

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)
(Kolkata Circuit Bench)**

**Appeal no. 217 of 2012 &
Appeal no. 7 of 2013**

Dated: 1st April, 2014

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

Appeal no. 217 of 2012

In the matter of:

DPSC Limited
Plot X – 1, 2 & 3, block EP, Sector V
Salt Lake City, Kolkata – 700 091

... Appellant (s)

Versus

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

... Respondent(s)

Counsel for Appellant(s) :

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Mr. Subir Kumar
Mr. Debnath Ghosh
Mr. Atul Shankar Mathur
Ms. Shruti Verma
Mr. Shounak Mitra
Mr. Abhisar Bairagi
Mr. Sandeep Mitra

Counsel for the Respondent(s): Mr. Pratik Dhar
Mr. C.K. Rai
Mr. Ravin Dubey

Appeal no. 7 of 2013

In the matter of:

DPSC Limited ... Appellant (s)
Plot X – 1, 2 & 3, block EP, Sector V
Salt Lake City, Kolkata – 700 091

Versus

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Counsel for the Respondent(s): Mr. Pratik Dhar
Mr. C.K. Rai
Mr. Ravin Dubey

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Appeal no. 217 of 2012 and Appeal no. 7 of 2013 have been filed by DPSC Ltd. against the orders passed by West Bengal Electricity Regulatory Commission (“State Commission”) in determining the Fuel and Power Purchase Cost Adjustment for the FY 2009-10 and FY 2008-09 respectively. The issue in these Appeals is limited to the disallowance of the expenses of quality and quantity assurance incentive paid by the Appellant to its transporters of coal.

2. The Appellant is a generation and distribution utility operating in the Asansol-Raniganj belt of District Burdwan in the State of West Bengal. The West Bengal State Commission is the Respondent. The orders of the State Commission dated 30.06.2010 (Appeal no. 7 of

2013) and dated 04.06.2012 (Appeal no. 217 of 2012) are challenged in these Appeals.

3. The Appellant in order to ensure minimum quantity and quality of coal from its suppliers Eastern Coalfields Ltd. ('ECL') has paid an incentive to its transporters. According to the Appellant, M/s. Eastern Coalfields Ltd. permit joint sampling of coal only if the quantity of coal supply exceeds 4 million tonnes per annum. Since the procurement of coal by the Appellant is much less than the said threshold limit, the Appellant does not have the facility of testing of coal at the time of lifting the coal from the coalfield. Hence the Appellant is constrained to resort to the necessity of entering into a contract with its transporters whereby the transporter is paid an incentive for assuring delivery of minimum quality and quantity of coal. In the impugned orders, the State Commission has disallowed the incentive paid by the

Appellant to its transporters for maintaining minimum quantity and quality of coal while deciding the Fuel and Power Purchase Cost Adjustment (FPPCA) for the FYs 2008-09 and 2009-10.

4. As the issue raised in both the Appeals is the same, the common judgment is being rendered.

5. Shri Buddy Ranganadhan, Learned Counsel of the Appellant has made the following submissions.
 - i) The incentive paid to the transporter of coal is fully documented and audited and forms a part of the contract entered into between the Appellant and the transporter. The State Commission has disallowed these expenses even though there is no dispute that these have been actually incurred by the Appellant.

- ii) The claim of the Appellant is completely covered by the ambit of Regulation 4.8.1 (iv) read with definition of “Fuel Cost” in terms of clause 1.2.1 (1a) of the 2007 Tariff Regulations.

- iii) In the impugned order, the State Commission has proceeded on the basis that the quality assurance is the responsibility of the supplier and not that of transporter. Such a statement is contrary to the 2007 Tariff Regulations.

- iv) The State Commission has failed to consider that if the Appellant had not incurred the expenses for quality/quantity assurance and had not entrusted the transporter with this kind of additional and value added task, the actual performance of the power plant would have been poorer than that was actually achieved.

- v) The State Commission has also not considered that the ECL does not permit joint sampling for procurement of less than 4 million tonnes which is the case of the Appellant. The State Commission has omitted to notice that the Appellant had in fact taken up the matter with ECL.

- vi) The only prudence check that the State Commission should have exercised was to find out whether the contracted quantity and quality of coal were in fact delivered to the Appellant instead of comparing the actual heat value of coal with the normative heat value of coal in terms of the Regulations.

