

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

Appeal No. 121 of 2005

Powergrid Corporation of India

Appellant

Versus

**Central Electricity Regulatory Commission
& Others**

Respondents

Under Section 111 (2) of Electricity Act, 2003

**Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A. A. Khan, Technical Member**

Dated 16th May, 2006

Counsel for the appellant (s): Mr. M.G. Ramachandran, Ms. Taruna S. Baghel, Ms. Saumaya Sharma, Mr. Sudhir Mishra, Mr. Samesh Jerath,

Counsel for the respondent(s): Mr. Bhaskar Mitra with Mr. P.C. Saha, Mr. Pradeep Mishra for PSEB, Mr. Sakesh Kumr with Mr. Rohit Singh, for MPSEB, Ms. Yogmaya Agnihotri, for CSEB, Mr. Keshav Mohan for HVPNL, Mr. S. Pushkarna with Mr. V.K. Garg, Manager for Delhi Transco., Ms. Madhu Dogra General Attorney, Delhi Transco Mr. R.K. Arora, Xen. HPGCL, Mr. T.P.S. Bawa, OSD & Mr. V.K. Gupta, consultant PSEB, Mr. Ramji Srinivasn, Mr. Priyabrat Tripathy for KPTCL

Judgment

Per Hon'ble Mr. A.A. Khan, Technical Member

1. This appeal is directed against the order of the Central Electricity Regulatory Commission's (hereinafter called CERC) dated 11th May 2005, in petition No. 26/2005, whereby the prayer of the appellant for restoration of depleted equity for fixation of tariff for the transmission of electricity was rejected.

2. The Appellant is a Company registered under the Companies Act 1956 and is wholly owned by Govt. of India. The Appellant is established inter-alia to own acquire, establish, operate and maintain transmission system to evacuate power from the generating stations owned and operated by Central Government-owned Companies through its transmission network, operating in parallel with the transmission network of State Power Utilities or of other agencies connected to the Grid, and its transmission to various State Power Utilities as per the directives of Govt. of India or of Regional Electricity Boards. The Appellant is also discharging the statutory functions under various provisions of the Electricity Act 2003 (hereinafter called E.A. 2003) in particular Section 28 and 38 of the Act. Govt. of India, in exercise of Powers under sections 38(1) of the Act, has also declared the Appellant as the Central Transmission Utility.

3. The Appellant, on its' establishment, took-over the transmission network from the Central Generating Companies like NTPC, NHPC, NLC and NEEPCO w.e.f. 01.04.1992 on book value. Prior to setting-up of the CERC under the Electricity Regulatory Commission Act 1998 (hereinafter called ERC Act 1998), the tariff for the various transmission systems owned by the Appellant was being fixed by the Ministry of Power (hereinafter called MOP) Govt. of India on advice from the Central Electricity Authority (hereinafter called CEA). The power to determine tariff is vested with the CERC w.e.f. 31.12.1998 in terms of the E.A. 2003.

4. While the norms for tariff fixation of transmission system was not finalized, Ministry of Power, Govt. of India, initially by notification fixed tariff for a block period of five years commencing from 01.04.1992 to 31.03.1997, on a case-to-case basis and was adopting basically the following principles:

- (a) Depreciation at the rates prescribed by the Central Government from time to time.
- (b) Return on equity (ROE) @ 12% (10% up to 1992-93) taking equity capital equal to 50% of capital cost on normative basis.
- (c) Interest on Loan (IOL) arrived at by considering weighted average rate of interest on actual loans but considering loan amount equal to 50% of capital cost on normative basis. (Loan and equity amount were progressively reduced by 50% of the depreciation amount).
- (d) Operation & Maintenance (O&M) charges @1%/1.4% of capital cost for plain/hilly regions.
- (e) Interest on Working Capital (WC) on the predefined components of working capital.
- (f) Reimbursement of income tax, FERV and other cess/taxes/duties; etc.

