

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

Appeal No. 132 of 2009

Dated: 31st March, 2011

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

In the matter of:

Power Grid Corporation
of India Ltd.
Saudamani, Plot No. 2,
Sector-29
Gurgaon 122001
Haryana

... Appellant(s)

Versus

1. Central Electricity Regulatory Commission
Through its Secretary,
3rd & 4th Floor, Chanderlok Building
36, Janpath
New Delhi-110 001.
2. Assam State Electricity Board
Bijulee Bhawan, Paltanbazar
Guwahati-781001

3. Meghalaya State Electricity Board
Lanjingshai, Short Round Road
Shillong-793001
 4. Department of Power
Government of Arunachal Pradesh
Itanagar
Arunachal Pradesh-791111
 5. Power and Electricity Department
Government of Mizoram
Mizoram, Aizwal
 6. Electricity Department
Government of Manipur
Keishampat, Imphal
 7. Department of Power
Government of Nagaland
Kohima, Nagaland
 8. Tripura State Electricity
Corporation Limited
Government of Tripura
Agartala-799001
- Respondents

Counsel for Appellant(s): Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms Swapna Seshadri
Ms Sneha
Mr. Rohit Shukla
Ms Ranjitha Ramachandran

Mr. Ramnesh Jerath
Ms Somya Singh
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Counsel for Respondent(s): Mr. Manish Goswami for R-2
Mr. K. Goswami for R-2
Mr. M.K. Adhikary
Mr. B.M. Saikia

JUDGMENT

PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

The Power Grid Corporation of India the Appellant has filed this Appeal challenging the order impugned dated 02.01.2002 passed by the Central Electricity Regulatory Commission (Central Commission) rejecting the Petition filed by them praying for the approval of the incentive based on the availability of the transmission system on the basis of the Government notification dated 16.12.1997 for the years 1998-99 and 1999-2000.

2. The short facts are as follows:

(i) The Appellant Power Grid Corporation of India Ltd.(PGCIL) is a central transmission utility. The Appellant Company is entrusted with the function to undertake transmission of energy through inter-state transmission system and network throughout the country. The network is broadly classified into 5 Regions namely (1) Northern Region, (2) Southern Region, (3) Western Region, (4) Eastern Region and (5) North Eastern Region.

(ii) The tariff for the Appellant is being determined and is continued to be determined on costs plus basis where the capital cost and other reasonable cost on PGCIL's assets are serviced. In addition to that, the Appellant is

allowed a Return on Equity with incentive/disincentive applicable based on the actual availability of the transmission system on annual basis.

(iii) By notification dated 16.12.1997, the Government of India indicated the norms for determination of tariff for the transmission system of PGCIL with effect from 1.4.1997 for the period of 5 years. Clause 7 of the Notification deals with the transmission charges. Clause 8 deals with the incentive/disincentive in deviation of the normative performance.

(iv) The Appellant, on behalf of North Eastern Region filed a Petition in Petition No. 40 of 2000 claiming transmission charges in accordance with Clause 7 of Notification 16.12.1997. The Central Commission by its order dated 1.1.2002

dismissed the said Petition and held that the Notification dated 16.12.1997 would not apply to the tariff of the transmission claims relating to the Appellant and instead directed the Respondent to pay the transmission charges @ 35 paise/unit of the power transmitted in the Region. During the pendency of the said Petition the Appellant on behalf of North Eastern Region filed another Petition in Petition No. 75 of 2001 claiming incentive on the basis of the said Notification for the years 1998-99 and 1999-2000. This Petition also was dismissed on 2.1.2002 on the reason that the Central Commission passed the earlier order dated 1.1.2002 deciding that the Notification dated 16.12.1997 would not apply to North Eastern Region and therefore, the incentive also cannot be claimed as per the Notification

dated 16.12.1997. Aggrieved by this order dated 2.1.2002 the Appellant has filed this present Appeal.

