

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

APPEAL NO. 227 OF 2014

Dated: 18th November, 2015

**Present: Hon'ble Mr. Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:

1. M/s. Jaipur Vidyut Vitran Nigam Ltd.,Appellant/Petitioner No.1
Vidhyut Bhawan,
Jyoti Nagar, Jaipur-302005.
2. M/s. Ajmer Vidyut Vitran Nigam Ltd.,Appellant/Petitioner No.2
Panchsheel Nagar,
Makarwali Road, Ajmer-305004.
3. M/s. Jodhpur Vidyut Vitran Nigam Ltd.,Appellant/Petitioner No.3
New Power House Road,
Industrial Area, Jodhpur-342003.

Versus

1. M/s. Raj West Power Ltd.,Respondent No.1
Office No. 2 & 3, 7th Floor,
Manupasana Plaza,
C44, Sardar Patel Marg,
C Scheme, Jaipur-302001.
2. M/s. Barmer LigniteRespondent No.2
Mining Company Ltd.,
Office No. 2 & 3, 7th Floor,
Manupasana Plaza,
C44 Sardar Patel Marg,
C Scheme, Jaipur-302001.

3. Rajasthan Electricity Regulatory Commission, Vidyut Viniyamak Bhawan Shakar Marg, Jaipur-302001.Respondent No.3

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Advocate
Mr. Bipin Gupta
Mr. Subodh Verma
Ms. Meghana Aggarwal
Mr. S.K. Bansal

Counsel for the Respondent(s) : Mr. M.G. Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Ms. Swagatika Sahoo
for R-1 & R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The present Appeal is filed under Section 111 of the Electricity Act, 2003 against the impugned order dated 30.05.2014 passed by the Rajasthan Electricity Regulatory Commission (hereinafter refer to as “**State Commission**”) in Petition No. RERC-445/14 and 446/14. M/s. Jaipur Vidyut Vitran Nigam Ltd. (hereinafter refer to as “**Appellant No.1**”) is a company incorporated under the Companies Act, 1956, engaged in the business of distribution and supply of electricity in 12 districts of Rajasthan. M/s. Ajmer Vidyut Vitran

Nigam Ltd. (hereinafter refer to as “**Appellant No.2**”) is a company incorporated under the Companies Act, 1956, engaged in the business of distribution and supply of electricity in 11 districts of Rajasthan. M/s. Jodhpur Vidyut Vitran Nigam Ltd. (hereinafter refer to as “**Appellant No.3**”) is a company incorporated under the Companies Act, 1956, engaged in the business of distribution and supply of electricity in the remaining districts of Rajasthan.

M/s. Raj West Power Ltd. (hereinafter refer to as “**Respondent No.1**”) is a company incorporated under the Companies Act, 1956 and engaged in the business of generation of the electricity within the meaning of Section 2(28) of the Electricity Act, 2003.

M/s. Barmer Lignite Mining Company Ltd. (hereinafter refer to as “**Respondent No.2**”) is a company incorporated under the Companies Act, 1956 and is mining entity.

The Rajasthan Electricity Regulatory Commission – RERC (hereinafter refer to as “**the State Commission**”) is the Respondent No. 3.

2. By the said impugned order, the State Commission has determined an interim generation tariff of the Respondent No.1 for the FY 2014-15. The main issue brought out by the Appellants in the said appeal

is against the impugned order wherein the Commission has determined an interim tariff which in the opinion of the Appellants, is not mandated as per Electricity Act, 2003 as well as per RERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 (hereinafter refer to as “**Regulations 2014**”).

As per the Appellants, the State Commission should have determined the final tariff instead of interim tariff, particularly in this case when a generating company has already commissioned all the units and has been commercially supplying power since 2009.

3. The following issues have been put forth by the Appellants in the present appeal:-
 - (i) The Government of Rajasthan accepted Respondent No.1’s proposal for Jalipa and Kapurdi Lignite Mining cum Power Project as per the specified terms & conditions.
 - (ii) Respondent No.1 filed a petition on 28.07.2005 before the State Commission for determination of capital cost and transfer price of lignite from Jalipa and Kapurdi Lignite Mine.
 - (iii) The State Commission vide its orders dated 19.10.2006 and 26.10.2006 approved the capital cost of Rs.4804.49 and Rs.811.65 per m/t as transfer price of lignite (fuel) for the first

year from Jalipa and Kapurdi Mines in the district of Barmer at generation tariff of Rs.2.28 per kWh.

