

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

OP NO.1 OF 2011

Dated: 02nd Dec, 2013

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
Hon'ble Mr. RAKESH NATH, TECHNICAL MEMBER
HON'BLE MR. V.J TALWAR, TECHNICAL MEMBER**

In the Matter of:

(Tariff Revision (Suo-Motu action on the letter received from Ministry of Power)

**Counsel for the Appellant(s) : Mr. Amit Kapur, Amicus Curiae
(Assisted by Ms. Divya Chaturvedi & Ms.
Sunaina Paintal),
Mr. M.G Ramachandran, Amicus Curiae
Mr. R K Mehta, Amicus Curiae,
Mr. Buddy A Ranganadhan, Amicus Curiae**

**Counsel for the Respondent(s): Mr. Aditya Pyasi, Forum
of Regulators(FOR)
Mr. G. Umopathy for TNERC
Mr. Arijut Maitra for MERC with
Mr. Palaniappan
Mr. Sugam Seth
Mr. Sanjay Verma, Director(Tariff) &
Mr. Rajesh Monga, Law Officer for
HERC.
Mr. V.G. Pandit, Director(Tariff) ,KERC
Dr. Rama Rao for PAERC
Mr. C.K. Rai for Rajsthan State
Commission
Mr. P.Dave, Jt. Secy.(Law) for RERC
Ms. Surbhi Sharma for MPERC**

ORDER

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

1. In pursuance of the earlier directions issued on 31.5.2013, the Forum of Regulators has filed the latest Status Report dated 16.9.2013.
2. We have perused the said Report. We have also requested the learned Amicus Curiae Counsel to go through the report and to give their suggestions with regard to further directions to be issued to the Commissions and others.
3. Accordingly, they filed their suggestions. On perusal of the Status Report submitted by FOR, it is clear that by and large, majority of the Regulatory Commissions have implemented or are in the process of implementing directions regarding the MYT Regime in their respective States.
4. But, in regard to the non-implementation of various directions issued by this Tribunal, we are constrained to give further directions to the Commissions as well as the persons concerned on the basis of the suggestions submitted by the Amicus Curiae Counsel.

Accordingly, we issue the following directions to the respective State Commissions, which are given in succeeding paragraphs.

A. Uttar Pradesh State Commission in its response have expressed their inability in framing of the MYT Regulations and processing of the true-up Petitions. They further stated that the same would be completed only

upon the constitution of the Full Commission. According to them, the vacancy of Chairman and Member in the State Commission has not been filled-up yet. However, as on date, it is informed to this Tribunal that both the vacant positions of Chairman and Member have been filled up and new Chairman and Member have already taken charge in the State Commission.

Therefore, the Uttar Pradesh Commission is directed to frame the MYT Regulations without further delay as we had directed earlier and put the same in place by the end of the Current Financial Year.

B. Punjab State Commission has expressed its inability to put into effect the MYT Regulations from 1.4.2004 due to various defects like non implementation of the audited accounts etc., In view of this, the Punjab Commission is hereby directed to furnish a report on or before 31.12.2013 as to what steps the Punjab Commission has taken to ensure that the State Utility provides the audited accounts etc., The Punjab Commission is further directed to furnish a clear timeframe for the implementation of the MYT Regime in the State in view of our judgment in OP No.1/2011 reported in 2011 ELR (APTEL)1742.

C. Similarly, the State Commissions of Arunachal Pradesh, Manipur & Mizoram and Meghalaya have not yet completed the process of framing the MYT Regulations.

Therefore, these State Commissions are also directed to take necessary steps to ensure that our earlier orders to put into effect the MYT Regulations from 1.4.2014, are complied with.

D. The State Commissions of Gujarat, Karnataka and Joint Commission of Goa and Union Territories have sent their response with regard to the directions.

I) As far as Gujarat Commission is concerned, it is noticed that in certain cases, it had granted extension of time for filing of the Petitions etc., The grant of extension of time would indicate that the State Commission is conscious of the existence of the time limit. It has also taken a considered decision to grant such an extension. However, we intend to advise the Gujarat Commission to ensure that the extension of time is not granted as a matter of course. The State Commission should satisfy itself about the genuineness of the reasons for such a request for extension and the time granted must be reasonable keeping in view of the letter and spirit of the Act while passing the reasoned order granting such extension.

