

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY
(APPELLATE JURISDICTION)
Appeal No. 164 of 2010

Dated : 8th February, 2011

Coram; Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial member

In the matter:

Chhatisgarh State Power Distribution Co.Ltd.
Vidyut Seva Bhawan, Danganiya,
Raipur, Chhatisgarh-492013 ...Appellant

Versus

1. Chhatisgarh Biomass Energy Developers Association,
C-33, 3rd floor, Ashoka Millenium,
Ring Road No.1, Rajendranagar Chowk,
Raipur- 492001.(Chhatisgarh)
2. Chhatisgarh Renewable Energy Development
Agency (CREDA)
Irrigation Colony, Shanti Nagar,
Raipur (Chhatisgarh) 492001
3. Chhatisgarh State Electricity Regulatory Commission,
Irrigation Colony, Shanti Nagar,
Raipur (Chhatisgarh) 492001 ...Respondent(s)

Counsel for the Appellant : Ms. Suparna Srivastav &
Mr. A. Bhatnagar SE/CSPDCL

Counsel for the Respondent:Mr. Sanjay Sen
Mr. Achintya Dvivedi
Mr. Sunil Arora for R-1
Ms. Surbhi Sharma, Ms Shikha Ohri
Mr. M.G. Ramachandran
Mr. Anand K Ganeshan
Ms. Swapna Seshadri for CSERC
Ms Sneha Venkataramani

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

The Appellant who is the successor in interest of the erstwhile Chhatisgarh State Electricity Board has preferred this appeal being aggrieved with the order dated 15.04.2010 passed by the Chhatisgarh State Electricity Regulatory Commission, Respondent No. 3 herein, whereby in course of adjudication upon the revision in the matter of determination of tariff for purchase of electricity generated by the biomass power plants in the State the Commission directed revision in fuel price to be applicable retrospectively with effect from 1.4.2009.

2. The biomass power producers through their Association which is the Respondent No. 1 herein filed a petition being petition No. 7/2005 on 4.5.2005 before the Commission seeking, inter alia, certain concessions and relaxations with

respect to the tariff determination and other charges payable by them for generation and sale of electricity. The Commission, however, by the order dated 11.11.2005 disposed of the said petition by extending certain concessions and relaxations. Yet, the Respondent No. 1 being dissatisfied with the order filed an appeal being appeal No. 20/2006 before this Tribunal praying for modification of the order dated 11.11.2005 and this Tribunal by order dated 7.9.2006 set aside the order of the Commission dated 11.11.2005 and remanded the matter back to the Commission for determination by modification on the issues over which the Tribunal did not agree with the Commission. According to the Appellant, the Tribunal not only confirmed the extra concessions and relaxations as were and relaxation given by the Commission to the biomass power producers but also granted further concessions which were impermissible in law. Accordingly, the Appellant aggrieved by the order dated 7th September, 2006 passed by this

Tribunal moved the Hon'ble Supreme Court in Civil Appeal No. 12/2006 which by the order dated 15.1.2007 passed the following:-

“Heard both sides.

As the matter has been remitted to the Commission, we are not inclined to interfere with the impugned order. Accordingly, the civil appeal is dismissed. However, we make it clear that the State would be at liberty to raise all the contentions before the Commission and the commission shall decide the same, untrammelled by any observations made in the impugned judgment”

3. Accordingly, the Commission by order dated 15.1.2008 re-determined the tariff for biomass based plants as a class petition only, with the computation having been done separately for plants using a maximum of 25% and 15% coal subject to review after 5 years. All other grievances

of the Appellant with respect to wheeling charges, cross subsidy surcharge, banking etc. were rejected and as such, the Appellant filed an Appeal No. 61/08 before this Tribunal which was decided by the judgment and order dated 6.11.2009. This is the introductory part of the Appellant's case.