- (iv) Thereafter, Petition No. 184 of 2009 was filed by Respondent No.1 on 17.03.2009 for approval of provisional tariff for the first two units of 135 MW each on alternate fuel and the State Commission on the basis of the consent of Discoms for alternate fuel passed its order on 13.11.2009 approving therein the tariff for the first 2 units of 135 MW each for FY 2009-10 at the rate of Rs.3.8932 per kWh and for FY 2010-11 at the rate of Rs.3.8773 on alternate fuel.
- (v) Respondent No. 1 thereafter filed Petition No. 244 of 2011 and 245 of 2011 on 25.01.2011 with a prayer to the State Commission to determine provisional tariff for the FY 2011-12 and FY 2012-13 for unit-1 and 2 on lignite fuel and unit-3 and 4 on alternate fuel.
- (vi) Respondent No.1 vide these petitions sought provisional tariff @ Rs.4.71 per kWh for unit-1 and Rs.4.84 per kWh for unit-2.
- (vii) The State Commission while disposing of this petition issued certain directions vide their order dated 17.08.2011

and the relevant extract is reproduced below:-

“24. Decision of the Commission on various issues are summarized as under:

- (1) The petition of lignite transfer price of BLMCL is maintainable.**
- (2) The petition for scrutiny of PPA needs to be filed by the licensee and it should be done at the earliest.**
- (3) There is a ceiling on first year tariff and for adjudicating upon the dispute there on, a petition under Sec. 86(1) (f) would have to be filed.**
- (4) The bidding undertaken for outsourcing of lignite extraction is not in accordance with earlier order dated 19.10.2006. Therefore, the variable cost of lignite transfer price endorsed by the independent person cannot be accepted and as a result lignite transfer price is not determinable.**
- (5) Interim tariff, therefore, also cannot be worked out for want of fuel cost.**
- (6) A fresh bidding for outsourcing would need to be undertaken as per directions given in 2006 order.**
- (7) The outsourcing bidding may be undertaken only for Kapurdi, as Jalipa mines would become operational not earlier than FY 13014, as indicated in the petition.**
- (8) For bidding, BLMC is advised to give due consideration to short term bidding in case such a tender is likely to lead to lower cost, as discussed earlier. A supplementary petition would need to be filed after completion of the said bidding for determination of lignite transfer price.**
- (9) The petitioner BLMCL could work out the lignite extraction cost based on lignite mines being operated by RSMML with due adjustment in respect of stripping ratio, depth of mine and variation in other relevant parameters and furnish**

that to the Commission for working out lignite transfer price for the interim period till the rate, based on transparent bidding for outsourcing gets finalized.

(10) Further hearing in the matter would be fixed based on option as emerges in respect of lignite transfer price or as deemed appropriate.”

- (viii) Thereafter, Respondent No.1 filed Petition No. 311 of 2012 on 22.02.2012 before this State Commission for determination of provisional tariff for unit-1 to 4 for FY 2012-13 and Petition No. 340 of 2012 on 24.08.2012 before the State Commission for determination of provisional tariff for unit-5 to 8 on lignite from Kapurdi mine.
- (ix) Simultaneously, the Respondent No. 2 filed a Petition No. 312 of 2012 on 22.02.2012 before this State Commission for determination of provisional transfer price of lignite for FY 2012-13 for supply of lignite to unit-1 to 4 of Respondent No.1 and Petition No. 341 of 2012 on 24.08.2012 before this State Commission for determination of provisional transfer price of lignite from Kapurdi mine block for FY 2012-13 for supply to unit-5 to 8 of Respondent No. 1.
- (x) The State Commission keeping in view the urgency, passed earlier an order dated 02.04.2012 in respect of the petition No.

311 of 2012 and petition No. 312 of 2012 filed on 22.02.2012 thereby approving the interim transfer price of lignite and interim tariff for the unit 1 to 4 of the Respondent No.1 subject to adjustment as per the subsequent orders.

- (xi) The State Commission's order dated 02.04.2012 was challenged before this Tribunal vide Appeal No. 98 of 2012 & IA No. 196 of 2012 and this Tribunal vide its order dated 21.09.2012 concluded as reproduced below:-

“Accordingly, the time of 14 weeks is granted to finish the process of fixing the final provisional tariff. In the meantime, the 4 Commission may consider fixing the adhoc tariff in respect of Unit nos. V to VIII after giving full opportunity to the Appellant.

The learned counsel for the Appellant submits that the adhoc tariff fixed for Units I to IV is inadequate and requests for issuing a direction to the Commission to re-consider the tariff rate. However, Mr. R.K. Mehta, the learned counsel for the Commission submits that the said rate is sufficient and it is not inadequate as claimed by the learned counsel for the Appellant.

However, we deem it appropriate to direct the State Commission to re-consider the rate uninfluenced by the earlier finding, by taking into consideration of the submissions of the Appellant as well as the materials placed by the Appellant and fix adhoc tariff in respect of Units I to VIII in the meantime. However, we make it clear that we are not expressing any opinion on the merits of the matter.

With these observations, the Appeal is disposed of in the light of the Memo of undertaking filed by the learned counsel for the State Commission. The State Commission is directed to continue the process, which has already been commenced and finish the same within the time frame as specified in the Memo after giving 5 opportunity to the all concerned. The Appellant is also directed to cooperate with the State Commission by promptly furnishing all the information sought for by the State Commission to enable the State Commission to complete the process for fixation of final provisional tariff within the time frame as indicated above.”

