

COURT-I

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**IA No. 288 of 2019 in
APPEAL NO. 138 OF 2018**

Dated : 17th May, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

**M/s. Barmer Lignite Mining Company Ltd. Appellant(s)
Vs.
Rajasthan Electricity Regulatory Commission & Ors. Respondent(s)**

Counsel for the Appellant(s) : Mr. Aman Anand
Mr. Aman Dixit

Counsel for the Respondent(s) : Mr. R.K. Mehta
Ms. Himanshi Andley for R-1
Mr. P.N. Bhandari for Discoms
(R-2 to 4)

ORDER

**IA No. 288 of 2019
(Appl. for directions)**

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. The present IA No.288 of 2019 in Appeal No. 138 of 2018 is filed by M/s Barmer Lignite Mining Company Ltd., the Appellant herein, seeking necessary directions for implementation of the order dated

5.12.2018, passed by this Tribunal in IA No.645 of 2018 in the instant Appeal.

2. The Appellant has sought the following reliefs in the instant IA, being IA No. 288 of 2019 in Appeal No.138 of 2018:

- a. Direct the Respondent Nos.2 to 4 to implement the order dated 05.12.2018 passed by this Hon'ble Tribunal in I.A. No.645 of 2018 in Appeal No.138 of 2018 and accordingly make payment of a sum of Rs.170.96 crore along with interest, to the Appellant immediately;
- b. Strictly in the alternative, direct the State Commission to dispose of IA No.13 in Petition No.966 of 2016 by passing a consequential order immediately, for implementing the order dated 05.12.2018 passed in I.A. No.645 of 2018 in Appeal No.138 of 2018 by this Hon'ble Tribunal; and/or
- c. Pass any other order(s) as this Hon'ble Tribunal may deem just, fit and proper.

3. The Appellant has made the following submissions for our consideration:-

3.1 The Appellant has been constrained to prefer the instant Application, as despite there being an order by this Hon'ble Tribunal increasing the recovery of interim transfer price of lignite to 85% (in place of 70%

as approved by the State Commission) for the relevant period of FY 2017-18, the Respondents 2-4 (the Respondent Discoms) have not made payment in terms of the order of this Tribunal; and have been obstructing the implementation of the said order.

3.2 After hearing the Appellant and the Respondent Discoms at length, this Tribunal vide order dated 05.12.2018 passed in I.A. no. 645 of 2018, was pleased to hold as under:

“4.0 Our consideration

4.1 In the light of the submissions made by the learned senior counsel appearing for the Appellant as well as the Respondents and in terms of the order of this Tribunal dated 08.08.2018 passed in IA No. 643 of 2018 in Appeal No. 137 of 2018, we feel just and right to increase the recovery of the interim transfer price of lignite to 85% instead of 70%.

4.2 Needless to mention that above directions are subject to the final outcome of the instant Appeal i.e. Appeal No. 138 of 2018 filed by the Appellant. Order accordingly.”

No appeal has been preferred by any party against the said order; and as such the order dated 05.12.2018 has attained finality.

3.3 In terms of the aforesaid order, the Respondent Discoms were only to make an arithmetic calculation and pay the Appellant the sum representing the difference between the interim transfer price of

lignite already recovered by the Appellant for FY 2017-18 in accordance with the State Commissions Order (approximately 70%); and the enhanced recovery(85%) as permitted by this Tribunal in terms of the order dated 05.12.2018. However, the Respondent Discoms have completely neglected/failed in their bounden duty to give effect to the terms of the order of this Tribunal dated 05.12.2018; and have instead chosen to obstruct the implementation of the order dated 05.12.2018 by taking recourse to belated, frivolous and untenable objections at every stage.