4. While the matter rested there, it was the Respondent No.1 who filed a petition, being petition No. 25/09 (T) before the Commission pleading inter alia as follows:

“3. It is submitted that the fixed cost determined were determined on the basis of, among others, the interest rates prevailing at that time with no provision for the same to be revised according to the changing fiscal policies of the Central Government and the consequent interest rates supplied subsequently. There has been a sea change in fiscal environment in recent periods

arising due to precarious global economic situations, and consequently there has been a very substantial increase in the debt service costs. Moreover, the interest rate was applied in the previous tariff order as a simple interest, whereas the interest payable to the financial institutions was compounded monthly. It is, therefore, necessary that the fixed cost be revised and re-determined to accord with the realities of the situation.

4. The Hon'ble Commission has also allowed an escalation of 5% each year for fuel costs. The Hon'ble Commission did not determine any fuel cost adjustment formula or any other variable cost adjustment formula. There has been a phenomenal increase in the cost of fuels which make the operation of biomass based generating plants unviable on the basis that has been

provided for in the Hon'ble Commission's order. It is therefore necessary for the Hon'ble Commission to revise and re-determine the allowable fuel cost and consequent variable charges giving effect also to the consequent changes in fixed/variable costs"

5. Thus what was prayed for by the Respondent No. 1 was revision and re-determination of tariff for purchase of energy by distribution licensees from biomass based power plants. The Respondent No.1 also prayed for interim relief of variable charges to be paid at the rate of Rs.2.66 per unit from 1.4.2009 in addition to fixed charges as per the previous order of the Commission. The Appellant objected to the petition on the ground inter alia that there was no provision under section 62 or 64 of the Act for revision of tariff already determined. If it was a review petition then it was not maintainable because the Commission in its tariff order dated 15.1.2008 incorporated escalation of 5% for fuel

cost and, thirdly, steep appreciation in biomass fuel cost was also a result of increase in tariff which would further increase if tariff of biomass power was increased. The Appellant suggested for specifying a variable cost adjustment formula for changes in fuel prices. However, during the course of proceedings, the Respondent No. 1 requested for dropping the plea of revisiting the fixed cost of supply of power to distribution licensees and requested the Commission to issue interim relief on energy charges on the ground that determination of rate of energy charges based on cost of fuel was to take time. Accordingly, the Commission by an interim order dated 17th September, 2009 granted interim relief to the Respondent No.1 by fixing Rs.0.76 per unit as variable cost escalation for purchase of biomass power by distribution licensees as mandatory purchase of power w.e.f. 1.4.2009. The retrospectivity of the interim order dated 17th September, 2009 was challenged by the Appellant before the Commission through a review petition being No.

57/2009(M) on the ground that no tariff order can be made retrospective in terms of the Tariff Regulations of the Commission which prescribed that tariff shall be applicable from a date which will be at least 7 days after the date of the publication of the notice for revision of tariff; as such, the order was to be prospective only. The Appellant prayed for interim revision in energy to be applicable with effect from 17th September, 2009, the date of the interim order. However, since no mechanism was worked out to know the real price of biomass the Commission by the impugned order dated 15th April, 2010 redetermined the final price of biomass at Rs.1797 per MT. By an order dated 24th April, 2010, the Commission dismissed also the review petition of the Appellant holding that the final order having been passed on 15/4/10 there remained nothing for revision. Hence this appeal.

6. The Respondent no. 1 in its counter affidavit denied the contentions of the Appellant to be of any merit. According to it, the Commission allowed escalation of 5% every year on account of fuel cost but did not provide for any fuel cost adjustment formula or any other variable cost formula. As per the previous order dated 11.11.2005 passed in petition No. 7/05 the tariff petition was made operative for a period of 10 years till 2014/2015 with a provision for review after 5 years and there was also a provision for review of the escalation of O&M expenses after 3 years. But the Association approached the Commission with the plea that there had been a large increase in the cost of biomass fuel and coal. In the previous order dated 11.11.2005 as modified by the order dated 15.1.2008 weighted average cost of fuel for 2009-10 was about Rs. 1085 per MT, while the actual present weighted average cost of such fuel is Rs.1913 per MT based upon the present actual cost of rice husk at about Rs.1750 per MT. Accordingly it was

imperative that the weight average fuel cost was to be revised to Rs.1915 Per MT for the year 2009-2010. The Commission by order dated 15.4.2010 revised the variable charges accordingly.