- vii) The State Commission should not have taken a decision that properly belongs to the internal management of the utility.

- viii) In this regard, the Learned Counsel for the Appellant has relied upon the judgment of this Tribunal dated 29.8.2006 in Appeal no. 84 of 2006 in the case of Karnataka Power Transmission Corporation Vs. Karnataka Electricity Regulatory Commission.
6. Shri Pratik Dhar, Learned Counsel for the State Commission in reply has made the following submissions in support of disallowance of quality/quantity assurance incentive:
- i) DPSC has paid a quality/quantity assurance incentive to the transporter at a rate which is more than 21% and 52% of the basic rate of transport for Dishergarh and Chinakuri Power Stations respectively for FY 2008-09. DPSC cannot give quality assurance incentive to the transporter. The quality of coal has to be assured by the

- supplier. DPSC should have taken up with Eastern Coalfields Ltd., the coal supplier, in case of any grade slippage and claim compensation from ECL on the ground of grade slippage.
- ii) Regulation 4.8 of the Tariff Regulations, provides for the minimum allowable weighted heat value of coal as per grade mix of actual coal consumption. The actual weighted average heat value for Dishergarh and Chinakuri generating stations of DPSC was less than the normative heat value provided for in the Regulation. For this reason also the incentive was not admissible as the normative heat value could not be attained.
- iii) DPSC appeared to have not taken up the matter of grade slippage i.e. not getting supply of coal at average declared heat value of the grade with the coal supplier. A letter was sent to Eastern Coalfields Ltd. only on

23.4.2009, i.e. after expiry of the year 2008-09 that too without identifying the financial impact of grade slippage and lodging any claims for refund of price difference. Hence the impugned orders are justified.

7. In view of the above rival contentions of the parties, the only question that arises for our consideration is this:

“Whether the State Commission was correct in disallowing the expenses incurred by the Appellant towards quality and quantity assurance incentive to the coal transporter in Fuel and Power Purchase Cost Adjustment for its thermal power stations?”

8. Let us first examine the impugned findings of the State Commission. The relevant extracts from order dated 30.6.2010 challenged in Appeal no. 7 of 2013 are reproduced below:

“2.2.5 As observed from the above, DPSCCL paid a quality / quantity assurance incentive to the transporter at a rate which is more than 52% of the basic rate of transport. A point here thus comes whether DPSCCL can give incentive to a transporter for quality assurance. Quality assurance is lying on the part of supplier. DPSCCL should take up with ECL, the supplier of coal in case of any grade slippage and claim the compensation from ECL on the ground of grade slippage. Moreover, in terms of regulation 4.8 of the Tariff Regulations, the minimum allowable weighted heat value of coal as per grade mix of actual coal consumption given in Annexure 1.5 to the application comes at 5551.44 Kcal/Kg and 5518.88 Kcal/Kg for Dishergarh and Chinakuri generating stations respectively. The actual weighted average heat value came to 5623.00 Kcal/Kg and 5221.00 Kcal/Kg at Dishergarh and Chinakuri generating stations respectively. Specially at Chinakuri, the actual weighted average heat value of coal received by DPSCCL fell short of the normative heat value allowable under regulation 4.8 of the Tariff Regulations. Considering all the related aspects, the Commission decides not to admit the quality / quantity assurance incentive to the transporter both for Dishergarh and Chinakuri Power Stations. The average prices of coal are therefore admitted presently as under:

	<i>Rs. per MT</i>
<i>i) Dishergarh</i>	<i>2536.65</i>
<i>ii) Chinakuri</i>	<i>2555.08”</i>

9. Thus, the reasons given by the State Commission in the impugned order for rejecting the claim of the Appellant regarding incentive given to the transporter of coal for quality and quantity assurance are:

- i) The incentive given to the transporter is more than 52% of the basic rate of transportation cost;
- ii) Quality assurance is under the purview of the fuel supplier i.e. M/s. ECL and the Appellant should take up the matter of slippage of grade of coal i.e. the quality of coal with M/s. ECL, and
- iii) Weighted average heat value of coal received at Chinakuri plant is less than the normative heat value specified in the Regulations.

