

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

APPEAL NO. 22 OF 2009

Dated: 15th December, 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
144, Anna Salai,
Chennai- 600 002.**

...Appellant

Versus

- 1. Central Electricity Regulatory Commission,
36, Chanderlok Building,
Jan Path, New Delhi-110 001.**
- 2. Powergrid Corpn of India Ltd,
8-9. Qutab Institutional Area,
Katwaria Sarai, New Delhi-16.**
- 3. Karnataka Power Trans. Corpn. Ltd.,
Cauvery Bhavan, Bangalore-560 009.**
- 4. Transmission Corpn. Of AP Ltd.,
Vidyut Soudha,
Hyderabad-500 049.**
- 5. Kerala State Elec. Board,
Vaidyuth Bhavanam,
Pattom, Thiruvananthapuram-695 001.**
- 6. Govt. of Pondicherry,
Pondicherry 605 001.**

... Respondents

Counsel for the Appellant(s) : Mr. Venkataramani, Sr. Advocate
Mr. P.R. Kovilan Poongkuntaran
Ms. Geetha Muthu Perumal
Mr. A.K. Joreph

Counsel for the Respondent (s): Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Mr. Swapna Seshadri
Mr. Somya Singh
Mr. Ramnesh Jerath
Mr. Rohit Shukla for PGCIL
Mr. Sudhir Misra
Mr. Ashish Singh

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

JUDGMENT

Tamil Nadu Electricity Board (TNEB) is the Appellant. The Powergrid Corporation of India Ltd. is the Respondent No. 2.

2. Aggrieved by the order dated 24.01.2008 passed by the Central Commission, the TNEB has filed this Appeal.

Short facts of the case are as under:

3. TNEB (the Appellant) entered into a bulk power transmission agreement with Powergrid Corporation of India Ltd. (R2) the transmission utility of the Ministry for Power on 04.03.2006 for evacuation of the power from Central Sector Generating Stations for the period of 25 years. As per the agreement, the parties have to honour the tariff fixed by the Central Commission.

4. On establishment of the Central Commission, general note relating to the fixation of tariff on the purchase of energy and for payment of transmission charges had been issued by the Central Commission. On such a note being received, all the State Electricity Boards in India had given various suggestions relating to the fixation of tariff for such generation/transmission assets. Accordingly, the Central Commission by the order dated 29.03.2004 fixed certain norms for working out such a transmission tariff and for payment of such tariff by the State Electricity Boards. To this effect notification was also issued.

5. On the basis of this notification the Powergrid Corporation of India Ltd., the 2nd Respondent filed a tariff petition before the Central Commission seeking for the fixation of tariff for the period 2004-09 in respect of Neyveli Stage-I and II transmission systems.

6. The Central Commission disposed of the said petition on 03.11.2005 by fixing the transmission tariff through the order passed on the various dates.

7. In the meantime, the Powergrid Corporation of India Ltd., the R2, approached the Ministry of Power objecting to the Net Block method adopted by the Central Commission for fixation of transmission tariff. The Ministry of Power in turn issued letter dated 16.02.2005 admitting that an error has crept in during the determination of tariff. On the basis of this letter, the R2, Powergrid Corporation of India Ltd. filed a Petition being Petition No. 26 of 2005 before the Central Commission with the request for resolution of depleted equity capital of Powergrid Corporation of India Ltd. amounting to Rs. 646 crores. The Appellant, the TNEB, filed reply before the Central Commission on 06.05.2005. Ultimately, on 11.05.2005 the Central Commission dismissed the Petition No. 26 of 2005 on the ground

that the decision taken by the Central Government through the earlier Orders on depleted equity was a conscious decision and, therefore, the Powergrid Corporation was bound by the said decisions. Aggrieved by the said order dated 11.05.2005 the Powergrid Corporation had filed an Appeal being Appeal No. 121 of 2005, before, this Tribunal.

8. The Appellate Tribunal, after hearing the Ld. Counsel for the parties, by the order dated 16.05.2006 allowed the Appeal and held that grave injustice have been done to the Powergrid Corporation by not allowing equity worth Rs. 646 crores for determination of tariff and directed the Central Commission to determine the tariff of Powergrid Corporation after rectifying the depleted equity. With this direction, the matter was remanded to the Central Commission.

