

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

APPEAL NO. 71 OF 2009

Dated: 3rd November, 2009

**Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. BAJAJ, Technical Member**

In the matter of:

**Tamil Nadu Electricity Board.
No. 144, Anna Salai,
Chennai-600002**

...Appellant

Versus

- 1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building
36, Janpath,
New Delhi-110001**
- 2. The Chairman cum Managing Director
Neyveli Lignite Corporation
Corporate Office
Block-I, Neyveli
Cuddalore District -607801**

... Respondents

Counsel for the Appellant(s) : Mr. R. Venkataramani, Sr. Advocate
Mr. R. Nedumaran, Mr. A. K. Joseph
Mr. Vimal Dubey
Mr. Krishna Bwany, DFC/PIg, TNEB

Counsel for the Respondent (s): Mr. N.A.K. Sharma, Sr. Advocate
Mr. Aashish
Mr. R. Suresh, GM, NLC
Mr. Raji Joseph

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

1. Tamil Nadu Electricity Board (TNEB) is the Appellant herein. Aggrieved by the Order dated 17.11.008 by the Central Commission on the application filed by the Neyveli Lignite Corporation (NLC), the 2nd Respondent herein, determining the transfer price of lignite for the purpose of the computing energy charges, the Appellant has filed this Appeal. The short facts are as follows:

2. TNEB, the Appellant herein, entered into a bulk power purchase agreement with Neyveli Lignite Corporation, the 2nd Respondent herein, for the purchase of power from the Thermal Power Station-I of the NLC for a period of 5 years from 1997 to 2002. However, on expiry, the agreement had not been renewed. On formation of the Central Commission under the Electricity Regulatory Commission Act, 1998, the powers to determine the tariff in respect of the generation station owned or controlled by the Government of India have been vested with the Central Commission. Accordingly, the Central Commission fixed norms for working out generation tariff on payment of such tariff by the State Electricity Boards.

3. Thereupon the Central Commission issued a general notice calling for the objections regarding the fixation of tariff relating to the purchase of energy. After deliberations, the Central Commission fixed certain norms for working out the generation tariff for the period from 2004-09. Consequent to this, the NLC (R2) filed a Tariff Petition No. 186 of 2004 seeking for the fixation of the generation tariff for the period from 2004-09. Accordingly, the Central Commission by the order dated 26.9.2006 disposed of the said petition fixing the generation tariff and provisionally fixed the energy charges considering the transfer price of lignite.

4. Thereupon, the NLC filed a tariff petition No. 125 of 2007 seeking for the revision of fixed charges and also for revision of energy charges and the transfer price of the lignite on the basis of the additional capitalization for the period from 2004-09 in terms of the 2004 Regulations, in terms of the Ministry of Coal proceedings dated 30.1.2006 and also in terms of the Central Commission Order dated 26.9.2006. The Appellant raised various objections in respect of the power tariff as well as to the lignite transfer price the petition before the Central Commission. Ultimately, the Central Commission approved the lignite transfer price for the respective years and determined the base energy charges by the order dated 17.11.2008.

5. Challenging this, the Appellant has filed this Appeal before this Tribunal.

6. Mr. R. Venkataramani, learned Senior Advocate appearing for the Appellant while assailing the order impugned would raise the following grounds:

A. The Central Commission while fixing the transfer price of lignite for the period 2001-04 in petition no. 5 of 2002 had adopted the norms fixed by the Ministry of Coal through its order dated 30.01.2006 whereas the Central Commission, in the impugned order, had adopted different norms contrary to the norms adopted by it earlier and simply granted transfer price of lignite as claimed by the NLC, the 2nd Respondent, without properly applying the norms adopted earlier and envisaged by the Ministry of Coal through its order dated 30.01.2006. As a matter of fact, the norms adopted by the Central commission in Petition No. 5 of 2002 to fix transfer price of lignite had become final as the NLC has not challenged the same. Therefore, the Central Commission is wrong in adopting different norms for fixing the transfer price

of lignite in the present petition no. 125 of 2007 for the subsequent period.

- B. The Central Commission ought to have fixed the actual expenses up to 2004 as the base. Only thereafter it should have granted escalation of 8% towards operation and maintenance expense, on the basis arrived at period 2003-04. Instead of doing so, the Central Commission had granted operation and maintenance expenses by escalating previous year's actual expenses by 8% up to 2006-07 and thereafter for the period 2007-09 without determining the base.
- C. The grant of relief towards the provision of mine closure without any statutory basis is contrary to the established principle of law. As a matter of fact, Mining Consideration and Development Rules, 1988 as amended in April, 2003 was very much in existence when the Ministry of Coal had framed the norms through its order dated 30.01.2006 which deal with capacity utilization, debt-equity ratio, additional capitalization, depreciation, operation and maintenance expenses, spares under working capital, income-tax, interest

on return on equity and royalty excluding the provisions for closure of mine. In the absence of any provision for mine closure through any order or statute, the Central Commission should not have granted the relief.

