

**APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

Appeal No. 56 of 2008 and Appeal No. 182 of 2009

Dated 31 May, 2010

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

Appeal No. 56 of 2008

In the matter of:

- 1. Himachal Pradesh State Electricity Board.
Vidyut Bhawan,
Kumar House,
Shimla-171 004**

... Appellant(s)

Versus

- 1. Himachal Pradesh Electricity Regulatory Commission
Keonthal Commercial Complex,
Khalini, Shimla-171 002 & Ors.**

... Respondent(s)

**Counsel for the Appellant(s) Mr. M.G. Ramachandran
Mr. Anand K. Ganesan**

Ms. Swapna Seshadri

**Counsel for the Respondent(s) Mr. Sanjay Sen &
Ms. Shikha Ohri**

Appeal No. 182 of 2009

In the matter of:

- 1. Himachal Pradesh State Electricity Board.
Vidyut Bhawan,
Kumar Bhawan
Shimla-171 004**

... Appellant(s)

Versus

- 1. Himachal Pradesh Electricity Regulatory Commission
Keonthal Commercial Complex,
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... Respondent(s)

**Counsel for the Appellant(s) Mr. M.G. Ramachandran
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Ms. Swapna Seshadri**

**Counsel for the Respondent(s) Mr. Sanjay Sen
Ms. Shikha Ohri**

JUDGMENT

1. Himachal Pradesh State Electricity Board (Electricity Board) is the Appellant herein. Himachal Pradesh Electricity Regulatory Commission (State Commission) is the Respondent herein.

2. The Appellant challenging the tariff order dated 16.04.2007 in respect of the FY 2007-08 has filed Appeal No. 56 of 2008. In respect of the same year, the State Commission passed a true up order dated 11.08.2009 by truing up the revenue requirements based on the audited accounts of the Appellant. Aggrieved by this order, the Appellant has filed Appeal No. 182 of 2009.

3. Short facts are as under:-

Himachal Pradesh State Electricity Board who is the Appellant herein, is a deemed licensee for electricity transmission, distribution and retail sale. The Appellant filed an application before the State Commission on

30.11.2006 for determination of tariff for the FY 2007-08.

On 16.04.2007, the State Commission passed an order determining the Annual Revenue Requirement (ARR) for transmission and bulk supply tariff as well as the distribution and retail supply tariff for the FY 2007-08.

4. As against this order, the Appellant filed a Review Petition before the State Commission on 21.05.2007. However, the State Commission disposed of the said Review Petition on 04.08.2007 holding that the issues raised in the Review Petition could be dealt with more effectively during the truing up process. Thereupon, the Appellant filed an Appeal before this Tribunal in Appeal No. 56 of 2008, as against the main order dated 16.4.2007.

5. Earlier, the Appellant filed an application for determination of tariff for the FY 2006-07. The same was determined by order dated 03.07.2006. Aggrieved by the

findings on some aspects of the tariff order, the Appellant filed an Appeal before this Tribunal in Appeal No. 209 of 2006. During the pendency of the above Appeal, the State Commission undertook the process of truing up for the FY 2006-07. Since the process of truing up was on the way, hearing of Appeal No. 209 of 2006 was adjourned from time to time. Ultimately, on 29.04.2008 the State Commission passed an order truing up the financial and various expenditure for the FY 2006-07.

6. Therefore, the Appeal No. 209 of 2006 was taken up for hearing. After hearing the Counsel for the parties, the Tribunal in this appeal by the order dated 18.12.2008 while deciding the various issues, directed the State Commission to consider the issue of interest on expenditure for loans taken to fund the power purchase. In pursuance of this order, the State Commission, by way of implementing the order dated 18.12.2008 in Appeal No. 209 of 2006 passed a final order on

11.08.2009. However, the State Commission did not allow this claim for interest on expenditure for loan. In the said order dated 11.08.2009, the State Commission not only passed an order to implement the order dated 18.12.2008 passed in Appeal No. 209 of 2006 in respect of the FY 2006-07 but also passed the order relating to the truing up of expenditure in respect of the tariff order for the FY 2007-08 on 11.08.2009. As against this order, the Appellant has filed an Appeal in Appeal No. 182 of 2009 on 19.10.2009.

7. At the time of filing the appeal in Appeal No. 56 of 2008, the Appellant had raised various issues against the tariff order dated 16.04.2007 passed by the State Commission in respect of the FY 2007-08. Since many of the issues raised in the said Appeal were settled in the truing up process, the Appellant confined itself only with some of the grounds for challenging the tariff order dated 16.04.2007, and true up order dated 11.08.2009.

