

Before the Appellate Tribunal for Electricity  
(Original Jurisdiction)

Original Petition No.1 of 2006

Appeal No. 187 of 2005 converted as Original Petition

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

Uttar Pradesh Power Corporation Ltd. ....Petitioner

Versus

1. Central Electricity Regulatory Commission  
2. National Thermal Power Corporation Ltd.  
3. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.  
4. Himachal Pradesh State Electricity Board  
5. Punjab State Electricity Board  
6. Haryana Vidyut Prasaran Nigam Ltd  
7. Power Development Department (J&K)  
8. Delhi Vidyut Board  
9. Chief Engineer, Chandigarh Administration (Power Department)  
10. Uttaranchal Power Corporation Ltd .....Respondents

Counsel for Petitioner	Mr. Pradeep Misra
For Respondent No.1	Mr. K.S. Dhingra, Chief (Legal)
Counsel for Respondent No.2	Mr. M. G. Ramachandran
Respondents 3 to 9	No appearance
Respondent No.10	Mr. Misra

Dated : 29<sup>th</sup> day of March 2006

**JUDGMENT**

The Petitioner above named initially moved Appeal No.187 of 2005 challenging the order passed by first Respondent in IA No.24 of 2003 and prayed for the following reliefs:-

- (a) allow the present appeal and set aside the order dated 06.10.2005 passed by Central Electricity Regulatory Commission, New Delhi whereby it adjourned the interlocutory application filed by the Appeal for fixation of ad hoc tariff sine die,
- (b) further direct CERC to determine the tariff in respect of Rihand Super Thermal Power Station for the period from 2001-2004 and for 2004-2009 as early as possible within a time bound period as directed by this Hon'ble Tribunal, and

(c) pass such other order or orders which this Hon'ble Tribunal may deem fit and proper in the interest of justice.

2. The order under appeal passed by the first Respondent reads thus:

“ORDER

(DATE OF HEARING: 29.8.2005)

The Interlocutory Application is filed by the respondent, UPPCL for reduction in fixed charges in respect of Rihand STPS. A Civil Miscellaneous Appeal No.133/2002 has been filed by the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. for the Rajasthan High, Jaipur Bench, against the Commission's order dated 4.10.2002 and that Rajasthan High Court has already stayed on 10.1.2003 operation of the said order.

2. Heard the parties. Shri K.K.Mittal appearing for RRVPNL, Respondent No.2 submitted that another Miscellaneous Application has also been filed before the High Court of Rajasthan for modification of the stay order. This application had not been taken up for hearing by the High Court so far.

3. In view of the above circumstances, hearing of the Interlocutory Application is adjourned sine die and may be taken up after modification/vacation of stay order dated 10.1.2003 or disposal of the appeal, for which the parties may approach the High Court.”

3. When this Tribunal pointed out as against the said order no appeal is maintainable under Section 111 of The Electricity Act 2003, the learned counsel pleaded that this Tribunal may treat the appeal as a petition under Section 121 of The Electricity Act 2003 and issue appropriate directions to first Respondent as the appellant is being denied of valuable rights besides submitting that appellant's day to day loss is mounting due to delay in the proceedings before first Respondent. We did not admit the appeal, however ordered notice to Respondents to show cause as to why we should not exercise our jurisdiction under Section 121 of The Electricity Act. The learned counsel for appellant served notice on all the Respondents including first Respondent and filed proof in this behalf.

4. Since we have already proposed to convert the appeal and exercise the jurisdiction under Section 121 of The Electricity Act, we heard the counsel for petitioner and Respondent No.2 alone, as others did not appear. After hearing the learned counsel, and on a

consideration of the entire matter, we delivered the judgment after due consideration on 10.1.2006. We issued the following directions to the first Respondent herein:

“16. In our considered view the present applications pending before the first respondent are not covered by interim order passed by the Hon’ble High Court. In the circumstances, we are persuaded to issue directions in exercise of powers conferred by Section 121 of The Electricity Act 2003 to the first respondent, the Central Electricity Regulatory Commission to take up all the applications filed by the second respondent on its file for tariff fixation for the years 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, etc., and all the connected interim applications and give expeditious disposal according to law. It is needless to add that the first respondent may give suitable priority for disposal of the tariff applications.