7. As directed by the State Commission by its interim order dated 18.6.2009, the Respondent worked out the impact of the cost of the fuel and submitted to the State Commission as additional submission. Accordingly the energy charges per unit of electricity generated was worked out at Rs. 2.40 per unit taking into account the cost of rice husk at Rs.1700 per MT and the cost of coal at Rs.2400 per MT. The price of rice husk had increased more than three times the rate since when it was first considered by the Commission while fixing the tariff. It was not a case of review of review as it only pleaded for revisiting the fixed cost for supply of power to distribution utility and as such determination of rate of energy charges based on actual cost of fuel. Section 61 and

86 (1) (e) enjoin upon State Commission to promote cogeneration and generation of electricity from renewable source of energy. Further, tariff order can be made prospective from the date of the revision of the tariff year which in the instant case is 1.4.2009 and this cannot be interpreted before the tariff order with retrospectivity. The application for revision was filed on 28.4.009 with a request for giving an effect to revision from 1.4.2009. The tariff order passed on estimate is subject to true up based on actual purchase of energy at the end of the tariff order. Accordingly the application has no merit. Although the State Commission allowed escalation of 5% each year for fuel cost the Commission did not provide for fuel cost adjustment formula and as there had been a severe increase in cost of fuel which made biomass based generation plants in the State of Chhatisgarh unviable. Accordingly, the Association filed a petition for revision in purchase of energy by distribution licensee from biomass based power plants. As per the order

dated 15.1.2008 the weighted average cost of fuel in 2009-2010 was Rs. 1085 per MT. But mere 5% increase on adhoc basis does not sufficiently compensate and adjust for the variables in fuel price. The state generating utility itself had procured rice husk for their biomass based generating station at Kawardha at Rs.1465 per MT and Rs.1615 per MT in the year 2007-08 and 2008-09 respectively. Therefore , the rate of biomass increased at much higher rate than what it was at the time of consideration of the issue in petition number 7/05 with respect to that period. It is further contended that the tariff order can be made effective from the date when the tariff year commences. As such, the Commission is empowered to pass tariff order with effect from the commencement of the tariff year. The Commission accepted 1.4.2009 to be the date of enforcement of the order because it was the commencement of the tariff year in question and this does not make the tariff order retrospective. The regulations based on which the Appellant

have raised objections are not relevant because there are separate regulations for determination of tariff of electricity generated by non-conventional energy sources. The regulation in the name and style of “The Regulations (Terms and conditions for determination of generators tariff and related matters for electricity generated by plants based on non-conventional source of electricity) 2008 provides for section 3 (1) that the biomass plants that have the PPA with the licensee prior to the date of regulations will not be covered under these regulations. Instead a tariff of said plants will be as per terms and conditions of the tariff order dated 5.1.2008. It is further submitted that tariff orders based on estimates are subject to true up at the end of tariff year. Therefore the Appellant cannot claim any prejudice. Furthermore the petition for revision of tariff was filed on 28.4.2009 and the State Commission rightly made the order effective from 1.4.2009 as it noticed that the state generating companies in 2008-09 procured biomass at

Rs.1615 per MT and the price of biomass for the year 2009-10 was fixed by CERC at Rs.1797 per MT. Accordingly, the Appellant has no case.

8. The Chhatisgarh State Electricity Regulatory Commission, Respondent No. 3 did not file any counter affidavit but filed a written note of arguments which we shall consider at the appropriate place.

9. The Appellant filed a rejoinder to the counter affidavit of the Respondent No.1 which relates to retrospectivity of the order and contended that retrospectivity of the tariff order caused financial loss of Rs.20.62 crores to the Appellant, which would be the deficit in the next tariff determination process and which cannot be made the subject matter of truing up exercise on the ground that truing up mechanism does not contemplate accommodating tariff revision from a retrospective date in as much as the truing up exercise takes place much later during the subsequent tariff determination

process but takes into account the surplus or deficit of generators tariff year before accommodating in subsequent tariff year.