II) As far as the Joint Commission for Goa and Union Territories is concerned, they have given two reasons for the delay.

a) Re-determination of the orders of this Tribunal;

- b) In Goa public hearing could not be held due to enforcement of the Model Code of Conduct for the Assembly Elections in Goa.

In this context, we are to remind the Joint Commission the following aspects:

(i) Prima facie, the Election Commission's Code of Conduct does not prohibit holding of a public hearing by a Statutory Authority in discharge of its statutory functions under the Act of the Parliament.

(ii) Even assuming that the State Commission had reasonable ground to impinge upon the Model Code of Conduct, the State Commission should have approached the Election Commission to clarify the above situation. In fact, the Karnataka Commission when a similar situation arose before them, sought the clarification from the Election Commission on the issue of Tariff Order and on such a clarification, the Election Commission had granted the permission to the State Commission for conducting public hearing and also for release of the tariff order. Therefore, the Joint Commission for Goa and Union Territories have to get those

clarifications from Election Commission if such a situation arose.

In these circumstances, we direct the Joint Commission to appear before this Tribunal through its Counsel to seek for necessary clarifications and for further directions if any on this issue from this Tribunal.

E) The Chhattisgarh State Commission, as per the report of the Forum of Regulators, has submitted that the tariff order could not be passed on account of non-furnishing of the necessary data. It is not clear as to what steps have been taken by the Chhattisgarh Commission to call for the requisite data from the persons concerned. Assuming that no data was made available, the Chhattisgarh Commission has not given any explanation as to why the said Commission did not proceed suo-moto as directed by this Tribunal in our order in OP No.1 of 2011.

Therefore, we direct Chhattisgarh State Commission to comply with the directions given in our Order in OP No.1 of 2011 dated 11.11.2011 and submit a report to the Forum of Regulators by 31.12.2013.

F) The Joint Commission of Manipur and Mizoram have submitted that due to the repetitive late filing of the Electricity Department, the Commission has taken a

decision not to issue tariff order for the Financial Year 2013-14. The State Commission has sent two orders in this connection. We have gone through the same. We have to point out with regret that the above decision of the Commission not to issue the tariff order for the Financial Year 2013-14 is not in consonance with the directions given by this Tribunal in Judgment No. OP No.1 of 2011. Therefore, we deem it appropriate to advise the Joint Commission that such action would tantamount to non-compliance and in which event, the said conduct would be construed to be wilful non-compliance of the orders of this Tribunal.

Therefore, the Joint Commission for Manipur and Mizoram is advised to follow the directions given in OP No.1 of 2011 and pass the Tariff Orders by taking suo-moto action in the future i.e. from the Financial Year 2014-15 onwards.

G)It is noticed from the report that the other Commissions such as Madhya Pradesh and Meghalaya have granted extension of time for filing of the true-up petitions. The grant of extension of time would indicate that the State Commission is conscious of the existence of the time limit and has taken a considered decision to grant such extension. However, the State Commission must be concerned about the fact that extension of time ought not to be granted as a matter of course. As a matter of fact,

the State Commission should satisfy itself about the genuineness of the reasons for such a request for extension for passing a reasoned order granting only such extension so warranted.

H) In respect of the West Bengal Commission it is noticed from the report of the Forum of Regulators that though the ARR Order for the Financial Year 2013-14 have been passed as far back as in December, 2012 and February, 2013, there is no explanation by the State Commission as to why the Tariff Orders for the Financial Year 2013-14 were still under process.

So, in view of the above, the West Bengal State Commission is directed to follow the time limit given in Section 64(3) of the Act and file a status report to the Forum of Regulators as well as the Tribunal on or before 31.12.2013.

5. We have gone through the Forum of Regulator's Report dated 16.9.2013 with regard to the issue of quorum. In this report they have reported as follows:

(a) The State of Andhra Pradesh, Jharkhand and Taiml Nadu are non-functional due to lack of quorum.

(b) As regards the Andhra Pradesh State Commission, the State Commission has reported that

the AP Reforms Act provides for a quorum of two members.

(c) In regard to the Jharkhand State Commission, Clause 10 of the Conduct of Business Regulations provides for a quorum of two members. The State Commission has reported that the positions of Chairperson and Member (Finance) are lying vacant since 16.12.2012.