9. Aggrieved by this order the Appellant filed the Appeal before the Hon'ble Supreme Court being Civil Appeal No. 256 of 2007 with regard to restoration of depleted equity on 03.01.2007. However, no stay was granted. This Appeal is still pending in the Supreme Court. In the meantime the Powergrid Corporation Ltd., the 2nd Respondent, filed a petition before the Central commission with a request to restore the depleted equity as per

the order of the Tribunal in implementation of the same. The Appellant however objected to the same by filing a counter indicating that the said prayer is neither in line with the rights conferred by the Act of Parliament nor with the order dated 20.12.2002 issued by the Ministry of Power. Ultimately, through the Order dated 24/1/08, the Central Commission rejected the objections raised by the Appellant and allowed the Petition filed by R2 by way of implementing the order of the Tribunal dated 16.05.2006 and rectifying the equity of Powergrid and allowing the Return on Equity for Powergrid for an amount of Rs. 646 crores as directed by the Tribunal. Aggrieved by the said order dated 24.01.2008 this Appeal has been filed by the TNEB.

10. The learned senior counsel appearing for the Appellant would urge the following contentions while assailing the order impugned dated 24.1.2008 passed by the Central Commission:

A. The Central Commission has given effect to the order of the Tribunal dated 16.5.2006 to restore the equity amounting to Rs. 646/- crores without going into the details of the amount or verifying the correctness of the same. The impugned order is not in line with the Act of the Parliament. The Central Commission has considered the

cost of the previous one instead of book value for tariff fixation by completely ignoring the intention of the Act.

- B. The order of the Central Commission is also not in line with the observations of the Ministry of Power in its letter dated 16.2.2005 which states that the error has crept in while determining the tariff during 1992-97 and not prior to 1992. In the said letter dated 16.2.2005, it is stated that the methodology has to be adopted for arriving at the equity depleted during 1992-97, but the Central Commission has wrongly considered 50% of the gross block as equity for tariff purpose.
- C. The issue regarding the restoration of the equity depleted prior to 1.4.1992 which was passed on mutual negotiation can not be restored by Ministry of Power because the tariff is not determined by them. Therefore, the Ministry of Power has rightly ordered to restore equity only during 1992-97, the period from which the tariff has been determined by them and not prior to 1992.

11. In reply to this the learned counsel for the Respondent would make following submissions:-

- i) The order impugned dated 24.1.2008 passed by the Central Commission is nothing but the order implementing the order passed by this Tribunal dated 16.5.2006 in letter and spirit. This could not be challenged in this Appeal as this would amount to challenging the order dated 16.5.2006 passed by this Tribunal. In fact, the order dated 16.5.2006 passed by this Tribunal has already been challenged before the Supreme Court and the same is pending.
- ii) In the order dated 16.5.2006 passed by this Tribunal the issue relating to the depletion of the equity has been considered and decided in favour of the Powergrid Corporation of India Ltd. (PGCIL), Respondent herein. In the said order, the Tribunal has specifically made a note of the reduction from the gross value cumulative depreciation till 31.3.1992 and also thereafter, as well as specific amount of Rs. 646 crores which was the reduction in equity part of the capital cost. The Central Government in its letter dated 16.2.2005 had in fact accepted

the position of the depletion of the equity. The total depletion in equity inclusive of all the wrong application of the depletion of Rs. 646 crores. This has clearly mentioned in the records of the earlier proceedings both before the Central Commission as well as before the Tribunal. As a matter of fact no dispute was raised by the Appellant either on the amount of Rs. 646 crores being the depleted equity or on the book value or in regard to the issue of cumulative depreciation prior to 1.4.1992.

- iii) The plea now raised by the Appellant in this Appeal to the effect that the depreciation amount for the years prior to 1.4.1992 can not be considered for enlarging the equity base, is nothing but an attempt to reopen the aspects already considered and decided by this Tribunal in the order dated 16.5.2006.
- iv) It is an accepted position that equity part of the capital base, nearly 50% of the gross value of all the assets, does not get depleted. Thus, equity part is determined on gross value and not on net asset value. This has been clearly laid down by this Tribunal in the order dated 16.5.2006. Therefore, there can not be any reduction on the equity base or amount on cumulative depreciation for the period up to 1.4.1992.

12. We have heard the learned counsel for the parties and considered their rival contentions and also perused the records including the written submissions filed by both the parties.

13. The main contention urged by the learned senior counsel for the Appellant is with reference to the depletion of the equity issued prior to 1.4.1992. According to the learned senior counsel for the Appellant, both the letter of the Ministry of Power as well as Tribunal's order did not refer to the period prior to 1.4.1992 and therefore, the methodology adopted by the Central Commission to consider the depletion of the equity issued prior to 1.4.1992 is wrong.

14. In order to deal with this issue, let us now refer to the relevant portion of the order passed by this Tribunal on 16.5.2006.

