

**Before the Appellate Tribunal for Electricity, New Delhi**

**Dated this 9<sup>th</sup> day of December, 2005**

**Appeal No. 119 of 2005**

Present: Hon'ble Mr. Justice E. Padmanabhan, Judicial Member  
Hon'ble Mr. H.L. Bajaj, Technical Member

Power Grid Corporation of India Limited - Appellant

V/s.

1. Central Electricity Regulatory Commission
2. Madhya Pradesh State Electricity Board
3. Maharashtra State Electricity Board
4. Gujarat Electricity Board
5. Government of Goa
6. Administration of Daman & Diu
7. Administration of Dadar & Nagar Haveli
8. Chattisgarh State Electricity Board - Respondents

Counsel for the Appellant : Mr. M.G.Ramachandran, Mr. Ramnesh Jerath,  
Ms. Taruna S. Baghel, Ms. Saumya Sharma

Counsel for the Respondent No.1: No appearance  
Counsel for Respondents No.2 : Shri Ajit Bhasme for MSEDCL  
Counsel for Respondent No. 3&4 : Shri Sakesh Kumar, MSEB & GEB  
Counsel for Respondent no. 8 Ms. Yogmaya Agnihotri, CSEB

**ORDER**

1. The appellant Power Grid Corporation of India has preferred the present appeal seeking to set aside (i) order dated 27.4.2004 passed in Petition No. 93 of 2003; (ii) order dated 26.7.2004 passed in Review Petition No. 58 of 2004 and (iii) order dated 2.8.2005 passed in Petition No. 18 of 2005 by the Central Electricity Regulatory Commission, the first Respondent herein in so far as it has directed the appellant to execute the Bina-Nagda-Dehgam Transmission project at a capital cost with a cap of Rs. 617/- crores and allow the

appellant to execute the project as per competitive bid invited by it and as detailed in its Petition No. 18 of 2005 before said Central Electricity Regulatory Commission.

2. Heard Mr. M.G. Ramachandran appearing alongwith Ms. Saumya Sharma, Ms. Taruna and Mr. Sudhir Mishra for appellant, Mr. Ajit Bhasme for Respondent No. 2, Mr. Sakesh Kumar for Respondent No. 3, Ms. Yogmaya Agnihotri for Respondent No. 8. The Learned Counsel for Respondents 2 to 4 apart from addressing arguments, submitted written submissions. The remaining Respondents though served have not chosen to appear either through Counsel or through their representative.

3. In the factual matrix leading to the present appeal there is no controversy. An application for grant of Transmission License under Section 15(1) of the Electricity Act, 2003 was submitted by a Consortium known as TNB-KPTL consortium in favour of Bina Dehgam Transmission Company for implementation of Bina Nagda Dehgam Transmission Line for evacuation of Power from NTPC SIPAT Power Station, as a result of a competitive bidding. It was the only one bid. The said applicant indicated the estimated project cost at Rs. 798 crores. The appellant, who is also the notified Central Transmission Utility (CTU), which identified the project, estimated the project cost at Rs. 485/- crores. After hearing all interested parties, taking note of the objections and recommendations of CTU and taking into consideration of various aspects, which are relevant in terms of Section 14 and 15 of the Act, the first Respondent rejected the application by its order dated 27.4.2004. The said rejection has not been challenged by the said sole bidder/applicant.

4. While rejecting the application, the first Respondent issued a direction, which is being challenged in the present appeal. The direction reads thus:

*“ 27. Before parting with the case, we consider ourselves duty to bound to record that Power Grid Corporation Ltd., who is to construct the transmission lines, shall make every endeavour to execute the transmission lines with in the cost which it has termed the bench mark price that is Rs. 557 crore and in any case the total cost should not exceed Rs. 617 crore”.*

5. The first Respondent, sought for review of the said order dated 27.4.04 praying for deletion of para 27 of the order. The appellant contended that the basis for determination of tariff in the terms and conditions notified by the first Respondent Commission has to be on the basis of actual expenditure incurred on completion of the project and the direction to implement the project at a cost of Rs. 617/- crore as contained in the said para 27 are contrary to statutory provision, as well as the Regulations and prayed for deletion of the entire para-27. The review sought for did not find favour with first Respondent Commission, who by its order dated 26.7.2004 rejected the review and declined to delete para-27.

