

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 177 OF 2015**

**Dated: 10<sup>th</sup> December, 2015**

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member  
Hon'ble Mr. I.J. Kapoor, Technical Member**

**IN THE MATTER OF**

**Barmer Lignite Mining Company Ltd**

Office No. 2 & 3, 7<sup>th</sup> Floor,

Man Upasna Plaza, C-44, Sardar Patel Marg,

C-Scheme, Jaipur - 302 001, Rajasthan ..... Appellant/Petitioner

VERSUS

1. **Jaipur Vidyut Vitran Nigam Ltd**

Vidyut Bhawan, Janpath,

Jaipur- 302 005, Rajasthan

2. **Ajmer Vidyut Vitran Nigam Ltd**

Old Power House, Hath Bhata

Ajmer – 305 001, Rajasthan

3. **Jodhpur Vidyut Vitran Nigam Ltd**

New Power House, Industrial Area,

Jodhpur- 342 003, Rajasthan

4. **Raj WestPower Ltd**

Office No. 2 & 3, 7<sup>th</sup> Floor,

Man Upasna Plaza, C-44, Sardar Patel Marg,

C-Scheme, Jaipur - 302 001, Rajasthan

5. **Rajasthan Electricity Regulatory Commission**

Vidyut Viniyamak Bhawan,

Near State Motor Garage,

Sahakar Marg, Jaipur-302 005, Rajasthan .... Respondents

Counsel for the Appellant	...	Mr. Ramji Srinivasan, Sr. Adv. Mr. Ramanuj Kumar Mr. Rahul Kumar Ms. Sara Sundaram
Counsel for the Respondent(s)...		Mr. P.N. Bhandari for R-1 to 3  Mr. M.G. Ramachandran Ms. Anushree Bardhan Ms. Poorva Saigal for R-4  Mr. R.K. Mehta Mr. Abhishek Upadhyay Ms. Himanshi Andley for R-5

## **J U D G M E N T**

### **PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by Barmer Lignite Mining Company Ltd (in short, the '**Appellant**'), against the Impugned Order, dated 31.3.2015, passed by the Rajasthan Electricity Regulatory Commission (in short the '**State Commission**') in Petition No. 486/14 and 487/14, thereby denying the Appellant recovery of enhanced statutory levies, made applicable by the legislature for FY 2015-16, on the ad-hoc transfer price of lignite.
2. The State Commission, vide interim order, dated 31.3.2015 (impugned order), with respect to the ad-hoc transfer price of lignite for FY 2015-16, simply extended the ad-hoc transfer price (*inclusive of all statutory levies*) applicable for FY 2014-15, without considering the increases in the statutory levies, brought about as a result of changes in law made by the Parliament. Consequently, no increase in the recovery of variable charges was considered for FY 2015-2016. As a result of mere extension of ad hoc transfer price applicable for FY 2014-15, the Appellant has been denied the recovery of increased statutory levies on the basic transfer price of lignite through the

variable cost component of tariff, while the Respondent No. 4 (Generating Company) has been permitted recovery of almost 102% of its claim through the fixed cost component of tariff.

3. Further, the State Commission, vide its order, dated 19.6.2015, rejected a joint application filed by the Appellant and the Respondent No. 4, without prejudice to their respective rights and contentions, seeking modification of the order, dated 31.3.2015, to the limited extent of permitting the Appellant and the Respondent No.4 to reapportion the interim tariff between fixed and variable charges in such a manner that (i) the Appellant is able to discharge its statutory liabilities, (ii) the approach adopted by the State Commission while granting the interim tariff and ad-hoc transfer price in the previous years is maintained, (iii) the overall interim tariff remains unchanged (at Rs. 4.06/unit), and (iv) the lignite mining operations are carried out on a commercially sustainable and viable basis. The State Commission rejected the Application for modification/reapportionment of interim tariff on the sole ground that Respondent No. 4's petition for determination of final capital cost of the power plant was being heard; and that the Appellant had initiated fresh tendering process for selection of Mining Development Operator (MDO), which had been permitted to go on by this Appellate Tribunal, while disposing of an appeal, being Appeal No 227 of 2014, by Respondents No. 1 to 3.
  
4. The Appellant/petitioner is a Government Company incorporated under the Companies Act, 1956 and has been, inter-alia allotted Kapurdi mine for supplying lignite, on captive basis to the 1080 MW thermal power plant set up by Respondent No. 4 M/s Raj WestPower Limited at village Bhadresh, District Barmer, Rajasthan. Thus, the Appellant is a Mining Development Operator (MDO). The Respondent No. 2 to 3 are the Distribution Licensees in the state of Rajasthan. The Respondent No.4/Raj West Power Ltd. Is the power producer and

the Respondent No. 5 is the State Electricity Regulatory Commission, which is empowered and authorized to perform and discharge the functions provided under the various provisions of the Electricity Act, 2003 including determination of tariff, etc.