- (xii) The State Commission vide its order dated 15.10.2012 allowed interim tariff and transfer price for lignite for unit-1 to 8 of 135 MW each on adhoc basis approving therein tariff for unit-1 to 4 for FY 2012-13 as Rs.3.6271 per kWh and for units-5 to 8 for FY 2012-13 as Rs. 3.8600 per kWh and the lignite transfer price after cess, royalty and VAT was determined as Rs.1266 per m/t. The relevant portion of the order dated 15.10.2012 to this effect is reproduced below:-

“20. It may be mentioned that the Commission in its order dated 02.04.12 issued in the matter of interim tariff for unit 1 to 4 allowed the fixed cost for ad-hoc tariff as 70% of the proposed fixed cost. The lignite transfer price equivalent to 65% of transfer price before royalty and VAT claimed by the petitioner was allowed in the fuel cost to calculate variable charges of the interim tariff. The Commission for the purposes of ad-hoc tariff adopted 95% of such calculated variable charges.

21. *The interim tariff & transfer price allowed in order dated 02.04.12 is as given below:-*

S.No.	Item	Rate
1.	Lignite Transfer Price after Cess, Royalty and VAT	Rs.1193/MT
2.	Fixed cost	Rs.1.8375/unit
3.	Variable cost	Rs.1.5073/unit
	Total (2+3)	Rs.3.3448/unit

37. *The interim lignite transfer price and interim tariff for units 1 to 4 and 5 to 8 on ad-hoc basis would be as under:*

Transfer price of supply of lignite from Kapudi

S.No.	Item.	Rate (Rs./MT)
1.	Lignite Transfer Price before Cess, Royalty and VAT	1088
3.	Taxes & duties	178
4.	Lignite Transfer Price after Cess, Royalty and VAT	1266

Unit 1 to 4

S.No.	Item.	Rate (Rs./MT)
1.	Fixed cost	2.0433
2.	Variable Cost	1.5838
3.	Total (2+3)	3.6271

Unit 5 to 8

S.No.	Item.	Rate (Rs./MT)
1.	Fixed cost	2.2762
2.	Variable Cost	1.5838
3.	Total (2+3)	3.8600

”

(xiii) However, for the subsequent FY 2013-14, the State Commission vide its interim order dated 4.4.2013 while disposing the claim of the Respondent No.2 for the increase in transfer price of the lignite, stated as follows:-

- “12. The Commission is constrained to remark that unless and until the points mentioned in the preceding paras are satisfactorily explained, it would not be possible to consider any increase in lignite transfer price on account of change in diesel price mechanism and its de-regulation by the Government of India.**
- 13. Considering the said position the Commission has no option but to extend the existing lignite transfer price till further orders. The variable component of the tariff gets extended accordingly.**
- 14. It may also be mentioned that petitioner has also prayed for extension of adhoc interim tariff beyond 31.3.2013. This was not objected by the learned counsel of the respondents during hearing. For ensuring that power supply does not get hampered and considering the fact that the order for capital cost determination as well as tariff for units 1 to 8 for the year 2012-13 stands reserved and the matter is at an advanced stage of consideration, it would be appropriate to extend the ad-hoc interim tariff allowed vide order dated 15.10.2013 by another three months i.e. upto 30th June, 2013.**
- 15. However, in case the lignite transfer price gets revised during the said period, the variable charges of the tariff would be subject to revision as a consequence thereof.”**

(xiv) In compliance with this Tribunal order dated 21.09.2012, the Commission in its order dated 30.08.2013 opined the entire delay beyond Commercial Operation Declaration (COD) of units

have been due to reasons entirely attributable to the Respondent No.1. In the same order, the provisional capital cost was determined as Rs.5.20 crore per MW against in principle approval of Rs. 4.8 crore per MW, considering the cost incurred till 30.09.2012 with the conditions that this said capital cost would be subject to adjustment after determination of the final capital cost duly audited on the COD of the project. Further under paragraph 6.46 of this order of the State Commission, Respondent No.1 was directed to provide reconciliation and detailed break up cost duly certified by statutory auditor.

In the petition of Respondent No.2, State Commission vide their order dated 30.08.2013 recorded that in absence of any supporting documents, the State Commission could not determine the final transfer price of lignite of the Respondent No.2 and as such the State Commission could only determine the interim transfer price of the lignite.

- (xv) In the above orders, the State Commission gave a specific direction to the Respondents that the final petition containing relevant details necessarily be filed by the Respondents within 2 months of the order.

(xvi) Respondent No. 1 & 2 filed Petition No. 423 of 2013 and 424 of 2013 on 24.09.2013 respectively for FY 2013-14 and again sought the provisional tariff and did not seek final tariff as directed by the State Commission through its order dated 30.08.2013. While disposing of these petitions, State Commission vide its order dated 11.10.2013 had held that the interim tariff for units-1 to 8 for FY 2013-14 would be the same as determined by this State Commission vide order dated 30.08.2013.

(xvii) Even for the FY 2014-15, Respondent No. 1 and 2 filed Petition No. 445/14 and 446/14 respectively before this State Commission and sought interim tariff instead of final tariff as directed under State Commission's order dated 30.08.2013.

(xviii) The State Commission by the impugned order dated 30.05.2014 has again determined interim generation tariff of the Respondent No.1 for the FY 2014-15.