6. The appellant who had invited bids and evaluated the cost, once again moved an application praying the first Respondent Commission to allow the appellant to execute the project on the basis of established process of approved cost estimate in vogue. In the application it has been specifically pleaded that subsequent to dismissal of its review on 26.7.04, lowest bid for the project quoted for different packages in the domestic competitive bids invited works out to Rs. 686.32 crores based on the increase of wholesale price index (WPI) and Consumer Price Index (CPI) for the past 12 months as per guidelines of Ministry of Finance dated 6.8.1997 for cost of the project as is worked, which is in variance as compared to the figures earlier furnished to the Commission, passage of time and steep increase in price of steel, zinc, Aluminium etc. contributed for the escalation of cost. In view of the earlier orders restricting the cost of project the appellant could not place orders and proceed with the execution of the project.

7. The appellant also pointed out that as per Regulations, the tariff determination is based on capital cost, i.e. the actual cost incurred for completion of the project alone be taken and form the basis for determination of tariff but subject to prudence check on completed cost. Therefore, the appellant moved the said petition to allow it to execute the

project on the basis of established process of approved cost estimate in vogue. This petition was generally opposed by some of the Respondents.

8. The first respondent heard the appellants' counsel and recorded its findings in paras 10 to 14 of its order dated 2.8.2005 and recorded its conclusion thus:

*“ 15. In the light of the above discussion the petitioner would be at liberty to follow the procedure for execution of the transmission lines as narrated in the Petition and would be entitled to claim tariff at a cost not exceeding Rs. 617 crore as earlier directed in Para 27 of the order dated 27.4.2004. The Commission will however, allow changes in IDC in the event of petitioner contracting loans on floating rates of interest. Similarly, changes on account of change of law will also be passed on in the tariff. The petition stands disposed of in these terms”.*

Being aggrieved, the undaunted appellant has come forward with the present appeal.

The substantial and only grievance being against the direction that the appellant would be entitled to claim tariff at a cost not exceeding Rs. 617/- crores and not based on the cost actually incurred in the execution of project on the basis of established process of approved cost estimate in vague after prudential check at the appropriate time.

9. Mr. M.G. Ramachandran, the learned counsel for appellant in his usual indomitable style raised and advanced a number contentions. The points that arise for consideration in this appeal are:

A. Whether the condition that the appellant would be entitled to claim tariff at a cost not exceeding Rs. 617 crores stipulated by the Central Electricity Regulatory Commission while allowing the appellant to execute the project by following the procedure narrated in the petition is just, valid, legally warranted and in excess of jurisdiction?

B. To what relief, if any, the appellant is entitled to ?

10. We have heard the learned counsel for appellant and the counsel for contesting Respondents. We were taken through the three orders passed by first Respondent as well as material papers placed before us, besides the statutory provisions of the Electricity Act 2003 and the relevant Regulations framed by the first respondent. We have also considered

the written submissions submitted by Respondents. Before discussing the legal contentions advanced, it would be appropriate to advert to the relevant Statutory provisions of the Electricity Act 2003 and the Regulations framed thereunder.

11. Section 2(10) defines the expression “ Central Transmission Utility; “ means any Government company which the Central Government may notify under sub-section (1) of Section 38. Sec 2(36) defines the expression ”inter-State transmission system” and it is an all inclusive definition. Sec 12 prescribes that only authorized persons are to transmit, supply or trade in electricity. Sec 14 of the Act provides for grant of licence by appropriate Commission on an application made to it under Sec 15 to transmit electricity as a transmission licensee, among other licences. In terms of the second proviso to Sec 14, the Central Transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee. Sec 15 of the Act prescribes the procedure for grant of licence. Sub Sec (3) of Sec 15 provides that a person intending to act as a transmission licensee shall, immediately on making the application, forward a copy of such application to the Central Transmission Utility or State Utility as the case may be, which utility within 30 days after the receipt of the copy of the application referred to in sub section (3) send its recommendations, if any, to the appropriate Commission.