Though the learned Senior Counsel for the Appellant has raised several other grounds, both in the appeal as well as in the written submissions, he has not pressed those grounds and he confined himself only to the grounds mentioned above.

7. Mr. N.A.K. Sharma learned Senior Advocate appearing for Respondent No. 2, NLC in reply would make the following contentions.

A. "It is wrong to contend that the lignite transfer price approved by the Central Commission is not in line with the Ministry of Coal order dated 30.01.2006 nor in accordance with the established prevailing practice through the regulations. On the other hand, the order of the Central Commission is in line with the Ministry of Coal proceedings and the regulations. The lignite transfer price claimed by the NLC in the present

Petition No. 125 of 2007 was not based merely on approximation or whisper. They are based on audited books of accounts and also the Ministry of Coal order dated 30.01.2006. The said order passed by the Ministry of Coal was only at the instance of the Appellant where a decision was taken after conducting a fair enquiry in which the Appellant and other beneficiaries participated. Therefore, it is not open to the Appellant either to challenge the norms laid down in the Ministry of Coal proceedings or to contend that it is not in line with the said proceeding. Any method based on actuals can be applied only after the block of years is over. The lignite transfer price has to be fixed in advance because without so fixing, it is not possible to determine the tariff as there is nothing called as the prevailing practice.

- B. In this case, it is statutory obligation for the NLC, the 2nd Respondent to formulate progressive mine closure plan and final mine closure plan as per the mineral conservation and Development Rules 1988 which was amended in 2003. Even though Ministry of coal norms did not specifically provide for inclusion of cost of mine closure, it had been

specifically stated in the said proceedings that the NLC should continue to perform well in the over all interest of the stake holders as well as the national economy. Therefore, it cannot be said that the grant of relief towards the provisions of mine closure is contrary to the established principles of law.

- C. The fixing of transfer price of lignite falls within the domain of the NLC and its controlling ministry. Only on that basis, earlier the Central Commission directed the Appellant to approach the Ministry of Coal through the order dated 02.11.2005. Only in pursuance of the said order the Appellant approached the Ministry of Coal and invited the order through the proceedings dated 30.10.2006. None of the other beneficiaries have questioned the lignite transfer price as fixed in terms of the Ministry of Coal guidelines norms nor the Appellant questioned the price of coal in respect of the tariff fixed for the Coal based generation stations.”

8. We have heard the learned Senior Counsel for both the parties who argued at length on the above points. We have carefully considered the same and perused the records including the impugned order.

9. This appeal is mainly confined to the lignite transfer price to be considered for the determination of tariff of generating stations of the NLC for the period 2004-09. In other words the present appeal is as against one part of the order dated 17.11.2008 passed by the Central Commission in petition No. 125 of 2007.

10. Admittedly, in view of the disagreement between the Appellant and the 2nd Respondent, with reference to the lignite transfer price, the Central Commission took the view that the mining activities are being regulated by the Ministry of Coal and, therefore, the Central Commission cannot step into regulating this activity and consequently it directed the Appellant to approach the Ministry of Coal to decide the said issue by the order dated 15.01.2006. Admittedly, the Appellant has not challenged the said direction issued by the Central commission in the order dated 15.01.2006. On the other hand, the

Appellant in compliance with the said directions approached the Ministry of Coal for fixing the norms. Thereupon, the Ministry of Coal at the instance of the Appellant and in the light of the directions of the Central Commission, examined the matter after giving opportunity to all the beneficiaries including the Appellant and the NLC, the 2nd Respondent, by allowing them for placing their views.

11. Accordingly, they have placed their respective views. Ultimately, after consideration of those views the Ministry of Coal issued order dated 30.01.2006 fixing the norms and guidelines for fixing of lignite transfer price by giving various details. Further, in the very same proceedings the Ministry of Coal, directed the 2nd Respondent, NLC, to recast the transfer price of lignite on the basis of those norms and place the same before the Central Commission for approval.

12. In accordance with the said directions, the NLC worked out the transfer price of lignite and placed the same before the Central Commission. Central Commission thereafter heard the views of the Appellant and others. The Appellant raised several grounds objecting

to the said price. In order to resolve the issue, the Central Commission appointed One Member Bench to examine the issue again after giving opportunity to the persons concerned. Thereupon, One Member Bench heard all the parties concerned including the Appellant and sent a report to the Central Commission on 08.01.2007 after considering various objections. The Appellant again raised their objections before the Central Commission. In the light of the repeated objections, it became necessary for the Central Commission to decide upon the issue of fixing the lignite transfer price before determining the power tariff. Accordingly, the Central Commission considered the same in great depth relating to the transfer price of lignite as worked out by the 2nd Respondent, in the light of the norms and guidelines contained in Ministry of Coal proceedings dated 30.01.2006. After thorough consideration, the Central Commission ultimately approved the transfer price of lignite for the period 2001-04 by the order dated 23.02.2007.

