
Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:25th April, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

IA No.10 OF 2014
IN
DFR No.2715 OF 2013

In the Matter of:

M/s. Jaiprakash Power Ventures Limited
Juit Complex, Wagnaghat,
PO Dumehar Bani,
Kandaghat, Distt- Solan
Himachal Pradesh
PIN-173 215

.....Applicant/Appellant

Versus

- 1. Himachal Pradesh Electricity Board Limited.,**
Kumar House,
Shimla-171 004

- 2. Himachal Pradesh Electricity Regulatory Commission**
Keonthal Commercial Complex,
Khalini,
Shimla-171 002

...Respondent(s)

Counsel for the Appellant(s) : Mr. S B Upadhyay, Sr Adv.
Ms. Anisha Upadhyay
Mr. Pawan Upadhyay
Mr. Sarvjit Pratap Singh
Ms. Sharmila
Mr. Jayesh Gaurav

Counsel for the Respondent(s): Ms. Swapna Seshadri
Mr. Anand K Ganesan for R-1

ORDER

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. This is an Application to condone the delay 1052 days in filing the Appeal as against the Main Order dated 24.1.2011.
2. Jaiprakash Power Ventures Limited is the Applicant/Appellant herein. Himachal Pradesh State Electricity Board is the First Respondent. Himachal Pradesh Electricity Regulatory Commission is the Second Respondent.
3. The short facts are as under:
 - (a) The Appellant is a Generating Company. It filed a Petition u/s 62 and 86 of the Electricity Act, 2003 before the State Commission for determination of tariff for sale of power to the State Electricity Board claiming additional cost of interconnection facilities as well as the additional compensation paid to land owners for the land.

(b) The State Commission, after considering the facts pleaded in the Petition filed by the Applicant/Appellant and the objections raised by the Electricity Board (R-1), passed the Impugned Order dated 24.1.2011 allowing some claims and disallowing other claims.

(c) Challenging the said order, the Applicant/Appellant, in respect of some claims disallowed, filed a Review Petition before the State Commission on 28.2.2011.

(d) At this stage, the Electricity Board, the 1st Respondent, aggrieved by the part of the Order dated 24.1.2011 allowing some claims in favour of the Generating Company filed an Appeal in Appeal No.43 of 2011 before this Tribunal on 26.03.2011.

(e) Ultimately, on 6.2.2012, Appeal No.43 of 2011 filed by the Respondent was dismissed by the Tribunal. Thereafter, the Review Petition filed by the Appellant, was taken-up for hearing. Ultimately, the Review Petition was dismissed by the State Commission on 8.10.2013 holding that there were no merits in the Review Petition.

(f) Challenging both the Main Order dated 24.1.2011 as well as the Review Order dated 8.10.2013, the Applicant has filed a Composite single Appeal.

4. In filing the Appeal against the Main Order, there is a delay of 1052 days. Hence, along with the Appeal, the Applicant/Appellant has filed this Application to condone the delay of 1052 days by giving the explanation for the said delay.
5. The explanation offered by the Applicant/Appellant in the Application to condone the delay is as follows:

(a) The Applicant/Appellant filed a Petition for determination of tariff on 20.1.2010 making various claims. The State Commission through the Impugned Order dated 24.1.2011 allowed some of the claims and rejected the other claims. The Applicant, aggrieved by the rejection of some of the claims, filed a Review before the State Commission on 28.2.2011. The Respondent Electricity Board aggrieved by the said Impugned Order, filed an Appeal in Appeal No.43 of 2011 before this Tribunal challenging the relief granted to the Applicant by the State Commission in respect of some claims.

(b) While this Appeal was pending, this Tribunal granted stay of the Impugned Order in respect of some claims in question in the Appeal. The Applicant as Respondent in that Appeal filed an Application to vacate the stay order so that the State Commission could go on hearing the Review Petition filed by the Applicant/Appellant. In that Application, this Tribunal by the Order dated 8.4.2011 without vacating the stay, clarified and directed that the State Commission that it may proceed with the Review Petition in respect of disallowance of some of the other claims since the stay granted in the said Appeal was confined to the relief of some of the claims which are different from the claims raised in the Review Petition.

(c) However, the Review Petition was not taken up for enquiry on the objection raised by the Respondent. Ultimately, the Appeal filed by the Electricity Board before this Tribunal in Appeal No.43 of 2011 was dismissed on 6.2.2011.

(d) Thereafter, the Review Petition was taken up for enquiry. Ultimately, on 8.10.2013, the State Commission passed the Impugned Order dismissing the Review Petition.

