Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 190 of 2005

Dated this 4th day of April 2006

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

M/s Jayshree Chemicals Limited
District Ganjam, Orissa

……Appellant

Versus

1. Orissa Electricity Regulatory Commission
   Bidyut Niyamak Bhavan, Unit-VIII
   Bhubaneswar, Orissa
2. Southern Electricity Supply Company of Orissa Ltd
   Komapali, Berhampur (Ganjam)

……Respondents

Counsel for the Appellant M/s M.N. Krishnamani, Sr. Advocate, S. Burthakur, B. Barooah, S. Pani, Advocates

Counsel for the Respondents M/s M. G. Ramachandran, Saumya Sharma, Taruna Singh Baghel, Advocates for OERC

Mr. R.K. Mehta, Advocate for SOUTHCO

JUDGMENT

The present appeal has been preferred by the appellant above-named, under Section 111 of The Electricity Act 2003, challenging the orders dated 22.3.2005

and 3.8.2005 passed by the first Respondent Orissa Electricity Regulatory Commission in case No. 145 of 2004.

2. Heard the learned senior counsel, Mr. M.N. Krishnamani appearing for the appellant, Mr. M G Ramachandran appearing for the first Respondent Regulatory Commission and Mr. R.K. Mehta, appearing for the second Respondent.

3. In the nature of order which we propose to pass, it may not be necessary to set out details of the case and counter case of the parties herein. It would be sufficient to refer to the material contentions advanced by the respective sides. The appellant, a sick industry under BIFR and working under the scheme sanctioned by the BIFR by its order dated 16.4.2002. The appellant entered into an agreement on 30.6.2002 with the second Respondent Discom for increase of contract demand. On 20.7.2002, on mutually agreed terms, the appellant and the second Respondent Discom fixed the tariff for the appellant's caustic soda manufacturing unit. The special tariff agreement entered between the appellant and the second Respondent on 20.7.2002 was renewed for a further period of one year from 1.7.2003.

4. The second Respondent filed its Annual Revenue Requirement for the year 2005-06 before the first Respondent Regulatory Commission and for revision of tariff. With respect to the tariff proposal dated 2.12.2004, the appellant filed objections on 23.12.2004. The first Respondent Regulatory Commission in respect of four Discoms in the State of Orissa passed the tariff order in case Nos. 139, 141, 143 and 145 of 2004 on 23.3.2005 to be effective from 1.4.2005.

5. According to the appellant none of the objections raised by the appellant has been adverted to or considered by the first Respondent Regulatory Commission and therefore, it moved an application for review of the tariff order passed by the first Respondent Regulatory Commission in case No.145 of 2004 for the year 2005-06 on 3.8.2005 reiterating the objections and raising a number of contentions.

The Orissa Electricity Regulatory Commission rejected the review petition holding thus: “As we find no merit in the review petition, the same is dismissed”.

6. In the circumstances, the appellant challenged the tariff order dated 22.3.2005 as well as the rejection of review petition by the first Respondent Regulatory Commission on 3.8.2005. According to Mr. Krishnamani, the learned senior counsel appearing for the appellant the Orissa Electricity Regulatory Commission has neither adverted to nor considered the objections raised by the appellant before it. It is also contended that the appellant’s factory is a power intensive unit and it should have been treated on par with other power intensive units in the State and particularly the Ferro Alloy Industries, which are identical in all respects. It is also contended that the Regulatory Commission has summarily dismissed the review petition by a non speaking order.

7. It is further contended that the appellant, a power intensive unit has been discriminated as against the power intensive industries located within the distribution area of NESCO and SOUTHCO, which units have received a special consideration and special tariff as seen from Clause 8 of the Tariff Order dated 22.3.2005. It is pointed that there is no reason or rhyme to deny identical treatment to the appellant, which is also a power intensive unit and comparable in all respects though located within the license area jurisdiction of the second Respondent Discom. The learned counsel for the appellant drew the attention of this Appellate Tribunal to para 8.28 of the Tariff Order dated 22.3.2005, by which the Regulatory Commission allowed 20% discount in the first slab up to 50% PLF to M/s IPI Steel, another BIFR industry while the appellant has been treated differently. The learned counsel for the appellant took this Appellate Tribunal through the entire tariff order and pointed out that there is no consideration of the objections filed by

the appellant and its request to treat on par with other power intensive units, which are comparable by all standards.

8. The appellant's request did find a favour with the second Respondent Discom who pleaded the first Respondent Regulatory Commission to allow special tariff for appellant's power intensive unit and it is recorded thus by the first Respondent in its tariff order:

> "8.3 SOUTHCO has also requested to allow special tariff for power intensive Industries category of consumers maintaining minimum guaranteed load factor of 80% or more to improve the consumption under HT/EHT category. This would not only benefit the consumers, but also ensure financial viability of SOUTHCO."