4. The Appellants are the aggrieved parties and brought out the following questions of law which need to be looked into

while considering their present Appeal:-

- I. Whether the Commission had the jurisdiction to determine an interim tariff when there is no provision to do so under the Electricity Act, 2003 and the Regulations 2014?
- II. Whether the Commission was correct in holding that it can determine interim tariff on the basis of exercise of powers under section 94(2) of the Electricity Act, 2003?
- III. Whether the Commission was correct in overlooking the express provisions contained in Regulations 42(4) and (5) of the Regulations 2014, which clearly specify conditions for determination of provisional tariff and the requirement to seek determination of final tariff after the unit/project has achieved commercial operation?
- IV. Whether in view of the provisions contained in section 62 and 64 of the Electricity Act, 2003 read with the applicable regulations, the impugned interim order can at all be construed as a tariff order for the year 2014-15, which has amended/modified the previous provisional order dated 30.08.2013?

- V. Whether there was any material available for determination of tariff and/or issuance of an interim order which resulted in increase of tariff by about 30 paisa per kWh?
- VI. Whether the exercise for determination of tariff was done in accordance with the Electricity Act, 2003 and the regulations?
- VII. Whether it is mandatory for the Commission to hold a public hearing for purposes of determination of tariff and the failure to do so goes to the very root of the tariff order?
- VIII. Whether the Commission was correct in increasing the variable cost of power by 10 paisa when there is no material for determining variable cost particularly when the Respondent No.1 and 2 are in violation of the State Commission's previous orders requiring appointing of a mining contractor through a bid process?
- IX. Whether there is any material available for increasing the fixed cost of the various units in a single combined order without any analysis of the various fixed cost parameters?
- X. Whether the Commission is mandatorily required to do a prudence check of all cost parameters for determination of tariff?

- XI. Whether in the impugned order, the Commission has discharged its legal obligation to conduct a prudence check of all cost parameters and also whether it can proceed solely on the basis of the statement made by the Respondent without any independent examination, analysis and prudency check?
 - XII. Whether the Commission has completely erred in entertaining the petition, passing an interim order and modifying/amending the provisional tariff dated 30.08.2013?
 - XIII. Whether the impugned interim order can at all be construed as an order issued under section 64 of the Electricity Act, 2003?
 - XIV. Whether section 94(2) of the Electricity Act, 2003 allows the Commission to make a departure from the procedure prescribed in section 64 of the Electricity Act, 2003, which section specifically deals with determination of tariff read with the provisions of the Regulations 2014?
5. The Appellants have contested the legality of the impugned order dated 30.05.2014 of the State Commission. It is stated that the State Commission was wrong in determining interim tariff on the basis of exercise of powers under Section 94(2) of the Electricity Act, 2003 and the State Commission has overlooked the provisions contained

in Regulation 42(4) and (5) of the Regulations 2014 which clearly specify conditions for determination of provisional tariff and the requirement to seek determination of final tariff after unit/project have achieved commercial operation. Even the provisions contained under Section 62 and 64 of the Electricity Act, 2003 read with the applicable regulations, the impugned interim order cannot be taken as a tariff order for the year 2014-15 since the provisions contained in Section 62 and 64 of the Electricity Act, 2003 provide for specific procedure for determination of tariff.

6. The Appellants further stated that when the State Commission passed the earlier order determining provisional tariff on 30.08.2013, the commercial operation of all the units had taken place.
7. This is the main grievance of the Appellants that generating company of Respondent No.1 having commissioned all the units and commercially supplying power since 2009 and even in spite of the directions given by the State Commission vide their order dated 30.08.2013 directing the Respondents to file a final petition, how the State Commission entertained this petition and determined the interim tariff of Respondent No.1 for the FY 2014-15 & whether the State Commission had the jurisdiction to determine an interim tariff?

8. The Respondent No.1 and 2 made the following submissions supporting the State Commission's impugned order dated 30.05.2014:-

(i) That interim order which is impugned in the subject appeal was related to the tariff for the FY 2014-15. That interim tariff was an outcome of non finalization of capital cost of the power plant for the year ending 31.03.2014. Once the capital cost and other fixed charges are finalized, the issue of the interim tariff order would be academic.

(ii) That the financial implications as per final tariff order will get adjusted. In support of the same, the relevant extracts from the impugned order dated 30.05.2014 as stated by the Respondents, inter-alia, provide as under:-

“35. This tariff & transfer price shall be for FY 14-15, pending the final determination of tariff for the financial year 2014-15 after following the due procedure provided in section 62 r/w Section 64.

36. We would like to make it clear that the above interim tariff is subject to final determination of RWPL tariff including transfer price of BLMCL and adjustments if any, thereafter.”

(iii) The State Commission has held that the tariff and transfer price for FY 2014-15 shall be determined after following due

procedure provided in Section 62 r/w Section 64 of the Electricity Act, 2003. It was also stated by the Respondents that after complying with the due procedure and hearing the stakeholders while determining the final tariff, the State Commission has reserved the order in June, 2015.

- (iv) That the impugned order dated 30.05.2014 was after considering the capital cost as per the actual expenditure with due justification based on audited account statements as furnished by the Respondents and the State Commission after having examined the same and being satisfied and concluded that there is an increase in the input cost of the Respondent Nos. 1 & 2, therefore, provided reasonable increase in the interim order to ensure the sustainability of the project.
- (v) The State Commission in the prevailing circumstances and after their prudent checks, passed the interim order giving an adhoc increase for the tariff pending the determination of the tariff. The Respondents further opined that it is always beneficial for consumers at large that year to year increase, if any, is allowed through interim orders as it would save the consumers from huge incremental cost when the final tariff in

view of the longer intervening duration will be granted thereby increasing their financial burden. Hence, reasonable incremental cost on year to year basis would always ensure that there would not be a tariff shock for the consumers at the time of final determination.