5. Appellant has submitted that by notification dated 16.12.1997, Government of India finalized the norms, terms and conditions for fixation of tariff for the Appellant for the five year block period from 1.4.1997 to 31.3.2002. Thereafter, Ministry of Power, Government of India issued tariff notification in respect of different transmission lines / network based on the above principal notification dated 16.12.1997. Appellant has further stated that the aforesaid notification continued to adopt the same method of determining the net fixed assets as on 1.4.1997 after deducting the cumulative depreciations allocating the capital costs for return on equity based thereon. It is also submitted by the Appellant that the proposal for tariff used to be examined by the Central Electricity Authority (CEA) and

notified by the government of India, based on CEA's recommendations. The Government of India used to issue tariff notifications project-wise for each of the transmission systems taken over by the appellant. Various notifications, between January 1994 and May 14, 1997, were issued for the block period of five years from 01.04.1992 to 31.03.1997, and for the next block of five years period between 01.04.1997 to 31.03.2002 on May 14, 1999. Besides, CERC issued the tariff orders for certain projects for 5 years block period from 01.04.1997 to 31.03.2002 on 15.05.1999.

FACTS AND OBSERVATIONS

6. As per tariff notification dated January 18, 1994, issued by the Government of India, for the block period of five years from April 1, 1992 to March 31, 1997, it appears that the following methodology for determination of tariff was followed.

- (a) Capital cost as on 31.03.1992 was notionally divided into Debt and Equity in the ratio of 50:50.
- (b) Cumulative depreciation accrued till 31.03.1992 was deducted from capital cost as at (a) above to arrive at Net Asset Value which was used for tariff purposes.
- (c) Net Asset Value obtained at (b) above, was divided notionally in Debt and Equity in the ratio of 50:50. In other words both Debt and Equity as in (a) above, were reduced equally by one-half of the cumulative depreciation mentioned in (b) above.
- (d) While for tariff fixation Net Asset Value at (b) was considered, Return-on-Equity (ROE) was computed on the reduced equity given at (c) above.
- (e) Consequent upon progressive reduction of Net Asset Value of the transmission projects over 5 years block period from 01.04.1992 to 31.01.1997, the original equities invested on projects also gradually depleted adversely impacting upon the ROE.

- (f) Debt portion was expected to be serviced by the entire amount of depreciation accrued rather than a part of it (as in this case) till such time the debt is fully repaid.

7. Following the principal notification dated 16.12.1997 the same method of tariff determination as indicated above was also continued for the next five year block period from 01.04.1997 to 31.03.2002 by Ministry of Power, Govt. of India. The Net Asset Value as on 01.04.1992 of Transmission Projects was further reduced as on 01.04.1997 after allowing depreciation for the period 1992-97.

8. Thus, it is seen that the amounts of Original Equities of the projects at the time of their transfer to Appellant or on date of commercial operation got substantially depleted as on 01.04.1997.

9. The Appellant has submitted in the memo of appeal that reducing equity by the amount of depreciation is against the tariff principles, since the depreciation amounts accrued or collected are to be utilized for debt servicing as there is no specific component in tariff fixation to take care of loan repayment.

10. It is also the case of the appellant that the principles and methodology for tariff computation followed by Ministry of Power/Govt. of India and by CERC were to be uniformly applied on all Undertakings, Central Power Sector Undertakings (hereinafter called as CPSUs) as also on Appellant, but the method of calculations of transmission tariff followed by Ministry of Power/Govt. of India for five years tariff block of 1992-97 was uniquely different, in application, from the others. The Appellant's first written representation to Ministry of Power, Government of India was made only on 06.10.1998. It is also noticed that the tariff notification dated 16.11.1998 issued by Ministry of Power/Govt. of India for the period from 1997-2002, recognized the error committed earlier in the method of calculation followed for the tariff block period of 1992-97 but provided only

partial modification, inter-alia, in keeping the value of equity existing as on 01.04.1997 constant throughout the technical life of project. The equity as on 01.04.1997, however, was still depreciated as done earlier. In tariff fixation dated 16.11.1998 for 1997-2002 period issued by Ministry of Power, Government of India, the corrected approach was specifically made clear by a note stating thus:-

NOTE

“The 50% of the book value as on 31.3.1997 of the transmission system under consideration has been deemed as equity that would remain constant up to the technical life of the project. The remaining 50% has been considered as notional loan and progressively reduced by corresponding annual depreciation. The equity amount for the purpose of this notification is fixed at Rs. 780.42 crores”.