9. The learned counsel for the appellant drew the attention of the OERC Distribution (Conditions of Supply) Code 2004 which classifies an industry as a power intensive category, where power is substantially utilized as raw material involving electro-chemical or electro metallurgical process with contract demand of 2000 KVA and above. There is no dispute that the appellant is an electro-chemical unit drawing more than 2000 KVA and there is no doubt that the appellant falls under the power intensive category as admittedly the load of the appellant is of the order of 11111 KV.

10. The learned counsel for the appellant while advancing the above contentions persuaded us to set aside the tariff order in so far as the appellant is concerned and further requested that the first Respondent Regulatory Commission may be directed to reconsider the fixation of tariff with respect to the appellant's power intensive unit denovo on par with other identical units..

11. Per contra on behalf of the respondents, it is contended that nothing survives in the appeal and the entire appeal has been rendered infructuous by the subsequent agreement entered between the parties. According to the respondents, an

agreement was entered between the appellant and the second Respondent Discom on 29.4.2005 acted upon and continue to be in force as of today, i.e., up to 31.3.2006 and for the further period negotiations are in progress. Factually the appellant in terms of the said agreement entered agreed to pay a consolidated energy charges including demand charges for monthly energy consumption corresponding to 10000 KW / 11111 KVA contract demand at Rs.2.40 per KWH for load factor of 80% and more but less than 90% and at Rs.2.30 for load factor of 90% and more for one year, i.e., 2005-06. After conclusion of the said agreement, concedingly an application was moved under Regulation 70 of OERC (Conduct of Business) Regulation 2004 and approval was sought for under Regulation 81 of OERC Distribution (Conditions of Supply) Code 2004.

12. The first Respondent Regulatory Commission on a consideration of the entire matter by its order dated 12.8.2005 granted approval and passed the following order:

> "The Commission after taking into account recommendations and pleadings made by SOUTHCO during the course of the hearing and keeping in view the conditions of special tariff approved in respect of the P.I. Industries in the order dtd.22.03.2005 approved as under:
>
> > The consumer shall pay to SOUTHCO a consolidated charges for the monthly energy consumption corresponding to 10 MW / 11111 KVA contract demand at a rate of Rs.2.40 per unit calculated at the actual load factor subject to a minimum guaranteed off take of 80%. The computation of load factor will be on monthly basis and not on annual basis as has been prayed for. The agreement will be valid for the period of one, i.e., from 01.04.2005 to 31.03.2006 as prayed for by SOUTHCO. The Commission feels that there will be no loss of revenue to SOUTHCO as per its own submission. As such, any compensation for loss due to special tariff in future ARR of SOUTHCO is ruled out."

13. The learned counsel appearing for the respondents relying upon the said approval further pointed out that in fact the appellant had the benefit of special tariff for its industry for the year ending with 31.3.2006 and therefore, it is being pointed out that nothing survives in this appeal and it has become infructuous. There is force and merit in this submission advanced by Mr. R.K. Mehta learned counsel appearing for second Respondent.

14. The learned counsel appearing on either side brought to the notice of this Appellate Tribunal an unreported judgment of the Orissa High Court where the High Court was pleased to hold that the tariff order with respect to an identical power intensive unit is vitiated on the sole ground that the failure to advert and consider the objections and consequently set aside the tariff order. However, the present case stands differently in view of subsequent concluded agreement.

15. In the present appeal since the appellant had factually entered into an agreement and enjoyed the benefit of special tariff in terms of the agreement concluded between the appellant and the second Respondent Discom, which has received the approval of the Regulatory Commission Ex vi terminorum nothing survives in the present appeal. We see force in the argument advanced by the counsel for the Respondents and it deserves acceptance.

16. The learned counsel appearing for the appellant also submitted that further negotiations are under progress between the appellant and the second Respondent Discom for the period commencing from 1.4.2006 onwards. Be that so, in our view in respect of the tariff order appealed against as well as review order, it is not necessary to examine the contentions advanced on behalf of the appellant in this appeal, as it will be mere academic.

17. Taking note of the above situation, Mr. Krishnamani learned senior counsel appearing for the appellant persuasively contended that a direction may be issued

to the first Respondent Regulatory Commission to appropriately consider the objections and pass orders according to law at least in future tariff orders. We find there is justification for this.

18. The first Respondent Regulatory Commission, a statutory authority constituted under The Electricity Act 2003 while fixing the tariff in terms of Part VII of The Electricity Act 2003 is bound to advert to the objections raised by consumer with respect to the tariff revision or fixation, consider the objections / requests and determine the tariff in terms of Sections 61, 62 as well as 64 of The Electricity Act 2003. Being a statutory functionary exercising powers under Part VII of The Electricity Act 2003, the minimum requirement on the part of the Regulatory Commission being to advert to the presentations / objections / requests, consider the objections / requests / representation of a consumer and determine the tariff according to law. In W.B. Electricity Regulatory Commission Vs. C.E.S.C Ltd reported in AIR 2002 Supreme Court, while considering a case which arose under the Electricity Regulatory Commission Act 1998 with respect to the powers of Regulatory Commission and its tariff fixation held thus:

> "Para 40: We notice that the 1998 Act brought about a substantial change in the manner in which the determination of tariff has to be made. It not only took away the right of the licensee or a utility to determine the tariff, but also conferred the said power on the Commission. <u>This was done because one of the primary objects of the 1998 Act was to create an independent regulatory authority with the power of determining the tariff, bearing in mind the interests of the consumers whose rights were till then totally neglected. The fact that the Commission was obligated to bear in mind the interests of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff. This right of the consumers is further supported by the language of S.26 of the Act, which specifically mandates the Commission to authorize any person as it deems fit to represent the interest of the consumers in all proceedings before it. If the above provision of the Act is read in conjunction with Ss.22 and 29 read with S.58(2)(d) of the 1998 Act, it is clear that the Commission while</u>

framing the regulations must keep in mind the interests of the consumers for the purpose of determining the tariff. At this stage, it may be worthwhile to notice the mandate of the Parliament in S.37 of the 1998 Act to the Commission that the Commission should ensure transparency while exercising its powers and discharging its functions which also indicates that the proceedings of the Commission should be public which, in itself, shows participation by interested persons."

It follows that it is incumbent for Regulatory Commission not only to follow the procedure, but also hear and consider the representation / requests / objections while fixing tariff.

19. The learned counsel appearing for the first Respondent sought to contend that there had been a consideration of the objections, however we find that there is no consideration at all excepting merely stating that there is reason to modify the existing tariff in respect of power intensive industries. In the light of the fact that a special treatment has been given to Ferro Alloy Industries and others which are power intensive units, there should have been atleast a consideration of the request / representation / objections advanced / raised by the appellant and determination of tariff in terms of Section 62 of The Electricity Act 2003. We find there is force in the contention advanced by the learned counsel appearing for the appellant in this respect. We hasten to add that the Regulatory Commission should have considered the representations / requests / objections one way or the other and determine the tariff for SOUTHCO and more so when the SOUTHCO itself has submitted that there should be a tariff fixation for power intensive units, extracted supra.

20. We also would like to point out that the rejection of review petition in the case on hand is also non-speaking and it is violative of the principles of natural justice. Being a statutory authority and quasi-judicial forum or a quasi-legislative body, the Regulatory Commission should have considered the grounds advanced in

the review petition one way or the other and passed a speaking order by recording its reasons for rejection. But we find that the review petition has been rejected without a speaking order, without reference to the grounds advanced in the review petition but merely stating thus: "As we find no merit in the review petition, the same is dismissed."

21. It is incumbent on the part of the Regulatory Commission to consider the grounds set out in the review petition and pass a speaking order. It is also well open to the Regulatory Commission to reject the review petition if the review petition is filed belatedly and beyond limitation. It is not clear as to whether the review petition is rejected on the ground of delay. However, we take it that the review petition has been dismissed summarily by a non-speaking order. We would impress upon the Regulatory Commission that being a quasi-judicial statutory authority, as has been held by the Hon'ble Supreme Court, it is incumbent on its part to consider the objections or points raised and pass a speaking order.

22. In this respect, it is suffice to refer to one of the pronouncements of the Hon'ble Supreme Court reported in S.N. Mukherjee Vs Union of India reported in 1990 (4) SCC 594 : AIR 1990 SC 1984, wherein their Lordships of the Supreme Court held thus:

> "Except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions must record the reasons for its decision. Such a decision is subject to the appellate jurisdiction of the Supreme Court under Art. 136 as well as the supervisory jurisdiction in the High Courts under Art. 227 and the reasons, if recorded, would enable the Supreme Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations are the requirement of recording reasons would (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimize chances of arbitrariness in decision-making. As contrasted with the ordinary courts of law and tribunals and authorities exercising judicial functions where the

Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency, an executive officer generally looks at things from the standpoint of policy and expediency. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decision irrespective of the fact whether the decision is subject to appeal, revision or judicial review.

However, it is not required that the reasons should be elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate revisional authority agrees with the reasons contained in the order under challenge.

The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". The requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making."

23. In the circumstances and in the light of the subsequent developments, we hold that the legal contentions advanced by the counsel for the appellant is academic and the appeal has been rendered infructuous by the subsequent agreement concluded between the appellant and the second Respondent Discom and therefore, we decline to interfere with the order passed by the first Respondent Regulatory Commission.

24. However, we make it clear that in future the first Respondent Regulatory Commission shall follow the basic rule, i.e., that it shall consider the representations / requests / objections that may be advanced with respect to the

tariff fixation by the appellant, a consumer and fix the tariff in accordance with the statutory provisions of The Electricity Act 2003.

Pronounced in open court on this 4th day of April 2006.

(Mr. H. L. Bajaj)	**(Mr. Justice E Padmanabhan)**
Technical Member	**Judicial Member**

The last page

rks

No. of corrections