10. The Commission in its 11 page order justified the revision of tariff for biomass based generating plants on the following premise:

“Accordingly, the biomass price was considered as Rs.850 per MT and coal cost was considered as Rs.1200 per MT for the year 2005-06. The weighted average cost of fuel was considered as Rs.937 per MT for the financial year 2005-06. An escalation of 5% annum was considered in fuel price and the landed cost of fuel corresponded to Rs.984 per MT, Rs.1033 per MT, Rs.1085 pr MT and Rs.1139 per MT for the financial year 2006-07, 2007-08, 2008-09 and 2009-10 respectively for fuel mix ratio of 75:25. For fuel- mix of 85:15, the weighted average cost of fuel considered for determining the tariff was

Rs.995 per MT, Rs.1045 per MT and Rs.1097 per MT for the financial year 2007-08, 2008-09 and 2009-10 respectively.

The information submitted by State generating Utility (CSPGCL) to CBEDA, reveals that the State utility itself had procured rice-husk for their bagasee based generating plant a Kawardha at Rs.1465 per MT and Rs.1615 per MT in the year 2007-08 and 2008-09 respectively. It is to take that the rates of biomass has increased at much higher rate than as considered in petition No. 07/2005 for the respective period. It is also pertinent to note that State utility was a vertically integrated utility till 30.12.2008.”

11. Again, it observed as follows:

The thermal generating plant procures fuel for power generation and in most of the cases there is an external agency which supplies fuel to

generators. The generators have no control on the fuel price and which may increase or decrease at any time. Keeping this point into consideration, the Act permits to revise the tariff on account of fuel price variation, Section 62(4) of the Electricity Act, 2003 mandates:

62 (4) no tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms or any fuel surcharge formula as may be specified.

On considering all the facts mentioned above, rice-husk procurement price of CSPGCL for 2007-08 and 2008-09, fuel rates specified by CERC for the year 2009-10, submission of CREDA and some of the bill invoices submitted by petitioner there is no doubt that the fuel cost including biomass price has increased and the energy charges specified in

petition No.7/2005 may not recover the fuel cost incurred by the power generators.

The Commission is therefore of the view that the increase in fuel cost cannot be overlooked and any generating plant including biomass plant is entitled to recover the fuel cost incurred for generation of power from its generating plant.

12. At para 19 of the order, the Commission writes

“ The petitioner has prayed to revise the energy charges for the year 2009-10 i.e. to be effective from 01.04.09. The CSPDCL in its submission has objected on any retrospective application of tariff. We have observed that the petition was filed on 28.04.09 with request for revision of tariff w.e.f. 01.04.09. The State generating company during 2008-09 procured biomass at the rate of Rs.1615/MT and the price of biomass is fixed as Rs,1797/M by

CERC for the year 2009-10. We, thus, feel that there is sufficient ground to revise the tariff w.e.f. 01.04.09. Hence, we feel it justify to revise the tariff for the year 2009-10 w.e.f. 01.04.09 on the basis of price of biomass asRs.1797/MT as decided by the CERC and as demanded by the petitioner. Since, this price is landed cost hence no separate transportation charges has been taken into account. It is to be noted that in the Regulations for terms and conditions of determination of tariff, the power purchase cost of a distribution licensee is considered as an uncontrollable item. Any variation in the cost of power purchase of a distribution licensee, on account of charges in the fuel price of any generator supplying power to distribution licensee would be passed on

during truing up. So a distribution licensee is able to recover the increased cost of power purchase, if any, through its retail tariff during truing up of ARR of 2009-10.”