5. The relevant facts for the purpose of deciding this Appeal are as under:

- (a) that the transfer price of lignite is to be determined by the State Commission and to be recovered through the variable cost component of generation tariff. Broadly stated, the transfer price is a summation of various components including the component of extraction cost of lignite (or MDO cost); and the activity of transferring lignite to the power plant attracts various statutory levies.
- (b) that the State Commission, vide its order, dated 17.8.2011, had rejected the lignite extraction cost claimed by the Appellant and directed the Appellant to undertake a fresh bidding for determination of extraction cost (hereinafter, the 'Bidding Process'). In the interregnum, the Appellant was directed to provide to the State Commission, extraction cost based on lignite mines being operated by Rajasthan State Mines and Minerals Limited ("**RSMML**") with due adjustments for various mine parameters.
- (c) that in compliance with the aforesaid direction, the Appellant furnished to the State Commission lignite extraction cost for Kapurdi mine based on the extrapolation of rates finalised by RSMML for its Sonari lignite mine, with due adjustments for stripping ratio, mine depth and other relevant parameters. This computation was also vetted and approved by Sh. N. S. Bohra (Ex-Director Mines & Geology, Government of Rajasthan). Based on this computation, the Appellant has been claiming the

extraction cost of lignite, pending finalisation of the Bidding Process and approval of the same by the State Commission.

- (d) that the State Commission had initially, vide its order, dated 2.4.2012, allowed recovery of approximately 65% of the claimed basic transfer price of lignite on an ad-hoc basis. Being aggrieved, the Appellant filed an appeal against that order before this Appellate Tribunal, being appeal No. 98 of 2012. This Appellate Tribunal, vide its order, dated 21.9.2012, remanded the matter back to the State Commission for reconsideration of this aspect.
- (e) that the State Commission, vide its order, dated 15.10.2012, in Petition No. 341/12, allowed ad hoc lignite transfer price of Rs. 1266 per MT (inclusive of applicable taxes) for FY 2012-13. This was arrived at by permitting recovery of 75% of the basic transfer price of lignite claimed by the Appellant and applicable taxes at the prevailing rate were added to the basic transfer price so approved. This ad-hoc transfer price was extended from time to time until 31.3.2014 through various ad-hoc orders i.e. 15.10.2012, 4.4.2013, 28.6.2013 and 11.10.2013 of the State Commission.
- (f) that the Appellant, on 27.3.2014, filed a petition for determination of provisional transfer price of lignite for FY 2014-15. The State Commission, vide order, dated 30.5.2014, allowed an ad-hoc transfer price of Rs.1397/- per MT (inclusive of all statutory levies) for FY 2014-15. This was once again, in line with the past approach of granting 75% of the basic transfer price of lignite claimed by the Appellant and applicable taxes at the prevailing rate were added to the basic transfer price so approved.
- (g) that the Respondents No. 1 to 3, on 25.7.2014, filed an appeal against the interim tariff order, dated 30.5.2014, being Appeal

No.227 of 2014 before this Appellate Tribunal. This Appellate Tribunal has not stayed the operation of the order, dated 30.5.2014, and the Respondents No. 1 to -3 have given full effect to the order, dated 30.5.2014, during the pendency of the said appeal.

- (h) that during the pendency of the petition for determination of provisional transfer price for FY 2014-15, on 11.7.2014, the Central Government increased the rate of clean energy cess on lignite from Rs. 50/- to Rs. 100/- per MT. Since, the increase was a result of a change in law, the Appellant, after notice, claimed this increase from the Respondent No. 4; who in turn, in terms of the Power Purchase Agreement between the Respondent Nos. 1 to 3 and Respondent No. 4, claimed the impact of this increase in the variable cost from the Respondents No. 1 to 3. Respondents No. 1 to 3 had initially accepted this change in law claim and had released the tariff payments accordingly. However, after a few months, despite having released payments giving impact of the change in law in the past, the Respondents No. 1 to 3 stopped making this payment and asked the Respondent No. 4 to approach the State Commission for necessary orders in this respect. In these circumstances, the Respondent No. 4 was forced to approach the State Commission by filing a petition under section 86(1)(f) of the Electricity Act, 2003.
- (i) that the said ad hoc lignite transfer price for FY 2014-15 was only valid till 31.3.2015. Accordingly, the Appellant filed a petition, being Petition No. 487/14, under Regulation 11 (8) of the RERC Tariff Regulations, 2014 (in short, the “**Tariff Regulations**”) before the State Commission on 26.11.2014, praying *inter-alia* for grant of a sustainable ad-hoc transfer price of lignite to be applicable from 1.4.2015.

- (j) that on 28.2.2015, during the pendency of the aforesaid petition before the State Commission, the Union Budget for FY 2015–16 was introduced, proposing certain significant changes to the statutory levies applicable to the mining sector which directly impacted the transfer price of lignite claimed by the Appellant. Hence, the Appellant, vide its letter, dated 28.2.2015, notified Respondent No. 4 of the impact of the revised statutory levies on the ad-hoc transfer price of lignite and sought to charge the revised rate from 1.3.2015. The Respondent No. 4 in turn notified Respondent No. 1 to 3 of the occurrence of change in law and consequent revision of variable charges component of tariff. All the changes proposed in the statutory levies in the Union Budget for FY 2015-16, have been subsequently, enforced by the Government of India and are in full force and effect.
- (k) that the Appellant, on 7.3.2015, moved an application seeking to amend the Petition No. 487/2014 filed for determination of provisional transfer price seeking incorporation of following changes:-
- (i) increase in Service Tax from 12.36% to 14%;
  - (ii) reduction in Excise Duty from 6.18% to 6%;
  - (iii) increase in Clean Energy Cess from Rs.100/ton to Rs.200/ton;
- and
- (iv) increase in surcharge on basic corporate tax from 10% to 12%.
- (l) that it may be mentioned here that for the sake of completeness, Respondent No. 4 filed a separate application claiming the impact of these changes in the variable cost component of tariff.
- (m) that according to the Amendment application of the Appellant, on account of the aforesaid changes in the statutory levies, the provisional transfer price (inclusive of all statutory levies) as

claimed by the Appellant/petitioner for FY 2015-16 stood revised from Rs. 1877.61/MT to Rs. 2008.10/MT resulting in the net increase of Rs. 130.49/MT in the transfer price, and a corresponding increase of about Rs. 0.1444/Kwh in the variable cost of generation tariff.