12. The proviso to Sub Sec (4) of Sec 15, which is material reads thus:

“Provided that such recommendations shall not be binding on the Commission” Sub Sec (5) of Sec 15 prescribes for Publication of application and consideration of all suggestions or objections and the recommendations of the Central/ State Transmission Utility. Sub Sec (6) of Sec 15 provides that the appropriate commission, as far as practicable, within ninety days after receipt of such application either issue a licensee or reject the application for reasons to be recorded, if such application does not conform to the provisions of the Act or

the Rules and Regulations or provisions of any other law. Sec 16 prescribes the conditions of licence.

13. Part V of the Act provides for “Transmission of Electricity, Inter-state, regional and inter regional transmission establishment of National and Regional Load Despatch Centre by Central Government and their functions. The next relevant provision is Sec 38, which provides that the Central Government may notify any Government Company as the “Central Transmission Utility”, which Central Transmission Utility shall not engage in the business of generation or trading of electricity. Sub sec (2) of Sec 38 prescribes the functions of the Central Transmission Utility. Sec 40 of the Act prescribes the duties of Transmission Licensees, the details of which we are not concerned for the present. Part VII of the Act provides for fixation of Tariff by appropriate commission. Sec 62 provides for determination of Tariff. Sub Sec (2) of Sec 62 provides that the appropriate Commission may require a licensee or generating Company to furnish separate details, as may be specified in respect of generation/Transmission /Distribution for determination of Tariff. The Central Commission has already framed Regulations in exercise of Power conferred by sec 178 of the Act with respect to inter-state transmission and fixation of tariff etc. etc.

14. There is no Quarrel with respect to Appellant, a Central Government Undertaking, which undertakes interstate transmission of electricity. The activities of the appellant, namely inter state transmission and the tariff to be charged for such transmission are regulated by the first Respondent in terms of the Electricity Act 2003 and the Regulations framed thereunder. In addition, the appellant is the notified “Central Transmission Utility”(CTU for brevity) under Sec 38(2) of the Act and discharges the Statutory functions of the CTU.

15. The Statutory role played by the appellant as CTU, apart from it being a Central Government Undertaking and Interstate Transmission Utility created the present situation. The dual role of appellant viz as a commercial undertaking and its statutory role as CTU, requires to be treated and kept in two separate water tight Compartments and shall not be mixed or confused. For deficiency or short fall or its representations/recommendations as CTU shall not be allowed to cause any prejudice to the other role it has to perform as a deemed transmission licensee. That apart the recommendations of the appellant in its role as CTU, with respect to grant of license under Sec 15 is not binding on the Commission, the first Respondent herein and it requires to be considered along with all suggestions or objections under Sub Clause (b) of Sub Sec(5) of Sec 15. Incidentally we have to examine the role of CTU under Sec 15, and scope of its "recommendation".

16. We have to advert and consider the reasons which prevailed with the first Respondent in Capping the Cost at Rs. 617 crores for fixation of tariff as reflected in its order dated 14.06.2005. They are :

- a) No second review application is maintainable and the Petition is liable to be dismissed summarily.
- b) The Appellant, a public authority has to act fairly and consistently and cannot be permitted to act in a contradictory and misleading manner since otherwise it would amount to an abuse of discretion vested in CTU.
- c) Advice given by CTU was intended to be acted upon and therefore binding on it, since otherwise it cause injustice to third parties and public, namely the consortium and the consumer.
- d) Amounts to blocking private sector investment which was being made available at a lower cost.

- e) The enforcement of the representation of estimated completion cost and therefore claim tariff on construction at a cost not exceeding Rs. 617 crores.
- f) The Commission cannot allow higher costs for building the same transmission system to the detriment of consumers.
- g) The appellant has sought to apply pressure tactics.
- h) Earlier application of consortium was rejected primarily at the behest of the appellant, who projected lower completion cost and tariff than indicated by consortium.
- i) It is a misconception to make distinction between the appellant and the role of CTU and it is the statutory function of the appellant.
- j) The appellant is estopped in avoiding to execute the project at the cost indicated by the first Respondent.