18. However, we make it clear that if within a period of one month from this day, the first respondent for any reason whatsoever is unable to pass orders on the pending tariff applications and petitions moved by the second respondent and other parties, we give liberty to the appellant herein to move appropriate interim application.

19. In the result, we direct the first respondent herein to consider and pass final orders on the pending applications and petition moved by the second respondent seeking fixation of tariff for Rihand Super Thermal Power Station for the period 2001-02 and subsequent years as expeditiously as possible according to law and after affording opportunity to all the parties concerned, but within six weeks from this day.”

5. Thereafter, the first Respondent moved Review Petition No.1 of 2006 seeking review of the said judgment dated 10.1.2006, on the solitary reason that in the notice served on the first Respondent there is no indication of our proposal to convert the appeal to a proceeding under Section 121 of The Electricity Act 2003. Except this, no other reason whatsoever has been set out in the review petition nor the first Respondent expressed any grievance with respect to the said judgment. Despite our pointing out that the first Respondent has no grievance, Mr. Dhingra, the first Respondent insisted for review on hyper technical ground. In the Review Petition No.1 of 2006, we passed an order on 13.3.2006, recording the stand of first Respondent, which reads thus:

“Mr. K.S. Dhingra, Chief (Law) appears on behalf of the applicant.  
Mr.M.G.Ramachandran appears for the NTPC and accepts notice.

It is very fairly stated by Mr. Dhingra that the applicant has no grievance with respect to orders as well as directions issued by this Appellate Tribunal. Yet it is pursuing the review application on the sole ground that in the notice served upon the applicant, there is mention about the proposal to exercise the powers under Section 121 of the Electricity Act, 2003.

It is also stated by Mr. Dhingra that the order/direction is being complied with.

To avoid the technical objections, we would like to set the record right.

In the circumstances, notice is ordered to Mr. Mishra, Adv. appearing for the first respondent who moved the appeal No.187 of 2005. Notice returnable by tomorrow (14.3.2006).”

6. On 14.3.2006, we passed the following order recording the representations of either side, which runs thus:

“Mr. Dhingra, Chief (Law) appears for the petitioner. Mr. Mishra learned counsel appears for the 1<sup>st</sup> respondent and Ms. Taruna Singh Bhagel, Adv. appears for Mr.M.G. Ramachandran, Adv. for 2<sup>nd</sup> respondent, who are the contesting Respondents.

Though the learned counsel for the 1<sup>st</sup> respondent raised certain objections contending that no notice need be served, we make it clear that a notice is required to be served since we proposed to issue direction u/s 121 of the Electricity Act, 2003 to the Central Electricity Regulatory Commission, namely the review petitioner. It is true that the review petitioner was served with a notice in the appeal which was yet to be admitted on that date.

Further, to avoid technical objections and to render substantial justice we propose to hear the review petitioner..

On the earlier occasion Mr. K.S. Dhingra represented that the CERC has no grievances with respect to order or the directions issued on 10.01.2006 and that those directions are being complied with.

Be that so, to set right the record and to render substantial justice with the consent of either parties we recall the earlier order dated 10.01.2006.

Today we call upon Mr. Dhingra, the representative of CERC to state objections, if any, for exercising our powers u/s 121 of The Electricity Act, 2003 on the facts of the case and as warranted by circumstances set out in the appeal memorandum as to why appropriate directions should not be issued to the CERC.

Mr. Dhingra is granted time to file his objections, if any, till 17<sup>th</sup> March 2006.”

7. On 17.3.2006, the first Respondent filed its reply. Even here no grievance or ground has been set out as to why review is sought for and that too when nothing adverse has been pointed out against first Respondent nor the order is adverse to first Respondent. In the reply, the first Respondent’s stand is set out thus:

“14. That notwithstanding the fact that the Central Commission made an application for review of the order dated 10.1.2006 in appeal No.187/2005, the Central Commission by its order dated 3.3.2006 in petition No.151/2004 (Approval of tariff for Rihand STPS for the period 1.4.2004 to 31.3.2009), has initiated steps for disposal of the petition No.38/2001 (Approval of tariff for Rihand STPS for the period 1.4.2001 to 31.3.2004) as also petition No.151/2004, and both these petitions are listed for further hearing on 30.3.2006.