- (n) that the Respondents No. 1 to 3, filed a response on 24.3.2015 to the petition of the Appellant, thereby stating, inter-alia that the ad-hoc lignite transfer price allowed for FY 2014-2015 deserves no revision for FY 2015-16, except on account of changes in taxes etc. and diesel costs.
- (o) that the State Commission, vide its interim order, dated 31.3.2015 (impugned order), ignoring the pleas of the Appellant as well as the categorical stand of the Respondents No. 1 to 3, decided to simply extend the ad-hoc transfer price allowed for FY 2014-15 to FY 2015-16, pending final determination of transfer price of lignite and tariff for power station without assigning any reason and without considering the monetary impact of change in law in transfer price of lignite, and in turn in the variable cost component of tariff, which entitlement was not disputed by the Discoms. This impugned order, dated 31.3.2015, has created a situation where the Appellant is permitted to recover only about 65% of the basic transfer price of lignite claimed by the Appellant; while the Respondent No. 4 would recover 102% of the claimed fixed costs.
- (p) that, on 31.3.2015, the Appellant/mining entity and the Respondent No.4/power generator moved a joint application before the State Commission seeking modification of the impugned order, dated 31.3.2015, to the limited extent of permitting the Appellant and the Respondent No.4 to reapportion the interim tariff between fixed and variable charges in such a manner that (i) the Appellant is able to



discharge its statutory liabilities,(ii) the approach adopted by the State Commission while granting the interim tariff and ad-hoc transfer price in the previous years is maintained (i.e. 75% of the claimed basic transfer price of lignite), (iii) the overall interim tariff remains unchanged (at Rs. 4.06/unit), and (iv) lignite mining operations are carried out on a commercially sustainable and viable basis. In this proposal, the benefit of the reduction in price of diesel, from the time of filing of the Petition in November 2014 to March 2015, was also proposed to be passed on to the beneficiary DISCOMs, which would have permitted the Appellant to recover the statutory levies that it is obligated to discharge, without in any way burdening the beneficiaries/consumers and ensured viability of operations.

- (q) that the said joint application, filed by the Appellant and the Respondent No.4, has been rejected by the State Commission vide its order, dated 19.6.2015, on the sole ground that the Respondent No.4's petition for determination of final capital cost of the power plant was being heard; and that the Appellant had initiated fresh tendering process for selection of Mining Development Operator (MDO), which had been permitted to proceed further by the order of this Appellate Tribunal while dismissing the aforesaid Appeal No. 227 of 2014.
- (r) that the impugned order, dated 31.3.2015 and the next following order, dated 19.6.2015, have put the Appellant in a situation where balanced approach adopted by the State Commission (of granting 75% of claimed basic transfer price), after numerous rounds of litigation to settle the ad-hoc transfer price, has been totally disturbed thereby relegating the Appellant to the same position of financial un-viability of operations, which had forced the Appellant to litigate in the first place (i.e recovery only of approximately 65% of claimed basic transfer price). The sole cause for the balance having been

disturbed, is the non- consideration of changes in the statutory levies for FY 2015-16 by the State Commission, without any cogent reasoning. If the State Commission had followed the approach adopted for previous years (i.e. permit 75% of basic transfer price of lignite claimed by the Appellant), the ad-hoc transfer price, after applying the current rates of statutory levies applicable for FY 2015-16, would have been Rs. 1558.69/MT.

- (s) that the Appellant has again been put in a situation where its mining operations have become unviable since it cannot meet its mining costs, debt service expenses and enhanced statutory liabilities within the ad-hoc rate of Rs. 1397/MT. Thus, the State Commission's direction to absorb the increased statutory liabilities within the existing ad hoc transfer price applicable for FY 2014-15 suffers from the vice of arbitrariness and unreasonableness and prevents the Appellant and thereby the Respondent No. 4 from recovering the reasonable cost of generation even to the extent of actual statutory levies.

6. We have heard Mr. Ramji Srinivasan, the learned senior counsel for the Appellant/petitioner, Mr. P.N. Bhandari, the learned counsel for the Respondent Nos.1 to 3/Discoms, Mr. M.G. Ramachandran, the learned counsel for the Respondent No. 4 and Mr. R.K. Mehta, the learned counsel for the Respondent No. 5 and gone through the written submissions filed by the rival parties. We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission.