3.4 After passing of the order dated 05.12.2018, the Appellant and the Respondent No. 5 (Raj West Power Limited) on 06.12.2018 requested the Respondent Discoms to act in accordance with the said order and make payment for the difference in the interim transfer price of lignite to the Appellant. Detailed calculations to show the amount payable by the Respondent Discoms in terms of the order dated 5.12.2018 of this Hon'ble Tribunal were also enclosed along with the above mentioned letter.

3.5 However, instead of making payment in accordance with the terms of the order dated 05.12.2018 of this Tribunal, the Respondent

Discoms communicated their inability to comply with the said order, till approval of the revised charges by the State Commission.

3.6 In terms of the order of this Tribunal, the Respondent Discoms were only to pay the difference between interim transfer price allowed by the State Commission and that as revised by this Tribunal for the relevant period of FY 2017-18. This absolute sum is certainly calculable.

3.7 In these circumstances, and since the absolute sum to be paid by the Respondent Discoms to the Appellant was calculable, there was no direction by this Tribunal, for the State Commission to pass any consequential order revising the variable charges, before the order of this Tribunal could be implemented. As such, the position taken by the Respondent Discoms in their letter dated 10.12.2018 demanding a variation in the charges by the State Commission, before implementation of the order dated 05.12.2018 was totally untenable.

3.8 Despite this and only in order to get its payment released at the earliest, the Appellant, as demanded by the Respondent Discoms, on 13.12.2018 filed an application before the State Commission seeking

a consequential order for implementation of the terms of this Tribunal's order dated 05.12.2018.

3.9 Even though the IA no. 13 in Petition 966/2016 only prayed for a formal consequential order, as was being insisted upon by the Respondent Discoms, for implementation of the order dated 05.12.2018 of this Tribunal, the State Commission has till date failed to pass the consequential order and the suffering of the Appellant continues.

3.10 The State Commission after filing of IA no. 13 on 13.12.2018 has held hearings on 03.01.2019 and 23.01.2019, and has completely erred in enlarging the scope of the proceedings initiated by the Appellant before it. The State Commission being bound by the order dated 05.12.2018 of this Tribunal, ought to have expeditiously passed the formal order for implementation of the terms of the 05.12.2018 order. Instead, the State Commission permitted the Respondent Discoms and even other purported stakeholders to file objections and be heard in an application seeking a consequential order. The Respondent Discoms, taking advantage of this position filed objections to passing of a consequential order, as if the State Commission was sitting in appeal over the order dated 05.12.2018 passed by this Tribunal.

3.11 Though the order on IA no. 13 in Petition No. 966/2016 was reserved by the State Commission on 23.01.2019, no order has been passed by the State Commission disposing the said IA, leaving the order of this Tribunal dated 05.12.2018 unimplemented till date.

3.12 Despite the relief afforded to it by this Tribunal in the order dated 05.12.2018, the Respondent Discoms as well as the Ld. State Commission are not taking steps to implement the said order. Consequently, the Appellant has been denied the benefit of the order dated 05.12.2018 of this Tribunal, even after expiry of more than two and a half months from the date of passing of the said order by this Tribunal.

3.13 As such, under the present circumstances, the Appellant has no other efficacious remedy except to approach this Tribunal for passing necessary directions against the Respondent Discoms for implementation of the terms of the order dated 05.12.2018. The Appellant undertakes before this Hon'ble Tribunal to withdraw IA 13 in Petition 966/2016, pending before the State Commission, in case so directed by this Tribunal.

4. Learned counsel for the Respondent Commission has filed written submission as under:-

4.1 The issue of determination of final transfer price of Lignite from Kapurdi and Jalipa Mines has been pending due to litigations at various stages. The Commission has, therefore, allowed interim transfer price in its various orders so that BLMCL gets a reasonable transfer price to run its operation and the generation from M/s RWPL plant does not get hampered.

4.2 For FY 2017-18, vide order dated 27.04.2017 Commission continued the interim Lignite Transfer Price of Rs. 1213 + Tax (**in respect of Lignite extracted from Kapurdi Mine**) allowed for FY 2016-17 vide order dated 31.03.2016. In the said order the Commission did not allow the transfer price as 70% of any value. This order was not challenged by the appellant.