15. That in keeping with the directions of the Hon’ble Tribunal in the said order dated 10.1.2006 (since recalled by order dated 14.3.2006 in review petition No.1/2006), for “affording opportunity to all the parties concerned”, they have been directed to spell out their views on the question of the capital cost to be considered for the purpose of determination of tariff commencing during the currency of stay by the Hon’ble Rajasthan High Court, for the reasons indicated hereinabove.”

8. In the reply, the first Respondent has sought for the following relief:

**“PRAYER**

Having regard to the position stated hereinabove, it is respectfully prayed that the Hon’ble Tribunal may, in exercise of its powers under Section 121 of the Electricity Act, 2003, issue appropriate orders, instructions or directions whether capital cost of Rs.229713 lakh as on 31.3.1997 or Rs.237227 lakh as on 31.3.2001 is to be considered for the purpose of determination of tariff from 1.4.2001 onwards, in view of the Hon’ble High Court’s order dated 10.1.2003”

9. After filing of reply by the first Respondent, we heard Mr. Pradeep Misra, Advocate for Petitioner, Mr. K.S. Dhingra, Chief (Legal) for first Respondent and Mr.M.G.Ramachandran for Respondent No.2.

10. The learned counsel for Petitioner and second Respondent submitted that it is just and essential to issue directions already issued once again and the facts of the case warrants the same.

11. Mr. K.S. Dhingra, Chief (Legal) appearing for the first Respondent sought for directions prayed for by first Respondent under section 121 and without reservation represented that earlier judgment dated 10.1.2006 may be reiterated as the same is being complied by first Respondent.

12. The points that arise for consideration in this original petition are:

- (A) Whether on facts the petitioner is justified in seeking directions to first Respondent? If so, what are the directions warranted to be issued?
- (B) Whether in law the first Respondent could seek the directions prayed for in its reply? Whether such a relief is maintainable under Section 121 of The Electricity Act 2003?

**Point B**

13. Taking up the second point, viz the relief prayed by the first Respondent in its reply, it is to be pointed that the first Respondent is a statutory authority constituted under section 70 of The Electricity Act 2003, to exercise such functions and perform such duties as are assigned to it under The Electricity Act 2003. Section 73 of The Electricity Act 2003 enumerates the functions and duties of the first Respondent. Such functions are Quasi-judicial in nature and as original authority it is the statutory function, which it has to exercise. A statutory Quasi-judicial functionary like the first Respondent has to exercise its jurisdiction and authority as vested on it, independently and shall not abdicate its functions to any one else, even to an appellate authority, as such an abdication vitiates the proceedings. Being a Quasi-judicial functionary, the first Respondent has to exercise statutory powers and discharge its functions in the light of its own independent perspective. The first Respondent, statutory authority exercising Quasi-judicial power, is required to do a thing in a particular manner, the same shall be done in that manner only and act within the four corners of the statute.

14. In respect of “Capital Cost”, to be taken into consideration to determine tariff by first Respondent, under Part-VII of The Act and the relevant Regulations, is within its jurisdiction as original authority and it is neither proper nor legally permissible to abdicate such functions. The appellate authority may decide such factors viz. “capital cost” etc., when concerned matter is brought before it by way of appeal and not at any time before by exercise of its appellate jurisdiction.

15. That apart under Section 121, the Appellate Tribunal issue such orders, instructions or directions as it may deem fit, to any appropriate Commission for the performance of its statutory functions under The Electricity Act, 2003. Neither this statutory provision nor there is any other provision in The Electricity Act 2003 which provides for a reference or answer the reference by this appellate authority at the instance of original authority even on a question of law. The relief sought for the first Respondent is a misconception of law, besides it may result in abdication of its authority, when it is well within its authority to take a decision independently. Hence, this point is answered against the first Respondent Central Electricity Regulatory Commission.

**Point A**

16. Taking up Point A, there is all round acceptance of our earlier judgment dated 10.1.2006 and the learned counsel appearing for the petitioner as well as second Respondent without reservation requested us to re-issue the same judgment, which was recalled by us at the instance of first Respondent.