11. The Appellant has pointed out that the erroneous methodology followed in the tariff notification issued by the Ministry of Power/Govt. of India has wrongly depleted the aggregate equity of their transmission projects from Rs. 2457.23 crores to Rs. 1901.66 crores (the difference being Rs. 646 crores) for fixation of tariff during the block period of 1992-97 and the succeeding tariff block period. This deficit in equity would remain in perpetuity which will result into that being not considered for future tariff determination and the appellant will continue to suffer loss in return on equity (ROE) and tariff on the above amount on perpetual basis.

12. The Appellant claims to have brought the erroneous methodology of tariff computation, applied only to Appellant’s transmission projects, to the notice of Ministry of Power on various occasions. However, a written representation to Ministry of Power/Govt. of India, to review the transmission tariff for the block period of 1992-97 was made by the appellant only on 6.10.1998. The appellant did not get any response. Further from the submissions it appears that the appellant had taken up the issue with Ministry of Power/Govt. of India vide their letter dated

22.12.2004 and 06.01.2005 for correcting the anomaly by issuing appropriate Government orders. It has taken seven long years for Ministry of power, Government of India since Appellant's representation dated 06.10.1998, to respond vide their letter dated 16.02.2005 accepting the error committed and advising the appellant to approach the CERC for restoration of depleted equity for the purpose of tariff determination.

13. The extract of the Ministry of Power/Govt. of India's letter reads as under:-

"Please refer to your D.O. letter No. DF/PG/NER/2005 dated 6.1.2005 on the above subject. This matter has been examined in this Ministry. It is observed that an error has crept in while determining tariff for the block year 1992-97 leading to depletion of equity. As fixation of tariff is now within the purview of Central Electricity Regulatory Commission (CERC), it is suggested that Power Grid Corporation of India Ltd. may approach the CERC for restoration of depleted equity for the purpose of determination of PGCIL's tariff".

14. The above suggestion of the Ministry of Power, Government of India, to approach CERC for restoration of depleted equity was in principle based on the fact that by this time Electricity Act 2003 had come into force and all other laws and regulations such as Electricity (Supply) Act 1948 and Electricity Regulations Act 1998 and Indian Electricity Rules 1910 stood repealed.

15. As per Ministry of Power's suggestion, the appellant approached the CERC by means of Petition No. 26 of 2005, for restoration of depleted equity amounting to Rs. 646 crores, for the purpose of tariff fixation with retrospective effect and approval of return on equity and its recovery from the beneficiary State Electricity Boards (SEBs).

REASONS ADVANCED IN CERC'S ORDER

16. The CERC rejected the petition at admission stage by its Order, dated May 11, 2005. While doing so, it ruled as under:

- (a) it appears that the reason for having depleted capital cost before dividing debt and equity in the ratio of 50:50 was on the consideration that the transmission assets were transferred to the appellant on book value.
- (b) it was a conscious decision of Government of India to deplete equity for the tariff fixed for block period 1992-97.
- (c) the delay by Appellant in seeking for the review of the notification to restore depleted equity has not been satisfactorily explained.
- (d) even if the delay factor as mentioned in (c) above is ignored the question of alleged discrimination vis-à-vis NTPC and other companies does not lend much strength to the case, and the Appellant can not be permitted to raise the plea of discrimination against its owner and the appellant being a Government Company is bound by the decision of its shareholders i.e. the Central Government.
- (e) the Government of India did not rectify the discrepancy when it was pointed to them and ought to have done so at least before the CERC was constituted.
- (f) the restoration of depleted equity retrospectively will be adverse to the interest of Respondents 2 to 30 and it will unsettle the position prevalent for the past many years.
- (g) in order to undo the depletion of equity due to the principle adopted by Government of India for tariff fixation, the terms and conditions for determination of tariff needs to be modified retrospectively and the same is not permissible to be done as ruled by the Hon'ble Supreme Court order in **Chairman, Railway Board Versus C.R. Ranganathamaiha** (1997) 6 SSC

623 where the retrospective amendment of Service Rules was held illegal as it would take away the vested right of existing employees.