- (vi) The Respondents even cited that the Central Commission following the principle of giving a provisional adhoc tariff upto 95% of the tariff allowed the same pending the determination of final tariff.
- (vii) That decision of the State Commission in giving interim order is, therefore, fully in accordance with the law and in the interest of the consumers at large.
- (viii) While contesting the jurisdiction of the State Commission to pass such interim tariff order, Respondents quoted Section 94 of the Electricity Act, 2003, inter-alia, provides as under:-

“(2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.”

The words “any proceedings, hearing or matter” use in the Section 94(2) include tariff proceedings initiated under Section 62 r/w Section 64 of the Electricity Act, 2003.

- (ix) That the requirement under Section 64 of the Electricity Act such as publication of the petition, public hearing etc. would arise when State Commission takes such matter finally on merit for final tariff and not at the interim stage. The very purpose of the Section 94(2) of the Electricity Act, 2003 is to enable the State Commission to decide on an adhoc interim order subject to the final determination.
- (x) The impugned order giving therein the interim tariff for the FY 2014-15 is subject to final determination of tariff after following due procedure prescribed under the Electricity Act, 2003 and the RERC Regulations, 2014 which includes public hearing and/or publication etc.
- (xi) As regards Regulations 42(4) and (5) of the RERC Regulations, 2014, the Respondents stated that the contention of the Appellants that the provisional tariff or the interim tariff can be fixed by the Commission only for the period prior to the Commercial Operation Date of the power plant and impugned order in nature of an interim order is contrary to the said regulation, is not legally tenable. These regulations deal with the specific aspects of determination of tariff prior to the

Commercial Operation Date and do not in any way take away the power of the State Commission to pass the interim order under Section 94(2) of the Electricity Act, 2003.

- (xii) Further, Regulation 62 of RERC (Transaction of Business) Regulations, 2005 specifically empowers the State Commission to pass interim order. The relevant portion as quoted by the Respondents is as under:-

“62. Interim Orders – The Commission may pass such interim orders as it may consider appropriate at any stage of proceedings.”

- (xiii) As per the Respondents, the interim order can also be passed in a proceeding for determination of provisional tariff and for that matter, an interim order can be passed in any proceedings.
- (xiv) That the transfer price for the lignite procured by Respondent No.1 from Respondent No. 2 in the subsequent proceedings before the State Commission, the Appellant itself had agreed that the transfer price determined by the impugned order may continue to be applicable for the tariff period 2015-16 with revision in taxes etc. In this regard, the Respondents have quoted relevant portion of the pleadings of the Appellants

seeking continuation of transfer price allowed by the State Commission by its last order.

9. The main issue as brought out by the Appellants in the present Appeal before us is limited to the issue of interim order passed by State Commission granting therein the interim generation tariff for the year 2014-15 in a case where the generating company has commissioned all the units and they have been commercially supplying power since 2009. As far as the transfer price of lignite of the Respondent No.2 is concerned, though it is adhoc interim lignite transfer price but the Appellants while making submissions before the State Commission for final tariff determination for the year 2014-15 pleaded for continuation of the same as passed in the last order till the time the final transfer price is worked out.
10. After hearing the learned senior counsel Shri Sanjay Sen for the Appellants, the learned counsel Shri M.G. Ramachandran for Respondents and considering the various issues brought out by them in their submissions and the arguments put forth, our observations are as follows:-
 - (a) The Appeal has been filed against the impugned order dated 30.05.2014 passed by the State Commission granting therein

an interim tariff for generation and sale of electricity by the Respondent No.1 to the Appellants, the distribution licensees in the State of Rajasthan for the FY 2014-15. The generation and sale is from 1080 MW (8 units of 135 MW each) lignite based power plant set up by the Respondent No.1.

- (b) The Appellants' challenge is that the State Commission had no jurisdiction to determine the interim tariff under the provision of the Electricity Act, 2003. The Appellant had also urged that the Commission should have only proceeded to determine the final tariff for FY 2014-15 since all the 8 units have been in commercial operation. This should have been done by the State Commission after undergoing appropriate proceedings under Section 64 of the Electricity Act, 2003 and as such the public notice, hearing etc. detailed herein ought to have been done by the State Commission for giving a reasoned award. The Appellants have also challenged the interim tariff fixation on the ground that same is unconstitutional and contrary to the earlier orders dated 30.08.2013 and 13.01.2014 passed by the State Commission deciding the provisional tariff with a specific direction that there shall be no further determination of the tariff

except final tariff of the Respondents. The Commission should have held on to the said decision and only determination of the final tariff for the year 2014-15 should have been done.