3. According to the Appellant, the finding given by the Central Commission in the impugned order that the incentive cannot be claimed as per Notification dated 16.12.1997 on the ground that the Central Commission has already decided in its earlier order dated 1.1.2002 holding that the Notification dated 16.12.1997 would not apply is patently wrong in view of the fact that earlier order dated 1.1.2002 was dealing with the main transmission tariff under Clause 7 of the Notification and not with reference to the incentive as per Notification.

4. On the contrary, Learned Counsel appearing for the Respondent has raised the preliminary objection in regard to maintainability of this Appeal on two grounds:

- (1) The findings given by the Central Commission that the Notification dated 16.12.1997 would not apply to the Appellant given in the earlier order dated 1.1.2002 has been challenged in the Appeal before this Tribunal and the same was dismissed by the order dated 20.10.2010. Therefore, the said finding with regard to the applicability of the Notification has attained finality as such the said finding cannot be challenged in this Appeal. Hence the present Appeal is not maintainable.
- (2) The finding with regard to applicability of the Notification dated 16.12.1997 rendered by the Central Commission on 1.1.2002 with regard to

the Transmission Tariff would certainly apply to the incentive issue also. Hence this Appeal is not sustainable.

5. In view of the above submissions made by both the parties two questions would arise for consideration:

- (a) Whether the dismissal of Appeal by this Tribunal through the order dated 20.10.2010 as against the order dated 1.1.2002 passed by the Central Commission in relation to the transmission tariff as per Notification dated 16.12.1997, would disentitle the Appellant to file the Appeal as against the order dated 2.1.2002 passed by the Central Commission relating to the incentive issue as per the same Notification dated 16.12.1997.

(b) Whether the Appellant is entitled to incentive as per Clause 8 of the Notification dated 16.12.1997 issued by the Government of India?

6. Before dealing with these questions, it would be appropriate to refer to the relevant facts and events to understand the background of this case.

7. On 16.12.1997 the Government of India issued Notification indicating the norms and factors for fixing the tariff for the transmission system built, operated and maintained by the Appellant. On 24.4.1998 the Central Commission came into existence. The Central Commission thereupon was required to fix the transmission tariff. Clause 7 of the Government of India Notification deals with the transmission charges and in accordance with the Notification the transmission charges payable by the

beneficiaries to the Appellant for recovery of full charges was to be determined by the Central Commission. Under Clause 8 of the Notification, the Power Grind Corporation of India (Appellant) is entitled to incentive and disincentive for operation of the transmission system in deviation to normative performance.

8. The Appellant filed the Petitions No. 12/99, 13/99, 14/99 and 16/99 seeking incentive in respect of all the four Regions on the basis of the Government of India Notification dated 16.12.1997. Admittedly, the Appellant did not apply for incentive in respect of North-Eastern Region on the basis of the Notification along with other aforesaid Petitions.

9. The Appellant in the year 2000 filed Petition No. 40 of 2000 before the Central Commission seeking approval of the transmission tariff for transmission system in respect of the

North-Eastern Region. The Central Commission passed final order in the said Petition on 1.1.2002 holding that the tariff of the transmission claims cannot be fixed under Notification dated 16.12.1997 as the said Notification may not be applicable to the North-Eastern Region. It further held that because of mismatch of generation capacity with the associated transmission network, there is excess transmission capacity and therefore, the Respondents are not deriving any benefit out of such capacity and therefore they cannot be held liable to pay the transmission charges for the excess capacity. In the meantime even during the pendency of the said Petition No. 40 of 2000, the Appellant filed the Petition No. 75 of 2001 on behalf of North Eastern Region claiming the incentive for the years 1998-99 and 1999-2000 as per Clause 8 of the Government of India Notification dated 16.12.1997. The said Petition was also dismissed by the Central Commission by the order dated

2.1.2002 on the ground that the Notification dated 16.12.1997 will not apply to North Eastern Region following its earlier order dated 1.1.2002 and therefore, incentive cannot be claimed as per the said Notification. The relevant portion of the observations of the Central Commission dated 2.1.2002 is quoted below:

“ 4. In our separate order dated 1.1.2002 in petition No.40/2000 and Review Petition No. 110/2000, we have allowed the petitioner to charge a lump sum tariff @ 35 paid/unit of the electricity transmitted through the transmission system owned by it in NER and not in accordance with the notification dated 16.12.1997 based on a decision to that effect at NEREB forum. The question of payment of incentive in accordance with the norms and factors prescribed by the Central Government in notification

dated 16.12.1997 in the circumstances cannot arise. Accordingly, the petition is dismissed with no order as to costs.”

