BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 99 of 2008 & IA No. 147 of 2008

Dated this 03rd day of February, 2009

Coram : Hon'ble Ms. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

IN THE MATTER OF:

Hindustan Zinc Ltd.
Yashad Bhawan,
Udaipur - Appellant (s)

Versus

1. Rajasthan Electricity Regulatory Commission
   Shed No.5, Vidyut Bhawan, Jyoti Nagar,
   Near Vidhan Sabha, Jaipur

2. Ajmer Vidyut Vitran Nigam Ltd.
   Hathi Bhata, Jaipur Road,
   Ajmer - Respondent(s)

Counsel for the Appellant : Mr. P. N. Bhandari

Counsel for Respondents: Mr. M. G. Ramachandran,
Mr. Anand K. Ganesan
Ms. Swapna Seshadri for RERC
Mr. R. C. Sharma, Jt. Secy.RERC

Mr. R. K. Aggarwal for Resp. No.2,

AVVNL

J U D G M E N T

Justice Manju Goel, Judicial Member

The appellant is an open access consumer of electricity. The open access is provided by the respondent No.2, Ajmer Vidyut Vitaran Nigam Limited who is also a distribution company. The appellant challenges in this appeal the order of the Rajasthan Electricity Regulatory Commission), Jaipur, hereinafter referred to as the Commission, dated 03.07.08 which affects the terms of the agreement between the appellant and the respondent No.2 that regulates the services of open access provided by respondent No.2 to the appellant. The facts leading to the appeal are as under:

2) On 22.09.06, the appellant and the respondent No.2 entered into an agreement although contending therein that the agreement would be effective from 01.05.06 that is when the open access services began. Certain salient features of this agreement are as under:

> *"13.* ***Defaults and Termination****:*
>
> *……..*
>
> *Any change in the terms and conditions of open access notified by the Commission shall be overriding the provisions in this agreement to extent of their applicability.*

Part-II*: *Regular Supply:

…….

15. Both the parties agree that charges for regular supply shall be as per the tariff for supply of electricity, prescribed by distribution licensee with the approval of the RERC, as applicable to HT large industrial/mixed load/bulk supply service tariff (Schedule HT-5). However, provisions of excess demand charges shall not apply during the period part III of the agreement is in force.

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Part-III: Standby Supply

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22 – Tariff applicable for standby supply shall be that applicable for temporary supply as per tariff for supply of electricity prescribed by the distribution licensee with the approval of RERC as applicable to HT large industrial/mixed load/bulk supply service. Tariff shall be applied on daily basis as & when such standby supply is available & shall be subject to minimum annual drawal for 36 days in a financial year.

Part-IV: Settlement:

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25. This agreement shall subject as hereinafter provided, remain in force for a period of one year in the first instance commencing from the date of supply and shall remain in force till its termination

Provided that either party shall be at liberty to terminate this agreement….

…..

Part-V: General:

……

……..

29. Billing.

a. …

b. …

c. …

d. Regular supply as per tariff for supply of electricity, specified by the distribution licensee for temporary supply for large industrial/non-domestic/mixed load service (schedule HT-5)

e. Standby supply as per tariff for supply of electricity, specified by the distribution licensee for temporary supply for large industrial/non-domestic/mixed load service during the period of outage of generating unit effecting open access supply for the days of such drawals.

f. Inadvertent drawal of electricity in excess of regular & standby supply as per sub-clause (e) at temporary supply tariff.

3) Subsequently, on 03.01.07 a standard format of agreement was issued for, *inter alia*, short term open access agreement for case of distribution system and HT supply. This new agreement contains the same clause 29 of billing with certain addition regarding power factor surcharge. It also added certain new conditions most important of which, for the purpose of present appeal, is clause 32 that deals with unscheduled interchange pricing. The new-clause 32 in the new format of 03.01.07 is as follows:

"32. Unscheduled Interchange Pricing:

(1) Payment of mismatch between scheduled and actual drawal will be governed by the RERC (Intra-State ABT) Regulations, 2006.

