

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

Appeal no. 78 of 2013

Dated: 13th May, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

Madhya Pradesh Power Generating Company Limited ...Appellant (s)
Shakti Bhawan, Vidyut Nagar
Rampur Jabalpur (M.P.) – 482 008

Versus

- i) Madhya Pradesh Electricity Regulatory Commission ...Respondent(s)
5th Floor, Metro Plaza
Arera Colony, Bittan Market
Bhopal – 462016
- ii) Madhya Pradesh Power Management Company Limited
Shakti Bhawan, Vidyut Nagar, Rampur
Jabalpur (M.P.) 482008
- iii) Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited
Shakti Bhawan, Vidyut Nagar, Rampur
Jabalpur (M.P.) 482008
- iv) Madhya Pradesh Madhya Kshetra Vidyut Vitran Company Limited
Nishtha Parisar, Govindpura
Bhopal (MP) – 462 008
- v) Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Limited
GPH Campus, Polo Ground
Indore (MP) – 452 015

vi) Madhya Pradesh Power Transmission
Company Limited
Shakti Bhawan, Vidyut Nagar, Rampur
Jabalpur (M.P.) 482008

Counsel for Appellant(s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Swagatika Sahoo
Mr. Avinash Menon

Counsel for the Respondent(s): Mr. C.K. Rai
Mr. Ashok Upadhyay (Rep.)
Mr. Gajendra Tiwari(Rep.)

JUDGMENT

RAKESH NATH, TEHNICAL MEMBER

This Appeal has been filed by M P Power Generating Co. Ltd. against the order dated 12.10.2012 passed by Madhya Pradesh Electricity Regulatory Commission (“State Commission”) dismissing the petition filed by the Appellant seeking determination of tariff of its small hydro generating station in terms of its tariff order dated 30.6.2008.

2. The Appellant is a generating company and is engaged in the business of generating electricity in the State of Madhya Pradesh. The State Commission is the first Respondent. The other Respondents are State Power Management Company, distribution licensees and the transmission licensee/STU. The Appellant and the Respondent no. 2 to 6 are the successor entities of the erstwhile M P Electricity Board. The Appellant sells its power to the Respondent no.2 for onward sale to the three distribution companies, the Respondent nos. 3 to 5 herein.

3. The brief facts of the case are as under:

3.1 One of the generating stations of the Appellant is Bansagar – IV, Jhinna Hydel Power Station having

2 units of 10 MW each i.e. total capacity of 20 MW. The Commercial Operation Date of the first unit is 20.8.2006 and the second unit is 30.8.2006.

3.2 The State Government vide notification dated 3.6.2006, directed that the Appellant would sell the entire power generated by Jhinna Hydel Power Station to the Respondent no.2 at the rate determined by the State Commission. Accordingly, on 29.11.2006 a Power Purchase Agreement was entered into between the Appellant and the Respondent no.2.

3.3 In the meantime, on 8.8.2006, the State Government notified a policy named Incentive Policy for development of Small Hydro Power

Projects in Madhya Pradesh, 2006, herein after referred to as 'Incentive Policy', with the aim to incentivize the small hydro power projects in the State.

3.4 Pursuant to the PPA dated 29.11.2006, the Appellant on 12.10.2006 filed a petition being petition no. 103 of 2006 before the State Commission for determination of provisional generation tariff of Jhinna project for the period period FY 2007 to FY 2009.

3.5 The State Commission vide order dated 18.1.2008 determined the provisional Annual Capacity Charges for Jhinna Project from 1.9.2006 to 31.3.2009.

3.6 In terms of the Incentive Policy, the water Resources Department, Government of Madhya Pradesh filed a petition being petition no. 123 of 2006 before the State Commission. The State Commission vide order dated 30.6.2008 determined the generalized tariff for procurement of power by distribution licensees from Small Hydro Power Projects.

3.7 On 28.7.2012, the Appellant filed a petition being petition no. 63 of 2012 before the State Commission for approval of the final generation tariff for Jhinna Project for the period of 30 years with effect from 1.9.2006 by applying the tariff order dated 30.6.2008.

3.8 By order dated 12.10.2012, the State Commission dismissed the Petition no. 63 of 2012 holding that in light of the Incentive Policy and tariff order dated 30.6.2008, the petition is not maintainable and directed the Appellant to file a fresh petition for determination of final tariff of Jhinna Project.

3.9 Aggrieved by the above impugned order dated 12.10.2012, the Appellant has filed this Appeal.

4. The short issue involved in this Appeal is whether the tariff of Jhinna Hydro Power Station of the Appellant has to be determined by the State Commission as per its tariff order dated 30.6.2008 determining the generic tariff for procurement of power by the distribution licensee

from small hydro projects in pursuance of the Incentive Policy of the State Government?