- (c) It has been urged by the Appellants that in the earlier order dated 30.08.2013, the State Commission had held that the capital cost determined at Rs.5.20 crore per MW as against in principle approval of Rs.4.80 crore per MW and this is provisionally allowed and may change while determining the final capital cost which would be based on the audited capital cost of the project as on the Commercial Operation Date of the project. The Respondent No. 1 was directed to file the petition for the final tariff within 2 months of the said order. Any upward change in the tariff should be only by the final order as contended by the Appellants. It is stated that in the next order dated 11.10.2013, the State Commission had held that the provisional tariff for the subsequent FY 2013-14 would remain the same and continued as determined for the FY 2012-13 as per the order dated 30.08.2013.
- (d) In the circumstances, the Appellants have urged that the tariff determination by the earlier order dated 30.08.13 and extended

by subsequent order dated 11.10.2013 should continue as an interim tariff for the FY 2014-15 also. The State Commission ought not to have varied the application of the above provisional order and should not have determined an increased tariff through an interim order for the subsequent FY 2014-15.

- (e) The Appellant has also made reference to the Regulation 42(4) and (5) of the Tariff Regulations, 2014 of the State Commission which deals with passing of the provisional tariff order.

The provision of the said Regulation, inter-alia reads as under:

“42.

.....
(4) A Generating Company may file a Petition for determination of provisional tariff in advance of the anticipated Date of Commercial Operation of the Unit or Stage or Generating Station as a whole, as the case may be, based on the capital expenditure actually incurred up to the date of making the Petition or a date prior to making of the Petition, duly certified by the Statutory Auditors and the provisional tariff shall be charged from the date of commercial operation of such Unit or Stage or Generating Station, as the case may be.

(5) A Generating Company shall file a fresh Petition in accordance with these Regulations, for determination of final tariff based on actual capital expenditure incurred up to the date of commercial operation of the Generating Station duly certified by the Statutory Auditors based on Audited Accounts, in accordance

with the formats prescribed by the Commission from time to time.”

(f) The Appellants have contended that the interim or provisional order that is permissible is confined to the above provision. There cannot be any other interim order in the merit of tariff.

(g) In the impugned order dated 30.05.2014, the learned counsel for the Discoms who appeared before the State Commission put forth as reproduced below:

- “(a) There is no provision for grant of interim/ad-hoc tariff, before starting the process of consideration of tariff application u/s 62 read with section 64. In dealing with the issues of tariff determination, it is unthinkable that Chapter VII of the Act dealing with tariff is totally bypassed and substantial relief is granted under section 94(2), which is very general in nature and outside the provisions dealing with tariff.***
- (b) Under sub clause (3) of Section 64, the Commission has to issue the order “within 120 days from the receipt of the application”. Any suggestion that the Commission can issue interim order directly under section 94(2) without proceeding under Part VII regarding tariff provisions, would be subverting the letter and spirit of the tariff provisions under the Electricity Act.***
- (c) It is well establish that any application relating to tariff has to be published for wider information of the stakeholders/consumers and inviting their objections. The Commission is required to conduct public hearing and a final view is to be taken on the application/petition only after such public hearing.***

Part VII is a self sufficient chapter and tariff matters have to be primarily governed by this chapter.

- (d) The main provision for tariff determination cannot be diluted and a stray provision regarding interim order cannot acquire the commanding position. In any case, an “interim order” can be passed under Section 94(2) but not “interim/Ad-hoc tariff”. Once a substantial part of the tariffs is allowed, then the public hearing would be reduced to a mock formality.***
- (e) CERC (Terms and Conditions of Tariff) (First amendment) Regulations, 2011 had the provision to grant provisional tariff upto 95% of the annual fixed cost of the project claimed in the petition but CERC in its Tariff Regulations, 2014 deleted such provisions for allowing interim tariff.***
- (f) Sh. Bhandari referred the judgment of Calcutta High Court issued on 07.12.2012 in the matter of Jai Balaji Industries Ltd. & Ors. Vs. Union of India & Ors. in which Hon’ble High Court quashed the clause of CERC Tariff Regulations, 2009 allowing the provisional tariff. In this judgment, Hon’ble High Court also considered the finding of Jharkhand High Court referred by the petitioner.***
- (g) Even if there is a seeming conflict between two provisions of the Act, a harmonious interpretation has to be adopted. Though any interpretation, a peripheral section of the Act (i.e. Section 94(2)) cannot overshadow the main provision regarding tariff contained in part VII. If the mandatory provision is for tariff determination after public hearing, then that provision cannot be lightly brushed aside. There is no earthly reason for ignoring the mandatory provision regarding public hearing.***