4.3 On 27.10.2017, appellant filed an application for interim transfer price of Lignite from **Kapurdi and Jalipa Mine** for FY 2017-18 w.e.f 01.11.2017. Vide order dated 05.04.2018, the Commission continued the same transfer price for FY 2017-18 for Lignite extracted from Jalipa mine as was allowed for Kapurdi Mine vide order dated 27.04.2017, inter alia, on the ground that FY 2017-18 is over and

Appellant has permission for extraction from Kapurdi Mine upto September 2018.

4.4 For FY 2018-19, vide order dated 10.05.2018 Commission allowed interim transfer price of Rs. 1958.99 per MT in respect of Lignite from Kapurdi and Jalipa Mine on the basis of 70% of the price claimed by the Appellant. Vide order dated 08.08.2018 in Appeal No. 137 of 2018 arising out of order dated 10.05.2018 of the Commission, Hon'ble Tribunal increased the interim transfer price for FY 2018-19 from 70 % allowed by the Commission to 85%.

4.5 In compliance with the order dated 08.08.2018 of the Hon'ble Tribunal, vide order dated 26.09.2018, the Commission allowed 85% of the Lignite transfer Price claimed by the appellant for FY 2018-19.

4.6 Vide order dated 05.12.2018 in the present appeal (arising out of order dated 05.04.2018 of the Commission), following the order dated 08.08.2018 in Appeal No. 137 of 2018, Hon'ble Tribunal increased the interim transfer price from 70 % to 85%.

4.7 The Appellant filed an Application on 13.12.2018 before the Commission for passing consequential orders with reference to order dated 05.12.2018 passed by this Hon'ble Tribunal. Discoms filed the

reply to the application. The matter was heard on 03.01.2019 and in the second hearing on 23.01.2019 the order was reserved.

4.8 It is most respectfully submitted that the Commission is finding difficulty in passing the consequential order pursuant to the order dated 05.12.2018 of this Tribunal since neither in the order dated 27.04.2017 nor in order dated 05.04.2018, the Commission had allowed 70% of any value as Interim Transfer Price of Lignite

4.9 While the Commission was contemplating to seek clarification or direct the parties to seek clarification from the Tribunal, the present IA was filed by the appellant before the Tribunal.

4.10 In the above premise, the Tribunal may kindly be pleased to clarify the order dated 05.12.2018 so that the consequential order can be passed by the Commission accordingly.

5. Learned counsel for DISCOMs/ Respondent Nos. 2 to 4 has submitted as under:-

5.1 Vide order dated 8.8.2018 in IA No.643 of 2018 in Appeal No.137 of 2018, the Tribunal was pleased to raise the ad hoc / interim tariff from 70% to 85%. That order has been promptly complied by the Discoms.

- 5.2** The matter arising out of IA filed by the Appellant on 13.12.2018 has been finally heard by the Commission and the order has been reserved. Unfortunately, the Appellant is trying to prejudice the Commission and bring undue pressure upon the Commission while the matter is under consideration of the Commission.
- 5.3** It was also felt that the question of raising 85% would arise when the interim tariff has been fixed at 70%. But since no such percentage had been laid down in the Commission's order of 5.4.2018, hence perhaps the Commission is facing the dilemma as how to increase the interim tariff, when no percentage has been indicated in its ad hoc interim tariff.
- 5.4** But since the ad hoc / interim tariff is allowed by the Commission without any scrutiny and is based only on approximate basis, the Tribunal has all along avoided in the past to intervene in such tentative / ad hoc/interim tariff orders, where the final order has not been passed by the Commission. At this stage, there is hardly any occasion to point out any lapses or errors in the Commission's order as the order is yet to be decided by the Commission on merits. Obviously, the Appellant has rushed before the Tribunal prematurely, with a view to prejudice the pending decision of the Commission.