7. The following issues arise for our consideration in the instant Appeal:

- (A) *Whether the State Commission, vide interim order, dated 31.3.2015 (impugned order) has legally and correctly extended the ad hoc transfer price of lignite (inclusive of all statutory levies) applicable for FY 2014-15 to the ad hoc transfer price of lignite for FY 2015-16*

*without considering the increase in the statutory levies brought out by the Union Government for the FY 2015-16?*

*(B) Whether the State Commission, vide its order, dated 19.6.2015, has legally and correctly rejected the joint application filed by the Appellant and the Respondent No.4 (Raj West Power Ltd) seeking modification of the order, dated 31.3.2015, to the limited extent of permitting the Appellant and the Respondent No. 4 to reapportion the interim tariff between fixed and variable charges in a manner as mentioned in the said joint application?*

8. Since, both the issues are inter-connected; we are taking-up and deciding them together.
9. The following contentions have been made on behalf of the Appellant/petitioner on these issues:
  - (a) that that the State Commission failed to give effect to the changes in the statutory levies while approving ad-hoc transfer price of lignite, applicable from 1.4.2015.
  - (b) that the State Commission has wrongly disallowed the reapportionment of the variable and fixed costs without any cogent reasoning.
  - (c) that the State Commission failed to follow the approach adopted by it for the previous years, after numerous rounds of litigation, to settle the ad-hoc transfer price, pending conclusion of the Bidding Process and its approval by the State Commission.
  - (d) that the State Commission has burdened the Appellant with statutory liabilities which it is obligated to discharge, but would be unable to recover within the approved ad-hoc transfer price, thereby making the operations of the Appellant unviable.
  - (e) that by not allowing the change in the statutory levies imposed by the Government of India for FY 2015-16 while approving the ad hoc transfer price of lignite applicable from 1.4.2015 to

31.3.2016, the State Commission has gone wrong. The Appellant has been relegated to the same position of financial un-viability of operations, which had forced the Appellant to litigate in the first place (i.e recovery merely of approximately 65% of claimed basic transfer price).

- (f) that the State Commission is totally unjustified in not considering the changes in statutory levies introduced pursuant to the Union Budget for FY 2015-16 while approving the ad hoc transfer price of lignite for FY 2015-16.
- (g) that the State Commission is totally unjustified in merely extending the interim tariff allowed for previous financial years to FY 2015-16, without applying its mind to the changed scenario where the per unit variable cost had gone up owing to changes in law; and the per unit fixed cost had reduced on account of repayment of debt in the past years and increase in normative target availability/plant load factor (PLF).
- (h) that the State Commission failed to appreciate that the joint application for modification of the order, dated 31.3.2015, filed by the Appellant and Respondent No. 4 was a very reasonable request to merely reapportion the fixed and variable costs while maintaining the overall interim tariff, and causing no prejudice to the beneficiaries and the consumers.
- (i) that the State Commission wrongly declined to take into account the changes in the statutory levies, which affect the activities of the Appellant, just on the ground that the application for determination of final capital cost has been part heard; and that this Appellate Tribunal has directed the Appellant to go ahead with the bidding process to select the Mining Development Operator.

- (j) that the State Commission failed to appreciate that the purpose of granting interim transfer price of lignite on an ad hoc basis was only to ensure continued and sustainable operations of the Appellant's mining operations, pending finalization of the bidding process.
- (k) that the State Commission erred in disturbing the balanced approach adopted by it in the past years, after numerous rounds of litigation, of granting 75% of the claimed basic transfer price with taxes duties and cess at actuals on an ad-hoc basis, till finalization of the bidding process and its approval by the State Commission.
- (l) that the State Commission had wrongly and illegally relegated the Appellant to the same position of financial un-viability of operations (recovery of merely 65% of the claimed basic transfer price), which in the first place triggered multiple litigation on this issue.
- (m) that the State Commission has failed to appreciate that even after the conclusion of the bidding process, the Appellant would have to approach the State Commission for approval of the transfer price and due procedure of law would have to be followed before the same is finally approved by the State Commission.
- (n) that the State Commission has erred in not appreciating that during the pendency of the petition before the State Commission, the statutory levies and duties as applicable to the mining industry in India have changed and which are to be taken into account while determining the ad-hoc transfer price of lignite for the ensuing year.

- (o) that the State Commission has erred in not applying its own Tariff Regulations which require statutory levies as applicable from time to time to be included as fuel cost.
- (p) that the State Commission has, further, erred in not appreciating that a sustainable transfer price must be recovered to enable the Appellant to continue uninterrupted supply of lignite to Respondent No. 4/generating company.
- (q) that the State Commission has also failed to appreciate that by reapportioning the fixed and variable costs of the ad hoc tariff determined by it, no prejudice would be caused to any party concerned while keeping the overall interim tariff determined by the State Commission unchanged.
- (r) that the State Commission failed to appreciate the contentions of the Appellant that since the statutory levies had been enhanced by the Central Government pursuant to the Union Budget for FY 2015-16 and they were beyond the control of the Appellant.
- (s) that the State Commission failed to appreciate that as the financial year had started, the Appellant already stood burdened by statutory levies, which were required to be discharged, and if the Appellant was not allowed to recover, the increase in taxes through the transfer price, it would adversely affect the viability of the operations of the Appellant, therefore, urgent relief in this respect ought to have been granted.
- (t) that the learned State Commission should not have disturbed the balanced approach adopted by it in the past years, after numerous rounds of litigation, of granting 75% of the claimed basic transfer price with taxes, duties and cess at actuals on an ad-hoc basis, till finalisation of the bidding process and its approval by the State Commission.