- (h) The petitioners are carrying a heavy backlog. The petitioners have repeatedly evaded and avoided the directions of the Hon'ble Commission.**
- (i) Vide order dated 17.08.2011 the Hon'ble Commission had found large scale irregularities in the International Competitive Bidding conducted by Rajwest and ordered for fresh bidding. Nearly 3 years have passed but the petitioner has taken no concrete steps for implementing the directions of the commission. If ad-hoc tariff is allowed, then it would make the petitioners even more complacent and they would concoct further excuses to indefinitely delay the fresh ICB.**
- (j) Truing up has also been avoided by the petitioner. For claiming the escalation on increase in diesel price, the petitioner has constantly avoided specific figures.**
- (k) Vide order dated 30.08.2013 the Hon'ble Commission directed RWPL to file a separate petition for determination of final capital cost and tariff for FY 2012-13 along with the information indicated in that order within 2 months of the order. RWPL has yet not filed the said petition along with required information.**
- (l) Under Regulation 10(2) of Tariff Regulations 2014, which provides that the tariff for a Generating Company or Licensee shall ordinarily be determined not more than once in a year, except in case of adjustment of fuel cost and/or rate of power purchase, wherever applicable. In the Tariff Regulations, 2014 there is no provision for grant of ad-hoc tariff before the starting of the proceedings under Section 64 of the Act.**
- (m) Since the Commission has already extended the provisional tariff for the first 3 months of this financial year, therefore it may not be desirable to**

allow any ad-hoc tariff prior to the completion of the mandatory procedure laid down in part VII of the Electricity Act.

(n) An interim order can operate only when the main proceedings have commenced. The tariff proceedings can commence only when the procedure laid down in Section 64 is followed. There is no provision in the Act which authorizes the Commission to defer the provisions under Section 64, once a petition is received for determination of tariff.”

(h) In response, the Respondents have contended that in terms of Section 94(2) of the Electricity Act, 2003, the Commission has power to pass interim order. Section 94(2) of the Electricity Act, 2003 relied on by the Respondents, inter-alia reads as under:-

“94. Power of Appropriate Commission.

(1)

(2) The appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission as that Commission may consider appropriate.”

Reference has also been made by the Appellants to the Regulation 62 (Transaction of Business) Regulations, 2005 of the State Commission and the same provides:

“62 The Commission may pass such interim order as deemed considered and appropriate at any stage of proceedings. It has also been urged on behalf of the Respondents that orders dated 30.08.2013 and 11.10.2013 pertain to FY prior to FY 2014-15. The impugned order of the State Commission has been in regard to the tariff for

the FY 2014-15. Accordingly, independent of the above order, the State Commission has the jurisdiction to consider and pass appropriate orders including an interim order in respect of tariff for the FY 2014-15. On the face of the above provisions, there is no legal bar rather there is a legal sanction to pass the interim order.”

- (i) The Respondent No. 1 has also stated that in the subsequent operation period 2015-16, the Appellants itself had specifically urged that the same impugned order passed for the year 2014-15 be continued both in respect of lignite transfer price which is the significant component of the generation tariff. In regard to above, the Respondents have made reference to the pleadings of the Appellants before the State Commission on 24.03.2015 as under:-

“The Adhoc interim lignite transfer price once allowed for the interim period finalization of the new bidding process does not qualify for any escalation except the revision in taxes etc.

In the light of the above submission, there are no justifications for reconsidering the various parameters which are, in the very nature, tentative. Till then, the transfer price allowed by the Hon’ble Commission by its last order may kindly be continued.”

- (j) The Appellants had in its submissions dated 08.05.2015 before State Commission related to tariff determination of FY 2015-16

stated that

“(8) An interim order has also been passed by the Hon’ble Commission and to avoid any hardship, it can be extended from time to time.”

- (k) In the impugned order, the State Commission has given an adhoc increase in the tariff for the FY 2014-15 pending determination of the tariff by holding regular proceedings and giving ample opportunity to all the stakeholders on merit. At the time of passing of the interim order dated 30.05.2014, the proceedings for determination of final capital cost and fixed charges for the previous tariff period ending 2013-14 was pending. Opening capital cost for the FY 2013-14 was depending on the closing capital cost to be determined for the previous years. In the impugned order, the State commission had specifically held as under:

“35. This tariff & transfer price shall be for FY 2014-15 pending the final determination of tariff for the financial year 2014-15 after following the due procedure provided in section 62 r/w section 64.

36. We would like to make it clear that the above interim tariff is subject to final determination of RWPL tariff including transfer price of BLMCL and adjustments if any, thereafter.”

(l) Section 94(2) of the Electricity Act, 2003 vests the power for the State Commission to pass interim order. Similarly, power under Regulation 62 of the Transaction of Business Regulations, 2005 notified by the State Commission vests with the State Commission. Section 94(2) of the Electricity Act, 2003 empowers the State Commission to pass such interim order in any proceeding. This would obviously include proceedings and all other requisite actions which may be held under Section 64 of the Electricity Act, 2003 for determination of final tariff. It will not be correct to proceed on the basis that interim order cannot be passed until the completion of the proceeding under Section 64 of the Electricity Act, 2003, namely by publication of the petition, public hearing etc. These processes become mandatory to be adopted for passing final tariff under section 64 of the Electricity Act, 2003. In a case, the State Commission considered necessary, it can pass an interim order under section 94(2) of the Electricity Act, 2003 pending the above process for determination of tariff. In the impugned order dated 30.05.2014, the State Commission has considered it necessary to pass an interim order in regard to tariff for the FY 2014-15 to

deal with the increase in the tariff. State Commission has given reasons for passing the interim order after the Commission had noted that there is an increase in the input cost of the Respondents. After rejecting the preliminary objection by the Appellants on the scope of applicability as Section 94 (2) of the Electricity Act, 2003, the State Commission has proceeded in their impugned order to hold as under:-