13. In course of hearing of the appeal, Smt. Suparna Srivastava, the learned Counsel for the Appellant solely and exclusively confined her arguments to the issue of retrospectivity of the order impugned giving up other contentions as were averred in the memorandum of appeal. In other words, the learned Counsel did not rather could not dispute the factual scenario that since the State generating utility (CSPGCL) itself procured rice-husk for their biomass based generating plant at Kawardha at Rs.1465/MT and Rs.1615/MT in the year 2007-08 and 2008-09 respectively it was necessary for the Commission to revise the tariff for supply of power by biomass based generators to the distribution licensee. But it was adequately demonstrated

before the Commission by Respondent No.1 that revision of energy charges was necessary due to phenomenal increase in the cost of fuel and as such the rate of power as was fixed by the Commission in its order dated 15.1.2008 was unviable. Although the petition of the Respondent No.1 before the Commission was comprehensive one praying for fixed charges and energy charges the Respondent No. 1 gave up the plea for determination of fixed charges as because such determination was a time consuming process and, accordingly narrowed down the scope of the petition to fixation of energy charges on account of rise in fuel price. In this appeal before us thus the learned Counsel for the Appellant has not questioned legality of the price rise with respect to energy charges and confined the Appeal to revision of tariff with retrospective effect i.e.1.4.09.

14. Smt. Suparna Srivastava, learned Counsel for the Appellant submitted at the outset that no tariff order can be made effective from a retrospective date because the

Chhatisgarh State Electricity Regulator Commission (Details to be furnished by licensee or generating company for determination of tariff and manner of making application). Regulations 2004 provides that tariff shall take effect only after 7 days from the date of publication of the tariff order and bills shall be issued accordingly. Thus, it is argued regulation 31 of the aforesaid Regulations clearly makes the tariff order enforceable prospectively. That is to say, it is to come into effect only seven days after the date of its publication. Accordingly, the Commission was patently erroneous in making the impugned order effective from 1.4.2009. The observations of the Commission that since the application for revision of tariff was filed on 28.4.2009 the order should take effect from 1.4.2009 is contradictory to the Act and the concerned Regulations. With respect to the submission of the Commission that true up mechanism is enough to take care of financials of the Appellant in case retrospectivity is made to stand, it is argued that true up

mechanism recognized in the exercise of tariff determination has been put in place with the specific purpose of bridging the gap between the estimations made in the previous tariff determination exercise and reasonable actuals received during the tariff year and this true up exercise does not contemplate accommodating tariff revision from retrospective effect in as much as the truing up exercise takes place much later during the subsequent tariff determination process which is to take into account surplus or deficit of previous tariff year to be accommodated in the subsequent tariff year. It is further contended that the Commission has completely lost sight of the fact that the effect of such truing up to bridge the deficit caused due to retrospective revision in tariff, would be to pass on the burden not only on the existing consumers but also on prospective consumers who have not been the consumers of the licensee at the relevant time. It is further argued such long term truing up as contemplated by the Commission

cannot be a proper or a correct substitute for compensating the loss caused to the Appellant due to otherwise impermissible retrospective tariff revision. Besides, there may be a situation where earlier consumer may no longer continue to be the consumer of the Appellant so that recovery after truing up cannot be effected from the appropriate person. Otherwise also, sub-section (2) of Section 56 of the 2003 Act bars recovery of sums due from any consumer towards charge for electricity after a period of two years from the date when such sums become first due. That being so, a subsequent truing up exercise may not be an effective mechanism for recovering the deficit caused due to retrospective revision even from the existing consumers. In the circumstances, the Commission's reliance on the truing up mechanism for compensating increased cost of power purchase on account of retrospective revision of tariff of members of the Respondent No. 1 Association, is erroneous and completely flawed and is liable to be set

aside. In the course of arguments when the learned Counsel for the Commission as also the learned Counsel for Respondent No. 2 submitted that concept of `tariff year' contemplates commencement of tariff with effect from the opening day of a particular tariff year or financial year, the learned Counsel for the Appellant replied that sub-section (3) of Section 62 nowhere prescribed that the tariff shall be applicable on and from a date antecedent to the date of its notification or antecedent to the date of commencement of financial year. Reference has been made to the decision in ***Binani Zinc Ltd V/s KERC and others reported in (2009) 11 SCC 244 which is reproduced below.***

“The Commission has been empowered to frame tariff. It has, however, not been empowered to frame tariff with retrospective effect so as to cover a period before its constitution. The matter might have been different if such a power would have been conferred on the Commission. It is now a well-settled principle of law that the rule of law inter alia postulates that all laws would be prospective

subject of course to enactment of an express provision or intendment to the contrary.”