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10. **Per contra**, the following contentions have been made on behalf of the Respondent/Discoms:
- (a) that the instant appeal is not maintainable since two orders, dated 31.3.2015 and 19.6.2015 have been challenged by filing a common appeal, which has deprived the exchequer of its prescribed court fee, by filing a common single appeal against the two orders.
  - (b) that the Appellant's request for increased tariff in the statutory levies by the Union Government for FY 2015-16 is totally violative of part VII of the Electricity Act, 2003.
  - (c) that Section 64 of the Electricity Act, 2003 prescribes a procedure under Section 64 of the Electricity Act, 2003 to be followed. Section 64 of the Electricity Act requires an application for determination of tariff under Section 62 to be made by generating company or licensee in the prescribed manner and accompanied with prescribed fee and the every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission. Further requirement is that the Appropriate Commission shall, within 120 days from receipt of an application and after considering all suggestions and objections received from the public, dispose of the said application. Since, there is a mandatory requirement for the Appellant to publish the application form. This condition has not been complied with by the Appellant.
11. The following contentions have been made on behalf of the Respondent/State Commission:
- (a) that the present appeal arises out of the orders, dated 31.3.2015 and 19.6.2016, of the State Commission determining the interim transfer price of lignite of the Appellant and the

interim tariff of M/s Raj West Power Limited, Respondent No.4 herein.

- (b) that the Petition No. 464 of 2014 filed by M/s Raj West Power Limited for determination of final fixed charges for the period FY 2009-10 to 2013-14 is at the final stage and the said petition involves determination of cost plus tariff for which the capital cost of the project has to be determined which would be valid for the life of the plant and requires prudence check of costs claimed to have been incurred.
- (c) that the hearing was concluded on 30.6.2015, but the order could not be passed since certain clarifications were required with regard to the information provided by M/s Raj West Power Limited. Although, the information provided by the M/s Raj West Power Limited is not as much as detailed as State Commission desired and the State Commission now undertakes to pass final order within one month on the basis of the material available on record.
- (d) that as regards lignite transfer price, in its order, dated 17.8.2011, of the State Commission, the State Commission had observed that the amount payable to MDO is a major component of the overall lignite transfer price and, therefore, neither the selection of MDO nor the overall transfer price can be finalized without following a transparent competitive bidding process.
- (e) **that in view of the order, dated 28.5.2013, of this Appellate Tribunal and the pendency of the appeal before the Hon'ble Supreme Court, the State Commission was of the view that the existing interim arrangement for mining of lignite for supply to power plants has to be continued till the completion of the competitive bidding process.** Thus, the interim arrangement for lignite transfer price had to be



continued from time to time. Since, the competitive bidding process for selection of MOD was reported to have been initiated and the Commission had already partly heard the petition for determination of final capital cost of the power plant, the Commission did not accept the request of the Appellant for increase in transfer price of lignite on account of taxes and duties in the impugned orders, dated 31.3.2015 and 19.6.2015, and directed the Appellant to meet the same within the total transfer price of lignite provisionally allowed by the Commission.

## 12. **Our consideration and conclusion:**

12.1 We have cited above in detail the facts of the matter in hand, the rival contentions of the parties and the relevant provisions of law, reproduction of which, we do not think necessary. Now, we directly proceed to the issue before us.

12.2 M/s Barmer Lignite Mining Company Ltd (BLMCL), a mining entity filed a petition, being Petition No. 487/2014, before the State Commission on 26.11.2014 for assessment of provisional transfer price of lignite from Kapurdi mine blocks for FY 2015-16 for supply of lignite to power plant of M/s Raj West Power Ltd., praying as under:

S.No.	Item	Rate
1.	Extraction cost of lignite before royalty, taxes and duties	Rs. 1418.82/MT
2.	Royalty, taxes and duties	Rs. 269.97/MT
3.	Net transfer price of lignite including royalty, taxes and duties	Rs. 1688.79/MT
4.	Net transfer price of lignite based on escalated extraction cost of lignite including royalty, taxes and duties.	Rs. 1877.61/MT

12.3 The Appellant also prayed for award of a sustainable interim transfer price in view of the fact that the applicability of the current transfer price of lignite available with the Appellant is expiring on

31.3.2015 to enable the Appellant/petitioner to continue to supply lignite to Respondent No.4/generating station, subject to adjustment on determination of final transfer price for FY 2015-16. Subsequently, the Appellant/petitioner filed an Interlocutory Application on 11.3.2015 seeking amendment in the petition in respect to revision made in the structure of statutory levies in the Union/State budget for FY 2015-16. The Appellant has revised transfer price of lignite as 2008.10/MT from Rs. 1877.61/MT.