- (h) even for consideration to safeguard the interest of Respondent no. 2 to 30, not to effect change in tariff retrospectively, but with prospective effect, as also offered by the Appellant, the modifications in the terms and conditions for tariff determinations are required for restoration of depleted equity, with retrospective effect.
- (i) the CERC has jurisdiction to adjudicate upon the tariff related matters even in cases where the cause of action arose prior to its establishment since change of forum is a part of the procedural law and operates retrospectively.

17. Aggrieved by the impugned order of the Commission, the appellant has filed the instant appeal.

18. Some of the Respondents such as Bihar State Electricity Board, Karnataka State Electricity Board, Madhya Pradesh Electricity Board, who are the beneficiaries of Appellant's Transmission System and Network, have, in their replies to memo of Appeal, articulated the similar reasons for seeking dismissal of the instant appeal, as advanced by the CERC while rejecting the Appellant's Petition.

ISSUES INVOLVED IN THE APPEAL

19. In the appeal, the following points arise for consideration.

- (a) Whether error was committed by the Regulator in fixing equity in the tariff determination?
- (b) Whether the appellant is entitled to restoration of equity? If so, to which period?
- (c) Whether the appellant is entitled to re-determination of tariff? If so for what period ?

e) Relief ?

EXAMINATION ON MERITS

20. We now proceed to consider all the aforesaid points together as it is not necessary to take them up separately. At the outset, it needs to be pointed out that entire approach of CERC appears to be as if the proceedings before it were of adversarial nature like in a civil court rather than that of a regulator who has to take into consideration the various principles incorporated in the regulations framed by it as well as the statutory provisions of the E.A. 2003 and various prescribed parameters.

21. It is admitted by the parties that the uniform principle and methodology for tariff computation was to be followed by the Ministry of Power, Government of India, when it was fixing tariff as a regulator for electricity utilities, including the appellant, NTPC, NHPC etc., Similarly, the principle and methodology for determination of tariff are to be followed by the CERC. The principles and methodologies and yardsticks cannot be differently applied by different authorities while determining tariff. Transfer of Transmission lines / network to Appellant on book value, in our considered view, could not be an accepted rationale to justify for application of totally different principles and methodology and on a selective basis to the appellant. Considering the fact that the Appellant was wholly owned and continued to be so owned by the Government of India, the transfer of transmission assets from other Central Power Sector Undertakings (CPSUs) to the Appellant ought to have been done on book value only and not on any other basis. There is no controversy in this regard. Prima-facie, Government of India, in no way, disadvantaged by transferring the assets on book value to the Appellant.

22. We are of the clear view, that it would have amounted to discrimination against the Appellant, if Ministry of Power, Government of India, even though belatedly, would not have owned the error committed in

determining the tariff for the block period 1992-97 leading to depletion of equity. We are of the considered view that Appellant is within its right to challenge the determination made by the regulator, on sufficient grounds, as may be available to it in law. Government of India is not only the owner of the Appellant but also has a *quasi judicial* role of a regulator as it stood then. Since the error in determining tariff for the block year 1992-1997 leading to depletion of equity is a continuous wrong and affects tariff determination for future years as well, it can be corrected by the regulatory authority, notwithstanding the fact that the error took place a few years back.

23. The Government of India's first tariff notification for block period from 01.04.1994 to 31.03.1997 was issued on 18.01.1994. However, it is claimed that the Appellant remonstrated against the tariff notification orally and a written representation to Ministry of Power, Government of India, was moved by the Appellant by its letter dated 06.10.1998. Thereafter, the Appellant again sent its written representations to Ministry of Power, Government of India, vide its letters dated 22.12.2004 and 06.01.2005.