The decision in ***M/s. Kusumam Hotel Pvt. Ltd. Vs. Kerala State Electricity Board (AIR 2008 SC 2796)*** has also been referred to.

15. The learned Counsel for the Commission submitted that the petition of Respondent No. 1 was filed on 28.4.2009 tariff of which the Commission undertake the exercise of collecting data from various sources about the actual fuel cost including from the Respondent No.2, a Government agency and then passed a previous order on 17.9.2009. allowing increase of Rs. 0.76 per unit as variable cost escalation for biomass on the tariff with effect from 1.4.2009 and the said interim order has been made ultimate and final with effect from the said date by an order dated 15.4.2010 . The claim of the Respondent No. 1 relates back to the date of the petition filed. A lot of time has been spent by the Commission to collect necessary data from various sources, to hear the stake holders, to deliberate upon the matter and

then passed appropriate order which cannot cause any grievance to the Appellant in view of the fact that the entire power purchase cost paid on account of revision of tariff by State Commission is allowed is passed though for the true up exercise.

16. Respondent No. 1 has submitted inter alia that Section 64 (6) of the Electricity Act, 2003 gives jurisdiction to the Commission to pass tariff order retrospectively. This Tribunal's order in the SEIL V/s Punjab Electricity Regulatory Commission & Others reported in 2007 APTEL 931 which we shall presently consider and has also been referred to.

17. Now we begin our appreciation of the law as we have found from the pleadings of the parties and their submissions, it is clear that the parties or the Appellant does not dispute the increase in tariff on account of increase in fuel cost and that the memo of appeal rested on more than one ground and the scope and ambit of the appeal has now

been restricted to the question as to whether the Commission can determine tariff order or amend a portion on account of increase in fuel price from a retrospective date. If the answer to this question is affirmative, then a further question would be as to whether in the instant case the Commission was justified in revising the tariff retrospectively from 1.4.2009. It is only when the existence of a power is located a further question would arise as to whether exercise of that power was judicious or not. The learned Counsel for both the parties referred to Section 62 and 64 and interpreted this in their own ways. It is, therefore, necessary to read relevant sections once again. Neither of the Section 62 nor section 64 expressly speaks of prospectivity nor retrosectivity. To put the mater other way, the section does not explicitly encourage prospecivity o discourage retrospectivity. Sub section (4) of Section 62 reads as under:

“ No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year except in respect of any changes expressly permitted in terms of any fuel surcharge formula as may be specified”

18. If we anatomize Sub-section (4) of Section 62 it would appear that tariff or part of tariff has been related to a financial year, which means that no matter when the order is passed for tariff it has to be related to a financial year. Secondly, this provision also permits amendment of tariff or part of tariff but not more than once and that too in a particular financial year save the changes that might be necessitated under the terms of any fuel surcharge formula as may be specified. Thus sub-section (4) bars amendment of tariff more than once in a financial year except in respect of variable cost of fund. It does not say that a tariff order is necessarily to be prospective. On the contrary, retrospectivity is permissible with respect to changes in variable cost like fuel purchase cost in a financial year. If

revision of such cost is permissible by the amendment more than once in a financial year, it implies in the context of absence of bar to the contrary that within a financial year tariff on account thereof can be amended retrospectively. The word "financial year" has significance in this that it contemplates passing a tariff order in a financial year that is a tariff is intrinsically related to a financial year. If the tariff order is completely divorced from the expression 'financial year' which a statute does not have any such intendment, then there would remain a force in the arguments that tariff order must invariably be prospective. The expression 'financial year' obviously refers to the period from 1st of April of every year to 31st March of the following year. Chhatisgarh Regulations 2004 does not have any definition of the 'year' but CERC (Terms and Conditions of Tariff) Regulations 2009 in Regulation 3 (43) defines year to be the financial year.