- “29. Having come to the conclusion that there is an increase in input costs of the petitioners, we cannot leave the generator to fend for itself. Therefore, we may have to grant reasonable increase in interim tariff.**
- 30. Let us now consider what could be reasonable increase in provisional tariff. We have noticed at paras 18 & 19, what is the increase in transfer price as well as capital expenditure besides increase in diesel price.**
- 31. Considering the increase in capital costs as well as diesel price and transfer price of BLMCL and the earlier order of this Commission dated 30.08.2013, we deem it appropriate to allow the transfer price of Rs.1213/MT (before royalty, cess, taxes and duties) which will come to Rs.1397/MT including taxes and duties etc.**
- 32. The provisional variable charges of power plant based on the above lignite price, come to Rs.1.6804/unit as against earlier variable cost of Rs.1.58/unit.**

34. In light of what has been discussed above, interim tariff & transfer price for unit 1 to 8 on adhoc basis for FY 2014-15 works out as under

S.No.	Item	Rate
1.	Lignite Transfer Price after Cess, Royalty and VAT	Rs.1397/MT
2.	Fixed cost	Rs.2.38/unit
3.	Variable cost	Rs.1.68/unit
	Total Tariff	Rs.4.06/unit

35. This tariff and transfer price shall be for FY 14-15 pending the final determination of tariff for the financial year 2014-15 after following the due procedure provided in section 62 r/w section 64.

36. We would like to make it clear that the above interim tariff is subject to final determination of RWPL tariff including transfer price of BLMCL and adjustments if any, thereafter.

37. We direct RWPL to comply with the various directions given in the order dated 30.08.2013 regarding final determination of capital cost within four weeks. We also direct the petitioner BLMCL to undertake bidding in time bound manner for selection of Mine Developer & Operator (MDO) as contemplated in order dated 17.08.11.”

(m) Thus, the State Commission has come to the conclusion that an adhoc increase by way of interim order in the tariff is warranted. The State Commission having come to the conclusion that there is an increase in the input cost, it may not be said that the Commission has committed illegality in granting

interim order thereby allowing adhoc increase in the tariff subject to the final adjustment upon determination of the final tariff in the near future.

- (n) The reliance placed by the Appellants to the above earlier orders of the State Commission stating that these orders prohibit the State Commission from granting any increase in the interim tariff, even if there is an increase in the input cost, is not correct. The above orders of the State Commission were passed by the State Commission in respect of the previous financial years. The same does not bind the State Commission in determination of tariff for the subsequent FY 2014-15, particularly when the Commission itself has come to the conclusion that there has been an increase in the input cost.
- (o) The reliance placed by the Appellants on Regulation 42(4) and (5) of the RERC tariff regulations as being the only avenue to pass interim order is not correct. These regulations deal with the provisional tariff order and not interim orders. The interim orders are passed pending hearing and decision in the matter. The provisional order in Regulation 42(4) and (5) of the RERC deal with the detailed tariff order including tariff order before

Commercial Operation Declaration. These regulations do not deal with the interim order. Purpose of interim order is different from that of the provisional order envisaged in the above regulations. One does not see any prejudice to the Appellants in the interim order. The interim order refers to definite increase in the input cost. The final tariff is to be determined in near future. As and when the final tariff is determined, the amount will in any case become payable. If an adhoc increase for such increased input costs which the State Commission found to be definitive, there shall be lesser burden on consumers as a consequence of final determination. Even the order of the State Commission itself speaks about adjustment. In the case of final tariff determined being less than the interim order, such adjustment would be done with carrying cost in accordance with the tariff regulations of the State Commission and that would protect the interest of both the parties.

- (p) Looking in to the question of law as brought out by the Appellants and after detailed examination of various legal provisions quoted by the Appellants, we are of the definite view that the State Commission is in a better position to ascertain

whether to issue interim orders if situation does warrant so which is very much within the legal provisions contained in their Regulations and the Electricity Act, 2003 and they have rightly done so. However, the State Commission should have insisted upon the Respondent No. 1 & 2 to submit all relevant information relating to the final capital cost without any further delay, more so, when all the units are in commercial operation and should have insisted upon the Respondent No. 1 & 2 to ensure compliance of the directions given by the State Commission in their earlier orders. Inordinate delays in submitting the final tariff petition is not justified on any account.

11. Though we are upholding the impugned order dated 30.05.2014 issued by the State Commission but we definitely appreciate the concern of the Appellants on account of adhoc tariffs thereby leaving them with a great uncertainty and this is because of the undue delays of the Respondents in furnishing complete information/details to the State Commission facilitating determination of final tariff.
12. As regards the lignite price which would determine the variable component of the tariff of the Respondent No.1, the directions given

by the State Commission vide Sl. No. 37 of the impugned order dated 30.05.2014 need to be complied with by the Respondent No.2.

ORDER

13. In view of the above, there is no merit in the Appeal filed and the order passed by the State Commission does not suffer from any defect. We hereby dismiss the Appeal and uphold the impugned order of the State Commission. No order as to costs.
14. Pronounced in the open court on this **18th day of November, 2015.**

(I.J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member

√
REPORTABLE/~~NON-REPORTABLE~~