10. In the order dated 4.6.2012 impugned in Appeal no. 217 of 2012 the State Commission has held as under:

“2.2.4 The weighted average prices of coal as computed from the particulars furnished by DPSCCL, vide its submission at Annexure 1.4 to the application are as under:

<i>Sl No</i>	<i>Particulars</i>	<i>Weighted Average Price (In Rs./MT)</i>	
		<i>Dishergarh</i>	<i>Chinakuri</i>
<i>1</i>	<i>Basic Price</i>	<i>2549.73</i>	<i>2485.62</i>
<i>2</i>	<i>Transportation cost</i>	<i>147.04</i>	<i>170.28</i>
<i>3</i>	<i>Quality/Quantity Assurance Incentive to transporter</i>	<i>113.93</i>	<i>348.06</i>
<i>4</i>	<i>Total</i>	<i>2810.70</i>	<i>3003.96</i>

2.2.5 As observed from the above, DPSCCL paid a quality / quantity assurance incentive to the transporter at a rate shown above. A point here thus comes whether DPSCCL can give incentive to a transporter for quality assurance. Quality assurance is the job of supplier. DPSCCL should take up with ECL, the supplier of coal in case of any grade slippage and claim the compensation from ECL on the ground of grade slippage. Moreover, in terms of regulation 4.8.1 of the Tariff Regulations, 2007 the minimum allowable weighted heat value of coal as per grade mix of actual coal consumption given in Annexure 1.5 to the application comes at 5647.85 Kcal/Kg and 5515.48 Kcal/Kg for Dishergarh and Chinakuri generating stations respectively. The actual weighted average heat

value, as submitted by DPSCCL in annexure 1.3 of their application was 5517.00 Kcal/Kg and 4942.00 Kcal/Kg for Dishergarh and Chinakuri generating stations respectively. Specially at Chinakuri, the actual weighted average heat value of coal received by DPSCCL fell short of the minimum allowable heat value under regulation 4.8.1 of the Tariff Regulations, 2007. Considering all the related aspects, the Commission decides not to admit the quality / quantity assurance incentive to the transporter both for Dishergarh and Chinakuri Power Stations. The average prices of coal are therefore admitted presently as under:

	<i>Rs. per MT</i>
<i>i) Dishergarh</i>	<i>2696.77</i>
<i>ii) Chinakuri</i>	<i>2655.90”</i>

“2.2.7 DPSCCL is, however, to take note of the provision contained in regulation 4.8.1 of the Tariff Regulations, 2007 wherein it has been specified for proving through documents that inspite of its sincere efforts, the generating company / the licensee has not been able to receive coal of higher heat value in the same grade. DPSCCL has got the system of regular sampling and testing of consignments of coal receipts. But the matter of grade slippage, i.e., not getting supply of coal at average declared heat value of the grade should have been taken up with the ECL by DPSCCL and compensation claimed.”

11. In the order dated 4.6.2012 also the State Commission has given similar reasonings for rejection of the claim of the Appellant regarding quality/quantity assurance incentive as given in the order dated 30.6.2010.

12. Let us examine the Tariff Regulations of 2007.

13. According to Clause (1a) of the Regulation 1.2.1 *“Fuel Cost” means all expenditure related to procurement of fuel that is required for combustion in thermal generating station for generation of electricity only and the associated transportation and handling charges inclusive of fuel quality assurance service cost, fuel delivery assurance cost, fuel quality enrichment cost and any other incidental charges as specified in regulation 4.8 of these regulations.”*

Thus, according to the Tariff Regulation, the fuel cost would also include the fuel quality assurance service cost and fuel delivery assurance cost.

14. Regulation 4.8.1 (i), (iv) and (vii) read as under:

“4.8.1 Determination of Rate of Energy Charge (REC) for thermal generating stations, as well as the projection of fuel cost shall be based on the following considerations:-

i) Useful Heat Value of coal / lignite or gas or liquid fuel based on weighted average of actual amount of fuel consumed annually or to be consumed for the year under consideration. In case of coal for each notified grade, mid value of UHV range will be considered for REC or Variable Charge computation during tariff determination stage. However, in order to increase coal procurement efficiency, for FPPCA, actual UHV will be considered provided it is not less than “X” Kilo Calorie/kilogram.”

“The Commission may allow lesser UHV in certain case if the generating company or licensee is able to prove through document that in spite of its sincere efforts, it has not been able receive coal of higher UHV in the same grade.”

“(iv) Transportation of coal and other charges related to fuel procurement shall be as per the latest declared charges received from the tariff applicant or from the declared price list of the relevant sources providing such transportation and other auxiliary services.”