19. Scope and ambit of Section 64(3) mandates; That the Commission is to pass a tariff order within 120 days from the receipt of application under sub-section (1) after considering all suggestions and objections. It is commonly known that the legislature does not utter a word than what is not necessary. Mention of 120 days in sub-section (3) is correlated to Regulation 6 of Chhatisgarh Regulations 2004 which provides that every year by November 30th, every generating company and licensee shall file with the Commission a tariff application. All Commissions have framed their respective regulations prescribing 30th November of a particular year to be the last date for making application for determination of tariff so that by period of 4 months, or 120 days next the Commission is able to pass an order and, to all intents and purposes, the date of enforcing such order is to be 1st April, which is the commencement of a financial year. Therefore, implicitly there is recognition of retrospectivity from 1st April of a financial year in case it is

not possible for the Commission for some unforeseen circumstances, to pass a tariff order within 31st March. Or else, revenue gap between estimate and actuals is passed through any true up exercise in the next financial year. Section 64 (6) is canvassed by the learned Counsel for the Respondent to argue that this sub-section permits retrospectivity. To our mind the letter and spirit of the said sub-section (6) of Section 64 says that once a tariff order is passed the Commission will determine as to the period till which it will remain in force unless of course it is amended or revoked. But we must take a note of the fact that this sub-section (6) does not disentitle the Commission to fix a date of commencement of the year and it does not prohibit retrospectivity of such commencement by putting any express bar. Interestingly learned Counsel for the Appellant has taken us to Regulations 31 which is reproduced below:

“ A generating company and a licensee shall publish in at least two daily news papers , one each in Hindi and English having wide circulation in the area of supply and make available to the public . On request, the tariff schedule for the supply of electricity. Such tariff shall take effect only after seven days from the date of such publication and bills shall be issued accordingly”(emphasis ours)

20. It is important to notice that Regulations 31 is not a direction upon the Commission; it does not say that the Commission's order shall take effect only after seven days from the date of publication of such order. This Regulation 31 casts obligation upon the generating company or the distribution licensee to make publication of the tariff schedule after the order is made by the Commission. It does not say that it is the Commission that has to publish its tariff schedule and make it enforceable seven days after its publication. That is to say, Regulation 31 of the concerned

Commission does not take away retrospectivity of the order of the Commission. Regulation 6 when read with Regulation 27 makes it clear that the internal arrangements of the Regulator by framing the Regulations is to make its order effective from commencement of the financial year. Of course there is no bar to make the order posterior to the commencement of the financial year.

21. The Chhatisgarh Regulations 2004 which we referred to above is somewhat based on the CERC (Procedure for making of application for determination of tariff, publication of the application and other related matters) Regulation 2004, but in the CERC Regulations, there is no provision akin to the Regulations 31 of the Chhatisgarh Regulations. The CERC (Conduct of Business) Regulations 1999 also does not speak like that as it is spoken of in regulations 31 to the extent as is relevant for the issue. It is only in Section 65 that prospectivity has been clearly mandated with respect to cross subsidy payable by State Government in advance.

22. The question of retrospectivity came up for consideration before The Supreme Court in the Kannodia Chemicals & Anr. V/s State of UP & Ors. Reported in (1992) 2 SCC 124. While upholding the retrospectivity of tariff order the Hon'ble Court observed as follows;

“A retrospective effect to the revision also seems to be clearly envisaged by the section. One can easily conceive a weighty reason for saying so. If the section were interpreted as conferring a power of revision only prospectively, a consumer affected can easily frustrate the effect of the provision by initiating proceedings seeking an injunction restraining the Board and State from revising the rates, on one ground or other, and thus getting the revision deferred indefinitely. Or, again, the revision of rates, even if effected promptly by the Board and State, may prove infructuous for one reason or another. Indeed, even in the present case, the Board and State

were fairly prompt in taking steps. Even in January 1984, they warned the appellant that they were proposing to revise the rates and they did this too as early as in 1985. For reasons for which they cannot be blamed this proved ineffective. They revised the rates again in March 1988 and August 1991 and, till today, the validity of their action is under challenge. In this State of affairs, it would be a very impractical interpretation of the section to say that the revision of rates can only be prospective”.