- 5.5** Since the judgment of the Tribunal are binding upon the Commissions, hence this decision would be cited as a precedent by the Appellant and other generators in future also. Perhaps the Tribunal would not like the ad hoc tariff, based entirely on rough estimates and guess work, to prevail over the final tariff based on elaborate pleadings, scrutiny of documents and prudence check.
- 5.6** It may also be appropriate to submit that the Appellant is in the habit of grossly exaggerating its claims. Order dated 19.6.2017 had decided the final tariff for the year 2014-15, 2015-16 & 2016-17. It has elaborately dealt with all the issues relevant for final tariff determination.
- 5.7** In these matters, keeping in view, the level of highly exaggerated claims, the Commission has generally allowed ad hoc / interim tariff ranging between 60% to 70%. In retrospect, even that has proved to be grossly in excess.
- 5.8** In the light of the above, it may perhaps be desirable to direct the Appellant to approach the Tribunal, only after the matters are concluded in the Commission. The Appellant should be discouraged in pursuing parallel remedies before the Tribunal as well as the Commission.

5.9 During the oral submissions before the Commission, prior to the reply filed by the answering respondents, the Appellant was vehemently arguing that 70 or no 70%, the ad hoc / interim tariff has to be raised to 85%. It was in this context that the Discoms had to defend its case before the Commission by reminding it that:-

- a. The Hon'ble Tribunal's earlier order was based on the specific facts of a particular case.
- b. That it was perhaps never the intention of the Hon'ble Tribunal to revise every ad hoc / interim tariff to 85%.
- c. It goes without saying that the Hon'ble Tribunal had no intention to fix the ad hoc tariff at 85% even when the Commission had not fixed at 70%.
- d. The increase was to be effected not in isolation but only when the ad hoc tariff was 70% or any other percentage.
- e. The Appellant had no right to selectively pick up the figure of 85% and totally ignore the figure of 70%.
- f. The answering Discoms have to vigorously watch the interest of millions of consumers against consistently false and highly exaggerated claims of the Appellant.

g. When a petition or IA is filed before the Commission, contesting the petition / application by the Discoms cannot be treated as objectionable. The Discoms cannot dilute their stand, to suit the wishes of the petitioner.

5.10 Since the financial year 2017-18 is already over, the Tribunal may like to direct the Appellant to file actual figures of the expenditure incurred by the Appellant and its Mining Contractors. Payments are made to the mine contractors every month and therefore aggregating of these figures should not be difficult. Now a stage has come when not to speak of 85% but 100% of the expenditure can be reimbursed to the Appellant , as per the final order of the Commission for 2017-18.

6. Our Consideration:-

6.1 We have carefully considered and analysed the submissions of the learned counsel for the Appellant and learned counsel for the Respondents/ DISCOMS as well as learned counsel for the Respondent Commission. Learned Counsel for the DISCOMs, Shri P.N. Bhandari vehemently submitted that the order dated 8.8.2018 in IA No.643 of 2018 in Appeal No.137 of 2018, passed by this Tribunal has been promptly complied with by the DISCOMs. It was understood that this order dated 05.12.2018 was based on specific

facts of that case and was not a general order for all adhoc/interim orders relating to the Appellant. He further submitted that the question of raising the lignite price to 85% would arise only when the interim tariff has been fixed at 70%.

6.2 Learned counsel was quick to point out that no such percentage has been laid down in the Commission's order of 05.04.2018, hence the Commission is facing the dilemma as how to increase the interim tariff when no such percentage has been indicated in its adhoc / interim tariff. He further submitted that at this stage there is hardly any occasion to point out any lapses or errors in the Commission's order as the order is yet to be decided by the Commission on merits and thus obviously the Appellant has rushed before this Tribunal prematurely. Advancing his arguments further, learned counsel submitted that the Appellant is in habit of grossly exaggerating its claim on lignite transfer price and, therefore, the Commission has restricted to allow the transfer price in the range of about 70% only.