12.4 The relevant part of the impugned order, dated 31.3.2015, runs as under:

*“15. Considering the fact that the existing tariff is applicable only up to 31.03.2015, the Commission, pending determination of the tariff on merits, considers it appropriate to admit both the petitions and extend the tariff as allowed by the Commission vide its order dt. 30.05.2014 for FY 2014-15 for RWPL’s power station and transfer price for BLMCL as an interim tariff applicable from 01.04.2015 subject to final determination of tariff for FY 2015-16.*

*16. In the light of what has been discussed above, interim tariff & transfer price for unit 1 to 8 on ad-hoc basis for FY 2015-16 works out as under:*

S.No.	Item	Rate
1.	Lignite Transfer Price after Cess, Royalty and VAT	Rs. 1397/MT
2.	Fixed Cost	Rs. 2.38/Unit
3.	Variable Cost	Rs. 1.68/Unit
Total Tariff		Rs. 4.06/Unit

*17. We would like to make it clear that the above interim tariff is subject to final determination of RWPL tariff including transfer price of BLMCL and adjustments if any, thereafter.”*

12.5 The relevant part of the subsequent order, dated 19.6.2015, is enumerated as under:

*“9. We observe that the Commission, while issuing order dated 31.03.2015 has not gone into the details of the various parameters affecting the transfer price & tariff etc. but only has extended the transfer price & tariff applicable for FY 2014-15 for the FY 2015-16 also subject to adjustment as and when the final tariff is determined by the Commission.*

*10. The transfer price of lignite from Kapurdi mine till now is provisionally allowed on adhoc basis, therefore, the impact of*

*change in law on provisionally allowed transfer price cannot now be firmly computed.*

11. *It is also submitted by the Petitioners that pursuant to the Commission's order dt. 31.10.2014, the bidding for selection of MDO is in process and the Hon'ble APTEL vide its order dt. 06.05.2015 in appeal no. 10 of 2015 has upheld the order of the Commission directing Petitioner to go ahead with bidding as ordered earlier.*

12. *Further, Commission while passing its order dt. 31.03.2015 has not given the bifurcated transfer price into basic extraction cost and taxes etc. Therefore, if*

*there is any change in tax liability of BLMCL, it can meet the same within the total transfer price provisionally allowed by the Commission.*

13. *As regards submission of carrying cost by M/s RWPL, Commission may take a view and pass appropriate orders while passing the final order."*

12.6 It is evident from the material on record that the State Commission had initially, vide its order, dated 2.4.2012, allowed recovery of approximately 65% of the claimed basic transfer price of lignite on an ad-hoc basis, which led to the first round of litigation causing the Appellant to file an appeal, being appeal No. 98 of 2012, before this Appellate Tribunal and this Appellate Tribunal, vide its order, dated 21.9.2012, remanded the matter back to the State Commission for reconsideration of the said aspect. Consequently, the State Commission, vide its order, dated 15.10.2012, in Petition No. 341/2012, allowed ad hoc lignite transfer price of Rs. 1266 per MT (inclusive of applicable taxes) for FY 2012-13 which permitting the recovery of 75% of the basic transfer price of lignite claimed by the Appellant plus applicable taxes at the prevailing rate. The same ad-hoc transfer price of lignite was extended from time to time by the State Commission through its various orders.

12.7 On 27.3.2014, the Appellant filed a petition for determination of provisional transfer price of lignite for FY 2014-15 and the State Commission, vide interim order, dated 30.5.2014, allowed an ad-hoc transfer price of Rs.1397/MT (inclusive of all statutory levies) for FY 2014-15. This was once again done by the State Commission, in line

with the past approach of granting 75% of the basic transfer price of lignite claimed by the Appellant and applicable taxes at the prevailing rate were added to the basic transfer price of lignite.

12.8 It was during the pendency of the petition for determination of provisional transfer price for FY 2014-15, on 11.7.2014, the Central Government increased the rate of clean energy cess on lignite from Rs. 50/- to Rs. 100/- per MT. Since, the increase was a result of a change in law, the Appellant claimed the same increase from the Respondent No. 4; who in turn, in terms of the Power Purchase Agreement between the Respondent Nos. 1 to 3 and Respondent No. 4, claimed the impact of this increase in the variable cost from the Respondents No. 1 to 3/distribution licensees who had initially accepted this change in law claim and had released the tariff payments accordingly but, after a few months, despite having released payments giving impact of the change in law in the past, the Respondents No. 1 to 3 stopped making this payment and asked the Respondent No. 4 to approach the State Commission for necessary orders in this respect. It was then, the Respondent No. 4/power generator forced to approach the State Commission by filing a petition under section 86(1)(f) of the Electricity Act, 2003.

12.9 Since, the said ad-hoc lignite transfer price for FY 2014-15 was only valid till 31.3.2015, the Appellant filed the impugned petition, being Petition No. 487/2014, under Tariff Regulation before the State Commission on 26.11.2014, praying *inter-alia* for grant of a sustainable ad-hoc transfer price of lignite to be applicable from 1.4.2015, during the pendency of the said petition before the State Commission, on 28.2.2015, the Union Budget for FY 2015-16 was introduced by the Government of India proposing certain significant changes to the statutory levies applicable to the mining sector which directly impacted the transfer price of lignite claimed by the Appellant. Hence, the Appellant, vide its letter, dated 28.2.2015, notified Respondent No. 4/generating company of the impact of the

revised statutory levies on the ad-hoc transfer price of lignite and sought to charge the revised rate from 1.3.2015. The Respondent No. 4/generating company, in turn, notified Respondent No. 1 to 3 of the occurrence of change in law and consequent revision of variable charges component of tariff. All the changes, proposed in the statutory levies in the Union Budget for FY 2015-16, have been subsequently, enforced by the Government of India and are in full force and effect. Hence, the Appellant, on 7.3.2015, moved an application before the State Commission seeking to amend the Petition No. 487/2014 filed for determination of provisional transfer price seeking incorporation of following changes:-

- (a) increase in Service Tax from 12.36% to 14%;
- (b) reduction in Excise Duty from 6.18% to 6%;
- (c) increase in Clean Energy Cess from Rs. 100/ton to Rs. 200/ton; and
- (d) increase in surcharge on basic corporate tax from 10% to 12%.