10. The above observations made by the Central Commission dated 2.1.2002 in the Petition No. 75/2001 would make it clear that the Central Commission has given a clear cut findings to the effect that the Notification dated 16.12.1997 would not apply to this claim regarding incentive by following its earlier order dated 1.1.2002.

11. Aggrieved by the order dated 1.1.2002 passed by the Central Commission relating to the transmission tariff in Petition No. 40 of 2000 the Appellant filed the Appeal before the High Court under Section 16 of the Electricity Regulatory Act, 1998 and the same was pending in the High Court. Similarly the Appellant filed another Appeal

before the High Court as against the order dated 2.1.2002 in respect of incentive and the said Appeal also was pending. Both these Appeals were pending before the High Court from the year 2002.

12. During the pendency of these Appeals, The Electricity Act, 2003 came into force with effect from 10.6.2003. Under this Act the Appellate Tribunal for Electricity came to be constituted in 2005. Therefore, the Tribunal began to discharge its functions. On being informed by the parties the High Court transferred the Appeal as against the order dated 1.1.2002 to this Tribunal. Accordingly the Appellant filed transferred Appeal as well as the Petition to condone delay, before this Tribunal.

13. The Appeal as against the order dated 1.1.2002 as well as the Application to condone delay came up for

consideration before this Tribunal on 20.10.2010. Since there was a long and unexplained delay, this Tribunal was pleased to dismiss the said Appeal as against the order dated 1.1.2002 as well as the Application to condone delay by the order dated 20.10.2010.

14. In the meantime Appeal as against the order dated 2.1.2002 also had been transferred by the High Court only in February, 2008 and consequently the Appeal had been re-numbered as 132 of 2009.

15. When this Appeal was taken up for hearing, the Learned Counsel for the Respondent raised an objection, as mentioned above that the impugned order in the present case dated 2.1.2002 was passed by the Central Commission on the strength of the earlier order dated 1.1.2002 which has attained finality and in view of the dismissal of the said

Appeal as against the said order dated 1.1.2002, this Appeal as against the order dated 2.1.2002 is not maintainable.

16. On the other hand, as indicated above the Appellant has contended that the dismissal of the Appeal on the ground of delay by this Tribunal on 20.10.2010 without going into merits of the matter would not disentitle Appellant to file a separate Appeal as against the order passed on 2.1.2002.

17. In the light of this rival submission, the first question relating to the maintainability of the Appeal has to be considered. Having heard the parties on this aspect, it is to be stated that the dismissal of the Appeal through the order passed by this Tribunal dated 20.10.2010 was only on account of delay and the issue of applicability of the Notification dated 16.12.1997 was never considered in that

Appeal in the said order. In other words, the rejection of the other Appeal was on the ground of limitation and not on merits.

18. As held by the Hon'ble Supreme Court in the case of (1) Fuljit Kaur v. State of Punjab & Others (2010) 6 SCALE 134 (2) Y. Satyanarayan Reddy vs. Mandal Revenue Officer (2009) 9 SCC 447 and (3) Sun Export Corpn. V. Collector of Customs (1997) 6 SCC 564 the dismissal of the Appeal on limitation without considering the merits of the matter cannot be a binding precedent. Therefore, it has to be held that the Appellant is entitled to argue the merits of the matter as against the order passed on 2.1.2002. Accordingly, the said question is answered.

19. Accordingly let us consider the 2nd question.

(1) According to Appellant, the Appellant is entitled to the incentive as per Clause 8 of the Notification dated 16.12.1997. According to the Respondent, the Appellant is not entitled to incentive as per the Notification dated 16.12.1997 since the said Notification is not applicable to the Appellant as held by the Central Commission by the order dated 1.1.2002. In this context it would be better to refer to the entire impugned order to consider the relevant issue in the proper perspective.