(e) Thereupon, the composite Appeal has been prepared as against both the Orders dated 24.1.2011 and 8.10.2013 and filed the same on 2.12.2013 along with the Application to condone the delay of 1052 days in filing the Appeal as against the Main Order dated 24.1.2011. That was how, the delay was caused. Hence, the delay which is not wanton, may be condoned.

6. This is stoutly opposed by the Electricity Board, the Respondent by filing a reply contending that the huge delay of 1052 days has not been satisfactorily explained and that therefore, the Application may be dismissed and consequently, the Appeal against the Main Order may be rejected. It is also pointed out that the Appeal as against the dismissal order in the Review Petition is not maintainable as per the settled law as laid down by this Tribunal in various decisions and hence the Appeal as against the Review Order also may be dismissed.
7. We have heard the learned Senior Counsel appearing for the Applicant as well as the learned Counsel for the Respondent appearing for the Respondent.
8. At the outset, it shall be stated that in the composite Appeal filed by the Applicant as against the Main Order dated

24.1.2011 as well as the Review Order dated 8.10.203, the Appeal against the Order dismissing the Review Petition dated 8.10.2013 cannot be entertained as it is settled law that no appeal would lie as against an Order dismissing the Review Petition and as such, the question of Appeal being filed as against the Review Order dated 8.10.2013 passed by the State Commission would not arise. Therefore, the Appeal as against the Review Order dated 8.10.2013 cannot be entertained as maintainable. Therefore, the Appeal as against the Review Order dated 8.10.2013 is dismissed.

9. In view of the above, we are only concerned with the question as to whether the explanation offered by the Applicant in IA No.10 of 2014 praying to condone the delay of 1052 days in filing the Appeal, is satisfactory so that the Appeal as against the Main Order dated 24.1.2011 could be entertained ?
10. In the light of the above question, we shall now refer to the chronological events which took place which led to filing of the Appeal belatedly as against the Impugned Order dated 24.1.2011 along with an Application to condone the delay of 1052 days:
 - (a) This case has got a chequered history.

(b) The Appellant is a Generating Company. It filed a Petition on 20.1.2010, u/s 62 and 86 of the Electricity Act, 2003 for determination of tariff taking into account the additional expenditure incurred in respect of protection works of pot-head yard. Ultimately, the State Commission passed the Impugned Order dated 24.1.2011 allowing the first four Claims out of nine claims in favour of the Applicant and rejected other claims. Thereupon, the Applicant aggrieved by the rejection of the remaining claims, preferred a Review Petition on 28.2.2011 before the State Commission.

(c) At that stage, on 26.3.2011, the Electricity Board, the Respondent, challenging the Main Order dated 24.1.2011 in respect of the reliefs granted to the Applicant filed an Appeal in Appeal No.43 of 2011 before this Tribunal.

(d) During the pendency of the Appeal, the Electricity Board filed a Petition in the said Appeal seeking for the interim stay of the Impugned Order dated 24.1.2011.

(e) Accordingly, on 29.3.2011, this Tribunal passed the conditional interim Order staying the operation of the Impugned Order only relating to the issues which were the subject matter of the Appeal.

(f) Since the Appeal as against the Impugned Order in respect of some of the issues was pending before this Tribunal, the State Commission was reluctant to take-up the Review Petition in respect of other issues. Therefore, the Applicant on 8.4.2011 filed an Application before this Tribunal for directing the State Commission to proceed with the Review Petition even during the pendency of the Appeal filed by the Electricity Board.

(g) Accordingly, this Tribunal, after hearing both the parties, through the Order dated 8.4.2011, directed the State Commission to proceed with the Review Petition since the stay Order was confined to only some of the issues which were claimed in the Appeal and they are different from the claims raised in the Review Petition.

(h) Even then, the Review had not been taken up for enquiry by the State Commission. On the other hand, on 18.4.2011, the State Commission informed the Applicant through the letter that since the Appeal had been preferred by the Electricity Board in the Tribunal, the Review Petition was not maintainable at that stage. Apart from 18.4.2011 letter, another order had been passed by the State Commission on 15.7.2011 stating that the State Commission will take-

up the Review only after the pronouncement of the judgment in the Appeal and not earlier.

