

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

Appeal No. 57 of 2010 & IA 78 of 2010

Dated : October 27, 2010

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson.**

Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

**Bihar State Hydro-Electric Power Corporation Ltd.,
2nd Floor Sone Bhawan, Birchand Patel Marg,
Patna-800 001**

.....Appellants

Vs

**Bihar Electricity Regulatory Commission,
Vidyut Bhawan-II, Bailey Road, Patna-110021.**

.....Respondent

Counsel for Appellant(s) : Mr. Suresh Ch. Tripathi

**Counsel for Respondent(s): Mr. Gopal Singh with
Mr. Md. Samiul**

J u d g m e n t

Per Hon'ble Shri Rakesh Nath, Technical Member:

1. This Appeal has been filed by Bihar State Hydroelectric Power Corporation Ltd. against the order dated 22.12.2009 passed by the Bihar Electricity Regulatory Commission determining the tariff of hydro power plants for the FY 2009-10.
2. The Appellant, Hydro Power Corporation is an undertaking of the Government of Bihar and is in the business of operation and maintenance and development of hydro power projects. Bihar Electricity Regulatory Commission is the Respondent.
3. The Appellant Corporation had filed Aggregate Revenue Requirement/ Tariff Petition for the FY 2009-10 before the State Commission on 31.3.2009. The State Commission in its order dated 31.3.2009 determined the provisional tariff for hydro power plants of the Appellant and allowed some expenses and disallowed some of the expenses. The State Commission has held in their order that the generation tariff determined in the order was provisional as the Appellant had not submitted annual accounts audited by the Statutory auditors/ Accountant General, being a mandatory requirement and further a number

of discrepancies have been noticed in the accounts. Aggrieved by the State Commission's order, the Appellant has filed this appeal.

4. The brief facts about the case are given in the following paras.

The Appellant Hydro Power Corporation filed ARR/tariff petition for the FY 2009-10 before the State Commission on 31.3.2009, as against the requirement of submission of tariff petition to be filed on or before 15th November, 2008 as per the Regulations of the Commission. The said petition did not contain the required data/information. Hence the State Commission directed the Hydro Power Corporation to remove the deficiencies in the tariff petition and also obtain approval of Board of Directors on ARR/ Tariff Petition and annual accounts for FY 2008-09. The Appellant/Petitioner, thereupon, submitted some of the data/ information along with the approval of the Board of Directors as sought by the Commission on 12.08.2009.

5. The State Commission took the petition on record on 2.9.2009 and asked the Appellant/Petitioner to remove the remaining deficiencies in tariff petition. The Appellant/Petitioner instead

of submitting the required information, submitted a revised ARR for the FY 2009-10 on 22.09.2009. The Appellant/Petitioner also did not furnish the Annual Accounts duly audited by the Statutory Auditors/ Accountant General. In view of the non-availability of Annual Accounts duly audited by the Statutory Auditors/ Accountant General and number of discrepancies noticed in the accounts, the State Commission determined only the provisional tariff.

6. The State Commission has also held in the impugned order that the annual accounts of the Appellant/Petitioner have not been audited by the Accountant General of Bihar from 1996-97 even though such audited accounts are mandatory. The Appellant/Petitioner did not get the previous years' account approved by the Annual General body Meeting for taking up the audit. On noticing this, the State Commission directed the Appellant to explain as to why the Annual General body Meeting has not been conducted for the last twelve years. The State Commission has further directed the Appellant to take immediate steps to get the annual accounts audited by the Statutory Auditors/AG within a time bound programme.

7. However, in the application of the Appellant for revision of tariff from Rs. 2.00/kWh to Rs. 4.06/kWh, the State Commission has allowed a provisional tariff of Rs. 2.49/kWh.
8. Aggrieved over this, the Appellant has filed this Appeal. The Appellant has submitted the following points:
 - i) The State Commission has disallowed part of O&M expenses on the plea of discrepancies in the accounts.
 - ii) Return on Equity has not been granted on the ground that same was not claimed whereas 14% Return on Equity had to be allowed as per the tariff Regulations.
 - iii) Against the claim of Rs. 723.86 lakhs on account of depreciation, the State Commission allowed only Rs. 412.63 lakhs due to non-availability of accounts audited by Statutory Auditors/CAG.
 - iv) The actual expenditure incurred on completion of the projects was not allowed due to absence of audited accounts by Statutory Auditors/CAG.
 - v) The State Commission did not allow any capital investment even though the Petitioner/Appellant had submitted a copy of the 11th Plan before the State Commission indicating an outlay of Rs. 1240 lakhs on

the existing projects and Rs. 945 lakhs for renovation and modernization of two hydro power projects for the FY 2009-10.

vi) The State Commission should have placed reliance on the audit conducted by the Chartered Accountant of the Appellant and should not have insisted on the Statutory Audit. Conducting of Statutory audit is beyond the control of the Appellant. The Hon'ble Supreme Court had also granted stay in the prosecution sought to be conducted by the Registrar of Companies for not carrying out the statutory audit. Audit of CAG may be a relevant factor for truing up but not for determination of ARR/tariff.