12.10 **As per the amendment application of the Appellant, on account of the aforesaid changes in the statutory levies, the provisional transfer price (inclusive of all statutory levies) as claimed by the Appellant/petitioner for FY 2015-16 stood revised from Rs. 1877.61/MT to Rs. 2008.10/MT resulting in the net increase of Rs. 130.49/MT in the transfer price, and a corresponding increase of about Rs. 0.1444/Kwh in the variable cost of generation tariff.**

12.11 We may mention here that the Respondent No.1 to 3/Discoms filed a response on 24.3.2015 to the said amended petition of the Appellant stating inter-alia that the ad-hoc lignite transfer price allowed for FY 2014-15 deserves no revision for FY 2015-16, except on account of changes in taxes etc. and diesel costs.

12.12 **The learned State Commission, in turn, vide impugned order, dated 31.3.2015, ignoring the pleas of the Appellant regarding increase in statutory levies by the Government of India in the**

**Union Budget for FY 2015-16 as well as the categorical stand of the Respondents No. 1 to 3/Discoms, admitting revision for FY 2015-16 on account of change in taxes, etc. simply decided to extend the ad-hoc transfer price allowed for FY 2014-15 to FY 2015-16, pending final determination of transfer price of lignite and tariff for power station without assigning any reason and further without considering the monetary impact of change in law in transfer price of lignite, and in turn in the variable cost component of tariff, which entitlement was not disputed by the Discoms.**

- 12.13 Since, the impugned order, dated 31.3.2015, has created a situation where the Appellant is permitted to recover only about 65% of the basic transfer price of lignite claimed by the Appellant; while the Respondent No. 4/generating company would recover 102% of the claimed fixed costs, the Appellant/mining entity and the Respondent No.4/power generator moved a joint application before the State Commission seeking modification of the impugned order, dated 31.3.2015, to the limited extent of permitting them to reapportion the interim tariff between fixed and variable charges in a manner that the Appellant is able to discharge its statutory liabilities, the approach adopted by the State Commission while granting the interim tariff and ad-hoc transfer price in the previous years is maintained (i.e. 75% of the claimed basic transfer price of lignite), the overall interim tariff remains unchanged (at Rs. 4.06/unit), and lignite mining operations are carried out on a commercially sustainable and viable basis. In this proposal, the benefit of the reduction in price of diesel, from the time of filing of the Petition in November 2014 to March 2015, was also proposed to be passed on to the beneficiary DISCOMs, which would have permitted the Appellant to recover the statutory levies that it is obligated to discharge, without in any way burdening the beneficiaries/consumers and ensured viability of operations. The said joint application has been rejected by the State

Commission vide its order, dated 19.6.2015, on the ground that the petition of the Respondent No.4 for determination of final capital cost of the power plant was being heard; and that the Appellant had initiated fresh tendering process for selection of Mining Development Operator (MDO), which had been permitted to proceed further by the order of this Appellate Tribunal while dismissing the aforesaid Appeal No. 227 of 2014.

- 12.14 The impugned order, dated 31.3.2015, and the next following order, dated 19.6.2015, have clearly put the Appellant in a situation where balanced approach adopted by the State Commission (of granting 75% of claimed basic transfer price), after numerous rounds of litigation to settle the ad-hoc transfer price, has been totally disturbed thereby forcing the Appellant to recover approximately 65% of the claimed basic transfer price of lignite. The sole cause for the balance having been disturbed, is the non-consideration of changes in the statutory levies for FY 2015-16 by the State Commission, which statutory levies have been imposed in the budget for FY 2015-16 by the Government of India which has been put into effect.
- 12.15 According to the Appellant, if the State Commission had followed the approach adopted for previous years permitting 75% of basic transfer price of lignite claimed by the Appellant, the ad-hoc transfer price, after applying the current rates of statutory levies applicable for FY 2015-16, would have been Rs. 1558.69/MT. Further contention of the Appellant on this point is that the Appellant has again been put in a situation where its mining operations have become unviable since it cannot meet its mining costs, debt service expenses and enhanced statutory liabilities within the ad-hoc rate of Rs. 1397/MT. After considering this important fact and the reasons thereof, we find that the learned State Commission's direction to absorb the increased statutory liabilities within the existing ad hoc transfer price applicable for FY 2014-15 is arbitrary, unreasonable and un-



appreciable because the same prevents the Appellant from recovering the reasonable cost of generation.

12.16 We also note that the learned State Commission is totally unjustified in not considering the change in statutory levies introduced pursuant to the Union Budget for FY 2015-16 while approving the basic transfer price of lignite for FY 2015-16 by the impugned order. We, further, find that the facts and the material available on record makes it evidently clear that the State Commission is totally unjustified in merely extending the interim tariff allowed for previous FY to FY 2015-16 without applying its mind to increase in statutory levies introduced by the Government of India in the Union Budget for FY 2015-16 where the per unit variable cost has gone up owing to the change in law.