23. This Tribunal in a batch of appeals namely SEIL India, New Delhi V/s PSERC reported in 2007 (APTEL) 931 considered the question of retrospectivity and maintained it. In this decision also the tariff order though made some time after commencement of the financial year was made effective from 1.4.2005 and this Tribunal upheld the order of the Commission. It observed : the cost prudently incurred is to be recovered, therefore, in the event of a tariff order being delayed, it can be made effective from the date tariff order commences or by annualisation of the tariff so

that deficit is made good for the remaining part of the year or it can be recovered after truing up exercise by loading it in the tariff of the next year. Thus law empowers the Commission to specify the date from which the tariff is to commence or the date when it will expire.

24. It is neither Section 62 nor Section 64 that constitutes bar to retrospectivity of a tariff order.

25. We must bear in mind that the Electricity Act 2003 in all its provisions have been made effective by the Central Government through a gazette notification from 10th June, 2003. This enactment speaks of prospectivity. In the same wave the concerned Regulations framed by the authority which is a creature of the Statute is also not retrospective. The Regulation is a current law that mandates how to govern the current activities. When the intention of the legislator or of the Regulator is to give effect to the tariff order from the date of the commencement of a financial year then by necessary implications the so called retrospectivity is

permissible. The mere fact that a change is operative with regard to price of fuel last determined does not mean that it is objectionably retrospective. Making tariff order retrospective from the date of the commencement of the financial year does not amount to inflicting legal injury to some other person because whatever is allowed in the tariff is necessarily passed through. Again, it cannot cause legal injury if claim of the Appellant is legally justifiable. The decisions referred to by learned Counsel for the Appellant are out of context.

26. Now the question is as to whether on the facts and in the circumstances of the case the Commission was justified in making the order retrospective i.e. from 1.4.2009. It is the settled law that generating plant is entitled to recover the fuel cost incurred for generation of power from its generating plant. The Commission noted that the biomass price was taken as Rs.850/PMT and cost of coal was considered at

Rs.1200/PMT for the year 2005-06. In that financial year the weighted average cost of fuel was considered at Rs.937/PMT for the financial year 2005-06, an escalation of 5% per annum was considered for fuel price and the landed cost of fuel was corresponding to Rs.984/PM, Rs.1033/PMT, Rs.1085/PMT and Rs.1139/PMT for the years 2006-07, 2007-08, 2008-09 and 2009-10 respectively for the fuel- mix ratio of 75:25. As such, the utility itself procured rice-husk for their bagasee based generating plant at Kwardha at Rs.1465/PMT for the year 2007-08 and Rs.1615/-PMT for the year 2008-09. The Commission's analysis of material and data justified a revision of the tariff on account of increase in fuel cost much before the financial year 2009-10 commenced. The price of biomass that has been fixed by the Commission is actually the price decided by the CERC. This is a factor uncontrollable, accordingly, the generator is entitled to revision of tariff with effect from commencement of financial year 2009-10. The Commission rightly observed

that distribution licensee is able to recover the increased cost of power purchase through its retail tariff during the true up exercise of ARR 2009-10. The contention of the Appellant that true up exercise cannot be a substitute for compensating the loss caused to the Appellant is difficult to accept.

27. Our considered view is that Commission committed no illegality in making the order retrospective.

28. We dismiss the Appeal without cost.

(Justice P.S.Datta)
Judicial Member

(Mr. Rakesh Nath)
Technical member

Dated 8th February, 2011

Index: Reportable/Non-Reportable

PK