(2) Where the open access supplier is governed by the inter-state ABT, it will be governed by CERC (Inter State OA) Regulations, 2004. For intra state ABT, the permissible deviation of actual injection with regard to scheduled injection and actual drawal against scheduled drawal will be as under and will be settled at intra state unscheduled interchange rate, as specified by RERC from time to time:

(a) Deviation at injection end (-) 100% to + 5%

(b) Deviation at drawal end (-) 5% to + 5%

Provided, a deviation in excess of 5% at injection end and lower than 5% at drawal-end will be considered as inadvertent supply to the supplier-end distribution licensee and to the consumer-end distribution licensee respectively. Such supply will neither be payable nor bankable unless specifically provided in the RERC regulations. Any deviation in excess of 5% at drawal end by open access consumer will be governed by balancing agreement for HT supply and/or standby supply

(3) Where an open access supplier is not governed by interstate or intrastate ABT, there will be no permissible deviation.

"32(4). In case of reduced supply or outage of supplier's generating station, the excess drawal at the drawal end, beyond the permissible limit will be first considered under HT power supply upto contract demand and beyond the contract demand under the standby supply and thereafter, excess drawal will be considered as per HT power supply agreement. Billing for HT supply will be effected on monthly or weekly basis and that of standby supply at temporary supply tariff on daily basis with fixed charges and minimum billing etc. based on daily maximum demand."

4) Referring to clause 29(1) (f), as extracted above, the respondent wrote to the Commission vide a letter dated 18.06.07 to the following effect: " *in view of the above two clauses which are contradictory to each other it is requested to advice us about the correct applicability of tariff for drawal of excess of regular plus standby".*

5) A further letter written on 30.06.07 by the respondent No.2 to the Commission asking the Commission to amend the clause 29(1)(f). In this letter the respondent No.2 asked for certain other

changes in the format issued on 03.01.07 relating to clauses 20, 32(4) as well as in clauses 29(e) and 29(f). The Commission issued notices, on 17.08.07 to the appellant as well as to certain other parties as the Commission intended to make certain changes in the agreement. The Commission said "*Accordingly, the Commission proposed to make some changes in this agreement. A copy of the proposed changes and letter received from AVVNL is enclosed herewith. You are requested to send your comments, if any, by 25.08.08. The Commission will also hold a public hearing in the matter on dated 27.08.07. You may present your case before the Commission herein."* The respondent No.2 again issued comments seeking changes in clauses 19, 20, 21(1)(f), clause 32(4). The electricity distribution company known as Jodhpur Vidyut Vitaran Nigam Limited also submitted certain comments. One of the important comments of Jodhpur Vidyut Vitaran Nigam Ltd. was that it was not in agreement with the proposed change in clause 29(f) which asked for inadvertent drawal as per clause 29(1)(d) and submitted that the same may be priced as per temporary supply tariff i.e. as per 29(e). The Commission came out with an order dated 15.09.07. The Commission declined to make any change in clause 19. However, the Commission considered making two additions in clauses 15 & 19. After considering the pros and cons on the issue the Commission in paragraph 11 wrote as under:

"11. Considering that the regular/standby supply demand is not deliberately kept low by the consumer and do not cause frequently exceeding contract demand and that in the ABT regime when the Discoms are subject to scheduling and drawal accounting on every 15 minutes duration basis, it would be proper that excess demand upto the standby supply contract demand should not be subject to excess demand charges.

Commission's decision:

12. *The existing provision "However, provisions of excess demand charges shall not apply during the period to which part-III of the Agreement is applicable." in clause 15 & 19 be clarified as under:*

i. In clause 15:

"However, provisions of excess demand charges shall not apply on regular supply to the extent of contracted standby supply during the period to which part-III of the Agreement is applicable."

ii. In clause 19 :

"However, provisions of excess demand charges on the standby supply shall not apply during the period to which part-III of the Agreement is applicable."