9. In reply to this submission, the Learned Counsel for the State Commission has submitted that the Appellant/Petitioner is expected to submit the application accompanied with annual accounts of the financial year ending prior to the date of application, duly audited and certified by the Statutory Auditors in accordance with the Regulations of the Commission. In the absence of audited accounts by the Statutory Auditors/AG, the State Commission had determined the provisional tariff on the basis of annual accounts for the FY 2008-09 as approved by the Board of Directors of the Appellant which were submitted by

the Appellant/Petitioner during the proceedings before the Commission and the provisional tariff was subject to finalization of annual accounts and audit by CAG.

10. Regarding capital investment, the State Commission has submitted that the Appellant/Petitioner had only submitted a copy of the 11th Five Year Plan document without identifying the funding agency or the concrete plan of funding and benefits accruing from the scheme and Appellant/Petitioner had not proposed any capital investment in the ARR and Tariff Petition.
11. According to the State Commission, the Appellant/Petitioner had neither shown any amount of equity nor claimed any Return on Equity in the petition and hence no ROE was considered by the Commission even though the Tariff Regulations provided for 14% ROE.
12. Taking into consideration of the contentions of both the parties following questions may arise for consideration :
 - i) Whether the State Commission was correct in asking for annual accounts duly audited by the Statutory Auditors/CAG for determination of tariff and not allowing

the full expenditure as per the accounts submitted by the Chartered Accountant appointed by the Appellant?

- ii) Whether the State Commission should have allowed Return on Equity even though the Appellant/ Petitioner had not claimed the same in the petition before the Commission?
 - iii) Whether the State Commission was justified in not allowing the capital investment on the basis of the 11th Five Year Plan document submitted along with the ARR/ Tariff Petition even though the Appellant/Petitioner had not proposed any capital investment in the ARR and Tariff Petition ?
13. Let us take up the first question relating to requirement of annual accounts duly audited by Statutory Auditors for determination of tariff. This question was examined by the Tribunal in Appeal No. 56 of 2010 filed by the Appellant against the refusal of the State Commission to determine the tariff/ARR of the Appellant for the year 2008-09 due to non-submission of annual accounts duly audited by the Statutory Auditors/CAG. This Tribunal in its judgment dated 29-09-2010 has held that the application for determination of tariff is required to be accompanied with annual accounts of the financial year prior to the date of application duly audited and

certified by the Statutory Auditors. However, in the present case the State Commission has determined provisional tariff based on the annual accounts approved by the Board of Appellant. The relevant extracts from the judgment dated 29.9.2010 are as under:

- “ 11. Section 61(a) of the Electricity Act, 2003 envisages that the Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating Companies and transmission licensees. Regulation 5 of Central Commission’s Tariff Regulations, 2004 applicable for the period 1.4.2004 to 31.3.2009 provide for the generating company to submit the capital expenditure incurred duly audited and certified by the statutory Auditors.*
- 12. The State Commission is expected to determine the tariff on commercial principles and to ensure recovery of the cost of electricity in a reasonable manner according to section 61(b) and 61 (d) of the Act. Actual costs form the basis for determination of various components of tariff and future projections. Therefore, availability of authenticated data of costs is an essential requirement for determination of tariff.*

The authenticated data of costs incurred could be only obtained from the accounts audited by the statutory Auditors.

14. *Regulation 5 of the “Terms and Conditions for Determination of Tariff Regulations 2007” of the State Commission dated 24.04.2007 stipulates that for determination of tariff, the generating company is required to make an application accompanied with annual accounts of the financial year prior to the date of application, duly audited and certified by the statutory auditors.....*
16. *Let us now discuss the requirement of audit of annual accounts of the Appellant as per the provisions of the Companies Act. The Auditor of the Appellant, being a Company owned by the State Government, have to be appointed by the Comptroller & Auditor General of India as per Section 619(2) of the Companies Act, 1956. After the audit, the Auditors have to submit a copy of the audit report to the CAG who has right to comment upon or supplement the audit report in such manner as he may think fit. The audit report alongwith the certificate of the CAG have to be put up before the Annual General Meeting of the Company. Admittedly this has not been done by the Appellant for last many years resulting in initiation of prosecution proceedings against the Appellant by the Registrar of Companies, Bihar.*

Thus audited accounts by a private Chartered Accountant appointed by the Appellant is not acceptable both as per the provisions of the Companies Act and as per the Regulations framed by the Commission in accordance with the provisions of the Electricity Act, 2003. The first question is thus answered against the Appellant.

23 *The Commission is expected to carry out prudent check of the expenses incurred by the Appellant while determining the tariff. The authenticity of the data for costs incurred is very important for this exercise. The audited accounts of the previous years by the statutory Auditors are necessary for authenticity of the cost data. The cost incurred on the capital works is also required to be certified by the statutory auditors for the capitalization of assets. It is not possible for Commission to go into details regarding authenticity of the accounts. The authenticity of the accounts is established only if the accounts are duly audited and certified by the statutory Auditors.”*

14. In this case, the State Commission has approved provisional tariff subject to finalization of the annual accounts and audit by CAG. The State Commission has also directed the Appellant to get the annual accounts audited by the Statutory

Auditors/AG within a time bound programme. Thus the Appellant has liberty to approach the State Commission for a review of the tariff after getting the annual accounts audited by the Statutory Auditors/AG.