13. On the strength of this order dated 23.02.2007 the NLC filed a petition being Petition No. 125 of 2007 before Central Commission for approval of the lignite transfer price for the period 2004-09.

14. Again the Appellant raised the similar objections. Ultimately, the Central Commission by the impugned order dated 17.11.2008, rejected the objections raised by the Appellant and approved the year-wise lignite transfer price for the period 2004-09 and the corresponding energy price.

15. It is mainly contended by the learned Senior Counsel for the Appellant that the transfer price of lignite which has been fixed as claimed by the 2nd Respondent is not in line with the earlier order and the Ministry of Coal proceedings.

16. A perusal of the impugned order would clearly indicate that the lignite transfer price approved by the Central Commission is based on the norms prescribed by the Ministry of Coal vide its order dated 30.01.2006. It has not been specifically pointed out by the learned Senior Counsel appearing for the Appellant as to how it is contrary to the earlier order and how it was not in line with the Ministry of Coal proceedings dated 30.01.2006. In fact at the earlier stage as pointed out by the learned Senior Counsel appearing for the, 2nd Respondent

the Appellant had submitted before the Central Commission that the pooled lignite transfer price according to the books of accounts of the NLC would be acceptable. In this case lignite transfer price was certified by the statutory auditors and the relevant records were submitted before the Central Commission.

17. Various sections of the Act provide that the Central Commission will exercise its jurisdiction only in respect of determination of tariff for electricity and not for determination of cost fuel used in generating stations. Thus it is clear that the jurisdiction, scope and power of the Central Commission with respect to the determination of power tariff are so specific and all pervasive but such specific provisions are not available in respect of lignite transfer price and, therefore, the Central Commission correctly felt that the scope and jurisdiction of the Commission to go into the said aspect is very limited. That was the reason why the Central Commission rightly directed the Appellant to go into the Ministry of Coal for getting the required norms for fixing transfer price of lignite, which in turn fixed the norms at the instance of the Appellant. So when such being the case, in the absence of any material to show that lignite transfer

price was worked out without any basis, it is not permissible under law on the part of the Central Commission to interfere with the transfer price of lignite. As indicated above in the present case the transfer price of lignite has been certified by the statutory auditors as the same was fixed as per the norms and guidelines issued by the Ministry of Coal. Therefore, this contention on this aspect urged by the learned Senior Counsel for the Appellant would fall

18. In respect of the contention regarding the provision for mine closure, it has to be pointed out that mine closure plan is a first time statutory introduction. In other words there were no existing government orders on the subject. The mineral Conservation and Development Rules 1988 came to be amended in the year 2003. Newly inserted rules specifically stipulated that every mine shall have a mine closure plan of two types (1) progressive mine closure (2) final mine closure plan. As per this Rule it is obligatory on the part of the owners of the existing mines to submit appropriate mine closures plan to the Regional Controller of Mines. Because of the binding nature of this statutory stipulation, it became mandatory to make provisions for mine closure for the period from 01.04.2004.

19. Even though Ministry of Coal norms did not specifically include the provision for mine closure, the same is covered by the norms indicated in paragraph 5 of the Ministry of Coal order. That is the reason why the impugned order indicated that the cost of mine closure allowed, is subject to the adjustment based on the actual expenditure incurred. Therefore, the contention regarding mine closure urged by the counsel for the Appellant is also without any merit.

20. As regards the operation and maintenance expenses it is pointed out by the learned senior counsel for the Respondent that the figures are derived from the books of accounts maintained by the NLC and certificates furnished by the statutory auditors. A perusal of the certificate would indicate that the auditors have gone through the parameters and principles spelt out by the Ministry of Coal order dated 30.01.2006 and certified the above prices. .

21. The operation and maintenance expenses broadly covered stores, spares, wages, outside services, power, etc., as indicated in

the auditors report. It is also brought to our notice that the increase in the operation and maintenance expenses in 2006-07 was owing to the pay revision with retrospective effect and consequent increase in the expenditure. Since, actuals were available up to the year 2006-07, operation and maintenance expenses were escalated at the allowed rate of 8% over previous years' actuals. Escalation factors of 8% per annum have been stipulated in the Ministry of Coal order dated 30.01.2006. Therefore, the ground of excessive operation and maintenance charge is also without merit and the same is liable to be rejected.

22. In view of the forgoing discussion, we are of the view that Appeal No. 71 of 2009 is liable to be dismissed as devoid of merits. Accordingly, the same is dismissed with no orders as to costs.

(H.L. Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 3rd November, 2009

INDEX: Reportable / Non-Reportable