17. In fact, Mr. K.S. Dhingra, Chief (Legal) also represented with vigour that the earlier judgment dated 10.1.2006 and directions set out therein are to be reiterated, while stating that the first Respondent has already initiated action to comply with the said directions already issued. In the circumstances, we reiterate our earlier judgment.

18. After due consideration of the facts, the submissions made by the learned counsel appearing on either side, interim order of the Hon'ble Rajasthan High Court and the subsequent petition No.38 of 2001 filed by the second respondent herein before the first respondent seeking for fixation of tariff for the subsequent years, we are persuaded to issue and well justified in issuing the directions in exercise of powers under Section 121 of The Electricity Act to the first respondent herein. The point that arises for consideration is:

Whether on the facts placed this Appellate Tribunal is justified in issuing directions to the Central Electricity Regulatory Commission in exercise of powers conferred under Sec 121 of The Electricity Act 2003?

19. Concedingly by order dated 4.10.2002, the first respondent determined the tariff for the period 1.11.1997 to 31.3.2001 and also accorded approval of revised fixed charges for the period 1.4.1997 to 31.10.1997 in respect of Rihand Super Thermal Power Station. The last six paragraphs of the order of the first respondent dated 4.10.2002, which are relevant for the present, are set out hereunder for immediate reference:

“24. The impact of additional capitalization & FERV in the fixed charges for the period 1-4-1997 to 31-10-1997 (date of expiry of validity period of Ministry of Power tariff notification dated 2-11-1992) is as under:

Impact of additional capitalization & FERV on  
Annual Fixed charges for 1997-98

(Rs. in lakhs)

	Addl Capitalisation	FERV
Depreciation	0	0
Interest on loan	63	27
Return on Equity	60	26
Total	123	53

25. The Commission, therefore, allows the following impact of fixed charges for the period 1.4.1997 to 31.10.1997: (Rs. in lakhs)

Impact due to additional capitalization 123 x 7/12

Impact due to FERV 53 x 7/12

26. Annual fixed charges for the period 1.11.1997 to 31.3.2001 are allowed as below:

(Rs. in lakhs)

	Particulars	01.11.1997	1998-99		1999-2000	2000-01
		01.11.1997 to 31.3.1998	1.4.1998 To 31.10.1998	1.11.1998 To 31.3.1999		
1	2	4	5	6	7	8
1	Interest on Loan	0	0	0	0	0
2	Intrest on Working Capital	2187	2069	2196	2061	2002
3	Depreciation	17665	17886	17886	17955	8167
4	Return on Equity	13869	13982	18642	18789	18939
5	O&M Expenses	8127	8940	8940	9834	10817
	Total	41848	42877	47664	48639	49925

The payments for part of the year shall be made on pro-rata basis.

27. The fixed charges decided by us in the preceding paras shall be shared by the respondents in the ratio of energy drawn from Rihand STPS during the relevant period. The petitioner has already recovered fixed charges from the respondents in view of continuation of tariff



notification dated 2.11.1992 on ad-hoc basis beyond 31.10.1997. the amount already recovered shall be adjusted against the fixed charges decided by us through this order.

28. The petitioner has not indicated energy charges payable in the respective year and it has been stated that it is not required as the tariff is for the past period and recalculation will have no effect because operational norms remains unchanged. The respondents also did not raise the issue during the pleadings. In view of this, petitioner/respondents shall not have the option to reopen this issue later on.

29. This order disposes of Petition No.30/2002.”

20. As against the said order dated 4.10.2002, the third respondent herein has preferred an appeal on the file of the Jaipur Bench of the Hon’ble Rajasthan High Court and it is pending in S.B. Civil Misc. Appeal No. 133 of 2002 and an interim order has been passed by the Hon’ble High Court. The interim order reads thus “This appeal shall be listed on 12.02.2003 and till then the order passed by the Central Electricity Regulatory Commission dated 04.10.2002 is stayed” - (Translated from Hindi). Concedingly, efforts have been taken by either side for modification of the interim order as well as for disposal of the appeal but the parties are not successful so far.

