

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 204 of 2005 & IA 21 of 2006

Dated this 29th day of March 2006

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

Him Urja Pvt. Ltd
E-14, East of Kailash, New Delhi - 110065Appellant

Versus

1. Uttaranchal Electricity Regulatory Commission
80, Vasant Vihar, Phase-I, Dehradun
2. Uttaranchal Power Corporation Limited
Urja Bhawan, Kanwali Road,
Dehradun, UttaranchalRespondents

Counsel for the Appellant M/s Amit Kapoor and Mansoor Ali Shoket, Advocates
Clounsel for the Respondents M/s M. G. Ramachandran, Taruna S Baghel, Saumya
Sharma – Advocates for Resp. No.1
Mr. Pradeep Misra for Respondent No.2

JUDGMENT

This appeal has been preferred against the tariff order dated 17.11.2005 passed by the first Respondent Uttaranchal Electricity Regulatory Commission in Tariff Petition No.03 of 2005, fixing the tariff for the sale of electricity generated by the appellant from its run of the river Mini-hydel plant of 4.4 MW to the second Respondent at Rs.2.28 per unit.

2. Heard Mr. Amit Kapoor learned counsel appearing for the appellant, Mr. M G Ramachandran appearing for the first Respondent Regulatory Commission and Mr. Pradeep Misra learned counsel appearing for the second Respondent.

3. In the nature of order which we propose to pass, it may not be necessary at all to set out the case, counter case and the findings recorded by the first Respondent Regulatory

Commission. It would be sufficient if factual matrix is summarized for the limited purpose. The appellant has located a small run of the river hydel generating station on river Nandakini, District Chamoli, Uttaranchal, with a generating capacity of 4.4 MW. The construction of the project was commenced during December 1999. The State of Uttaranchal, on 22.12.01, agreed to pay Rs.2.50 per unit and PPA was entered between the appellant and the second Respondent on 22.12.01 for sale and purchase of electricity generated by the appellant. On 15.11.2002, the appellant commenced commercial operation and since then supplying power generated to second Respondent.

4. On 10.6.2003 The Electricity Act 2003 was notified. The first Respondent Regulatory Commission framed the UERC (Terms and Conditions for Determination of Hydro Generation Tariff) Regulations 2004 for hydro power projects above 25 MW. The said Regulations excluded hydel generation plants of less than 25 MW like the appellant from its applicability. On 31.12.2004, the first Respondent Regulatory Commission extended the operation of said 2004 Regulations in principle to small hydro power projects as well.

5. The appellant filed "Tariff Petition" on 30.5.05 before the first Respondent Regulatory Commission and also submitted certain additional materials and documents in support of its claim. On 10.11.2005, just after the conclusion of hearing of the tariff petition, the first Respondent Regulatory Commission notified the Regulations for determination of tariff for hydro power projects having capacity of 25 MW or less. The first Respondent Regulatory Commission passed the impugned tariff order on 17.11.2005 determining the primary energy charges at 45% PLF at Rs.2.28 per unit and incentive for any generation above 45% at 25 paise per unit. According to the appellant, the impugned tariff order as determined, when spread over the entire annual generation, works out to Rs.1.61 per unit as against the levelized rate of Rs.2.50 per unit for the entire generation agreed under PPA. Being aggrieved by deep reduction of tariff, the present appeal has been preferred by the appellant under Section 111 of The Electricity Act, 2003. The respondents have been served and they have filed their responses.

6. During the hearing on two different dates, the learned counsel appearing for the appellant placed number of additional materials, which the appellant had not placed before the first Respondent Regulatory Commission, for reasons beyond its control. In fact, the tariff order refers to certain deficiencies on the part of the appellant to place the materials.

With respect to Tariff Regulations framed by first Respondent just before the tariff order, it is pointed out, has not been followed nor its scope and amplitude been given due consideration.

7. There is no reason to deny a fair tariff fixation for the small hydel generation project, which hydel generation deserves encouragement as the natural resources are exploited without pollution. This is the object of The Electricity Act 2003. Such natural resources in course of time would be in the interest of the consumers and society as well. Various contentions were advanced by the counsel for the appellant challenging the tariff order. Per contra, Mr. M.G. Ramachandran, the learned counsel for the first Respondent Regulatory Commission and Mr. Pradeep Misra the learned counsel for the second Respondent fairly pointed out that the appellant would have been well advised to seek a review by placing all the materials before the first Respondent Regulatory Commission, as the Commission would be in a better position to appreciate the material and fix the tariff, after taking a fresh look on the materials that the appellant could have very well placed before the first Respondent Regulatory Commission.