6) The Commission considered change in the clause 29(1)(e). The clause initially dealt with the tariff for standby supply during the outage of the generating unit whereas the same clause was sought to be applied in situation of reduced supply also. The Commission gave its ruling on 29(1)(e) as under :

> *" Commission's decision:*
>
> *15. It is stated that the concept of standby supply originates from the situation of non-availability of required power at times from Open Access or from Captive Plant. Since, less availability of Captive/Open Access power cannot be ruled out at any time and hence to meet such contingency the standby power in place of and to the extent of O.A. power has to be availed without any disruption. Accordingly, it is decided that the proposed changes in clause 29(1)(e) to incorporate the provisions of "reduced supply" be agreed."*

7) The Commission also gave a ruling on the proposal to further alter clause 29(1)(f). The relevant part of the paragraphs 16, 17, 18, 19 & 20 of the order of 15.09.07 are as under:

*"**Clause 29(1) (f):***

16. Under clause 29 of the Agreement it is stipulated that the distribution licensee shall raise the bills for different purposes wherein at para (f) it is for inadvertent excess drawal of electricity. Under clause 29(1)(f), it is now proposed to specify the applicable rate also which is actually missing for billing inadvertent excess supply for the sake of clarify in implementation. .....

17. The inadvertent supply in this case is the excess demand over and above the regular supply demand plus standby supply demand which is in excess of regular and standby supply. The existing provision in the Agreement considered inadvertent drawal, which is in excess of regular and standby supply. The standby supply has been further qualified as the supply which is as per sub clause (e) to be billed at temporary supply tariff. This qualification is inadvertent and can be deleted. However, this does not mean that the applicable tariff for inadvertent or excess drawal is temporary supply tariff. The accounting and billing of permissible and excess demand is covered in clause 32 of the Agreement for both the scenarios i.e. with ABT & without ABT. The proposed changes clarify that this inadvertent supply is a part of excess demand of regular supply contract demand.

Jodhpur Discom has not agreed to the proposed change stating that drawal of electricity in excess of regular and standby supply should be billed at temporary supply tariff. Jaipur Discom also did not agree to the proposal without stating any reason.

18. Shree Cement Ltd. has suggested that over-drawals as referred in 29(1)(d), (e) and (f) should be billed on day to day basis or alternatively over drawal be considered under HT supply and temporary supply tariff respectively in proportion to the contract demand for HT supply and standby supply, latter, on day to day basis.

19. Since unscheduled interchange as a result of excess drawal or deviation beyond permissible limit is though inevitable mismatch but cannot be allowed indefinitely and has to be restricted within the permissible limits. As is clear from clause 20 of O.A. Regulations such limits of permissible variation in excess demand drawal in the event of open access suppliers, if governed by ABT, necessary accounting would be done as per relevant ABT regulations by SLDC, but where the Open Access supplier is not governed by the ABT there will be no permissible deviation. The user thus have to cautiously select and

contract for regular and standby supply requirements so that excess demand is not caused on the system.

Commission's decision:

20. In view of the above, it is decided that the sub-clause 29(1)(f) of the Agreement be clarified further as under:

"(f) drawal of electricity in excess of sum of the contract demand under regular supply and standby supply shall be billed alongwith 29(1)(d) above."

8) Coming to clause 32, the Commission gave the following ruling:

"*Commission's decision:*

25. Although the provisions of the Agreement are in line with relevant Regulations, however, it is felt that for the purpose of clarity between the parties executing the agreement, certain elaboration about the HT power supply agreement need to be specified. Based on the harmonious interpretation under the various provisions of the Open Access Regulations, ABT Regulations and other provisions of the Agreement, it is clarified that; in the event of drawal exceeding the standby supply contract demand and regular supply contract demand then such excess demand

caused shall be considered as excess on the part of regular supply contract demand, as explained above. Accordingly, in the event of actual drawal is more than the sum of contract demands under regular supply and standby supply, then the billing shall be first made for full standby supply contract demand as per temporary tariff and balance towards regular supply contract giving effect of excess demand charges. "

9) The Commission accordingly issued a fresh format. It is important to note that as per the new format clause 29(1)(e) and (1)(f) both stood altered as under:

*"**Clause 29(1) (e):***

e. Standby supply as per tariff for supply of electricity determined by the Commission for temporary supply for the respective consumer category, during the period of reduced supply or outage of generating unit effecting open access supply for the drawal days.