(i) The relevant portion of this Order dated 15.7.2011 is reproduced below:

“4.15 Further an additional interlocutory Application (IA 74 of 2011) was filed by JPVL with the Hon’ble ATE and it was pleaded by the Counsels that the State Commission was reluctant to take up other issues raised in other proceedings including the Petition, in view of the stay granted in Appeal No.43 of 2011. Hon’ble ATE in its Order dated 8th April, 2011 against the IA-74 of 2011, has said the following:

‘After hearing, we feel that we should make it clear that the stay granted in this matter is only confined to the issues in the present proceedings not with reference to the other issues in other proceedings including the review Petition. Therefore, the State Commission may go on with those proceedings.’

4.16 The Commission has taken note of the order of Hon’ble ATE in IA 74 of 2011. As the issues raised in the Petition No.11 of 2010 are linked to the issue of approval of additional capital cost and the matter is subjudice and judgment of Hon’ble ATE on this matter is awaited. The Commission shall address this matter after the pronouncement of judgment of Honourable ATE in this matter.”

(j) The above order would show that the State Commission, without complying with the Order dated 8.4.2011 passed by the Tribunal simply adjourned the matter observing that the Review Petition for enquiry would be taken up only after the pronouncement of the judgment in the Appeal by this Tribunal.

(k) Ultimately, the Appeal No.43 of 2011 filed by the Electricity Board was dismissed by this Tribunal on 6.2.2012. Thereupon, as against the Order dated 6.2.2012, the Electricity Board filed the second Appeal before the Hon'ble Supreme Court. The said second Appeal has been admitted and issued notice to the Applicant. The Applicant is contesting Respondent in the said Appeal and is appearing in that Appeal before the Hon'ble Supreme Court.

(l) At this stage, i.e. on 22.3.2013, the Review was taken up for enquiry and admitted for hearing.

(m) After considering the objections raised by the Electricity Board, the State Commission by the Order dated 8.10.2013, dismissed the Review Petition. Thereupon, the present composite Appeal has been filed on 2.12.2013 along with an Application to condone

the delay of 1052 days as against the Main Order dated 24.1.2011.

11. From these chronological events, we could notice three important aspects which would show that the Applicant was not diligent in prosecuting the matter as a result of which the huge delay of 1052 days has been caused. Those three aspects are as follows:

(a) As against the Impugned Order dated 24.1.2011, the Electricity Board (Respondent) filed an Appeal before this Tribunal in Appeal No.43 of 2011 as against the reliefs granted to the Applicant. In that Appeal, the Applicant was a contesting Respondent in the said Appeal. The Applicant appeared before this Tribunal and filed its pleadings before this Tribunal in defending the Impugned Order. However, in respect of other claims disallowed, the Applicant instead of filing Appeal filed a Review Petition in Petition No.19 of 2011 before the State Commission. Even though the Applicant knew about the pendency of the Appeal as against the Impugned Order dated 24.1.2011 filed by the Electricity Board, the Applicant was not interested in taking up the matter to the Tribunal by filing the Appeal as against disallowance of other claims so that both the Appeals could be heard together by this Tribunal to arrive at a

final conclusion in respect of all the claims. On the other hand, the Applicant was interested in prosecuting the Review Petition only.

(b) This Tribunal in the Appeal No.43 of 2011 filed by the Electricity Board, after hearing both the parties granted stay of the operation of the Impugned Order in respect of the issues involved in the said Appeal by directing the Electricity Board to deposit Rs.15 Crores subject to result of the Appeal. During the pendency of the Appeal, the State Commission was reluctant to take up the Review Petition. Therefore, the Applicant filed a Petition before this Tribunal to issue a direction to the State Commission to proceed with the Review Petition pending disposal of the Appeal before this Tribunal. In this Application, this Tribunal by the Order dated 8.4.2011 specifically clarified that the issues in the Appeal are different from the issues in the Review Petition and therefore gave a specific direction to the State Commission to go on with the enquiry in the Review Petition. This order was passed on 8.4.2011. Despite this order, the State Commission informed the Appellant by the Order dated 18.4.2011 stating that the Review Petitions was not maintainable as the Appeal filed by the Electricity Board was pending in the

Tribunal. This information given by the State Commission has not been brought to the notice of this Tribunal to enable this Tribunal to give further directions. There is no reason given by the Applicant for not approaching the Tribunal for getting suitable directions immediately thereafter for the early disposal of the Review Petition.