12.17 We, further, observe that the learned State Commission has wrongly declined to take into account the changes in the statutory levies, which affect the mining operation activities of the Appellant, just on the ground that the petition for determination of final capital cost filed by the Respondent No.4/power generating company had already been partly heard and the Appellant has been directed to go ahead with the bidding process to select the Mining Development Operator. We find that the State Commission has totally failed to appreciate or consider that the purpose of granting interim transfer price of lignite on ad-hoc basis was only to ensure the continuous and sustainable mining operations of the Appellant pending finalization of the bidding process.

12.18 The State Commission has, further, not considered that even after the conclusion of the bidding process, the Appellant would have to approach the State Commission for approval of the transfer price and due procedure of law would have to be followed before the same is finally approved by the State Commission.



12.19 Shri Ramji Srinivasan, learned senior advocate for the Appellant, 19.11.2015, filed a chronology of events on behalf of the Appellant candidly stated that on 30.10.2015, Engineers India Ltd. (EIL) has opened the price bids. The lowest bidder needs to be put formally approved by the Board of EIL and, thereafter, EIL will send a recommendation to the Appellant for declaration of successful bidder. However, before award of the contract to the successful bidder, the Appellant will need to approach the State Commission, in compliance with the State Commission's order, dated 17.8.2011, and this Appellate Tribunal's order, in Appeal No. 10 of 2015. It is only after the State Commission's approval, the Appellant would be in a position to award the MDO contract to the successful bidder for development and operation of lignite mines. While this process will continue, there is no reason or basis to deny the impact of increased statutory levies to the Appellant. The Discoms have already stated that they have no objection to allow the impact of such increases to the Appellant. Additionally, Discoms have not filed any reply to the present appeal despite having sufficient opportunity to do so.

12.20 The current position as it emerges from the material on record and from the submissions of the parties is that :

12.21 On 30.10.2015, Engineers India Ltd. (EIL) has opened the price bids and the lowest bidder will be formally approved by the Board of EIL and, thereafter, EIL will send a recommendation to the Appellant for declaration of successful bidder. We find that this can be expedited by the Appellant itself by pursuing the EIL to complete the formalities without any further delay and submit its recommendation to the Appellant for declaration of successful bidder.

12.22 The learned counsel for the State Commission clearly admits that the State Commission will take hardly 2-3 months in deciding the said petition which is pending before the State Commission after submission of bidding documents before the State Commission. We

believe all these things as stated by the learned counsel for the parties and there is no reason to disbelieve the same.

- 12.23 In view of the above discussions, we hold that the State Commission has committed gross illegality in passing the interim order, dated 31.3.2015 (impugned order), whereby it simply extended the ad-hoc transfer price (*inclusive of all statutory levies*) applicable for FY 2014-15, to the ad-hoc transfer price of lignite for next FY 2015-16 even without considering the increases in the statutory levies introduced by the Union Budget for FY 2015-16 because the State Commission was bound to consider the increase in statutory levies and allow the impact thereof to the Appellant while extending the ad-hoc transfer price of lignite to the next financial year.
- 12.24 We also hold that the State Commission, vide its subsequent order, dated 19.6.2015, has wrongly rejected the joint application filed by the Appellant and Respondent No.4 seeking modification of the order, dated 31.3.2015, to the limited extent of permitting the Appellant and the Respondent No.4 to reapportion the interim tariff between fixed and variable charges in the manner as provided in the said joint application because the whole adjustment were to be made between the mining entity (Appellant) and the Respondent No.4/power generation company without there being any increase in the tariff at the said moment.
- 12.25 In view of the above discussions, both the issues at Sl. No.12.23 and Sl. No. 12.24 above, are decided in favour of the appellant and the impugned order dated 31.03.2015 and the following order dated 19.06.2015 are liable to be set aside. This appeal is liable to be partly allowed.

### **ORDER**

The present Appeal, being Appeal No. 177 of 2015, is hereby partly allowed to the extent indicated above. Both the orders, dated 31.3.2015 (impugned order) with respect to ad-hoc transfer price of

lignite for FY 2015-16 and, the subsequent order, dated 19.6.2015, are hereby set-aside. The State Commission is directed to allow basic transfer price of lignite on ad-hoc basis passed by the State Commission in the Impugned Order dated 31.03.2015 and 19.06.2015 plus applicable taxes viz. the current rates of statutory levies applicable for FY 2015-16 and, pass a consequential order within three months from today based on our decision given at paragraph 12.23 & 12.24 above. We further direct the Appellant, which is a Mining Development Operator (MDO), to compel the EIL to complete the formalities immediately and then submit the bidding documents before the State Commission for its approval. We, further, direct the EIL to complete the formalities and send recommendation to the Appellant within one month from today and the Appellant, in turn, shall submit bidding documents for approval of the State Commission within next one month and the State Commission shall dispose of the said petition within one month thereafter. Thus, the whole exercise is to be done within three months positively so that the State Commission will be able to decide the final transfer price of lignite and the final tariff of the Power Generating Company. No order as to costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 10<sup>th</sup> DAY OF DECEMBER, 2015.**

**( I. J. Kapoor )  
Technical Member**

**( Justice Surendra Kumar )  
Judicial Member**

**√ REPORTABLE/~~NON-REPORTABLE~~**

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