8. The Learned Counsel for the Appellant would urge the following contentions as against both the impugned orders:

- (i) The State Commission, by the order dated 17.01.2007, in Case No. 181 of 2004 and Review Petition No. 214 of 2006 before the State Commission, directed the Appellant to revise the bills to the consumers at 90% of the contract demand instead of 100% of the contract demand as allowed during the tariff years 2005-06 and 2006-07. The State Commission observed in the above order that the adverse impact on the revenue of the Appellant would be appropriately adjusted and allowed in the ARR for the FY 2007-08. Accordingly, the Appellant complied with the above order and effected refund to the consumers for the past period. Nevertheless, the State**

Commission has not allowed the refund to be effected in the ARR for the financial year 2007-08.

- (ii) The State Commission, by the order dated 30.03.2007 had re-determined the tariff applicable to the Power Intensive Units (PIU) category for the tariff year 2006-07. The State Commission had reduced the applicable demand charges for the PIU category of consumers to the level of large industry. Accordingly, the Appellant implemented the said order and revised the demand charges for the PIU category of consumers. Despite this, the State Commission has not considered the adverse impact on the Appellant on account of reduction in the tariff for the PIU category of consumers and adjusted. When the State Commission had reduced the tariff for a particular category, the under recovery of the revenue requirement by the**

Appellant on account of such reduction of tariff ought to have been adjusted and allowed the Appellant to recover the same from other category of consumers.

- (iii) The State Commission has disallowed a sum of Rs. 13.62 crores incurred by the Appellant on interest on General Provident Fund (GPF). The Appellant has been investing the GPF amount to the best of his ability but the State Commission has merely stated that the Appellant has not managed the funds effectively. The Appellant has acted in the normal course of .business in making investments and cannot be faulted for lower return on investments. In the circumstances, the interest on GPF ought not to be disallowed by the State Commission.**

(iv) The State Commission failed to consider the entire capital cost of Larji Project. Due to this, there is an un-recovered interest on loan of Rs.1060 crores. In the capital debt component is about 1060 crores. The State Commission has been denying interest charges on the actual long-term loan taken from the Larji Project. The State Commission, at the time of passing of the tariff order dated 16.04.2007, did not allow the employees cost in full. However, in the true up order dated 11.08.2009 it has allowed the employees expenses in full except for an amount of Rs. 3.75 crores. The State Commission has merely deducted an amount of Rs. 3.75 on account of deviation from the Punjab State Electricity Board pattern in the employee's pay-scale.. There is no justification for comparing the pay-scale of the Appellant with that of the Punjab State Electricity Board.

(v) The State Commission has not allowed the interest of Rs. 1.69 crores on loan taken by the Appellant for meeting the power purchase for the FY 2004-05. The only reason for the denial by the State Commission is that the loan was not a capital loan. There is no justification for the State Commission to disallow the interest on loan taken by the Appellant for meeting the power purchase despite the directions given by the Tribunal by the order dated 18.12.2008 in Appeal No. 209 of 2006, directing the State Commission to allow the claim of the Appellant in respect of interest on the money borrowed.

9. In reply to the above contentions, the Learned Counsel for the State Commission would point out the various

reasonings given by the State Commission in the impugned orders for justifying the same.

10. We have heard the Learned Counsel for the parties and given our thoughtful consideration to their respective submissions.

11. The following questions would emerge for consideration in this Appeal”

- (i) Whether the State Commission is correct in refusing to allow for the adjustment of the demand charges on account of refund due to reduction of the contract demand from 100% to 90% and also declined to allow the adjustment with reference to the refund of the amount to be paid to the PIUs as directed by the State Commission by the order dated 17.01.2007.**

- (ii) Whether the State Commission is correct in the denial of interest of Rs. 17.9 crores for FY 2006-07 towards interest on GPF in the audited accounts. .**
- (iii) Whether the State Commission is justified in not adopting the same methodology for determination of capital cost of Larji Project as was adopted in respect of small hydro plants and by not allowing the interest on the amount of Rs. 148.11 crores taken by the Appellant from Punjab National Bank and Power Finance Corporation for the Larji Project.**
- (iv) Whether the State Commission is justified in not fully allowing the employees cost of the Appellant and deducting a sum of Rs. 3.75 crores from the employees cost on the ground of deviations from the Punjab State Electricity Board pattern.**

- (v) Whether the State Commission was justified in disallowing the interest on the borrowed loan for power purchase when the said claim was specifically directed to be allowed by the Tribunal.**