“ In this petition the petitioner seeks approval for incentive based on ‘availability’ of transmission system in the North-Eastern Region (NER) for the years 1998-1999 and 1999-2000 in accordance with Ministry of Power’s notification dated 16.12.1997.

2. *The norms and factors in accordance with which tariff is chargeable for transmission of electricity by the petitioner to the State Electricity Boards and other persons, is to be determined under GOI notification dated 16.12.1997. Para 8 of the notification provides that in addition to the transmission charges, the petitioner shall be entitled to incentive for availability of the system beyond 95%. According to the petitioner, it has operated and maintained the transmission system in NER beyond 95% availability and is, therefore, entitled to incentive in accordance with the provisions of the said notification. The petitioner has also furnished the details of incentive chargeable for the years 1998-99 and 1999-2000.*

3. *The Respondents have opposed the claim of the petitioner for incentive. It has been contended on behalf*

of the respondents that the tariff being presently paid by them is not based on the notification dated 16.12.1997 and therefore, the question of payment of incentive based on the provisions of this notification should not arise. It has been further submitted on behalf of the respondents that the transmission system constructed by the petitioner has been planned to cater to future generation of electricity and for transfer of power to other regions. For this reason also, the respondents have denied their liability to pay incentive claimed by the petitioner. On behalf of Meghalaya State Electricity Board it was also submitted that their own share of power itself is not being delivered through the transmission system belonging to the petitioner because of the transmission bottlenecks.

4. *In our separate order dated 1.1.2002 in petition No. 40/2000 and Review Petition No. 110/2000, we have allowed the petitioner to charge a lump sum tariff @ 35 paise/unit of the electricity transmitted through the transmission system owned by it in NER and not in accordance with the notification dated 16.12.1997 based on a decision to that effect at NEREB forum. The question of payment of incentive in accordance with the norms and factors prescribed by the Central Government in notification dated 16.12.1997 in the circumstances cannot arise. Accordingly, the petition is dismissed with no order as to costs.”*

20. The gist of the reasonings given by the Central Commission in its earlier order dated 1.1.2002 can be summarized as under:

- (i) *In the North Eastern Region there was a decision of North Eastern Regional Electricity Board to implement the UCPTT (Uniform Common Pool Transmission tariff) of 35 paise in place of the notification dated 16.12.1997.*
- (ii) *The above was done when the expected generation capacity for which transmission system was required for evacuation of power did not materialize and, therefore, there will be a burden on the consumers if the transmission tariff are to be paid in terms of notification dated 16.12.1997.*
- (iii) *Powergrid should approach the Central Government for grant to meet the difference between the tariff which Powergrid is entitled to as per the notification dated 16.12.1997*

and 35 paise per unit allowed by the Central Commission.

21. The perusal of the above reasonings in the order dated 1.1.2002 would reveal that the Central Commission did not allow transmission tariff for North-Eastern Region as per the Government of India Notification dated 16.12.1997 on the basis of the various reasons for holding that the said Notification would not apply to the Appellant. Instead, the Central Commission allowed the alternate transmission tariff @ 35 paise/unit of the electricity transmitted as was decided in NEREB meeting held on 13.11.1997. The Central Commission in fact in its order dated 1.1.2002 has explained various aspects as to why it cannot fix the transmission of tariff for North Eastern Region as per the Notification dated 16.12.1997.

22. It shall be stated that in this Appeal we are not called upon to go in the legality of the findings given by the Central Commission in the order dated 1.1.2002 with reference to the applicability of Notification for the determination of the transmission tariff. But it is to be taken note of the fact that the Appellant filed the petition Nos. 12,13,14 and 16 of 1999 seeking incentive for all other 4 Regions except North-Eastern Region on the basis of the Notification dated 16.12.1997. In these Petitions, the Central Commission allowed the incentive for other Regions except North Eastern Region as per the Notification. It is noticed that earlier the transmission tariff for all the 4 Regions were fixed as per the said Notification and on that basis Central Commission allowed incentive for those Regions.