21. In the meanwhile, years rolled and the necessity to fix the tariff for the subsequent period has arisen. Hence, the second respondent moved the petition before the first respondent for fixation of tariff for the subsequent years, namely, 2001-04 as well as 2004-05 and they are pending. The first respondent was moved by way of review as well as by way of a petition for direction by the parties. However, the first respondent, apparently had taken the view that since matter is pending before the Hon’ble High Court it may not be justified to take up and pass orders on the pending tariff applications in view of stay orders and it has adjourned the matters sine die.

22. From the facts it is clear that, the subject matter of the pending appeal before the Hon’ble Rajasthan High Court relates to the earlier period and the stay / interim order has to be confined to the order under appeal. The learned counsel on the either side fairly stated that there is no stay or any prohibition or impediment for the first respondent taking up the application / tariff petition filed by the second respondent herein for the subsequent years and passing orders. It is rightly pointed out that the proceedings of the first respondent for the subsequent period are independent proceedings and the counsel appearing on either side

fairly submit that the first respondent could consider the petition moved for revision of tariff and pending on its file according to the provisions of The Electricity act 2003 and the relevant regulations and pass orders. The order which is under appeal before the Hon'ble Rajasthan High Court also makes it clear that it is for the particular period.

23. That apart, Sub Section (6) of Section 64 of the Electricity Act 2003 provides that a tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order. The first respondent has already specified the period for which its earlier order which is under appeal to be effective or in force. Of course, any modification by the Hon'ble High Court may have certain degree of effect on the tariff to be fixed for the subsequent period. This could be taken care of by truing up exercise or amendment as may be required.

24. It is the settled position that stay of operation of an order means that the order which has been stayed would not be operative from the date of passing of stay order. It does not mean that the said order has been wiped out from existence. The order of interim stay granted has to be read so as to confine its effect to the order under appeal and not beyond, unless specifically ordered. Hence, we hold that there is no justification for the first respondent to stay off its hands despite the tariff period 2001-02, 2002-03, 2003-04 and 2004-05 have already rolled and tariff petition for those years are kept pending, though we are in the year 2005-06. We do not find any justification for the first respondent to stay off its hands without considering the tariff petition filed for the years 2001-04 and 2004-05 and subsequent years as well, merely because an appeal is pending with respect to tariff fixation for the years prior to 2001-02.

25. It is pointed out and claimed by Mr. Pradeep Misra, Advocate for appellant, that the appellant herein is seriously prejudiced and sustaining day to day loss. Mr.M.G.Ramachandran on figures and facts, disputes the said claims of Mr. Misra and at the same time submits that the first respondent will not be justified in keeping off its hands and it has to take up the pending tariff petitions before it and decide the same according to law, at the earliest and without further delay.

26. In our considered view the present tariff petitions seeking revision of tariff pending before the first respondent are not covered by interim order passed by the Hon'ble High Court. In the circumstances, we are persuaded to issue directions in exercise of powers conferred by Section 121 of The Electricity Act 2003 to the first respondent, the Central Electricity Regulatory Commission to take up the tariff applications filed by the second respondent on its file for tariff fixation for the years 2001-02, 2002-03, 2003-04, 2004-05,

2005-06, etc., and all the connected interim applications and give expeditious disposal according to law. It is needless to add that the first respondent may give suitable priority for disposal of the tariff applications.

27. However, we make it clear that if within a period of six weeks from this day, the first respondent for any reason whatsoever is unable to pass orders on the pending tariff applications and petitions moved by the second respondent and other parties, we give liberty to the petitioner herein to move appropriate interim application before first Respondent.

28. In the result, we direct the first respondent herein to consider and pass final orders on the pending applications and petition moved by the second respondent seeking fixation of tariff for Rihand Super Thermal Power Station for the period 2001-02 and subsequent years as expeditiously as possible according to law and after affording opportunity to all the parties concerned, but within six weeks from this day.

29. Before parting, we would appreciate if the CERC whenever served with notice in any appeal or petition or proceeding by this Appellate Tribunal, it shall see that its representative or Presenting Officer appears and make submissions as provided in Section 124 of The Electricity Act 2003 or it may submit a memo as to the stand it may take in the particular matter as a statutory Quasi-judicial authority.

Pronounced in open court on this 29<sup>th</sup> day of March 2006.

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

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