24. In spite of the representations of the Appellant the Ministry of Power issued tariff notification for the block period 01.04.1997 to 31.03.2002 on 16.11.1998, wherein same method, as was employed for the previous block period for arriving at net asset values as on 01.04.1997 was followed but it made correction to keep value of equity constant throughout the life of the Project. It was only in the year 2005 that the Government of India by its letter dated 16.02.2005 conveyed that error had crept in while determining the tariff for the block year 1992-97, leading to depletion of equity and advising the appellant to approach CERC for restoration of depleted equity.

25. It may be noted that tariff determination is a periodic exercise followed at specified regular interval. The error made in the preceding tariff fixation exercise could always be corrected in the following block year

with or without adjustment. Denial of a large size of equity invested in projects for ROE, not only for one block period but for the entire technical life of the projects, is neither fair nor judicious. This is against all fundamentals of tariff fixation and commonly followed principles of operating an enterprise on commercial basis. The said anomaly ought to have been corrected at the first available opportunity by the Regulator.

26. The Appellant's letter to Ministry of Power, Government of India, dated 22.12.2004 was followed by another letter dated 06.01.2005. The Ministry of Power's response on 16.02.2005 in the context of the matter, provided enough data with regard to details of omission on the part of Regulator who had admitted the 'error'. Even otherwise, in order to ascertain facts the Commission would have asked the Ministry of Power, Government of India, to produce record in the matter. The letter of Ministry of Power, Government of India, has to be read as a whole and we have no doubt that the Ministry of Power has admitted the apparent error committed by it as a Regulator. Lack of details of 'error' in Ministry of Power, Government of India's letter, therefore, is not as significant as sought to be suggested by CERC.

POINTS OF LAW

27. We shall now proceed to consider the issues from the legal angle as well. CERC has rightly determined that it has full jurisdiction to adjudicate upon the tariff related matters even in cases (as the instant one) where the cause of action arose prior to its' establishment.

The above is supported by the decision of Hon'ble Supreme Court order in **New India Assurance Company Ltd. Versus Smt. Shanti Misra** (AIR 1976, SC 237) wherein it is held that;

"...the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well established proposition that such a change of law operates

retrospectively and the person has to go to the new forum even if his cause of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum...”

28. The Appellant has prayed for the restoration of depleted equity amount of Rs. 646 crores from the retrospective date i.e. 01.04.1992 with a further prayer for approval of return on equity from retrospective dates on the restored equity with the directions to the beneficiaries to pay revised return on equity and the revised tariff, if any. The Appellant, however, in their written submissions on 17.03.2006 to this Tribunal appreciating the difficulty faced by Respondents that at this point of time it would not be possible for them to pass on the liability and recover the increased tariff from the consumers with retrospective effect and perhaps, sharing the guilt of delays caused in seeking resolution of the matter, have modified their request that the revised tariff based on restoration of depleted equity could be most equitably made effective at least from 01.04.2004 onwards.

29. On principle, the appellant should not be allowed to suffer for the mistake of the Central Government, who, at the relevant time, was acting as a regulator. Error in the determination of tariff for the block 1992-97 crept in leading to depletion of equity. In **Jung Singh Vs. Brij Lal and Ors.**, (AIR 1966 SC 1631), the Supreme Court held that there is no other principle for the guidance of the Court than the one that no act of the Court should harm litigant. While adumbrating the principle, it observed as follows:

“ it is the bounden duty of courts to see that if a person is harmed by a mistake of the court he should be restored to the position, he would have occupied but for that mistake”

In yet another decision the Hon’ble Supreme Court in **Jauhari Singh Versus Satpal Singh and Ors.** (AIR 1989 SC 2073) held thus:

*“The single strand running through all these decisions is that no litigant should be prejudiced and made to suffer because of a wrong order of the Court. The principle has been crystallised in the maxim **actus curiae neminem gravabit**. This salutary principle has held sway for a very long time and could not be allowed to be diluted in the instance case. Besides, the court have inherent powers to do complete justice between the parties and it will not hesitate to pass the appropriate orders to undo the mischief or perpetration of injustice”*

We have no hesitation in holding that the same principle will apply on all fours to the case in hand. Therefore, for the fault of the Central Government, which at the relevant time was discharging the functions of the regulator, the Appellant cannot be allowed to suffer *ad infinitum*.