12. In respect of the issues relating to the refund made by the Appellant on contract demand reduction to the consumers and to the PIUs despite the order dated 17.01.2007 passed by the State Commission, Learned Counsel for the State Commission has admitted that the State Commission did not allow for the adjustment of the amount of refund of contract demand made to the consumers and to the PIUs. While explaining the reasons for the same, the learned counsel for the Commission submits that the Appellant has failed to submit the details of the exact amount of the refund given to the consumers and to the PIUs despite specific directions given by the State Commission. He further submits that the Appellant can now

approach the State Commission with all the details of the exact amount of the refund given to the consumers and PIUs and in that event, the State Commission would make a scrutiny of the actual refund made and pass appropriate orders. However, the learned counsel for the Commission has not mentioned about the details of the said direction and how much time was given for furnishing those details. We are of the view that State Commission should have allowed these claims in the light of the assurance given by the Commission in the earlier orders. Therefore, this finding disallowing these claims is set aside. Accordingly, we direct the Appellant to approach the State Commission and place necessary materials giving the details of the exact amount of refund for the adjustment of the refund amount due to reduction of contract demand from 100% to 90% made to the consumers as well as to the PIUs. The State Commission, in turn, shall examine those details and scrutinise the same and after making due verification, appropriate orders may

be passed allowing these claims in the light of the earlier orders passed by the State Commission.

13. The Appellant had challenged the denial of interest of Rs. 17.9 crores for FY 2006-07 towards interest on GPF in the audited accounts. On going through the impugned order of the State Commission, it is noticed that the State Commission has given valid reasons to disapprove this claim. According to the State Commission, the Board has mismanaged the GPF corpus and therefore this claim could not be allowed. The relevant portion of the observations made by the Sate Commission is as follows:

“2.47 Interest on GPF. The Board has submitted interest expense of Rs. 17.90 cores for FY 06 towards interest on GPF in the audited account. As this expense arises due o gap between amount invested by the Board and average balance of GPF, lower returns Board is

getting for invested amount against interest rate of 8% which the Board is paying to employees, the Commission disapproves the expense item. The Commission is of the view that the Board has not managed the GPF corpus effectively and hence, the consumers should not pay for that.”

14. Nothing has been shown to indicate that this finding of the State Commission is wrong. According to the State Commission this expenditure arose due to the gap between the amount invested by the Appellant and the average balance of GPF. The Board is getting lower interest for invested amount against the interest rate of 8% which the Board is paying to the employees. In view of the above finding, the claim for the interest on GPF cannot be allowed as it would burden the consumers for a cost which should have been easily avoided by prudent methods of managing

the GPF corpus effectively. Therefore, the finding on this issue is perfectly justified.

15. According to the Appellant, the State Commission in the order dated 11.08.2009 has failed to consider the entire capital cost of Larji Project and, therefore, there is an unrecovered interest component and the State Commission has not allowed servicing of debt of Rs. 148.11 crores. On this issue, the State Commission has observed in the impugned order that it has already approved the capital cost of Rs. 960 crores provisionally by the order dated 30.05.2008 and the same has not been challenged and as such the said issue cannot be reopened in the present Appeal. It is noticed that the said provisional determination made by the State Commission by the multi year tariff order dated 30.05.2008 was made in pursuance of the order dated 17.07.2006 passed by the Tribunal in Appeal No. 3/06. Therefore, the rejection

of this claim by the State Commission on the above reasoning is perfectly valid.

16. The next issue is relating to the Employees cost. The Appellant has submitted that claim of Rs. 3.75 crores towards Employees cost has wrongly been denied for each year for the period from 2005-06 to 2008-09. The Appellant has totally claimed Rs. 15 crores on this account. As pointed out by the Learned Counsel for the State Commission, this issue has already been decided by the Tribunal in the earlier Appeal in Appeal No. 209 of 2006, filed by the Appellant in the judgment dated 8.12.2008. The relevant observation made by the Tribunal is as follows:

“ 14. The Commission has explained in the Written Submission that when the Himachal Pradesh State Electricity Board (HPSEB) was constituted its employees were to get salary and allowances in the same pattern as their counterparts in the PSEB. Probably most

of the employees in the newly constituted HPSEB were erstwhile employees of the HPSEB, it is explained by Mr. Sanjay Sen, the Learned Counsel appearing for the Commission, that the appellant did not stick to the pattern and some employees were given higher basic pay than payable to their counterparts in the PSEB. This amount being disapproved, the Commission disallowed Rs. 3.75 crores in total employee expenses. The Commission says the following in its tariff order in paragraph 8.10:

“8.10 The Commission has approved terminal benefits as per the Board’s projection, i.e. Rs. 70 cr. The Commission has projected other expenses (under employee costs) in the ratio as that of the increase in Basic Salary with respect to last year’s approved salary. The Commission disallows Rs. 3.75 crores in total employee expenses due to deviation of salary of HPSEB from PSEB pattern as per CAG report for 2001-02. The

Appellant has not taken any specific plea regarding this disallowance. This could be challenged by pleading either that the Appellant had followed the same pattern as that of Punjab or that deviation, if any, was justified. This having not been done, we are not inclined to interfere with the State Commission's decision in this regard".

