Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 277 of 2013 and
Appeal No. 286 of 2013

Dated: 27th October, 2014

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

Appeal No. 277 of 2013

DPSC Limited
Plot X – 1, 2 & 3, block EP, Sector V
Salt Lake City, Kolakta – 700 091
Versus
West Bengal Electricity Regulatory commission
FD-415A, Poura Bhawan
3rd Floor, Sector – III
Bidhannagar
Kolkata – 700 106

Appeal No. 286 of 2013

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West Bengal Electricity Regulatory commission
FD-415A, Poura Bhawan
3rd Floor, Sector – III
Bidhannagar
Kolkata – 700 106

Counsel for the Appellant(s): **Mr. Buddy A. Ranganadhan**
Mr. Subir Kumar
Mr. Sandip Mitra
Mr. Atul S. Mathur
Ms. Shruti Verma
Mr. Shoonak Mitra
Mr. Debnath Ghosh

Counsel for the Respondent(s): **Mr. Pratik Dhar**
Mr. C.K. Rai
Ms. Tejinder Khanna
Mr. Samir Haldar

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Appeal no. 277 of 2013 and 286 of 2013 have been filed by DPSC Ltd. against the orders of the West Bengal Electricity Regulatory Commission ("State Commission") rejecting part of the claim of transportation cost of fuel in the Fuel and Power Purchase Adjustment orders for the FY 2010-11 and 2011-12 respectively.

2. The Appellant is a distribution licensee which is also engaged in the business of generation. The State Commission is the Respondent.

3. The brief facts of the case in respect of Appeal no. 277 of 2013 are as under:

3.1 The Appellant submitted Fuel and Power Purchase Cost Adjustment, hereinafter referred to as "FPPCA", for FY 2010-11 before the State Commission.

3.2 On 17.12.2012 the State Commission disposed of the Petition filed by the Appellant disallowing part of transportation cost for coal in respect of Dishergarh and Chinakuri Power Stations of the Appellant for the reason that the amounts claimed were more than 200% for Dishergarh and more than 125% for Chinakuri than the rate of transportation cost during 2009-10 as claimed by the Appellant and is more or less four times

higher than the transportation cost admitted by the State Commission for FY 2009-10 for each of these power stations. The State Commission disallowed the cost on account of Quality and Quantity Assurance Incentive paid by the Appellant to its transporters of coal for FY 2010-11 on the ground that the quality assurance is the job of the supplier, no tender process was adhered to while executing the coal transportation agreement and there was no improvement in the heat value of coal.

3.3 The Appellant aggrieved by the order dated 17.12.2012 preferred a Review Petition against the said order, giving further details regarding their claim for transportation cost. However, the State Commission dismissed the Review petition by order dated

01.07.2013 giving further explanation for rejection of the claim of the Appellant.

3.4 Aggrieved by the order dated 17.12.2012 and Review order dated 01.07.2013, the Appellant has filed the Appeal no. 277 of 2013 challenging both the main order and the Review order.

4. The facts of the case in Appeal no. 286 of 2013 are similar except that in this Appeal the Appellant has challenged the FPPCA order dated 25.07.2013 for the FY 2011-12. Since the issue involved in both the Appeals is the same, a common judgment is being rendered.

5. The Appellant in Appeal no. 277 of 2013 has made the following submissions.

5.1 The Appellant does not have a Fuel Supply Agreement with the Eastern Coalfields Ltd. ("ECL") and thus has necessarily to undertake ad-hoc purchases of coal. Since the actual off-take of the Appellant is less than 4 million tones per annum, ECL does not extend the Appellant the facility of joint sampling at the collieries.

5.2 By the impugned order the State Commission has exceeded the boundaries of prudence check and has entered into the realm of indoor management of the utility which has been expressly barred by this Tribunal in KPTCL Vs. KERC in Appeal no. 84 of 2006.

5.3 The State Commission has given reasons for rejection of actual transportation cost incurred by the Appellant and determined the allowable increase of transportation

cost over the previous year's figure. Such formulation is completely alien to the Regulations and does not have any legal or statutory basis.

5.4 In the Review petition, the Appellant had filed detailed analysis of the difference in distance to collieries from which coal was procured in FY 2009-10 and 2010-11 to show that transportation cost had increased due to increase in the distance of collieries from which coal was supplied. The Appellant had in fact granted the contract to the transporter on the basis of the rate linked to distance from colliery to the power plant. Despite the details regarding distance and quantum of coal transported from various collieries indicating increase in transportation distance during FY 2010-11 having been furnished before the State Commission there is no finding in the Review order on such details.