“(vii) At tariff determination stage, the incidental charges of fuel such as sizing charges, transportation charges to the loading point (not railway freight), underloading/overloading charges, crushing charges and other incidental charges, if any and related taxes and duties shall only be considered on the basis of actual annual average expenses against each unit of

fuel for each items related to such supply from each source as will be provided in form D(2) and Form D(3). However, for FPPCA, it shall be considered on actual basis on the quantum of fuel that has been allowed by the Commission.”

15. Regulation 4.8.1 provided for determination of energy charges for thermal power stations. Regulation. 4.8.1 (i) provides for mid value of Ultimate Heat Value range of each notified grade of coal to be used for determination of variable charges at the time of tariff determination. However for FPPCA in order to increase coal procurement efficiency the actual UHV (Useful Heat Value), provided it not less than the heat value computed from minimum UHV of each notified grade of coal and difference of maximum and minimum UHV of respective notified grade of coal corrected by a numeric number, will be considered for determination of variable charges. However, Commission may allow lesser UHV if the generating company or the licensee is able to

- prove through documentation that inspite of its sincere efforts it has not been able to receive coal of higher UHV.
16. Regulation 4.8.1 (iv) envisages that the transportation of coal and other charges relating to fuel procurement shall be as per the latest charges received from the applicant or from the declared price list of the relevant sources providing such transportation and other auxiliary services.
 17. Regulation 4.8.1 (vii) provides that the incidental charges of fuel such as sizing charges, transportation charges from the coal mine to loading point, under overloading charges, crushing charges and other incidental charges shall be considered on actual basis for FPPCA.

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.
19. We find from the order placed by DPSC 29.11.2006 on the coal transporter that the terms and conditions for transportation services include:
- i) Supervision of loading of coal at the loading point of Eastern Coalfields collieries.
 - ii) Elimination/picking out any extraneous material from coal loaded.
 - iii) To prevent any pilferage of coal during transit.

- iv) Liaison with the coal supplier on behalf of DPSC in all matters relating to quality and quantity of coal.
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.

23. Let us now examine whether the expenditure claimed by the Appellant on these services should be included in the ARR and tariff of the Appellant.

24. Let us first see the reasons given by the State Commission in the impugned order for not accepting the claim of the Appellant are:
 - i) Quality/Quantity assurance incentive paid to the transport contractor is more than 52% of the basic rate of transportation cost;

ii) Quality assurance is under the purview of the fuel supplier; and

iii) Weighted average heat value of coal received is less than the normative heat value specified in the Regulations.

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.

27. As regards the weighted average heat value of coal received, the position is as under:

	<u>Dishergarh</u> Weighted average Heat Value of Coal		<u>Chinakuri</u> Weighted average Heat Value of Coal	
	Minimum as per Regulation 4.8	Actual	Minimum as per Regulation 4.8	Actual
FY 2008-09	5551.44	5623.00	5518.88	5221.00
FY 2009-10	5647.85	5517.00	5515.48	4942.00

Thus, the actual weighted average Heat Value of Coal for Chinakuri during 2008-09 and for Dishergarh and Chinakuri for FY 2009-10 fell short of the minimum allowable weighted average heat value of coal as per the grade mix of actual coal consumption as per the Regulation 4.8. However, during FY 2008-09, the Heat Value of coal actually received at Dishergarh has been

more than the minimum value as per the Regulations 4.8. We also find that the State Commission has not considered the incentive for quantity assurance.

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.

31. Summary of our findings:

- i) According to the Regulations the fuel cost would include the fuel quality assurance service cost and fuel delivery assurance cost. Therefore, the Appellant is entitled to obtain fuel quality/quantity assurance service 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 be paid.**
- ii) In these cases, the Appellant has incurred expenditure on quality/quantity assurance services by means of providing incentive to the coal transporter. We give opportunity to the Appellant to present its case before the State Commission for**

quality assurance service for Dishergarh for FY 2008-09 and quantity assurance service rendered by the coal transporter for both the power plants for FY 2008-09 and 2009-10 and the State Commission shall consider the same after prudence check as per the directions given by us in paragraph 29 of this judgment.

32. In view of above, the Appeal is partly allowed to the extent as indicated above and the matter is remanded to the State Commission with some directions. No order as to costs.
33. Pronounced in the open court on this 1st day of April, 2014.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE/NON-REPORTABLE

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