30. We are of the firm view that grave injustice has been done to the Appellant by not allowing equity worth Rs. 646 crores for determination of tariff, particularly when on the own admission of the Regulator (Government) an error had crept in while determining the tariff for the block year 1992-97 leading to the depletion of equity. This has not been disputed or controverted on merits by any of the Respondents. The error / mistake of the Regulator has caused the Appellant to suffer loss in the past and in case the situation is not remedied he will suffer loss in perpetuity. We cannot allow technicalities to defeat justice. It will be just fair and reasonable and in keeping with the provisions of Section 111 (6) to correct the error.

31. The learned counsel for the respondent urged that the determination of tariff for the block years 1992-1997, which lead to the depletion of

equity, cannot be reversed as the same would operate retrospectively. In support of the submission, reliance was placed on **Chairman, Railway Board Vs. C.R. Rangadhamiah [(1997) 6 SCC 623]**, in which it was held as under:

“ ...a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior a benefit which has been granted or availed of e.g. promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively”

In our considered view this pronouncement has no application to the facts of the instant case and is clearly distinguishable. The Supreme Court was concerned with the vested right guaranteed by a constitutional mandate. In the present case the appellant has been *ad nauseam* suffering from the mistake of the Regulator in the fixing tariff. It is the bounden duty of the Regulator to see that no one suffers for its mistake.

32. It was recognized by the Supreme Court in **Rohtas Industries vs. Chairman, Bihar State Electricity Board, (AIR 1984 SC 657)**, that determination of tariff is to be made so as to raise sufficient revenue, which will not merely prevent any net loss being incurred during the financial year, but will ensure a profit being earned. In this regard, the Supreme Court held as under:

“Section 59 of the Electricity (Supply) Act says that the tariff fixation has to be so made as to raise sufficient revenue which will not merely avoid any net loss being incurred during the financial year but will ensure a profit being earned, the rate of minimum profit to be earned being such as may be specified by the State Government. Notwithstanding this mandatory provision, the Board in the present

case has been selling energy at rates which are lower than the actual cost incurred by it per unit of production. In such a situation it cannot be said that the tariff fixation effected by the Board suffers from the vice of arbitrariness and is liable to be interfered with by the Court on that ground. Rohtas Industries Ltd. Vs. Chairman, Bihar State Electricity Board, [1984 Supp SCC 161 : AIR 1984 SC 657]

Taking cue from the aforesaid Judgment of the Hon'ble Supreme Court, the Appellant is entitled to earn specified rate of return on the equity invested in the project in accordance with law. Any mechanism by which the equity is gradually reduced proportionately reducing rate of return below the specified rate of return shall not be legal.

CONCLUSION

33. Thus, we have no hesitation in holding that the aforesaid grave error committed by the Central Government as a regulator while determining tariff for the block year 1992-1997, requires to be rectified with effect from April 1, 2004.

34. In the light of the aforesaid discussion, the issues raised in Para 19 are determined and answered as follows:

ISSUE No.1: The regulator committed grave error in fixing equity while determining tariff for the block year 1992-1997 and 1997-2002.

ISSUE No.2: The appellant is entitled to the restoration of equity of Rs.664 Crores, with effect from April 1, 1992, for the purposes of accounting.

ISSUE No.3: Consequent to restoration of equity, tariff needs to be determined for the period commencing from April 1, 2004.

ISSUE No.4: The Order of the CERC is liable to be set aside.

ISSUE No.5: The CERC shall re-determine the transmission tariff for the period commencing from April 1, 2004.

35. In view of the aforesaid determination, the appeal is allowed. The order of the CERC is set aside and the matter is remitted to it (CERC) for re-determination of the tariff for the period commencing from April 1, 2004 in accordance with law and having regard to the observations made by us.

We make it clear that the appellant shall not be entitled to claim tariff difference from the period anterior to 01.04.2004.

(Mr. A. A. Khan)
Technical Member

(Mr. Justice Anil Dev Singh)
Chairperson