5.5 The procurement process was by a tender which was put on the website of the Appellant as well as Notice Board of all the offices of the Appellant and informed to all locally known contractors. The Agreement was executed on 24.02.2011 but it was preceded by a Letter of Intent issued to the transporter.

5.6 The quality and quantity assurance is an admitted part of the fuel cost under the definition in the Regulations. Had the transport contract not been entered into, the actual heat value of the coal procured would have been lower than what had in fact been achieved. The Regulations do not stipulate that the task of quality and quantity assurance cannot be entrusted to a contractor.

5.7 In the Review proceedings, the State Commission called upon the Appellant to produce the documents relating to the tender process which were furnished by the Appellant. However, the State Commission has erroneously rejected the claim giving some more reasons, namely, no newspaper publication was made of the tender, Notice Inviting Tender was not found on the Appellant's website as on date, the bids of unsuccessful bidders was not accompanied by EMD and were liable to be rejected and the sealed envelope containing the two unqualified bidders had not been produced, etc.

5.8 There is no principle of law that a private utility is bound to follow a particular tender process such as publication in the newspaper, etc. As long as the Appellant is able

to show that the tender process undertaken by it is reasonable, the State Commission would, in law, be bound to accept the same unless the State Commission is able to show that such process suffers from any legal or statutory infirmity.

5.9 Unless there is a statutory bar from claiming more than a certain level of expenditure, the mere fact that there has been an increase in expenditure over the previous year's is not a ground for rejecting the same. This is when the Appellant had given detailed justification and analysis to show and justify the increase in cost over the previous year.

5.10 It is admitted by the State Commission in the order that clause 4.8.1 of the Tariff Regulations of 2007 would continue to apply to FPPCA determination from FY

2010-11. In such light, the claim of the Appellant is covered by Regulation 4.8.1(v) read with definition of "fuel cost" in terms of clause 1.2.1 (1a) of the 2007 Tariff Regulation. The definition of "Fuel Cost" clearly contemplates that the transportation cost would include the amount spent on quality assurance, etc. Thus, the impugned order is contrary to the Regulations. The aforesaid issue now stand covered by the judgment of this Tribunal dated 01.04.2014 in Appeal no. 217 of 2012 wherein the Tribunal has held that the transportation incidental was a part of fuel cost and the Appellant was entitled for the same.

6. In Appeal no. 286 of 2013 in which the Appellant has challenged the FPPCA order dated 25.07.2013 for FY 2011-12, the facts are similar to the Appeal no. 277 of

2013. The additional points raised in Appeal no. 286 of 2013 are as under:

6.1 The Appellant in the Appeal has given a detailed analysis of the difference in distance from the coal procured in FY 2009-10, 2010-11 and 2011-12 to show that the Appellant was constrained to bring coal in FY 2011-12 from the farthest mines as compared to FY 2009-10 and 2010-11 and the transportation rate in the contract to the transporter was on the basis of distance of colliery from which coal is supplied to the power plants.

6.2 The contract rate with the transporter has not been increased in FY 2011-12 and only the contract has been renewed but due to increase in distance, the cost of transportation has increased.

6.3 The agreement executed on 24.02.2011 had been preceded by a Letter of Intent issued to the transporter. The Appellant as per the mutual terms and conditions has renewed the said contract.

6.4 In case of Dishergarh Power Station, the Appellant has achieved the minimum allowable heat value.

7. On the above issues we have heard Shri Buddy Ranganadhan, Learned Counsel for the Appellant and Shri Pratik Dhar, Learned Counsel for the State Commission. They have also submitted comprehensive written submissions.

8. On the basis of the contentions of the parties, the following questions would arise for our consideration:

i) Whether the State Commission has erred in not considering the quality and quantity assurance services cost paid to the coal transporter in the transportation cost contrary to the Regulations?

ii) Whether the State Commission has erred in not considering the distance of collieries from which coal was supplied in deciding the transportation cost?

iii) Whether the State Commission in seeking details of tender process undertaken by the Appellant in awarding coal transportation contract has exceeded the boundaries of prudence check and entered into the realm of indoor management of the utility against the dictum of this Tribunal?

iv) Whether the State Commission has erred in reaching the conclusion on the basis that the

Appellant had not published the NIT in the Newspapers without considering the publicity given to the NIT by the Appellant through website, Notice Board and letters to the known contractors of the area?

v) Whether the State Commission has erred in allowing coal transportation cost after applying inflation factor as determined in the impugned order over the cost allowed for the previous year without considering the actual expenditure incurred by the Appellant?

9. As all the above issues are interconnected, these are being dealt with together.

10. Let us first examine the findings of the State Commission in rejecting the claim of the Appellant. The

findings in the impugned order dated 17.12.2012 are as under:

i) The Appellant has claimed transportation cost of Rs. 601.58/MT and Rs. 650.62/MT in respect of Dishergarh and Chinakuri generating station respectively during FY 2010-11, which amounts to more than 200% for Dishergarh and 125% for Chinakuri than the rate of transportation cost during 2009-10 as claimed by the Appellant. However, the claim is more or less four times higher than the rate of transportation admitted by the Commission for FY 2009-10. There is no clarification for such exorbitant claim except that a copy of Coal Transportation Agreement has been annexed with the Application.

ii) There is no indication in the Application of the Appellant as to whether any exercise through tender process was

adhered to prior to awarding the transportation contract. No price analysis was found. Instead, the price and other terms and conditions appear to have been negotiated and/or mutually agreed to by the parties.

iii) The Agreement for FY 2010-11 was executed on 24.02.2011, i.e. almost at the end of the contract period.

iv) The Appellant has to take up with ECL in case of any grade slippage, etc., and claim compensation from ECL instead of engaging a transporter for quality/quantity assurance service which is not relevant with his job.

v) In terms of Regulation 4.8.1 of the Tariff Regulation, 2007, minimum allowable weighted heat value of coal as per the grade mix of the actual coal consumption was not achieved indicating that there was no improvement in heat value of coal.

11. In the Review order dated 01.07.2013 the State Commission had examined the tendering process of the Appellant in awarding the transportation contract after examining the supporting documents furnished by the Appellant. The relevant findings are:

i) Putting up a copy of the circular on the Notice Board does not mean wide circulation. No newspaper publication was made.

ii) NIT for coal transportation is not found in the website of the Appellant as of now.

iii) Only 3 bids were received out of which the bids of M/s. Ripley & Co. Ltd. and M/s Chindit Carrier's Pvt. Ltd. which were shortlisted were liable for disqualification in terms of clause 3.2 of the Tender Notice.

iv) The sealed envelope containing the bids of the above two bidders was not produced.

v) Neither the date of receipt nor the date of opening of bids is available in the covering letters forwarding the bids. No documentary proof as to whether the bids were received and opened within due date was found.

vi) For Chindit Carriers Pvt. Ltd., photocopies of the unpriced bid has been submitted without any date of submission/date of receipt.

vii) Instead of original price bids, photocopies of the same have been submitted in respect of Ripley & Co. Ltd. and Chindit Carriers Pvt. Ltd. that too without any date of receipt/date of submission. DPSC categorically stated that they could not produce the original price bids and un-priced bids in respect of these two companies.

viii) The one and only bidder for which DPSC could produce documents was Vizag Industrial and Minerals (Pvt.) Ltd. on whom they have ultimately placed the order. However, date of opening of the sealed envelops

containing EMD, unpriced bids and price bids were neither recorded nor authenticated by DPSC. As such it cannot be verified whether the same were received within the due date. Hence the same is liable to be rejected in terms of Clause 3.2 of the Tender Notice.

ix) Copy of LOI has not been made available for verification. The agreed rates of coal transportation as per agreement dated 24.02.2011 were entirely at variance with the rates obtained through the said tendering process.

12. In the impugned order dated 25.07.2013, the State Commission, following the principles adopted in passing the FPPCA order dated 17.12.2012 for FY 2010-11, has found unreasonableness in the claim of the Appellant. It was seen by the State Commission that during FY 2011-12, the contract of the existing coal transporter, namely, M/s Vizag Industrial Minerals (Pvt.)

Ltd., was extended on the same terms and conditions upto 31.03.2012. However, in the FY 2011-12, the actual weighted average heat rate for Dishergarh was achieved as per the minimum allowable weighted heat value of coal as per grade mix as per the Tariff Regulations.

13. Mr. Buddy Ranganadhan, Learned Counsel for the Appellant has relied on the judgment dated 01.04.2014 in Appeal no. 217 of 2012 and Appeal no. 7 of 2013 of this Tribunal in the matter of DPSC Ltd. Vs. West Bengal Electricity Regulatory Commission wherein similar issue was considered by this Tribunal. In these Appeals the Appellant had challenged the Fuel and Power Purchase Cost adjustment for FYs 2008-09 and 2009-10. The Appellant had claimed the transportation

cost along with quality/quantity assurance incentive paid to transporters.

14. Let us examine the findings of the Tribunal in judgment dated 01.04.2014 in Appeal nos. 217 of 2012 and 7 of 2013.

"18. We find that the definition of fuel cost clearly includes fuel quality assurance service cost and fuel delivery assurance cost besides other expenditures mentioned therein and in Regulation 4.8. Thus, according to the Tariff Regulations, the Appellant is entitled to claim fuel quality assurance service cost and fuel delivery assurance cost in the fuel cost.

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20. The quality assurance service according to the above order by the coal transporter would be to ensure that the quality of coal received from the coal supplier conform to the grade declared by the coal supplier at the loading point of the colliery based on which payment is made by the Appellant. The guaranteed supply of coal has been indicated to be having weighted average Gross Calorific Value of 5350 Kcal/kg on 'as fired' basis which is the weighted average Gross Calorific Value of coal received by the power stations of the Appellant prior to implementation of the incentive scheme. The order provides for incentive and penalty to

be made effective only when the heat value of coal is 75 Kcal/kg more or less than the guaranteed weighted average figure of 5350 Kcal/kg. Similarly the coal transporter has to ensure that the transit loss is not more than 0.5% of the quantity mentioned in the challan. If the transit loss is more than 0.5%, the transporter is liable to pay compensation for such short supply at the cost of coal.

21. *We find that the terms and conditions of the contract with the transporter provided for incentive for quality and quantity assurance. According to the Regulations the fuel cost would include the fuel quality assurance service cost and fuel delivery assurance cost. Thus according to the Regulations, the Appellant is entitled to claim the expenses incurred on these services which will be subjected to the prudence check by the State Commission.*

22. *The Appellant has also entered into contract on 24.12.2008 for incentive on additional quantity of coal over and above the allocated quantity and claimed for quantity assurance incentive for the period December 2008 to March 2008. Similarly quantity assurance contract were entered into on 21.4.2009, 24.9.2009 and 30.12.2009 for the FY 2009-10.*

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25. *It is seen that the quality/quantity assurance incentive claimed by the Appellant for the FY 2008-09 is more than 52% of the basic rate of transportation cost. Similarly for FY 2009-10 the claim is 77.4% and 204.4% of the transportation cost for Dishergarh and Chinakuri*

respectively. However, in our view the quantum of incentive paid to the coal transporter for quality/quantity assurance has to be examined with respect to the value addition made by the coal transporter by ensuring quality and quantity of coal supply with respect to benchmarks for quality and quantity of coal.

26. *The Appellant pointed out that as the quality of coal received by them from ECL is less than 4 million tonnes per annum, they are not permitted joint sampling of coal. When joint sampling of coal is not permitted it is difficult to enforce quality related penalty on the supplier. Further the coal companies have monopoly in coal supply and in the absence of competition the generating companies have to resort to taking services of external agencies at the loading point to assist in maintaining coal quality and quantity. Thus, the Appellant may need the quality/quantity assurance services either by deputing its own officers at the collieries or take the services of any external agency. In this particular case, the Appellant has taken the services of its coal transporter. However, the Appellant has to establish by documentary proof that the coal transporter has made value addition to the coal quantity and quality and the amount of incentive is justified for the value addition services provided by him.*

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28. *We find that the Appellant has not provided specific details to justify the claims for quality and quantity assurance incentive paid to the transporter The only argument advanced by the Appellant in support of providing incentive to the transporter for quality/quantity*

assurance service is that if the incentive had not been given to the contractor the quantity and quality of coal would have been inferior to that actually received. We feel that this argument alone will not establish the value addition, if any, provided by the coal transporter towards quality/quantity assurance. The Appellant has to clearly establish by the documentary proof that the coal transporter has provided the value addition in maintaining quality and quantity of coal with respect to a benchmark and the incentive is justified for the services rendered. State Commission has established the benchmark in the Regulation 4.8.1 for quality of coal. However, there is no benchmark for quantity of coal.

29. *In view of above, we give an opportunity to the Appellant to establish with the help of documents the justification of claim for quality assurance for Dishergarh for FY 2008-09 where the heat value of coal has been more than the minimum value as per Regulation 4.8 and for quantity assurance service provided to both the power plants for the FY 2008-09 and 2009-10 and the State Commission shall consider the same without being influenced by its findings in the impugned order. If the Appellant is able to establish the value addition actually provided by the coal transporter based on the documentary proof, the Commission shall allow only the amount of incentive as expenditure in coal cost which is justified for the value addition service provided by the transporter.*

30. *The Appellant has relied on the finding of the Tribunal in Appeal no. 84 of 2006 in the matter of Karnataka Power Transmission Corporation Vs. Karnataka*

Electricity Regulatory Commission to press its point that the State Commission should not take decision in the internal management of the utility. We feel that findings of Karnataka case will not be applicable in this case. The State Commission has to undertake prudence check of the expenditure incurred by the utility before allowing the same in the tariff. Thus, the State Commission has to carry out prudence check of the incentive paid by the Appellant for fuel quality/quantity assurance service to see if the incentive is justified for the value addition made by the coal transporter in quality and quantity of coal actually supplied to the power plants."

15. It is seen from the above judgment that the contract awarded by the Appellant on the coal transport contractor had provisions for charges for quality and quantity assurance service to be provided by the contractor. The performance benchmark for maintaining quality and quantity and incentive/penalty for deviations was also provided for. This Tribunal after examining the Regulations held that the Appellant is entitled to obtain fuel quality/quantity assurance services and claim expenditure incurred on these services subject to

prudence check by the State Commission, both regarding value addition of such services and reasonability of the amount of incentive to the coal transporter. Accordingly the Tribunal granted opportunity to the Appellant to present its case before the State Commission for quality assurance services for the Dishergarh for the FY 2008-09 and quantity assurance services rendered by the coal transporters for both the power plants for FY 2008-09 and FY 2009-10 and directed the State Commission to consider the same after prudence check as per the directions given by the Tribunal.

16. The Tribunal in judgment in Appeal nos. 217 of 2012 and 7 of 2013 also held that findings of the Tribunal in Appeal no. 84 of 2006 in the matter of Karnataka Power Transmission Corporation Vs. Karnataka Electricity

Regulatory Commission will not be applicable as the State Commission was required to carry out the prudence check of the incentive paid by the Appellant for fuel quality/quantity assurance service to see that the incentive is justified for the value addition made by the coal transporter.

17. Now let us examine the applicability of the above judgment in the present case.

18. We have examined the Agreement dated 24.02.2011 between Vizag Industrial and Minerals (Pvt.) Ltd., the coal transporter and the Appellant in the present case and find that the pricing is based on rate in Rs./MT/KM for different collieries from which coal is to be supplied. For example, for Kalidaspur colliery located at a distance of 120 KM the rate is Rs.5.58/MT/KM and for

Dhemomain colliery located at a distance of 23 KM the rate is Rs. 9.32/MT/KM. There is no separate rate for quality and quantity assurance service. The terms and conditions of the Agreement contains a general clause that the contractor shall pursue with ECL along with DPSCL (the Appellant), to minimize percentage of stones, boulders, mud, dust, etc., in the allotted coal lots at loading point and keep proper check at transportation and unloading points for any pilferages, loss, damage and grade slippage. There is no specific benchmark or quality and quantity of coal except that moisture content of the received coal shall be maximum of 9% in monsoon and maximum 8% during other seasons. The Appellant has right to impose a suitable penalty beyond this limit. However, no penalty rates have been defined in the Agreement. Thus, the Agreement is basically having a distance based rate for

per MT of coal supplied without any benchmark for quality and quantity of coal and penalty/incentive for maintaining the requisite quality/quantity of coal.

19. We notice that for the FY 2011-12, the Agreement dated 24.02.2011 with the same coal transporter was renewed by the Appellant at the same terms and conditions except that the rate for transportation of coal from different collieries based on the distance from the power plants was negotiated and the contractor offered some discount in the price.

20. We find that the terms and conditions of coal transportation contracts for FY 2010-11 and FY 2011-12 are different from the contracts for FY 2008-09 and 2009-10 which were dealt with by us in Appeal nos. 217 of 2012 and 7 of 2013. In the contracts for FY 2008-09

and 2009-10, the benchmark for coal quality in terms of heat value and deviation in heat value for which incentive and penalty was to be made effective were specified. Similarly benchmark for transit loss beyond which the penalty was leviable and incentive for quantity of coal supply beyond the allocated quantity were specified. Thus, the benchmarks for coal quality/quantity assurance services were specified. Unlike the earlier contracts, in the coal transportation contract in the present cases, the rate is linked to distance of the colliery without any specific benchmarks and incentive/penalty for the quality and quantity assurance service.

21. We feel that the finding of the Tribunal that the Appellant is entitled to claim the quantity/quality assurance service in the fuel price as per the

Regulations will be applicable to the present case also. However, in the absence of any specific quality and quantity assurance service benchmarks and charges/penalty in the contracts for 2010-11 and 2011-12, we do not find any merit in the claim of the Appellant for additional payment to the contractor for quality/quantity assurance service over and above the transportation cost. We are unable to understand as to how in the absence of specific Clauses for quality/quantity assurance service, the Appellant will be able to ensure value addition by the coal transporter in term of quality and quantity of coal.

22. But, there is merit in the claim of the Appellant regarding consideration of distance of the various collieries from which coal was actually supplied while determining the transportation charges. We find that the

State Commission has not dealt with this issue in the impugned orders. According to the data furnished by the Appellant, the weighted average distance of collieries for Chinakuri Power Plant was 69.19, 98.57 and 94.18 KM respectively for the FY 2009-10, 2010-11 and 2011-12. In case of Dishergarh the weighted average distance was 52.83, 81.46 and 94.87 KM for FY 2009-10, 2010-11 and 2011-12 respectively. This shows that there has been increase in average distance of collieries from which coal was supplied to the power plants during FYs 2010-11 and 2011-12 compared to FY 2009-10. Therefore, we deem it fit to remand the matter to the State Commission directing it to consider the contention of the Appellant relating to increase in transportation cost on account of increase in average distance of coal transportation during the FY 2010-11

and FY 2011-12 compared to the previous year. Accordingly remanded.

23. Let us now examine if the State Commission has exceeded the boundaries of prudence check and entered into the internal management of the Appellant.

24. We find from the impugned order dated 17.12.2012 that the Appellant had claimed transportation cost which was more than 125/200% than that claimed for the previous year (2009-10) without giving any reason/clarification for such exorbitant increase in transportation cost. It was also observed by the Commission that Agreement was entered into on 24.02.2011 i.e. almost at the end of the contract period. The Commission also felt that there was no indication in the application of the Appellant to show

that any exercise through tender process was carried out.

25. The Appellant filed a Review petition against the order dated 17.12.2012 and in the Review proceedings the State Commission sought the details of tender process. We do not find any infirmity in the State Commission examining the details regarding the tender process in the circumstances of the case when the Appellant had claimed exorbitant coal transportation costs without giving any explanation. Such enquiry was in the process of prudence check in the Review petition filed by the Appellant.

26. This issue has also been dealt with in judgment dated 01.04.2012 in Appeal no. 217 of 2012 and Appeal no. 7 of 2013 wherein this Tribunal held that the findings of the judgment of the Tribunal in Appeal no. 84 of 2006 in the matter of Karnataka Power Transmissions

Corporation Vs. Karnataka Electricity Regulatory Commission would not be applicable to that case.

27. The State Commission felt that adequate transparency was not adopted while inviting the bids for coal transportation and therefore asked for details regarding the tender process and tenders received by the Appellant.

28. Let us examine the tendering process undertaken by the Appellant for awarding the coal transportation contracts.

29 We find that in the present case the Appellant has not been successful in satisfying the State Commission about the transparency and wide circulation given to the tender. Some of the discrepancies pointed by the State

Commission where the explanation given by the Appellant has not been satisfactory by us are as under:-

i) Only 3 bids were received out of which the bids of two unsuccessful bidders were liable to be disqualified in terms of the tender notice as they had not submitted the EMD.

ii) Sealed envelope containing the bids of the above two bidders were also not produced. The Appellant had to submit the original envelope in which the bids were submitted and which were opened. The Appellant has argued that the sealed envelopes could not be submitted as they had been opened. We feel that the State Commission had sought evidence in the form of opened envelope in original which forms part of record for verification and which were not furnished by the Appellant to the State Commission.

iii) The date of receipt and the date of opening of bids is not available in the covering letters forwarding the bids. Further no documentary proof regarding the receipt and opening was provided.

iv) For one of the unsuccessful bidders namely M/s Chindit Carriers Pvt. Ltd., photocopies of un-priced bid has been submitted without any date of submission/date of receipt.

v) The Appellant categorically stated that they could not produce the original price bids and un-priced bids in respect of the two bidders.

vi) The date of opening the sealed envelope containing the EMD, un-priced bids and priced bids of the successful bidders were neither recorded nor authenticated by the Appellant.

vii) Copy of LOI was not made available for verification.