15. The Appellant has also pleaded that according to the guidelines issued by the Ministry of Non-Conventional Energy, Government of India the base electrical energy purchase price valid for 1994-95 shall be minimum of Rs. 2.25 per kWh and the same shall be escalated at a minimum of 5% every year and this principle has been given a go-bye in the impugned order.
16. We feel that the State Commission is expected to determine the tariff according to its own Regulations. The guidelines issued by the Ministry of Non- Conventional Energy are not binding on the State Commission. In view of above the first question is answered against the Appellant.
17. Let us now take up the second question relating to Return on Equity.
18. Return on Equity is allowed @ 14% according to the tariff Regulations. According to the State Commission the

Appellant has neither shown any amount of equity nor claimed any ROE in ARR and tariff petition but claimed interest on all the outstanding loans.

19. We notice from the ARR application submitted by the Appellant/Petitioner before the Commission that Return on Equity in the various projects has been specifically indicated as nil and the entire amount has been shown as loan. When the Appellant/Petitioner has neither given the data on equity deployed nor claimed Return on Equity in the ARR/ Tariff Petition, we cannot find fault with the findings of the State Commission in this regard. Accordingly we decide this point also against the Appellant.

20. We will now discuss the third issue regarding the capital investment disallowed by the State Commission. According to the State Commission the Appellant/Petitioner had not submitted any capital investment in the ARR and Tariff Petition for the year 2009-10 but had simply submitted the 11th Plan document for the year 2007-12. The Appellant/Petitioner in the 11th Plan document has indicated an outlay of Rs. 1240 lakhs towards capital investment of the existing projects and Rs. 945 lakhs towards renovation and

modernization of two projects during the year 2009-10. The Appellant/Petitioner has neither identified any specific funding agency for drawal of loans nor any concrete plan for funding and expected benefits from such investment have not been furnished. The Appellant/ Petitioner has stated that the purpose of submitting the 11th Five Year Plan document was to seek approval of the capital investment.

21. In our opinion the Five Year Plan document is a broad plan for setting up the goals. It is not sufficient for the Appellant to furnish a copy of the plan for the five years period for getting approval of the State Commission for capital investment in the ARR for the year 2009-10. The State Commission is right in asking for the submission of proposal for the capital investment in the ARR application with proposed funding of the scheme and the expected benefit from the scheme. The Appellant/Petitioner has adopted a casual approach in submitting the ARR/ Tariff Petition. Therefore, the third point is also held against the Appellant.

22. Our findings are summarized as under:

a. The Tariff Regulations of the State Commission stipulate that the application for determination of tariff is required

to be accompanied with annual accounts of the financial year prior to the date of application, duly audited and certified by the statutory auditors.

- b. The State Commission is expected to determine the tariff on commercial principles and to ensure recovery of cost of electricity in a reasonable manner. Data on actual costs incurred by the Appellant forms the basis for future projections and for determination of various components of tariff. Availability of authenticated data of costs incurred is essential pre-requisite for determination of tariff.
- c. The State Commission is expected to do prudent check of the costs incurred by the Appellant for which the authenticity of data is essential. The authenticity of data is only established by accounts audited by the statutory Auditors. Audited accounts by a private Chartered Accountant appointed by the Appellant i.e. internal audit are not acceptable both as per the provisions of the Companies Act and as well as Tariff Regulations. The Appellant has failed to get the annual accounts audited from the Statutory Auditors/ CAG for last many years despite directions by the State Commission and the statutory requirement.

- d. The State Commission is right in determining the provisional tariff for the year 2009-10 subject to finalization of annual accounts audited by the Statutory Auditors/CAG.
- e. The Appellant has not claimed any Return on Equity in the Petition nor given any data on equity deployed. In view of this the State Commission is correct is not allowing any Return on equity. In our opinion the Appellant/Petitioner has adopted a very casual approach in submission of the ARR/ Tariff Petition before the State Commission.
- f. The State Commission is correct in not allowing any capital investment merely on submission of the 11th Five Year Plan document of the Appellant without furnishing any specific proposal for the capital investment in the ARR application with proposal for funding and expected benefits from the scheme. In our opinion, as indicated above, the Appellant has adopted a very casual approach in submission of the ARR/Tariff Petition before the State Commission.

23. In view of above findings, we conclude that the Appeal has no merits and the same is liable to be dismissed.

24. In our judgment dated 29.9.2010 in Appeal No. 56 of 2010 we had imposed cost on the Appellant in view of its conduct in moving two review petitions before the State Commission instead of complying with the directions of the State Commission and then approaching this Tribunal that too with a delay. In this case we do not propose to impose any costs. Accordingly, the appeal is dismissed as devoid of merits. No costs.

25. Pronounced in the open court on this 27th day of October, 2010.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

INDEX : REPORTABLE / NON-REPORTABLE.

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