Identical reasons also prevailed with the first Respondent as reflected in its two earlier orders as well.

17. As regards the first reason, in law no second review of the decision or order is maintainable. In this case, the present petition for review of the earlier order rejecting the review petition has been moved. Such a review petition is maintainable as provided in Sec 94 (f) of the Act. That apart, the first Respondent had not chosen to reject the third petition but on the other hand entertained the petition, as if it is an independent petition and passed orders on merits while permitting the appellant to execute the project but with a cap. Hence this reason cannot be sustained.

18. The other reasons (b) to (h) could be considered together. When the consortium applied, after the bid, the appellant had neither taken part in the bid nor applied under Sec 14 and 15 of the Act. This has been lost sight by the first Respondent. The CTU which has a role to play under Sub Sec (3) and (4) of Sec 15 had sent its recommendations, to first



Respondent, which recommendation will not bind the Commission. In terms of Sec 15(5) (b), the Commission has to consider all suggestions or objections and recommendations of CTU before the grant of licence. Such a grant of licence, if at all, it is the decision of the first Respondent and none else. If the first Respondent had decided otherwise than as a Quasi-Judicial functionary in the grant of licence by independently assessing the merits of the applicant, it shall not blame CTU for its recommendations as to the cost.

19. In this respect, what is the scope of recommendations of CTU requires to be considered. The dictionary meaning of the word “recommend” as defined in Websters’ Dictionary means “ to advise, to counsel; as recommend that some thing be done, to speak favourably as suited for some use, function, position etc; to make acceptable or pleasing to suggest, to counsel a course of action and leave its acceptance to that person. To “recommend” is to present one’s advice & choice or as having one’s approval and involves the idea that another has the final decision. The word ‘ recommend ‘ has to be seen in the context in which it is employed by the legislature. That apart , the legislature by introducing proviso to sub sec(4) of Sec 15 of the Act, has abundantly made it clear that the recommendation of CTU shall not be binding on the commission. This provision has been lost sight by the first Respondent . If first Respondent has failed to decide the application for grant on merits, the first Respondent, as a Quasi-Judicial functionary , it has to take the responsibility on itself for its failure to consider the application and take a decision in terms of Sec 15 and definitely not the appellant herein. The CTU by its recommendations, cannot abridge or curtail the powers of the first Respondent.

20. The role of the CTU being advisory and not binding on the first Respondent, the appellant should not be entrapped by its advise/recommendation. The Latin maxim “Nemo ex consilio obligator” means “No one is bound by the advice he gives”, squarely

applies to the case on hand. It is well settled in law, that nothing unjust to be presumed in law. This basic principle has been lost sight by the first Respondent. The approach of the first Respondent in entrapping the appellant to the advice it had submitted by its recommendations, submitted in its distinct role is not well founded.

21. The appellant, a Government Company having been notified as the CTU, whose functions are as enumerated in Sec 38(2) of the Act. The restriction that CTU shall not engage in the business of generation of electricity or trading in electricity is a statutory bar. Second proviso to Sec 38 enables the Central Government to transfer interest etc. of the CTU to a Company or Companies to function as a transmission licensee through a transfer scheme, in the manner specified in Part XIII and such a transferee shall be deemed to be transmission licensee/s under the Act. As of today the appellant, being the notified CTU is a deemed Transmission licensee. Concededly it could undertake interstate transmission. We posed a question to contesting Respondents 2 to 4 as to whether they are in a position to execute the project at a cost of Rs. 617 crores , which cost will be paid in advance by appellant. The response was in the negative.

22. The point highlighted by the first Respondent viz the appellant also happened to be the CTU and apart from being an undertaking entrusted with interstate Transmission, which at times causes certain difficulties cannot be brushed aside and it is for the Central Government to examine and provide certain measures. But at the same it shall not be forgotten that the appellants' role on the two occasions are distinct, we shall not loose sight of the fact that the appellant did not compete with the consortium. Merely because as a "recommending" agency under Sec 15(4) it had evaluated, it cannot be fastened to the same cost it had set out in its recommendation. There is no justification for such an approach.