6.3 Learned counsel, Shri P.N. Bhandari while summing up his arguments contended that the judgments and orders of this Tribunal are binding to all the Commission's and it is clarified that neither the State Commission nor the DISCOMs have any intention of interfering

in the order of this Tribunal dated 05.12.2018. However, as Financial Year 2017-18 is already over, this Tribunal may like to direct the Appellant to file actual figures of the expenditure incurred by the Appellant and its mining contracts so that the same could be reimbursed to its full.

6.4 Learned counsel, Shri R.K. Mehta, appearing for the Respondent Commission, at the outset, submitted that in compliance with the earlier order dated 08.08.2018 of this Tribunal, the Commission vide its order dated 26.09.2018 has duly allowed 85% of lignite transfer price claimed by the Appellant for Financial Year 2018-19. He further submitted that subsequent to the order of this Tribunal dated 05.12.2018, the Appellant filed an application on 13.12.2018 before the Commission for passing consequential orders with reference to the said order of this Tribunal and the matter has been heard on 03.01.2019 and 23.01.2019 and the order has been reserved. Learned counsel for the State Commission contended that the Commission is finding difficulty in passing the consequential order pursuant to the said order of this Tribunal since neither in the order dated 27.04.2017 nor in the order dated 05.04.2018, the Commission had allowed 70% of any value as interim transfer price of lignite. He

further added that the Commission was contemplating to seek clarification from this Tribunal but before that the Appellant has already filed the present IA before the Tribunal for consideration.

6.5 We have heard the learned counsel for the Appellant as well as learned counsel for the Respondents and taken note of their written submissions as well as our previous orders dated 08.08.2018 and 05.12.2018 relating to the adhoc transfer price of the lignite. Admittedly, the issue of determination of final transfer price of lignite from Kapurdi and Jalipa Mines has been pending due to litigations at various stages and the Commission has, therefore, allowed interim transfer price in its various orders so that BLMCL gets a reasonable transfer price to run its operation and the generation from M/s RWPL plant does not get hampered. However, it is noticed from previous IAs' against which this Tribunal passed orders dated 8.8.2018 and 5.12.2018, the adhoc transfer price of lignite was being allowed to the extent of 65 to 70 % of the claimed price which in turn caused financial hardships to the Appellant. Accordingly, after hearing, learned counsel for the parties and keeping in view the financial hardships expressed by learned counsel for the Appellant, it was decided by this Tribunal to increase the recovery of the interim

transfer price of lignite to 85% instead of 70%. We are unable to accept the arguments of the learned counsel for the Respondent Commission as well as Respondent/DISCOMs that there has been no mention of 70% in allowing the interim transfer prices of lignite and hence, the order dated 05.12.2018 required some clarification. The said order was passed by this Tribunal at the premise of financial hardship to the generator which was being allowed considerably less transfer price than they actually claimed. Hence, the base rate at 70% are no 70% has nothing to do with the final ad hoc percentage allowed by this Tribunal at 85 %. In fact, the ad hoc percentage of 85% was directed only to have a consistent view with reference to earlier order dated 8.8.2018 of this Tribunal.

6.6 Needless to mention that the directions in our order dated 05.12.2018 were subject to the final outcome of the instant Appeal No.138 of 2018 filed by the Appellant.

6.7 While concluding, we may point out the maintenance of judicial discipline is a part of our judicial process.

7. In view of the above facts and circumstances, Rajasthan Electricity Regulatory Commission is directed to get the order dated 05.12.2018 passed by this Tribunal in IA No.645 of 2018 in Appeal No.138 of

2018 implemented in its true spirit and differential amounts arising therefrom be paid by DISCOMs, expeditiously.

8. With these observations, the instant IA is disposed of.
9. List the main Appeal No.138 of 2018 on 30.08.2019.

(S. D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson