Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.78 of 2011

Dated: 27th April, 2012

Present: **HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON,**
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER

In the Matter of:

Uttar Haryana Bijili Vitran Nigam Ltd
Shakti Bhawan, Sector-6
Panchkula-134 109 .....Appellant

Versus

1. **Haryana Electricity Regulatory Commission**
   Bays No.33-36, Sector-4,
   Panchkula, Haryana-134 112

2. **M/s. Bhoruka Power Corporation Limited**
   48, Lavelle Road,
   Bangalore-560 001

3. **Government of Haryana**
   Department of Power and Renewable Sources
   Haryana Civil Secretariat,
   Chandigarh-160 001

4. **Government of Haryana**
   Department of Irrigation
   Sinchai Bhawan, Sector-5,
   Panchkula-134 109

5. **Haryana Renewable Energy Development Agency**
   SCO No.48, Sector-26,
   Chandigarh-160 019 Respondents

Counsel for the Appellant(s):	**Mr. Ramji Srinivasan,Sr Adv** **Ms. Shweta Mishra** **Ms. Ruchi Gour Narula** **Mr. Vivek Kishore** **Mr. P C Sharma** **Ms. Nidhi Minocha**
Counsel for the Respondent(s):	**Mr. Anand K Ganesan for R-1** **Ms. Swapna Seshadri for R-1** **Mr. Sanjeev Kr Saxena for R-2** **Mr. G Joshi for R-2** **Mr. Sridhar Prabhu for R-2** **Mr. P C Sharma for R-5**

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Uttar Haryana Bijili Vitran Nigam Limited (UHBVNL) is the Appellant herein.

2. Aggrieved over the impugned order dated 8.9.2010 passed by the Haryana Electricity Regulatory Commission (State Commission) revising the approved Tariff of the 2nd Respondent, the Appellant has filed this Appeal.

3. The short facts are as follows:

   (a) The Appellant is a Government of Haryana undertaking.

   (b) It is a Distribution Licensee, being responsible for the distribution and retail supply of power in the Northern parts of Haryana.

(c) State Regulatory Commission is the 1st Respondent. M/s. Bhouruka Power Corporation Limited is a generating company and is the Second Respondent.

(d) Haryana Renewable Energy Development Agency (HAREDA), 5th Respondent, an autonomous body was set-up by the Government of Haryana to implement the Non-Conventional & Renewable Energy Projects under the Haryana State Department of Non-Conventional Energy Sources.

(e) HAREDA issued advertisements in 1998, inviting the proposal for setting up mini hydro plants on canal drops at Dadupur and other sites in Haryana.

(f) M/s. Bhouruka Power Corporation Limited, the 2nd Respondent was one of the bidders for the Dadupur site. Ultimately it became the successful bidder. A Letter of Intent was issued on 30.4.1999 for the said site.

(g) However, by the Memo dated 30.9.1999, the HAREDA cancelled the allocation of the Dadupur site made in favour of M/S. Bhouruka Power Corporation (R-2).

(h) Challenging the same, M/s. Bhouruka Power Corporation (R-2) preferred a Writ Petition before the

Punjab and Haryana High Court. The High Court ultimately by the order dated 3.7.2000 allowed the said Writ Petition setting aside the cancellation and restored the order of allocation of Dadupur site made in favour of M/s. Bhouruka Power Corporation (R-2).

(i) Thereafter, on 17.4.2006, a PPA was entered into between the Appellant and M/s. Bhoruka Power Corporation Limited (R-2). The said PPA was placed before the State Commission for approval.

(j) On 10.7.2007, the Haryana Commission gave its approval to the PPA with some modifications including slight change in the tariff. Thereafter, the modified PPA was signed by the parties on 3.3.2008.

(k) Thereafter, due to escalation of prices in the changes made in the tax regime, change in scope and other relevant factors, heavy additional cost was incurred by the Generator (R-2) for completion of its Dadupur site. Due to heavy additional cost, M/s. Bhoruka Power Corporation Limited (R-2) felt difficult to survive at the tariff determined by the State Commission on the basis of the PPA. Therefore, M/s. Bhoruka Power Corporation Limited (R-2) sent a letter to the Appellant requesting for the increase in the tariff. However, the Appellant did not accede to the request of M/s.

Bhoruka Power Corporation Limited (R-2) to increase the tariff.

(l) Hence, in April, 2010, M/s. Bhoruka Power Corporation Limited (R-2) filed a Petition before the State Commission for re-determination of the tariff of the project on the grounds mentioned above.

(m) The State Commission, after hearing the parties passed the impugned order dated 8.9.2010, allowed some of the claims made by M/s. Bhoruka Power Corporation Limited (R-2) and approved additional capitalisation of Rs.4.12 Crores on completed cost basis and re-determined the tariff.

(n) Aggrieved by the said order, the Appellant has preferred the present Appeal.

4. The Learned Senior Counsel for the Appellant would urge the following contentions:

(a) The HERC (Terms and Conditions for Generation of Tariff) Regulations 2008 are only prospective. Regulation 2 of the 2008 Regulations limits the scope and extent of application of the said Regulations to cases where the commission determines the tariff under Section 62 and 64 of the Electricity Act, 2003. In the present case, the tariff has been determined in

accordance with Section 63 of the Act through the bidding process on the basis of mutually agreed tariff by both the distribution licensee and the generator. As such, the applicability of this Regulation is excluded. Furthermore, the Regulations which have been applied in the present case to over ride the PPA provisions are only prospective in nature. Therefore, the impugned order is erroneous.

(b) The State Commission has wrongly exercised its jurisdiction and determined the tariff by complying with its 2008 Regulations which would not apply to the present case. As a matter of fact, the State Commission by the order dated 10.7.2007 had finally approved and fixed the tariff for a period of 15 years. The State Commission reserved its right to review and approve the fresh tariff only from the 16th year onwards and not before. Therefore, the decision to review the tariff before the expiry 15 years period is wrong.

(c) Admittedly, M/s. Bhoruka Power Corporation (R-2) conducted the detailed survey of the site and prepared a DPR on the basis of which the project was awarded to it. It was expected that the project developer, being a prudent businessman, would factor in the

inflationary trends and the possible spill over of costs in a project which was expected to extend over a period of time.

(d) The Commission has wrongly allowed the claims in respect of construction of cut-off wall, expenses on account of dewatering and dewatering equipment, purchase of diesel for dewatering, barrage gate and repair of existing barrage gate even though the 2nd Respondent is not entitled to the said claims.

5. In reply to the above submissions, the Learned Counsel for the Respondents namely the Commission as well as M/s.Bhoruka Power Corporation Limited (R-2) have made the following submissions:

(a) On 19.12.2008, the Tariff Regulations, 2008 were notified which provided that final tariff has to be determined based on the actual competitive cost of the project. Admittedly, the Appellant has not challenged the said Regulations in the appropriate forum. Therefore, the same are binding upon the Appellant. Furthermore, it is a settled law that Regulations framed under the Act can intervene and override the existing contracts of the regulated entities.

(b) The contention of the Appellant is that the tariff was determined under section 63 of the Electricity Act, 2003 and therefore, the same cannot be reviewed is wrong since in the Petition filed before the Commission on 17.4.2006 it had not been mentioned that the tariff may be fixed on the basis of the competitive bidding process. The instant project falls outside the purview of the Clause of National Tariff Policy which mandates that all future requirements of power should be procured competitively by the distribution licensee. The tariff had been determined by the Commission only under section 62 of the Electricity Act, 2003 and not under Section 63 of the Act.

(c) The State Commission has correctly held that the tariff fixed by it at the time of approval of the PPA was subject to the review and that Regulations have overriding effect over the existing contracts including the said PPA. Even assuming that the PPA did not provide specific clause for revision of the project, the Commission is empowered to re-determine the tariff already fixed by it under section 62 of the Act.

(d) The Respondent in its Petition has claimed 11 items but the State Commission has allowed claim for only 5

items by giving valid reasons. As such, the impugned order does not suffer from any illegality.

6. In the light of the above submissions, the following question may arise for consideration:

   (a) Whether the tariff could be re-determined by the State Commission through the impugned order under section 62 of the Electricity Act, 2003 when the basis of allocation of the project to Bhouruka Power Corporation Limited (R-2) was through the process of competitive bidding under section 63 of the Act ?

   (b) Whether the tariff could be re-determined by the State Commission on the basis of escalated cost when there was no escalation clause in the PPA entered into between the Appellant and the Bhouruka Power (R-2) under the garb of Regulations to re-determine the tariff as prayed ?

   (c) Whether the State Commission is empowered to increase the tariff even before the expiry of the period namely ceiling limit which was prescribed in the approval order approving the Power Purchase Agreement?

(d) Even assuming that the State Commission had the jurisdiction, whether the same has been correctly revised ?

7. Let us deal with these questions one by one.

8. According to the Appellant, the Generating Station was set-up by the generator pursuant to a competitive bidding process under section 63 of the Electricity Act, 2003 and consequently the same was adopted by the State Commission and therefore, the State Commission had no jurisdiction to revise the tariff so discovered under the competitive bidding process under section 62 of the Electricity Act, 2003.

9. At the outset, it shall be stated that the contention of the Appellant that the tariff had been earlier determined under section 63 of the Act and that therefore, the same cannot be re-determined under section 62 of the Electricity Act, 2003 is not tenable for the following reasons:

(a) As a matter of fact, in the present case even though the competitive bidding process was held, such bidding process cannot be said to be under section 63 of the 2003 Act as the bidding took place in 1998 i.e. prior to enactment of Electricity Act, 2003. Section 63 of the Act provides that the Appropriate Commission

shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. The Central Government issued guide lines in the year 2006. Thus, the bidding process which took place in the year 1998 cannot be said to be held in accordance with the said guidelines issued by the Central Government under Section 63 of the 2003 Act.

(b) It is true that the State Commission has to adopt the tariff determined through transparent process of bidding under section 63. In this case the Appellant merely prayed the State Commission on 17.4.2006 to determine/approve the tariff. Furthermore, it has not been mentioned in their petition that the tariff has be fixed on the basis of the transparent competitive bidding process as per the guidelines of the Central Government. Rather, it has been mentioned in the said Petition that the power to be procured " at the rate to be decided by HERC as per the provisions of the Electricity Act, 2003". The State Commission did not adopt the mutually agreed tariff mentioned in the petition and had modified the said tariff. Therefore, the tariff fixed by the State Commission by the order dated 10.7.2007 on the petition filed on 17.4.2006 was not

under section 63 of the Act but under section 62 of the Act.

(c) That apart, the instant project falls outside the purview of the National Tariff Policy because this mandates that only future requirement of power should be procured competitively by the distribution licensee. Therefore, the clauses of National Tariff Policy providing for procurement of power on the basis of the competitive bidding would not apply to the project in question.

(d) The State Commission has rightly held in the impugned order that the petition dated 17.4.2006 did not mention any rate which was the outcome of any competitive bidding process to be adopted by the Commission under section 63 of the Act. Therefore, the State Commission treated the Petition accordingly and determined the tariff on the basis of the data available in DPR determining the tariff as per the provisions of the Act. The relevant finding of the State Commission is as follows:

> *"Thus, the Commission finds it difficult to agree with the contention of UHBVNL that tariff (as different from project) was determined on the basis of competitive bidding. Accordingly, the issue framed at Sr No.B by the Commission is*

answered that the tariff was determined by the Commission under Section 62 of the Act and not adopted under Section 63 of the Act as an outcome of a competitive bidding as provided in the National Tariff Policy"

10. In view of the above, the contention of the Appellant that the first tariff order was passed under section 63 of the Act and that therefore it cannot be revised under section 62 of the Act is liable to be rejected.

11. That apart, during the proceedings before this Tribunal, the Appellant was asked to submit the copy of the RFP and the bid to show that the bidding was carried out in accordance with the guidelines issued by the Central Government. At that stage, the Appellant submitted that it will not press the ground that the tariff was determined in the earlier order under competitive bidding process under section 63 of the Act, 2003.

12. We will now refer to the 2nd issue raised by the Appellant as to whether the tariff could be re-determined by the State Commission on the basis of escalated cost when there was no escalation clause in the PPA entered into between the Appellant and the Bhouruka Power (R-2) under the garb of Regulations to re-determine the tariff as prayed.

13. On this issue, the State Commission has given the following finding in the impugned order:

"It is an admitted fact that the PPA signed between the parties has no specific clause providing for any revision of project cost and hence re determination of tariff. However, the HERC Regulations i.e. HERC (Terms and Conditions for Determination of Tariff), Regulations, 2008 at clause 12 (1) provides as under:

"*The Actual expenditure incurred on the date of completion of the project shall form the basis for fixation of final tariff. Investments made prior to 1st April, 2008 in the case of the existing generating stations shall be accepted for reckoning capital cost on the basis of audited accounts. The final tariff shall be determined based on the capital expenditure allowed by the commission and the expenditure actually incurred upto the date of commercial operation of the generating station and shall include capitalised initial spares, subject to ceiling norms mentioned below, as a percentage of plant and equipment cost".*

Thus, it is clear from the above Regulation that the final tariff has to be determined based on the actual completed cost of the project. Hence in order to mitigate investments risk, encourage huge investment requirement and ensure stipulated return on equity the regulation provides for re-look at the project cost and realign tariff. The basic principle enunciated in the above Regulations is applicable in all cases except where the Commission adopts tariff under Section 63 of the Act. The Commission also examined the relevant Regulations of CERC as Section 61 (a) of the Act provides that the methods and principles enunciated by the Central Commission with regard to Generation has to be the guiding factor for the SERCs. The Commission observes that the CERC Regulations on terms and conditions for determination of generation tariff also provides for additional

capitalization including on account of change in law any additional work/ service which has become necessary in efficient and successful operation of plant but not included in the original capital cost.

The Status of regulations vis-a-vis a concluded commercial contract like PPA was examined in the light of the Hon'ble Supreme Court judgment in the matter of PTC Vs CERC (2010 AIR (SC) 1338, 2010 INDLAW SC 169). The relevant portion of the order is re-produced below:

***"A Regulation under Section 178 (181 in the case of State Commission), as part of Regulatory framework, intervenes and even overrides the existing contracts between the regulated entities in as much as it casts a statutory obligation on the regulated entities to realign their existing and future contracts with the said regulations"**. The Hon'ble Court further observed that the validity of the regulation may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.*

***It is clear from the above that the Regulations framed under the enabling provisions of the Act can intervene and override the existing contracts of the regulated entities**.*

14. From the above, it is clear that there is a specific finding that the tariff fixed by the State Commission at the time of approval of the PPA was subject to the review and the Regulations framed by the State Commission have an overriding effect over the existing contracts over the PPA. Therefore, even when the PPA did not provide for a specific clause for revision of the project cost, the State

Commission under the Regulations was empowered to re-determine the tariff fixed by it under section 62 of the Act.

15. As pointed out by the State Commission, as per the Regulations framed by the State Commission, the final tariff has to be determined based on the actual cost of the completed project and the Regulations framed under the enabling provisions of the Act will override the PPA of the regulated entities.

16. As correctly submitted by the Learned Counsel for the Respondent, the clauses of National Tariff Policy providing for procurement of power on the basis of the competitive bidding does not apply to this project and therefore, even when the PPA did not provide any specific clause for revision of the project cost, the State Commission under section 62 of the Act, 2003 as well as under the Regulations, was empowered to re-determine the tariff fixed by it.

17. In respect of the 3rd issue, the Appellant has contended that the review of the tariff can be made only after completion of 15 years of operation of generating stations and not before that as provided in the approval of the PPA. While dealing with this issue, it would be appropriate to refer to the relevant clause of the PPA which is approved by the order

dated 10.7.2007. The State Commission in the order dated 10.7.2007 has held as under:

> **"***The Tariff from 1-12 years shall be Rs.2.80/unit and Rs.1.70/unit for 13 to 15 years from the date of commissioning and shall continue to be in force till such time it is reviewed and approved by the Commission. In the light of this para No.3.2 & 3.3 of the PPA shall be appropriately worded".*

18. The above order dated 10.7.2007 passed by the State Commission was on the basis of the Petition filed by the Appellant for determination of the tariff and approval of the PPA. Let us quote the plea and prayer made by the Appellant in the said Petition dated 17.4.2006. The relevant portion is as under:

> **"***In the meanwhile, Haryana Government has notified the 'Policy for promoting generation of electricity through renewable energy sources 'on 6.12.2005 and circulated vide No.DRE/2005/3943-47 dated 20.12.2005. The Section 10- Purchase Price provides as follows:*
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> *i) "New Projects: Licensee / Utilities will purchase electricity offered by the power producers in case of new projects set up after the notification of the present policy at the rate to be decided by the Haryana Electricity Regulatory Commission as per provisions in the New Electricity Act, 2003".*
>
> *.....*
>
> *In view of the above, the Hon'ble Commission is requested to fix / determine / approve the cost of*

power to be purchased from M/S. Bhoruka Power Corporation Limited from their proposed 6 MW Hydro Power Plant at Dadupur, Disttt. Yamuna Nagar, Haryana".

19. Thus, on the basis of this Petition and the PPA, the State Commission passed the 1st Tariff Order dated 10.7.2007 holding that the tariff for 1-12 years shall be Rs.2.80/ unit and Rs.1.70/ unit for 13th year to 15th year from the date of commissioning and shall continue to be in force till such time it is reviewed and approved by the State Commission.

20. It is evident from the plea in the Petition as well as from the order dated 10.7.2007 passed by the State Commission that the State Commission had retained with itself the power to review the tariff in future. In other words, the tariff that was approved by the State Commission for the first 15 years of operation from the date of commissioning was subject to the power of the State Commission to review and re-examine the tariff at any point of time. There was no restriction placed in the above order passed on 10.7.2007 with regard to the timings for review of the tariff so approved.

21. The expression "shall continue to be in force till such time it is reviewed and approved by the Commission" cannot be applied in a restricted manner for the period after the expiry of 15 years of the commissioning of the generating station.

22. The State Commission in the impugned order has given the correct interpretation of the earlier order dated 10.7.2007 to the effect that it had retained the power to review or revise the tariff at any point of time. The said findings is given as under:

> *"While deliberating on issue at Sr.No.B framed by us, we referred to Memo No.793/HERC/SV/07 dated 10.7.2007 vide which PPA was approved by the Commission. Point No.1 of the approval reads as under:*
>
> > *"The Tariff from 1-12 years shall be Rs.2.80/unit and Rs.1.70/unit from 13 to 15 years from the date of commissioning and shall continue to be in force till such time it is reviewed and approved by the Commission. In the light of this Para No.3.2 & 3.3 of the PPA shall be appropriately reworded".*
>
> *It is quite clear from the above paragraph that the tariff was worked out / approved by the Commission subject to being reviewed by itself if the situation so warranted.".*

23. It is not a case where the State Commission has simply approved the tariff for a particular period of time. It cannot be argued that once the tariff having been approved for a particular period, the same cannot be reviewed at subsequent stage. This is evident from the first order dated 10.7.2007 by which the State Commission had retained its right to review the tariff even during the period of 15 years.

24. Let us go to the last issue.

25. Once it is held that the State Commission has retained its right to review the tariff even during the period of 15 years, the only question that arises is as to whether the power has been correctly exercised by the State Commission?

26. Let us deal with this question now.

27. Though the Petition by the generator was filed for revision on tariff on various counts including increase in costs, inflationary factors, change in scope etc., the State Commission has only allowed the increase in tariff after prudence check on each claim of the Generator and has permitted additional capitalisation primarily for factors beyond the control of the Generator. In this regard, the State Commission has rejected various other claims made by the Generator for tariff increase. The State Commission has in the impugned order while allowing some of the claims as passed has given various reasons. They are as follows:

> "*21. Specific Claims of M/s. BPCL:*
>
> *The Commission has examined the details of the additional work expenses submitted by the Petitioner amounting to Rs.8,25,17,918 (rounded off to Rs.8.25 Crores) including the comments on the same filed by the Respondent i.e. UHBVNL and Haryana Irrigation Department. It is also noted that the Respondents have not disputed the amount of claims filed under*

different head by the petitioner with reference to the parties who actually did the work and bills raised by them.

At the outset, it needs to be clearly understood the implementation of any long term project which would remain operational for more than 35 years or so as in the instant case is all about balancing risk and reward. Hence, normally the inflationary impact on the cost of the project which may take up to about three years or so is anticipated by the project developer and built in to the cost of project. In case the project is implemented through an EPC contractor the agreement between the two provides sufficient cushion to the expected increase in different project components including steel, cement etc. Thus, the Commission agrees with UHBVNL that the same cannot be passed on as additional capital work. Accordingly, the petitioner's claim of Rs.1.65 Crore on account of value difference in TMT and ST Steel is not admissible. Implementation of projects which is staggered for more than a year is always fraught with some risk, such risks gets compounded if the project is delayed. Hence in a developing economy like Indian which is prone to moderate to high levels of inflation this acts like a deterrent delaying early financial closure and completion of project. Any time and cost overrun due to rise is general price a level in the Economy has to be absorbed by the developers. As far as Operation & maintenance (O&M) is concerned which impacts the financial performance of the project over the entire fruitful life of the project spanning more than thirty years and hence the rise in costs cannot be reasonably projected the risk is mitigated in building in an escalation factor. In the instant case, the same was done by the petitioner by considering 5% YOY escalation in the O&M cost from 2nd year of operation

of the project. Consequently, the claim on account of price rise is dismissed".

28. So from the above findings given with the valid reasons it is clear that the State Commission has disallowed many of the claims of the Respondent Generator M/s. Bhoruka Power Corporation Limited (R-2) and has allowed only some of the claims. It is noticed that out of the total claim of Rs.8.25 Crores, the State Commission has only allowed Rs.4 Crores for the purpose of tariff. Consequently we hold that the impugned order does not suffer from any infirmity whatsoever.

29. **Summary of Our Findings**:

(i). **The site allocation was made in this case through the competitive bidding process. But, such bidding process cannot be said to be under section 63 of the 2003 Act as the bidding took place in 1998 prior to enactment of Electricity Act, 2003. Section 63 of the 2003 Act provides that the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. The Central Government issued guide lines only in the year 2006. Thus, the**

bidding process which took place in the year 1998 cannot be said to be held in accordance with the said guidelines issued by the Central Government under Section 63 of the 2003 Act.

(ii). **As per the Tariff Regulations 2008 framed by the State Commission final tariff has to be determined based on the actual cost of the completed project and the Regulations framed under the enabling provisions of the Act will override the PPA of the regulated entities.**

(iii). **It is evident from the State Commission's order dated 10.7.2007 that the State Commission had retained in itself the power to review the tariff in future. In other words, the tariff that was approved by the State Commission for the first 15 years of operation from the date of commissioning was subject to the power of the State Commission to review and re-examine the tariff at any point of time. There was no restriction placed in the above order passed on 10.7.2007 with regard to the timings for review of the tariff so approved.**

(iv). **The State Commission has disallowed many of the claims of the Respondent Generator M/s. Bhoruka Power Corporation Limited (R-2) and has allowed**

only some of the claims. It is noticed that out of the total claim of Rs.8.25 Crores, the State Commission has only allowed Rs.4 Crores for the purpose of tariff along with detailed valid reasons for the same. As such, jurisdiction has been rightly exercised by the State Commission. Consequently we hold that the impugned order does not suffer from any infirmity whatsoever.

30. In view of our above findings, we do not find any merit in this Appeal. Hence, the Appeal is dismissed.

31. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 27th April, 2012

√REPORTABLE/~~NON-REPORTABALE~~