

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Review Petition No. 10 of 2012

In

Appeal No.89 of 2011

Dated: 23rd January, 2013

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

In the matter of:

Chhattisgarh State Power Distribution Co. Ltd.,

4th Floor, Vidyut Seva Bhavan,

Danganiya, Raipur-492013,

Represented by its Superintending Engineer

**... Review Petitioner/
Appellant**

Versus

1. **Chhattisgarh State Power Generation Co. Ltd.,**
3rd Floor, Vidyut Seva Bhavan,
Danganiya, Raipur-492013.
2. **Chhattisgarh State Power Transmission Co. Ltd.,**
3rd Floor, Vidyut Seva Bhavan,
Danganiya, Raipur-492013.
3. **Chhattisgarh State Power Holding Co. Ltd.,**
2nd Floor, Vidyut Seva Bhavan,
Danganiya, Raipur-492013.
4. **Chhattisgarh State Power Trading Co. Ltd.,**
2nd Floor, Vidyut Seva Bhavan,
Danganiya, Raipur-492013.
5. **Chhattisgarh State Load Dispatch Centre,**
C/o Chhattisgarh State Power Transmission Co. Ltd.,
3rd Floor, Vidyut Seva Bhavan,
Danganiya, Raipur-492013.
6. **Chhattisgarh State Electricity Regulatory Commission,**
Irrigation Colony, Shanti Nagar,
Raipur-492 001. **...Respondent(s)**

Counsel for the Appellant(s) : Mr. K. Gopal Chaudhary with
Mr. A. Bhatnagar (Rep.)

Counsel for the Respondent(s) : Ms. Suparna Srivastava for R.1,2 & 5
Mr. M.G. Ramachandran
Mr. Anand K. Ganesan,
Ms. Swapna Seshdri for R-6

ORDER

Per Hon'ble Mr. Rakesh Nath, Technical Member

This Review Petition has been filed by Chattisgarh State Power Distribution Company Limited against judgment dated 14.8.2012 in Appeal No. 89 of 2012 on the ground that there is an error apparent on the face of the record.

2. This Tribunal by order dated 14.8.2012 disposed of the Appeal filed by the Petitioner/Appellant against the order of the State Commission dated 31.3.2011 determining the tariff for the FY 2011-12 and the true up for previous years.

3. In this Review Petition the Petitioner/Appellant has made the following submissions:

3.1 The Tribunal upheld the findings of the State Commission for true up of depreciation for FY 2005-06 holding that the State Commission had allowed the depreciation as per the audited accounts submitted by the Appellant and when the audited accounts of the Appellant indicated a depreciation of Rs. 41 crores, the Appellant could not claim that the Holding Company (R-3) had submitted wrong data. The amount of Rs. 41 crores was not the depreciation as per the audited accounts. As per the audited accounts, the depreciation was Rs. 53.20 crores which was placed before the Tribunal. The figure of Rs. 41 crores was the computation by the Holding Company as per the 2006 Tariff Regulations without noticing that the said Tariff Regulations did not apply to FY 2005-06 and that there was no Regulation for that year. As there was no applicable Tariff Regulations, it is only the

methodology adopted in the original tariff order that has to be taken into account for the purpose of truing up the depreciation. The Tribunal did not consider the same and gave no finding with regard to the contention of the Appellant that the 2006 Tariff Regulations could not be applied to the FY 2005-06. Moreover, the deduction of any amount of consumer contribution is not at all prescribed or allotted in the original tariff order and there was no regulation requiring the same. The depreciation has to be trued up adopting the same methodology as in the original order.

3.2 The Tribunal had held that there was no infirmity in the finding of the State Commission regarding true up of reasonable return for FY 2005-06 as the State Commission had determined the Return on Equity in terms of the audited accounts. The Tribunal has not

adverted to the actual issue raised in the Appeal and urged during the hearing. The grievance of the Appellant in the Appeal was that the State Commission had itself stated that the State Commission had recomputed the ROE on the basis of the methodology adopted in the previous orders but it had not done so while carrying out the true up for FY 2005-06. As such the actual grievance was that the State Commission had erroneously computed the reasonable return for FY 2005-06 by adopting the methodology of 2006 Tariff Regulations which was not applicable to FY 2005-06 and that the State Commission should have adopted the very same methodology as set out in the original Tariff Order for FY 2005-06. But the Tribunal did not consider the said issue raised by the Appellant and decide the same.

3.3 For the FY 2005-06 an amount of Rs. 79.62 crores was actually paid towards employees' pension and gratuity fund as against the amount of Rs. 111.01 crores approved by the State Commission in the Tariff Order. The amount actually paid was restricted because of certain problems relating to the incidence of Fringe Benefit Tax. The Electricity Board made a provision of Rs. 279.62 cores in its accounts, meaning thereby that such an amount was set aside by the Electricity Board in its financial statements for the purpose of meeting its accrued and future liabilities towards contribution to the Fund. The contention of the Appellant was that unpaid amount out of Rs. 111.01 crores ought to have been considered as having been paid at a later date by apportioning the excess payment of a later year as having been on account of the shortfall during this year. The

Electricity Board and its successors were put to loss by not allowing the amount paid in the year on the ground that it had not been paid, and also disallowing the shortfall paid in the subsequent year without considering the apportionment of such excess payment in the later year towards the shortfall of the earlier year. The Tribunal has not considered the aspect that the issue has to be considered on an accrual basis and not on cash basis, more particularly when there has been an actual outflow subsequently.

3.4 For 2008-09 a total amount of Rs. 407.22 crores was paid to the Fund comprising Rs. 100 crores by the Electricity Board during April-December 2008, 195.59 crores by the 3 other companies during January-March 2009 and additional monthly contributions to the fund aggregating to Rs. 111.63 cores. The State Commission

misconstrued that the amount of Rs. 111.63 crores was direct payment to the retired employees and disallowed the same, thus allowing only Rs. 259.59 crores (Rs. 100 Crores+195.59 crores).

3.5 For FY 2009-10 also the State Commission misconstrued certain amount as having been paid to the retired employees and disallowed the same. Consequently, the State Commission allowed only Rs. 176.54 crores out of total amount of Rs. 257.09 crores actually paid to the Fund by the Appellant as against Rs. 197.67 crores allowed in the Tariff Order. The Tribunal has not considered this issue.

3.6 It was specifically pleaded that amounts aggregating to Rs. 111.63 crores in 2008-09 was not paid directly to the employees but the amounts were

paid to the Fund. The Tribunal did not consider and adjudicate the question of fact whether the amounts were in fact paid to the Fund or were paid directly to the retired employees. The Tribunal has failed to remand the matter for determination of the factual position. The Tribunal, without any adjudication, simply assumed the position as stated by the State Commission in the impugned order as correct.

4. We have heard the learned counsel for the parties on the above issues. We have given our careful consideration to these issues.

5. On the first issue regarding true up of depreciation for the FY 2005-06 we had framed the following question for our consideration:

“i) Whether the State Commission has erred in applying a different methodology for determination of depreciation than that

adopted in the Tariff Order for the FY 2005-06 while carrying out the true up?”

We had also referred to the contention of the Appellant that the State Commission should have used the same methodology as adopted in the Tariff Order for the FY 2005-06 while truing up. However, we found that the State Commission had allowed the depreciation in terms of the petition for truing up filed by the Appellant. The statement as furnished by the Appellant before the State Commission clearly indicated actual (audited) depreciation of Rs. 41 crores and therefore, we confirmed the finding of the State Commission.

6. On this issue the Appellant in the written submission filed before us in the main appeal had indicated that the accounts of the Electricity Board were being handled by the Holding Company. The

Appellants had submitted the accounts as prepared by the Holding Company without realizing that the depreciation for FY 2005-06 had been erroneously computed as per the 2006 Regulations which were not applicable to FY 2005-06. This came to light after the impugned order was made. Further, the truing up of depreciation has to be done as per the methodology used in the Tariff Order for FY 2005-06. These submissions have not been considered by the Tribunal.

7. On consideration of these issues, we feel that our findings may have to be reviewed.

8. It is a settled position of law that the same methodology has to be applied in truing up exercise as used in the main tariff order.

9. We notice that in the Tariff Order of 2005-06, the State Commission had allowed depreciation @ 4% on the new additions to fixed assets during 2004-05 and 2005-06. Over and above this, the State Commission had allowed actual depreciation as asked by the Electricity Board on the existing assets at the end of the FY 2003-04.

10. The Petitioner/Appellant submitted that the depreciation of the existing assets at the end of the FY 2003-04 i.e. on 31.03.2004 for generation, transmission and distribution as allowed in the Tariff Order for FY 2005-06 was Rs. 55.07 crores. The actual new additions during the FY 2004-05 and 2005-06 as per the audited accounts are Rs. 868.13 crores. Accordingly, depreciation @ 4% on actual new additions during the FY 2004-05 and 2005-06 works out to be Rs. 34.73 crores. Therefore,

total depreciation in the true up should be Rs. 89.80 crores as against Rs. 41 crores allowed by the State Commission. The Appellant has also submitted copies of audited annual statement of accounts of the Electricity Board showing the new additions to the fixed assets for each of the years 2004-05 and 2005-06.

11. The Appellant has also submitted that Rs. 10 crores deducted by the State Commission on account of consumer contribution should not have been deducted as it was not prescribed or allotted in the original tariff order and there was no regulation requiring the same. We do not find any substance in the arguments of the Appellant relating to deduction of amount of consumer contribution as at the time of original tariff order the amount of consumer contribution was not known and, therefore, the State

Commission could not have considered the same in the original tariff order. Further, the Regulations were not available in the year 2005-06. Therefore, if the State Electricity Board has received the consumer contribution, the same needs to be deducted.

12. In view of above, we direct the State Commission to consider the actual new additions during FY 2004-05 and 2005-06 as per the audited accounts and allow depreciation in the true up for 2005-06 as per the methodology used in the tariff order for FY 2005-06.

13. The second issue is regarding true up of reasonable return for FY 2005-06.

14. On this issue also, the question framed by the Tribunal was:

“Whether the State Commission was correct in applying a different methodology for the

reasonable return than that adopted in the Tariff Order for the FY 2005-06 in carrying out the true up for the FY 2005-06 on the basis of 2006 Regulations which were not applicable to FY 2005-06?”.

On this issue we upheld the findings of the State Commission considering that the State Commission had determined the return on equity in terms of the information furnished by the Petitioner/Appellant before the State Commission. However, we have not considered whether the State Commission should have followed the same methodology as was adopted in the main Tariff Order for the FY 2005-06.

15. We notice that the State Commission in the Tariff Order for the FY 2005-06 determined the reasonable return as 14% on net worth of the Electricity Board at the beginning of the year. Accordingly, the Return on

Equity of Rs. 176.44 crores was allowed for generation, transmission and distribution. The State Commission in the impugned order observed that the Petitioner had also proposed ROE on the capital works in progress which is not in line with the methodology presented in the Commission's previous Tariff Order and therefore, the State Commission has recomputed the ROE on the basis of the methodology approved by it in the previous orders. However, the State Commission allowed only Rs. 158.08 crores towards reasonable return for 2005-06 as against Rs. 176.44 crores as reasonable return for 2005-06 as was allowed in the original Tariff Order for 2005-06. As the same methodology used in the original Tariff Order has to be adopted in the true-up, the State Commission is directed to allow the reasonable return of

Rs. 176.44 crores as allowed in the Tariff Order for the FY 2005-06.

16. The third issue is regarding employees' pension and gratuity fund.

17. The contention of the Appellant has been:

(i) for the year 2005-06, the Board should be allowed contribution on an accrual basis and not upon cash basis.

(ii) the State Commission had wrongly disallowed an amount of Rs. 111.63 crores for the FY 2008-09 and misconstrued that this amount was directly paid to the retired employees whereas in fact the amount was paid through the Fund. For the FY 2009-10 also the State Commission misconstrued certain amount as having been paid to the retired employees directly and

disallowed the same. Consequently, the State Commission allowed only Rs. 176.54 crores.

18. For the year 2005-06, we have given a clear finding that the State Commission has correctly done the true up on the basis of actual contribution made by the Petitioner/Appellant to the Fund. We have not accepted the contentions of the Appellant that the contribution should be allowed on accrual basis. Therefore, the findings for the FY 2005-06 do not require any review as there is no error apparent on the face of the records.

19. However, if the additional amount has been contributed to the Fund in the subsequent year, the same may be considered by the State Commission in the true up for the subsequent years. The Petitioner/Appellant has submitted that for the years

2008-09 and 2009-10, they have not made any direct payment to the employees and an amount of Rs. 407.22 Crores and Rs. 257.09 crores respectively was actually paid with the Fund. Accordingly, we direct the State Commission to verify the actual facts from the records and consider the submissions of the Appellant and decide the issue accordingly.

20. **Summary of our findings:**

i) We remand the matter regarding true up of depreciation for the FY 2005-06 to the State Commission with directions to consider the actual new additions to the assets during FY 2004-05 and FY 2005-06 as per the audited accounts and allow depreciation as per the methodology used in the Tariff Order for FY 2005-06. However, we reject the contention of the Review Petitioner regarding

deduction made by the State Commission on account of consumer contribution.

ii) The matter regarding true up of reasonable return for the FY 2005-06 is also remanded back to the State Commission with directions to allow the reasonable return as allowed in the Tariff Order for FY 2005-06.

iii) We do not agree with the contention of the Review Petitioner regarding true up for contribution to employees' pension fund for FY 2005-06 on the accrual basis. As regards FY 2008-09 and 2009-10, we remand the matter to the State Commission to consider the submissions about actual direct contribution to the fund and decide the issue as per law.

21. This Review Petition is allowed to the extent as indicated above. The State Commission is directed to pass consequential orders in terms of this order. No order as to costs.

22. Pronounced in the open court on this **23rd day of January, 2013.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Reportable/Non-Reportable

vs