5. On the above, issue, Shri M.G. Ramachandran, Learned Counsel for the Appellant has submitted as under:

(A) The State Commission has not properly construed the scope of the Incentive Policy notified by the State Government. The Incentive Policy provides that the policy shall apply to all the small hydro projects upto 25 MW capacity which have been identified for being set up and to all projects which have been allocated to the MP Electricity Board and which are yet to attain the stage of commercial operation. It clearly stipulates that the projects which get commissioned after the

notification of the Incentive Policy are eligible for all the benefits envisaged under the policy. Jhinna Project Unit I was commissioned on 20.8.2006 and Unit II on 30.8.2006 i.e. both units were commissioned after the notification of the Incentive Policy on 8.8.2006.

(B) Though the Incentive Policy is primarily intended for private sector, any Government or Semi-Government organization of the State or Union Government is equally eligible to avail the benefits of the policy.

(C) The State Commission vide tariff order dated 30.6.2008 determined the generalized tariff specifically referring to the Incentive Policy. However, the State Commission has not

construed harmoniously the Incentive Policy of the State Government and its tariff order dated 30.6.2008. The tariff order is only applicable to the projects commissioned on or after 30.6.2008 i.e. after passing of the order. But the scope of the Incentive Policy is applicable to all projects commissioned after the notification of policy i.e. after 8.8.2006. To apply the benefits of generalized tariff on or after 30.6.2008 deprives the projects commissioned during the period 8.8.2006 to 30.6.2008 and is against the spirit of the Incentive Policy.

6. Shri C.K. Rai, Learned Counsel for the State Commission in support of the findings in the impugned order has submitted that the State Commission in terms of its 2005 Tariff

Regulations had passed provisional tariff for Jhinna Project on 18.1.2008 with directions to the Appellant to take immediate steps to finalize its accounts as early as possible and also file appropriate petition based on the audited accounts for approval of fixed tariff of Jhinna Project. This order was not challenged by the Appellant. The tariff determined by the State Commission by order dated 18.1.2008 was upto 31.3.2009 only. On 3.3.2010, the State Commission passed Multi Year Tariff order for all power stations of the Appellant including Jhinna in light of the provisions of the 2009 Tariff Regulations for the period 1.4.2009 to 31.3.2012. The Appellant was once again asked to file petition for final generation tariff for Jhinna. This order dated 3.3.2010 was also not challenged by

the Appellant. On 24.2.2012 the State Commission amended the 2009 Tariff Regulations to extend the control period of principal Regulation from 1.4.2012 to 31.4.2013. Accordingly, on the petition of the Appellant, the State Commission passed order for FY 2012-13 for generation tariff of all the power stations of the Appellant including Jhinna in light of the provisions of the 2009 Regulations and its amendments for the FY 2012-13. This order was also not challenged by the Appellant.

7. According to Shri C.K. Rai, the generic tariff order dated 30.6.2008 was passed almost 2 years after commissioning of the Appellant's hydel project and the generic tariff order was applicable to the projects commissioned on or after 30.6.2008. The

demand of the Appellant made 4½ years after the issue of the order dated 30.6.2008 to modify the applicability of the order retrospectively was not found maintainable by the State Commission.

8. Let us now examine the findings of the State Commission in the impugned order. The relevant extracts are reproduced below:

“a) Incentive Policy of GoMP dated 8th August, 2006:

The policy was to apply to projects identified for being set up by WRD/NVDA/MP Genco. The main thrust of the policy was to promote private participation. The projects were to be allotted through competitive bidding or in case of self identified projects allotted as per procedure outlined in the policy. The instant project was commissioned on 20th August, 2006 i.e. barely 12 days after announcement of policy. By any stretch of the imagination, it cannot be accepted as a project identified to be set up under the aforesaid policy.

b) Tariff order pursuant to the above Incentive Policy of GoMP was issued by this Commission on 30th June, 2008 i.e. almost 2 years after commissioning of this project. The order was applicable to projects commissioned on or after the date of issue of the order. The demand of the petitioner, made after 4 years of issue of this order, to modify it to include earlier projects like this one has no merit. Beside, review of a tariff order can only be considered up to 60 days of its issue.”

The State Commission in the impugned order decided that the project was not identified to be set up under the Incentive Policy of the State Government and the order dated 30.6.2008 would not be applicable to the Jhinna project of the Appellant as this order was applicable to projects commissioned on or after the date of issue of the order. The State Commission also directed the Appellant to file a petition with appropriate details for determination of the final tariff of Jhinna project.

9. Let us now examine the Incentive Policy of the State Government. This policy was framed to promote hydro power projects to tap the potential of hydro power in the State of Madhya Pradesh. Though the policy is primarily intended for private sector participation, any Government of Semi Government organization of the State or Union Government is equally eligible to avail the benefits of the policy. The policy also applies to all the projects which had been allotted by the erstwhile Electricity Board and which are yet to attain COD. The policy describes the selection process for the project developers and constitution of a committee called Project Clearance and Implementation Board for determining the norms and procedures and for selection of the project

developers. The policy states that the State Commission shall have the exclusive jurisdiction to determine the sale rates. The policy stipulates incentives and only those hydro projects which meet the milestones prescribed under the Hydro Power Development Agreement shall be eligible for the specified incentives.

10. The above Policy was notified on 8.8.2006 and the two units of the Appellants project were commissioned on 20.8.2006 and 30.8.2006 respectively. The State Commission in the impugned order has held that by no stretch of imagination it can be accepted that the said project of the Appellant as the project identified to be set up under State Government's policy dated 8.8.2006. The State Commission before coming to

this conclusion has examined all the aspects of the Incentive Policy and also noted that the Appellant did not participate in the proceedings in Petition no. 123 of 2006 filed by Water Resources Department of the State Government for determination of tariff which resulted in generic tariff order dated 30.6.2008.

11. Let us now examine the generic tariff order dated 30.6.2008 pursuant to the Incentive Policy of the State Government. The State Commission has determined the tariff of the hydro projects after accounting for free power to be supplied by the generator to the State Government as per the State Government Policy. The tariff order clearly states that the tariff determined under the order shall be applicable for the projects which are

commissioned on or after the date of issue of the order. The tariff date of order is 30.6.2008 and the project of the Appellant was commissioned in August 2006 i.e. 1 year and 10 months before the generic tariff order was issued by the State Commission. Thus, in terms of the tariff order dated 30.6.2008, the generic tariff will not be applicable to Jhinna Hydro Power Project of the Appellant. Admittedly, the order dated 30.6.2008 was not challenged and has since attained finality.

12. Learned Counsel for the State Commission has brought the following facts to our notice.

(A) The PPA dated 29.11.2006 entered into between the Appellant and the Respondent no.2 provides

that the tariff payable by the Respondent no.2 to the Appellant would be as determined by the State Commission for the period from the Effective Date which is the COD of the project. The Regulation referred to in the relevant clause of the PPA is the 2005 Tariff Regulations.

- (B) On 10.10.2006, pursuant to the PPA, the Appellant filed a petition before the State Commission for determination of the provisional tariff since COD of the project upto 31.3.2009. Accordingly, the State Commission determined the provisional tariff upto 31.3.2009 as per the 2005 Tariff Regulations with the directions to the Appellant to finalize the accounts and file petition for final tariff along with the audited accounts. This order was not challenged by the Appellant.

- (C) On 8.5.2009, the State Commission issued 2009 Tariff Regulations for the second control period of FY 2009-10 to FY 2011-12.
- (D) On 30.9.2009 the Appellant filed a petition for determination of tariff of its hydro projects including Jhinna for the control period 2009-10 to 2011-12 as per the 2009 Tariff Regulations.
- (E) The State Commission determined the tariff for the generating stations of Appellant including Jhinna for the control period 2009-12. The Appellant was again reminded to file petition for final tariff for Jhinna. This order was also not challenged by the Appellant.

- (F) The State Commission by an amendment dated 24.2.2012 extended the control period under the 2009 Tariff Regulations upto 31.3.2013.
- (G) On a petition filed by the Appellant, the State Commission vide its order dated 16.4.2012 again determined the tariff of all the projects of the Appellant including Jhinna for FY 2012-13 based on the 2009 Tariff Regulations as amended on 24.2.2012.
- (H) In the meantime on 16.1.2012, the State Commission through letter directed the Appellant to file the final tariff petition for Jhinna latest by 30.4.2012.

(I) After consistent follow up on 28.7.2012 the Appellant filed a petition for determination of final tariff for Jhinna on the basis of generic tariff determined by the State Commission with zero free power.

13. Thus, we find that the Appellant has been supplying power and billing the beneficiaries based on the provisional tariff determined by the State Commission by the various tariff orders as per the 2005/2009 Tariff Regulations since 18.1.2008 to 28.7.2012 i.e. for more than 4-1/2 years. The final tariff could not be determined earlier due to the Appellant not filing the audited accounts required for determination of the final tariff.

14. Admittedly, the generic tariff order dated 30.6.2008 was applicable to the projects commissioned on or after 30.6.2008. Thus, the Appellant's project which was commissioned in August 2006 will not be covered by the generic tariff order dated 30.6.2008. The Appellant under the guise of the State Government Incentive Policy wants the tariff order dated 30.6.2008 to be amended with a view to apply the generic tariff retrospectively from August, 2008. This is not permissible. The order dated 30.6.2008 was not challenged by the Appellant and has since attained finality.

15. We also agree with the finding of the State Commission that the Jhinna Project which was commissioned barely 12 days after the issuance of

the Incentive Policy cannot be construed to have been developed under the Incentive Policy of the State Government.

16. In view of above the State Commission's finding that the petition of the Appellant is not maintainable is valid. The State Commission has also directed the Appellant file a petition for determination of final tariff. The Appellant is directed to comply with the directions of the State Commission.

17. Summary of our findings:

i) The Appellant's Jhinna Hydro Project has not been developed under the State Government's Incentive Policy.

ii) The generic tariff dated 30.6.2008 determined by the State Commission which is applicable to the projects commissioned on or after 30.6.2008 will not be applicable to the Appellant's plant which was commissioned in August 2006.

18. In view of above, the Appeal is dismissed as devoid of any merit. No order as to costs.

19. Pronounced in the open court on this **13th day of May, 2014.**

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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