30. Hence, we agree with the State Commission that the Appellant has not followed the tendering procedure properly. The tendering has to be carried out as per the approved procurement procedure of the company. Normally NIT is invited by publishing in newspaper to ensure transparency and wide circulation. However, in case of low cost works and works of emergent nature, deviations are acceptable. What is important is that the tendering process is transparent and is subjected to wide circulation. Normally the sealed envelopes containing the bids have to be opened at a pre-announced place, date and time in the presence of authorized persons and the interested bidders who wish to witness the opening of the bids. All the pages of the bids including the envelope have to be signed by the authorized persons of the company and entities of price bids have to be made in the register with signatures of

the authorized persons. In the present case, the documents submitted by the Appellant before the State Commission do not clearly establish that the proper tendering process had been followed

31. In view of above, we do not find any infirmity in the method followed by the State Commission in deciding the transportation cost based on the rate allowed in the previous year with indexation for inflation. However, as indicated above, the State Commission should have considered the increase in distance through which the coal was transported during the FY 2010-11 and 2011-12 compared to the FY 2009-10 while deciding the transportation charges.

32. We, therefore, remand the matter to the State Commission for redetermination of transportation charges after considering the data regarding actual distance and quantum of coal from the various collieries

and accordingly escalate the transportation cost based on the distance and inflation factor as adopted in the impugned orders with respect to the transportation cost allowed for the FY 2009-10.

33. Summary of our findings

i) The examination of Agreement dated 24.02.2011 between the Appellant and the coal transporter indicates that the rate is based on the distance of the collieries from the power plant. There is no specific benchmark for quality and quantity of coal as also the incentive/penalty for deviation in quality and quantity. The terms and conditions of Coal Transportation Contract for FY 2010-11 and 2011-12 are different from the contracts for FY 2008-09 and 2009-10 which were dealt with by us in Appeal nos.

217 of 2012 and 7 of 2013. In the contracts for FY 2008-09 and 2009-10, the benchmark for coal quality and quantity assurance services were specified. Unlike the earlier contracts, the Coal Transportation Contract in the present cases are linked to distance of collieries without any specific benchmark and incentive/penalty for quantity and quality assurance services. Thus, even though the Regulations provide for claim of quality/quantity assurance service in the fuel price, in the absence of necessary provision for benchmaking quality and quantity assurance services and charges therein, we do not find any merit in the claim of the Appellant for additional payment to the contractor for quality/quantity assurance services over and above the transportation cost.

ii) However there is merit in the claim of the Appellant regarding increase in weighted average distance of collieries from which coal was actually supplied to the power plant during the FY 2010-11 and 2011-12 compared to the previous year which has not been considered by the State Commission while determining the transportation cost. We, therefore, remand the matter to the State Commission for redetermination of the transportation cost after considering the distance of the collieries form which coal was supplied to the power plant.

iii) We do not find any infirmity in the State Commission seeking the details of tender process for transportation contract in the circumstances of the case as the Appellant had claimed exorbitant coal transportation cost without giving any

explanation. Such inquiry was in the process of prudence check in the Review petition filed by the Appellant.

iv) We agree with the State Commission that the Appellant had not followed the tendering process properly. We do not find any infirmity in the methodology followed by the State Commission in determining the transportation cost based on the rate allowed in the previous year with indexation for inflation. However, as indicated above the State Commission has to re-determine the transportation charges after considering the data furnished by the Appellant regarding the distance and quantity of coal received from the various collieries during the FY 2010-11 and 2011-12 compared to FY 2009-10 and accordingly escalate the transportation cost

based on distance and inflation factor over the transportation cost allowed for FY 2009-10.

34. In view of above the Appeals are allowed in part as indicated above. The State Commission is directed to pass consequential orders within 3 months of the communication of this judgment.

35. Pronounced in the open court on this **27th day of October, 2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/NON-REPORTABLE

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