(c) Despite the Order passed on 8.4.2011 directing the State Commission to go on with the Review Petition even during the pendency of the Appeal in the Tribunal, the State Commission passed the Order on 15.7.2011 after quoting the Order of this Tribunal dated 8.4.2011 to the effect that the State Commission would take up the Review Petition for enquiry only after the pronouncement of the judgment of this Tribunal and not earlier as the issues raised in the Petition No.11 of 2010 are linked to the issues of the approval of the additional capital cost. This order dated 15.7.2011 is reproduced again:

“4.15 Further an additional interlocutory Application (IA 74 of 2011) was filed by JPVL with the Hon’ble ATE and it was pleaded by the Counsels that the State Commission was reluctant to take up other issues raised in other proceedings including the Petition, in view of the stay granted in Appeal No.43 of 2011. Hon’ble ATE in its Order

dated 8th April, 2011 against the IA-74 of 2011, has said the following:

'After hearing, we feel that we should make it clear that the stay granted in this matter is only confined to the issues in the present proceedings not with reference to the other issues in other proceedings including the review Petition. Therefore, the State Commission may go on with those proceedings.'

4.16 The Commission has taken note of the order of Hon'ble ATE in IA 74 of 2011. As the issues raised in the Petition No.11 of 2010 are linked to the issue of approval of additional capital cost and the matter is subjudice and judgment of Hon'ble ATE on this matter is awaited. The Commission shall address this matter after the pronouncement of judgment of Honourable ATE in this matter."

So, this Order dated 15.7.2011 would clearly indicate that the State Commission has deliberately violated the Order passed by this Tribunal by not taking up the Review Petition even though the State Commission took note of the specific directions issued by this Tribunal in the Order itself to proceed with the enquiry in the Review Petition. Even though this order was passed on 15.7.2011 by the State Commission refusing to follow the order dated 8.4.2011 passed by this Tribunal, the Applicant has not taken care to file necessary application before this Tribunal for bringing

to the notice of this Tribunal, the conduct of the State Commission indicating the violations of our directions. If such an Application was filed, this Tribunal could have ensured to see that Review Petition is disposed of early without any further delay. On the other hand, the Applicant was all along keeping quite by adhering to the order of the State Commission dated 15.7.2011 which is a violation of this Tribunal's direction. There is no explanation by the Applicant as to why it did not approach the Tribunal to seek direction for the early disposal of the Review Petition by bringing to the notice about the violation. Ultimately, the Appeal had been dismissed on 6.2.2012 by this Tribunal. Only thereafter, i.e. after one year, the Review Petition was taken-up for enquiry on 22.3.2013 and ultimately final order dismissing the Review was passed only on 8.10.2013 i.e. after seven months.

12. These three aspects would make it clear that the Applicant even though he was armed with the Order of this Tribunal dated 8.4.2011 directing the State Commission to go on with the enquiry in the Review Petition, did not take steps to ensure the compliance of the Order of this Tribunal dated 8.4.2011 for early disposal of the Review. Thus, there is absolutely no explanation for the period between 8.4.2011

on which date the Tribunal directed the Commission to go on with the enquiry and the 22.3.2013, the date on which the review was taken-up for hearing.

13. The learned Senior Counsel for the Appellant cited the judgment of this Tribunal in IA No.224 of 2010 in Appeal No.26 of 2009 dated 27.8.2012 in which it is held that the pendency of the Review Application before the Commission is normally considered to be a good ground for condonation of delay.
14. Of course it is true that in the said judgment, the delay was condoned on the main reason that the period of pendency of review can be a good ground for condonation of delay. This decision cannot be applied to the present case because the Applicant did not take appropriate steps to have a Review Petition enquiry taken up at an earlier date for early disposal of the Review despite the specific directions issued by this Tribunal. In the very same decision, it is held that if the explanation for the delay lacking bona fide was found to be unreasonable, the said delay cannot be condoned by the Court. Hence, this judgment is of no use to the Applicant.
15. In the absence of any explanation, that too when we find that the Applicant was a party to the violation of our

directions by the State Commission, we are unable to find any sufficient cause to condone the delay.

16. In fact, we feel that the Applicant was not diligent enough to bring to the notice of this Tribunal about the violation of our Order directing the State Commission to go on with the Review Enquiry despite the pendency of the Appeal and as such the Applicant was neither interested nor vigilant enough to have the Review Petition disposed of at an earlier date without any further delay.
17. Thus, it is clear that the delay was not only due to the pendency of the Review before the State Commission but also was due to the inaction of the Applicant in not taking steps to ensure the Order of this Tribunal giving directions for disposal of the Review, is complied with in letter and spirit.
18. Hence, the Application to condone the delay is dismissed. Consequently, the Appeal against the Impugned Order dated 24.1.2011, also is rejected.

(Rakesh Nath)
Technical Member
Dated:25th April, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

✓ ~~REPORTABLE/NON-REPORTABLE~~