23. Admittedly, at that time Appellant did not apply for incentive for North Eastern Region on the basis of the

Notification dated 16.12.1997. As stated earlier admittedly the transmission tariff for North-Eastern Region was never fixed on the basis of the said Notification.

24. It is pointed out by the Learned Counsel for the Respondent that the Appellant failed to provide power available to all the beneficiaries states on its own as stipulated in the Notification dated 16.12.1997. The availability of power was dependent not only on the Appellant line but also on the state owned lines because of the insufficient connectivity through CTU lines in the hilly terrain of the Region and the total availability of power system was always less than 95%.

25. As per clause 8 of the notification dated 16.12.1997, the rate of incentive was not to exceed 1.0% Return on Equity, for each percentage point on increase in

availability. It follows that in the present case, in order to find out the incentive payable, the equity for the assets has to be first conclusively approved by the Central Commission in as much as the incentive payable is directly linked to the equity approved.

26. Admittedly, the Central Commission did not allow the transmission tariff as claimed by the Appellant in the Petition No. 40 of 2000 in the order dated 1.1.2002 and instead the Central Commission fixed the lump sum 35 paise/unit as transmission tariff.

27. Thus it is clear the equity of the assets in the North-Eastern Region as claimed by the Appellant was not approved by the Central Commission.

28. The Central Commission in its order dated 1.1.2002 allowed the continuation of the Uniform Common Pool Transmission Tariff (UCPTT), as decided by the NEREB forum till 31.3.2004 instead of approving capital cost for fixation of tariff on the basis of the notification. Thus it is evident that Central Commission did not finalise any capital cost in the North-Eastern Region system for the period from February 2000 to 31.3.2004. Unlike other Regions of the country, the transmission tariff of the North-Eastern Region was governed as per Uniform Common Pool Transmission Tariff Mechanism. The said Mechanism was in operation from April, 1992 till March, 2004. The Appellant is claiming incentive for the period 1.4.1998 to 31.3.2000 i.e. the period when the Uniform Common Pool Transmission Tariff Mechanism was in operation in the North Eastern Region.

29. From the above it is apparent that the Uniform Common Pool Transmission Tariff Mechanism which was a unique system was adopted for North Eastern Region because of its peculiar situation. Under those circumstances the claim of incentive in terms of Notification dated 16.12.1997 is not sustainable as the said notification would not apply to the present case.

30. SUMMARY OF OUR FINDINGS.

(a) The Appellant is entitled to argue this Appeal on the merits of the matter as against the order passed on 2.1.2002 even though the order passed on 1.1.2002 deciding the similar issue has been appealed before this Tribunal and the same was dismissed. The Dismissal of the said Appeal was not on merits but it was only on the ground of limitation and therefore, the Appellant cannot be said to be disentitled to argue this Appeal as against

the order passed on 2.1.2002 on the basis of the merits of the matter.

(b) The impugned order dated 2.1.2002 was passed by the Central Commission rejecting the claim for incentives on the basis of the order passed on 1.1.2002 that the Notification dated 16.12.1997 could not apply to the Appellant. There is nothing wrong on the part of the Central Commission to rely upon the said order dated 1.1.2002. Even though the Central Commission has dealt with the Clause 7 of the said Notification, the reasonings given by the Central Commission in that order would apply to the entire Notification dated 16.12.1997. As a matter of fact, the Appellant filed Petitions before the Central Commission seeking incentives for all the other four Regions except the North Eastern Region. In these Petitions, the Central

Commission allowed the incentives for those four Regions mainly on the reason that the transmission tariff in respect of those all four Regions were fixed as per the Notification. But as far as the North Eastern Region is concerned, the transmission tariff was not fixed on the ground that Notification would not apply to the North Eastern Region. Consequently, it has to be held that the same reasonings would apply to the present case also. Therefore, the findings given by the Central Commission in respect of incentive is perfectly legal.

31. Hence we do not find any merit in the Appeal. The Appeal is dismissed. No order as to costs.

(Justice P.S.Datta) (Rakesh Nath) (Justice M.Karpaga Vinayagam)
Judicial Member Technical Member Chairperson

Dated: 31st March, 2011

REPORTABLE/NON-REPORTABLE