But in the instant case it appears that the Central Commission did not even bestow any prima-facie consideration to the matter while continuing the earlier tariff as an interim arrangement. It did not consider the question whether there was any justification in continuing the higher tariff as an interim measure in view of the fact that the NTPC in the tariff

petitions had demanded lower tariff. It seems to us that the Central Commission mechanically issued the notification dated 04.04.2001, whereby the tariff as existing on 31.03.2001 was continued. The undue monetary benefit drawn by the NTPC by virtue of the interim arrangement ought to have been refunded with interest. Interest was payable by the first respondent to the appellant and the other beneficiaries on the principle of justice, equity and fair play.

19. In BSES Ltd. Vs. Tata Power Company Ltd., (2004) 1 SCC 195 it was held that “*an interim arrangement is normally based on a prima-facie consideration of the matter and on broad principles without examining the matter in depth.*” The Supreme Court further held that “*after the (final) decision of the Commission, the equities can be adjusted and the excess amount paid by any party can be refunded to it **along with appropriate interest or can be adjusted in future bills.***” (*Emphasis supplied*)

20. In Southern Coalfields Ltd. Vs. State of M.P. and Others (2003) 8 SCC 648, one of the issues before the Supreme Court related to the liability of the consumers/purchasers to pay interest to the Coalfields for the period during which restraint order on recovery of money passed by the Court remained in operation. This was a case where the South Eastern Coalfields

Ltd. (SECL) and Western Coalfields Ltd. (WCL) were operating coal mines in the State of Madhya Pradesh. The Central Government through a notification dated 01.08.1991 enhanced the royalty payable on coal. The State Government was entitled to the said royalty from SECL/WCL, who in law could pass on the burden to the purchaser/consumers of coal. The hike in the royalty was challenged in the High Court of M.P. through writ petitions. The High Court by means of an Interim Order, dated 28.08.1992 directed that the respondents shall not charge royalty on coal from the petitioners at the enhanced rate but shall charge the same at the old rate.

Finally, the High Court quashed the aforesaid notification, on the ground that it was arbitrary and lacking in bona-fides. On appeal the Supreme Court allowed the appeal and set aside the order of the High Court.

Subsequently, in the year 1997, the state Government claimed interest at the rate of 24% per annum from SECL/WCL in regard to the period for which the payment of enhanced amount of royalty was delayed. Thereupon SECL/WCL acted with a view to pass on the interest claimed by State Government to their consumers. In turn consumers filed writ petitions seeking quashing of the demand raised on account of interest. The High Court, however, reduced the interest from 24% p.a. to 12% per annum.

On appeal by the consumers and SECL /WCL, to the Hon'ble Supreme Court it was, inter-alia, held that the interest was payable in equity even in the absence of any agreement or contract to that effect. In this regard the Supreme Court observed thus:

“Interest is also payable in equity. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreementInterest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.

.....

We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties there is no reason why the Coalfields

should not be compensated by payment of interest for the period for which the consumers/purchaser did not pay the amount of enhanced royalty....”

21. In the Southern Coalfields case (supra) a plea was taken by consumers/purchasers that the non-payment of enhanced royalty was sanctioned by a judicial order, though of an interim nature, passed by the courts and, therefore, they should not be held liable for payment of interest so long as the money was withheld under the protective umbrella of the court order. Rejecting the submission, the Hon’ble the Supreme Court observed as under:

“the principle of restitution takes care of this submission. The word ‘restitution’ in etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order

.....

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree.

The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modifications.

.....

Section 144 CPC is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties.

.....

Once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution.”

22. In the backdrop of the aforesaid decisions of the Hon’ble Supreme Court, we are of the view that on the grounds of justice, equity and fair play the appellants are entitled to interest on the payment made by them to the NTPC in excess of the final tariff determined by the Central Commission.

23. NTPC has submitted that the demand of the appellant for interest is contrary to the practice followed in the past. We regret our inability to accept the submission. It has not been established by the first respondent that any such practice was followed continually for a long period of time without any claims to the contrary. While we may accept that in the past on some occasions the NTPC may not have claimed interest on retrospective revision of tariff, we have come across instances which suggest that there was no such industry practice. As part of the scheme of securitization of past dues of Central Power Sector Undertakings from state power utilities, part of the surcharge (in the form of interest on overdue bills) was waived off while the other part was securitized. Similarly, the Regulations, 2001 of the Central Commission provide for levy of interest on overdue bills. It is difficult to hold that the interest cannot be levied on the amounts which became payable due to retrospective revision of tariff.

24. In view of the aforesaid discussion, we conclude that the appellants are entitled to receive interest from the first respondent on the amounts paid by them in excess of the final tariff determined by the Central Commission.

25. Now the question arises at what rate the interest is to be paid to appellants? This question would require consideration of the following:

- (a) If such funds were not available to NTPC, at what rate it would have borrowed such funds from the market?**
- (b) What is the opportunity cost of such funds to MPSEB or other appellants?**

26. We are of the view that the NTPC, being a 'AAA' rated company can borrow money from the domestic market at a most competitive terms and at interest rate below PLR than MSEB and PSEB who are unrated and not financially sound. The cost of borrowing for NTPC is more relevant because it cannot be asked to refund more than what it has gained by such excess amount made available to it. If such free-of-cost funds were not available to NTPC, it may be reasonably presumed that NTPC would have borrowed from the market to run its operations. To that extent we can say that NTPC has benefited as a result of the excessively delayed final tariff orders of the Central Commission. It will be difficult to determine the cost of borrowings applicable for the excess amount charged by the first respondent from the appellant and beneficiaries. We note that as per Regulation 5A of Regulations, 2006, the Central Commission has recognized the appropriateness of levying 6% as the rate of interest liable to be paid by the party(ies) who has enjoyed excess differential amount between the

provisional and final tariffs determined by the Central Commission to other party(ies) involved in the sale and purchase of the power. Considering the cost of borrowings we allow for calculation of rate of interest as an average of the prevailing lending rates of the Reserve Bank of India to Banks during the relevant periods.

27. Having regard to the aforesaid discussions, we allow appeal nos. 64, 212 and 237 of 2006 and remand the matter to Central Electricity Regulatory Commission for computation of the interest payable by first respondent to the appellant in the light of the aforesaid observations made by us.

28. With the above directions the appeals are disposed of but with no order as to costs.

A.A. Khan
(Member Technical)

Justice Anil Dev Singh
(Chairperson)