17. The above observation made by the Tribunal relying upon the finding given by the State Commission on this issue would clearly show that this issue had already been decided by the Tribunal earlier. The Learned Counsel for the Appellant has contended that the said claim was rejected by the Tribunal in earlier judgment merely on the ground that no specific plea was taken in the earlier Appeal and, therefore, that reasoning would not hold good in this Appeal. This submission has no merit. The reading of the judgment of the Tribunal in Appeal No. 209 of 2006 would indicate

that the Tribunal had rejected that claim not only on the ground that the Appellant has not taken this plea in the Appeal but also on the ground that the Appellant did not stick to the pattern as some employees were given higher basic pay than payable to their counter-parts in the PSEB. In fact, the reasoning given by the State Commission for disallowing Rs. 3.75 crores due to the deviation of salary of Electricity Board from PSEB pattern has been upheld and confirmed by the Tribunal in earlier Appeal. The said issue cannot be reopened in this Appeal.

18. The next issue would relate to the interest cost on additional short-term borrowing to meet power purchase expenses. According to the Learned Counsel for the Appellant even though Tribunal in the judgment dated 18.12.2008 in Appeal No. 209 of 2006 directed to allow the claim for the interest on the money borrowed, the State Commission has not complied with the said direction and,

therefore, the impugned order is wrong. In this context it would be worthwhile to refer to the relevant observation and directions given by the Tribunal in Appeal No. 209 of 2006, as follows:

“17. So far as power purchase cost is concerned, the Commission has eventually granted the claim of the Appellant. The Commission, however, has denied the interest on the money borrowed to meet this expense. Such denial is not justified. Nor has the Commission attempted to justify the same. The appellant is entitled to this expense as pass through in tariff.”

19. The reading of the relevant observation referred to above made by the Tribunal would indicate that the Tribunal was of the view that the denial of the interest on power purchase cost was not justified since the Commission had not given any reason to deny the same. It is noticed that

in the impugned order, the State Commission has given the reason as to why the Appellant is not entitled to the interest on the power purchase cost. As a matter of fact, the State Commission proceeded on the basis that interest on power purchase expenses is recovered as a part of the interest for working capital loan. This is allowed to the Appellant in terms of the Regulations. Under the Regulations, the Appellant is allowed operation and maintenance expenses for one month and receivable for 2 months as a part of working capital. This includes any interest on working capital loan. According to the State Commission, the Commission arrived at this conclusion only on the basis of Regulations according to which, the power purchase expense is a component of working capital. The loan taken by the Appellant to meet power purchase cost does not fall under the category of loans which are taken for capital expenditure. As per Regulation 22 this can only be covered as a part of working capital. So in the light of the said

regulation, the Commission has disallowed this claim. Though the Tribunal in earlier judgment stated that the denial of interest on cost was not justified, the Tribunal did not choose to direct the State Commission to pass an order on this issue as against the Regulations framed by the State Commission. Further, after true up for the year 2007-08 the Commission has approved cumulative revenue surplus taking into consideration true up order for FY 2007, in compliance of Tribunal order in Appeal No.209 of 2006 and approved true up for FY 2008 at Rs. 53.64 crores. In view of this there is no carrying cost on additional power purchase. As such, the reasoning given by the State Commission to disallow this claim is justified. Hence, we do not find any merit in this contention.

20. As indicated above, in respect of the finding with reference to the refund made by the Appellant on the contract demand reduction to the consumers and to Power

Intensive Units (PIUs) which has not been allowed by the State Commission to the Appellant is set aside. The Appellant is directed to approach the State Commission with full particulars with exact amount of refund given to the consumers as well as to the PIUs. On the basis of those details, the State Commission may pass appropriate orders in accordance with law, after verification and scrutiny of those details.

21. The Appeal No. 182 of 2009 is partly allowed. With these observations, both the Appeals are disposed of. No order as to costs.

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

Dated: 31st May, 2010.

INDEX: REPORTABLE/NON-REPORTABLE