8. During the hearing, the counsels appearing for the appellant and the Respondents made a joint request that in the interest of parties to the present appeal and especially the appellant, a small hydel generator, it is fit and proper to remand the matter to the first Respondent Regulatory Commission. On behalf of the Commission it was assured that the first Respondent Regulatory Commission would consider the materials that may be placed before it, take a fresh look and fix the tariff according to law. In the light of the said development and the fair stand taken by the parties to the appeal and as it is not possible for this Appellate Tribunal to look into the fresh materials that are placed or proposed to be placed to decide the matter. It is the request of the counsel as well as the appellant present before this Appellate Tribunal, to afford sufficient opportunity to the appellant by Regulator to place the materials, which it relies upon and which it has placed before this Appellate Tribunal. In fact, by the order dated 17.11.2005, the first Respondent Regulatory Commission had given time till 1.4.2006 to the appellant to place additional materials with respect to its claim for additional capitalization. However, the appellant had rushed and preferred the present appeal without complying with the same. Had the appellant moved the first Respondent Regulatory Commission with a review, which it should have been well advised, would been a better course for the appellant in the fixation of tariff.

9. In fact, the counsel appearing for the contesting parties not only jointly represented that it is essential to remand but they all readily and fairly agreed for remand to the first Respondent Regulatory Commission for denovo tariff determination.

10. Before finally concluding, it is but essential to consider the scope of appeal powers of this Appellate Tribunal under Section 111 of The Electricity Act 2003. Sub-Section (3) of Section 111 reads thus:

“(3) On receipt of an appeal under Sub-Section (1), of the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.”

11. In respect of identical provision, their Lordships of the Supreme Court in Union of India & Others Vs. Umosh Dhaimode reported in 1997 (10) SCC.233, while considering Section 128 (2) of The Customs Act, 1962 as it stood then, upheld an order of remand and further held that the said provision necessarily imply the power of remand by the Appellate Authority. In that context, it has been held thus:

“As the order under appeal itself notes, the aforesaid provision vested the appellate authority with powers to pass such order as it deemed fit confirming, modifying or annulling the decision appealed against. An order of remand necessarily annuls the decision which is under appeal before the appellate authority. The appellate authority is also invested with the power to pass such order as it deems fit. Both these portions of the aforesaid provision, read together, necessarily imply that the appellate authority has the power to set aside the decision which is under appeal before it and to remand the matter to the authority before for fresh decision.”

12. Hence we hold that the Section 111 (3), confers the power to set aside the decision under appeal and to remand the appeal before us to the first Respondent for denovo consideration on the facts of the case and as jointly requested by the appellant and Respondents as well.

13. In the circumstances, the appeal is allowed setting aside the tariff order and remanded to the first Respondent Commission for denovo consideration on the basis of the materials already placed and to be placed by the appellant. The appellant is given six weeks from today to place all the materials in support of its claim. The Commission will consider and determine tariff as expeditiously as possible.

14. In the meanwhile and pending tariff fixation, the second Respondent shall continue to pay charges at the rate of Rs.2.50 per unit of electricity generated and supplied by appellant.

15. Between 01.10.2005 and 18.12.2005, the appellant generated and supplied electricity while admittedly no amount has been paid so far by the second Respondent. It is a fit case where the second Respondent should be directed to pay for energy so supplied by appellant. The second Respondent shall pay at the rate of Rs.2.30 per unit of power supplied between 01.10.2005 and 18.12.2005 within three weeks from this day.. The payments so made by the second Respondent to the appellant pursuant to the interim orders of the Appellate Tribunal for Electricity as well as this final order shall be subject to the outcome of final fixation of tariff and payments, if any shall be adjusted depending on the outcome or final determination. For the excess payment, if any, the appellant shall be liable to pay interest at the rate of 6% per annum and such excess shall be adjusted out of future supply.

16. We record the statement of the appellant and its counsel made in the course of hearing that the appellant shall sell the power generated by it to the second Respondent for 20 years provided the appellant gets a fair return.

17. In the result in the above terms, there will be an order in the above appeal and the matter is remanded back to the first Respondent Regulatory Commission for a denovo consideration for fixation of tariff according to law and with an open mind to encourage small hydel projects, as expeditiously as possible.

18. Consequently, IA No.21 of 2005 is dismissed as having become infructuous.

Pronounced in open court on this 29th day of March 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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