23. The first Respondent being an expert body could have very well over ruled the advice (recommendation ) of CTU and nothing prevented the CERC in deciding the application submitted by the consortium on merits. It is not as if the CERC, the first Respondent issued any notice in writing requiring CTU to execute at the cost capped by it before directing execution as set out in Para 27 of its order dated 27.04.2004. What was raised or discussed during hearing will not be a reason to fasten the appellant to the same cost, even after passage of time, when price of steel etc. have considerably increased since then. In such discussions or hearing nothing unjust shall be presumed against appellant. In the role, the appellant played at the first instance, as already pointed out is advisory and it is for the first Respondent to act upon it or over rule it . It is far fetched and unreasonable to fasten the appellant to the same cost it estimated while forwarding its recommendations. It is unfair to entrap the appellant to its earlier recommendation. Being a Central Government Company, whose projects, estimates etc being controlled by the said Government, it deserves certain level of credence. That apart neither malice nor a motive could be suggested against CTU for its recommendation, much less against the appellant herein.

24. The view of the first Respondent that the CTU's earlier advice amounts to blocking private sector, that the appellant has sought to apply pressure tactics, that the same is adverse to consumers, that the appellants' conduct is unjust/unfair and that the appellant is bound by its advice cannot be sustained. Such a view of the first Respondent, a regulator exercising Quasi-judicial function, we are unable to appreciate or uphold. The first Respondent had mixed up matters and its approach deserves to be interfered as not being fair and not being warranted. For the earlier rejection of application, under Sec 14 and 15, as already pointed out, if the present reasons advanced by the first Respondent are to be

sustained, then it has to be pointed that it has failed to exercise the power vested in it in the manner in which it is expected to exercise.

25. The conclusion that the appellant is estopped cannot be sustained as on facts the plea of estoppel has no application at all. On facts the recommendation/report submitted as to feasibility or cost effectiveness or consumer friendly, by CTU will not constitute estoppel and the appellant being an advisor/Counsel is not precluded from going back from its advice and coming forward with the application for review. It will not constitute estoppel within the four corners of Sec 115 of Evidence Act, nor it will constitute estoppel by acquiescence nor estoppel by deed nor representation nor estoppel by latches nor estoppel by record nor estoppel by warranty nor promissory. Further on the date when the first respondent rejected third party application, it is neither warranted nor is it the occasion nor the first respondent has the authority to fix the cost and direct execution of the project by the CTU. The appropriate time to examine the cost, incurred and fix the actual cost if the appellant executes the project, is when it approaches the first Respondent for determination of tariff after thorough examination or Prudent check and not at any time earlier.

26. In the light of the above discussions, in exercise of appellate powers, we are persuaded to interfere with all the three orders passed by first Respondent CERC to the extent it has capped Rs. 617 crores as the cost of the project for fixing tariff and we make it clear that it is well open to the first respondent to thoroughly study or analyse the cost that may be claimed as incurred after execution of the project and/or a prudential check and on that basis determine the tariff. For the foregoing reasons, on the first point we hold that there is neither a warrant nor justification nor jurisdiction to fix the cost of project at Rs. 617 crores for purpose of tariff fixation by the first Respondent at this stage. We answer the point in favour of the appellant.

27. We make it clear that it is well open to first Respondent to subject the appellant to prudential check or a thorough check and acid test on the cost of project as may be claimed by the appellant at the appropriate time and determine the tariff in terms of The Electricity Act 2003 read with the relevant regulations.

28. On the second point, we allow the appeal and order deletion of condition as to capping the cost of the Project at Rs. 617 crores as imposed in all the three orders appealed against and further hold that the appellant shall execute the project at the cost as is permissible in terms of the established and approved procedure, but it shall be subject to prudential check by first Respondent at the time when appellant moves for tariff fixation. The parties shall bear their respective costs in this appeal .

Dated this Friday, the 9<sup>th</sup> day of December 2005.

**(Mr. H L Bajaj)**  
**Technical Member**

**(Mr. Justice E. Padmanabhan)**  
**Judicial Member**