(d) As regards, the Tamil Nadu Commission it is noticed that Clause 12 of the Conduct of Business Regulations provides for a quorum of two members but the State Commission has reported that the post of the Chairman as well as the Member were vacant.

6. On the basis of this report, we deem it appropriate to give the following directions to these Commissions:

(a) It is settled law that the Regulations with regard to quorum cannot be framed as against the substantive sections of the Electricity Act, 2003. The functions of the State Commission u/s 86 and 181 of the Act, 2003 would, in terms of the Conduct of Business Regulations have to be discharged through the proceedings for which no quorum have been specified under the Act.

(b) Of course, there were Regulations framed by some other Commissions relating to the quorum. Those Regulations also would refer to the quorum only for the meeting of the Commission and not for the proceedings before the Commission.

(c) These Regulations provide that the Commission may hold such proceedings as deemed considered appropriate in discharge of its functions under the applicable legal framework. It also provides that all other matters may be decided by the Commission administratively through the meeting of the Chairmen, Members and Secretary or other Officers of the Commission.

7. Thus, it is clear, the conduct of the business Regulations framed by the Commission specifically differentiate between the proceedings before the State Commission and meetings of the Commissions.
8. In this context, it is to be pointed out that this Tribunal has already rendered judgments while interpreting Section 93 of the Electricity Act, 2003 that any decision taken by the Commission should not be invalidated by a mere fact that there is some vacancy either of the Chairman or Member.
9. In view of the above decision, we are to direct all the Commissions to conduct the proceedings irrespective of

the quorum since the proceedings before the Commission could be conducted even by a single Member.

- 10.** Of course, Section 82 (4) of the Act, 2003 provides that the State Commission shall consist of not more than three Members including Chairperson. However, Section 93 of the Act, 2003 provides that no Act or proceedings of the appropriate Commission shall be questioned or shall be invalidated merely on the ground of any vacancy or defect in the constitution of the appropriate Commission.
- 11.** In our view, since the quorum depends upon the number of Members in the office, even single Member of the Commission including the Chairperson of such a Commission can conduct the proceedings of the appropriate Commission.
- 12.** Therefore, we direct that all the Commissions concerned irrespective of the Regulations with regard to the quorum for a meeting, that Commission, even with a single Member despite that there are vacancies of other Members or Chairperson, can continue to hold the proceedings and pass the orders in accordance with the law.
- 13.** Before parting with this order, we have to record one more aspect with a great anguish with regard to repeated instances of institutional vacuum being created due to lack of diligence by the respective appointing authorities in filling up the vacancies. The important statutory role has been

assigned by the Parliament to the State Commission which includes safeguarding the consumers' interest and sector viability.

- 14.** In the context of the above concern, in view of the delays in appointing all Members of the Commission or filling up all the posts in the Commissions, we are afraid that the institutional vacuum would cause delay the vital decisions to be taken by the Commission which will result in the defeat of the object of the Act, 2003.
- 15.** Hence, we are constrained to advise the Ministry of Power to take note of this issue and take suitable steps as repeated failure to implement an important reform legislation will erode the pace of the Reforms in the implementation of the provisions of the Act.
- 16.** Therefore, we direct the Secretary, Forum of Regulators to forward a copy of this order to the Secretary, Ministry of Power, Government of India for emergent suitable action with the appointing authorities of the respective States for taking timely action for appointment of the Members/Chairperson of the State Commissions by filling up the vacancies without any delay.
- 17.** We also deem it fit to direct the Commissions to amend the Regulations if any, to the effect that if there is only one Member of the Commission available, the quorum of the proceedings of the Commission also shall be one.

18. Accordingly ordered.
19. At the end, we have to place on record our appreciation to Mr. Chandra Prakash, formerly Deputy Chief Engineer in CERC and also Mr. M M Chaudhari, Asstt Secretary of Forum of Regulators who took all sincere efforts to get the information from the Commission before this Tribunal to enable us to pass further directions.
20. Similarly, we appreciate the services rendered by all the Amicus Curie Counsel in this matter.
21. The Registry is directed to send a copy of the order to the Forum of Regulators as well as all the Commissions concerned so that they may pursue the action on the basis of the directions issued by this Tribunal.
22. Post the matter for reporting further compliance on **6.1.2014.**

(V.J Talwar) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Technical Member Technical Member Chairperson

Dated: 02nd Dec, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~