“ 3. The Appellant, on its' establishment, took-over the transmission network from the Central Generating Companies like NTPC, NHPC, NLC and NEEPCO w.e.f. 01.04.1992 on book value” (page No. 77 of Appeal paperbook

“As per tariff notification dated January 18, 1994, issued by the Government of India, for the block period of five years from April 1, 1992 to March 31, 1997, it appears that the following methodology for determination of tariff was followed.

(a) Capital cost as on 31.03.1992 was notionally divided into Debt and Equity in the ratio of 50:50.

(b) Cumulative depreciation accrued till 31.03.1992 was deducted from capital cost as at (a) above to arrive at Net Asset Value which was used for tariff purposes.

(c) Net Asset Value obtained at (b) above, was divided notionally in Debt and Equity in the ratio of 50:50. In other words both Debt and Equity as in (a) above, were reduced equally by one-half of the cumulative depreciation mentioned in (b) above.

(d) While for tariff fixation Net Asset Value at (b) was considered, Return-on-Equity (ROE) was computed on the reduced equity given at (c) above.

(e) Consequent upon progressive reduction of Net Asset Value of the transmission projects over 5 years block period from 01.04.1992 to 31.01.1997, the original equities invested on projects also gradually depleted adversely impacting upon the ROE". (Page No. 79 of Appeal Paperbook).

"11. The Appellant has pointed out that the erroneous methodology followed in the tariff notification issued by the Ministry of Power/Govt. of India has wrongly depleted the aggregate equity of their transmission projects from Rs.2457.23 crores to Rs. 1901.66 crores (the difference being Rs. 646 crores) for fixation of tariff during the block period of 1992-97 and the succeeding tariff block period. This deficit in equity would remain in perpetuity which will result into that being not considered for future tariff determination and the appellant will continue to suffer loss in return on equity (ROE) and tariff on the above amount on perpetual basis". (page No. 81) of Appeal Paperbook)

"28. The Appellant has prayed for the restoration of depleted equity amount of Rs. 646 crores from the retrospective date i.e. 01.04.1992 with a further prayer for approval of return on equity from retrospective dates on the restored equity with the directions to the beneficiaries to pay revised return on equity and the revised tariff, if any. The Appellant, however, in their written submissions on 17.03.2006 to this Tribunal appreciating the difficulty faced by Respondents that at this point of time it would not be possible for them to pass on the liability and recover the increased tariff from the

consumers with retrospective effect and perhaps, sharing the guilt of delays caused in seeking resolution of the matter, have modified their request that the revised tariff based on restoration of depleted equity could be most equitably made effective at least from 01.04.2004 onwards". (page No. 88 of Appeal Paperbook)

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"30. we are of the firm view that grave injustice has been done to the Appellant by not allowing equity worth Rs. 646 crores for determination of tariff, particularly when on the own admission of the Regulator (Government) an error had crept in while determining the tariff for the block year 1992-97 leading to the depletion of equity. This has not been disputed or controverted on merits by any of the Respondents. The error/mistake of the Regulator has caused the Appellant to suffer loss in the past and in case the situation is not remedied he will suffer loss in perpetuity. We cannot allow technicalities to defeat justice. It will be just fair and reasonable and in keeping with the provisions of Section 111 (b) to correct the error." (Page No. 89 of Appeal Paperbook)

15. The perusal of the observation in the order dated 16.5.2006 passed by this Tribunal would make it clear that this Tribunal had substantially taken note of the deduction of the gross value cumulative depreciation till 31.3.1992 and also thereafter i.e. 1.4.1992 onwards. As indicated in the order the fact that the assets were taken at book value was also substantially mentioned in the said order. It can not be disputed over the principle that the equity part remains in perpetuity to earn rate of return, and the same is not depleted on account of depreciation of the capital asset.

16. It is also noticed that the aspect regarding the depreciation of equity has also been accepted in the Government letter dated 16.2.2005 which is as follows:-

“Please refer to your D.O. letter No. DF/PG/NER/2005 dated 16.1.2005 on the above subject. The matter has been examined by the Ministry. It is observed that an error has crept in while determining the tariff for the Block 1992-97 leading to depletion of equity. As fixation of tariff is now within the purview of the Central Electricity Regulatory Commission (CERC), it is suggested that Powergrid Corporation Ltd. May approach the CERC for restoration of the depletion of equity for the purpose of determination of PGCIL’s tariff”.

17. In view of the above materials, the plea now raised by the Appellant that the depreciation amount of years before 1/4/92 has to be deducted for determining the equity base is nothing but an attempt by the Appellant to re-open the issue already decided by the Tribunal in the Order referred to above. This cannot be permitted.

18. It is an accepted position that equity part of the capital base namely 50% of the gross value of the assets does not get depleted. The equity part is determined on gross value and not on net asset value at all times. This aspect of the matter also has been dealt with by this Tribunal in its order dated 16.5.2006. The relevant part of the observation is as follows:

“21. It is admitted by the parties that the uniform principle and methodology for tariff computation was to be followed by the Ministry of Power, Govt. of India, when it was fixing tariff as a regulator for electricity utilities, including the appellant, NTPC, NHPC etc. Similarly, the principle and methodology for determination of tariff are to be followed by the CERC. The principles and methodologies and yardsticks can not be differently applied by different authorities while determining tariff. Transfer of Transmission lines/network to Appellant on book value, in our considered view, could not be an accepted rationale to justify for application of totally different principles and methodology and on a selective basis to the applicant. Considering the fact that the Appellant was wholly owned and continued to be so owned by the Government of India, the transfer of transmission assets from other Central Power Sector Undertakings (CPSUs) to the Appellant ought to have been done on book value only and not on any other basis. There is no controversy in this regard. Prima-facia, Govt. of India, in no way, disadvantaged by transferring the assets on book value to the Appellant”.

19. In the light of the above observations it has to be held that there can not be any reduction on the equity base or on account of cumulative depreciation for the period up to 1.4.1992.

20. Much reliance was placed by the learned Senior counsel for the Appellant on the letter of the Government of India dated 16.2.2005 to substantiate his plea about depreciation only for the period 1992-97 and not prior to this. This contention cannot be countenanced. The said letter of the Government of India does not speak about depreciation only for the period

1992-97 but it speaks about the tariff for the block year 1992-97 and this means the depletion as on 1.4.1992. As correctly pointed out by the learned counsel for the Respondent, it was never disputed as to the amount of Rs. 646 crores before the Central Commission. The break up of the figures was available to the Appellant in all the proceedings before the Central Commission as well as in the earlier proceedings before this Tribunal. Admittedly, during these proceedings, this objection was never raised by the Appellant.

21. It is now brought to our notice by the learned counsel for the Respondent that even in the Appeal pending before the Supreme Court challenging the order dated 16.5.2006 of the Tribunal, the Appellant has not raised the dispute with regard to the quantum of Rs. 646 crores being the depleted equity.

22. The Ld. Senior Counsel for the Appellant would mainly submit the following:

- A) The Central Commission ought not to have accepted the order of the Tribunal without verifying the correctness of the same and without going into the facts and details of the case.

B) The Central Commission ought to have gone into the question whether the Tribunal in the order dated 16.5.2006 was right in accepting the amount of Rs. 646 crores, the figure of which the Powergrid has given without going into the correct calculations.

23. The above submissions, in our view, would amount to challenging the Tribunal's Order passed earlier. It is quite strange to contend that the Commission is empowered to reopen issues which have been decided by the Tribunal and to come to its own conclusion, by discarding the finding given by the Tribunal. We cannot accept this proposition.

24. It is to be pointed out that the Central Commission being a subordinate authority is bound to implement the Order of this Tribunal in true letter and spirit. Any deviation by the Central Commission from the implementation of the order would lead to judicial impropriety. In our view, the Central Commission has with the right spirit, implemented the order passed by this Tribunal which is an Appellate body.

25. The Central Commission is not expected to hold any proceeding to consider whether determination of the Tribunal is correct or not in the

process of the implementation of the order passed by this Tribunal. As a matter of fact, the order passed by this Tribunal on 16.5.2006 would clearly reveal that after due discussion, clear findings have been given, on the relevant aspects. They are as follows:

- a) Gross value of the assets taken over by the Powergrid from other Public Sector Companies at book value i.e. as per their balance sheets with effect from 1.4.1992.
- b) Gross value of the assets taken over by the Powergrid was inclusive of cumulative depreciation amount as on 31.3.1992.
- c) The equity amount to be serviced is to be 50% of the gross value of the assets.
- d) The cumulative depreciation of the assets during the period 1.4.1992 onwards till 31.1.1997 was also taken to reduce the equity base on which return on equity was to be given.
- e) The total depletion of the equity inclusive of all the above wrong application of depletion of Equity was Rs. 646 crores.

26. These findings, in our view are perfectly justified.

27. Hence, we do not find any merit in this Appeal. Accordingly, the Appeal is dismissed. No order as to costs.

(H.L. Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 15th December, 2009

INDEX: Reportable/Non Reportable.