Clause 29(1) (f):

f. Drawal of electricity in excess of sum of the contract demand under regular supply and

standby supply shall be billed alongwith 29(1)(d) above."

10) As mentioned earlier, 29(1)(d) remained as it initially stood as has been reproduced in paragraph 2 above. The clause 29(1)(f) read with clause 29(1)(d) as it stands after the order dated 15.09.07 means that the inadvertent drawal will be billed at the same rate as regular supply irrespective of whether such inadvertent drawal was done during a period of outage of generating unit affecting open access supply or during the period of shortage of supply. The earlier clause 29(1)(f) related to 29(1)(e) and provided for the same rate for inadvertent drawal as for temporary supply only during the period of outage of the generating unit affecting the open access supply. At the cost of repetition, it can be said that the Commission itself brought about the change consciously as it said in paragraph 17 of the order "*proposed changes clarify that this inadvertent supply is a part of excess demand of regular supply of contract demand."* Clause 32 of the agreement format issued on 03.01.07 related to the cases where ABT were applicable. The new change brought about in 29(1)(f) read with the other changes now mean that inadvertent drawal covered by it was not related to the ABT at all.

11) The respondent No.2 filed the petition, being No. 86/08 before the Commission, under section 86(1)(f) praying that the order dated

15.09.07 of the Commission in petition No. 134 of 2007 is operative retrospectively to be read in the agreement from its effective date i.e. 01.05.06." On this petition the Commission passed the impugned order on 03.07.08.

The Impugned Order:

12) The Commission dealt with two letters of the Secretary of the Commission dated 15.10.07 and 22.10.07 in which the Secretary had given an opinion that the order dated 15.10.07 was prospective. The Commission stated that these letters be treated as null and void as they had been issued without authority of the Commission. The Commission noted that the order dated 15.09.07 had become finality and further that that order was not equivalent to regulations. Further it said that "*any interpretation, clarification etc. to the order dated 15.09.07 have to be derived from it.*" The Commission also observed that there was an understanding between the petition (respondent No.2 herein) and the respondent (the appellant herein) with respect to agreeing to the provisions of the standard format of agreement as approved by the Commission and further that it was not a case of promissory estoppel. In the paragraph 10 of the judgment the Commission said that the petition could be disposed of on the above consideration namely that the interpretation, clarification have to be derived from the order dated 15.09.07 itself, that the order dated 15.09.07 was not a regulation and that the principles of promissory estoppel were not

attracted to the case. Nonetheless, the Commission proceeded to say more "*for the benefit of both the parties*". In the concluding part the Commission said the following:

> "*12. It is thus stated that the order dated 15.09.07 is not a regulation in itself but the interpretation of various clauses of the standard format of the agreement. These agreements were issued by the Commission in exercise of powers conferred under Open Access regulations and have to be in consonance with various provisions of the regulations. As the effective date of the regulations are from the date of their publication in Official Gazette which are different for different regulations. As the regulations are of paramount importance the corresponding provisions in the agreement shall be effective from the effective date of the regulations and hence the date 15.09.07 has no relevance.*"

Decision with reasons:

13) The Commission said that the interpretation of the order dated 15.09.07 has to be obtained from the order itself. Had the Commission stopped there the appellant would not have been required to come here. No order can have a retrospective effect unless the order specifically so lays down. All orders are generally of prospective nature. However, interpretation of an earlier order is

not a new order. An interpretation relates to the original order and therefore would operate from the date of the original order. If the order dated 15.09.07 is merely an order clarifying the format of agreement issued on 03.01.07 the respondent No.2 is entitled to bill the appellant as per the order dated 15.09.07 or, in other words, as per the amended clause of 29(1)(f). The Commission says, as reproduced above, that the order dated 15.09.07 is not a regulation in itself but the interpretation of various clauses of standard format of the agreement. The Commission is naturally implying that the order dated 15.09.07 is merely an interpretation and therefore from the very date the format agreement had been brought into force the interpretation would apply. This means that from 03.01.07 if not from the first effective date i.e. 01.05.06 the clauses of the agreement between the parties be read as the clauses as given in the order dated 15.09.07.

14) The moot question is whether the order dated 15.09.07 is merely an interpretation of the standard format of the agreement or an order changing the terms of the format. If the order dated 15.09.07 brings change in substance, the same has to be read as an order having prospective effect. It may be stated here that the Commission issued the draft agreement to give effect to the RERC (Terms & Conditions of Open Access) Regulations 2004. The amendment to those regulations, made in December, 2006, made provisions for unscheduled interchange pricing. The Commission

amended the format on 03.01.07 which included clause 32 as mentioned above.

15) The initial agreement between the parties dated 22.9.06 effective from 1.5.06 refer to inadvertent drawal of electricity in sub-clause 29(f), as quoted above in paragraph 2, and such drawal in excess of regular and standby was to be charged as per sub-clause (e). Sub-clause(e) simply provided that standby supply would be charged as per temporary rates during the period of outage of generating unit affecting open access supply for the days of such drawal. This can be read with clause 22 of the original agreement, as quoted in paragraph 2 above. Tariff for standby supply, as per part-III of the agreement was prescribed to be the same as for temporary supply. Clause 22 makes no exception for standby supply during the periods of outage of the generating unit affecting open access supply. Therefore, the mention of the "period of outage of generating unit affecting open access supply" in sub-section(e) is not of any consequence. All that it can mean is that even during the time of outage the standby supply will be charged at the same rate at which temporary supply is charged. When this sub-clause(e) is read into sub-clause(f) it simply means that all inadvertent supply would be charged as per temporary supply tariff. The sub-clause introduced by the order dated 15.9.07 says that instead of the tariff for temporary supply the tariff for regular supply will be payable for inadvertent drawal. It is further to be noted here that

the new sub-clause makes no reference to outage of the generating units or of un-scheduled interchange. Clause 32(4), which has been extracted above in paragraph 3 is under the heading "32 – Unscheduled interchange pricing". It mentions "excess drawal at the drawl end" "beyond the permissible limit" and in case of "reduced supply or outage of suppliers' generating station". The situation contemplated in clause 29(f) and sub-clause 4 of clause 32 are different. There could be over lapping situations which could call for clarifications. However, what the Commission has done in the order dated 15.09.07 is not such a clarification. The order dated 15.09.07 has altered the original sub-clause (f) substantially, thereby changing the tariff for inadvertent drawal from temporary supply rate to the regular supply rate. In our opinion, this cannot be treated as merely an order interpreting the terms of the standard agreement issued on 03.01.07. This is a substantial change and therefore cannot be read retrospectively.

16) The impugned order of the Commission says that "any interpretation/clarifications etc. to the order dated 15.09.07 have to be derived from within it". The Commission thus means that retrospectivity or prospectivity of the order has to be determined from the order itself. Apparently, the Commission is avoiding to make a categorical pronouncement about the prospectivity or retrospectivity of the order dated 15.09.07. Nonetheless, the Commission in paragraph 12 of the impugned order, as extracted

above in paragraph 12, says that the order dated 15.09.07 is but an interpretation of various clauses of the standard format. Thus the Commission, without making a categorical pronouncement says that the order dated 15.09.07 shall apply with effect from the date standard format was issued. Thus there is a genuine grievance on the part of the appellant which has required the appellant to present the appeal. We find force in the contention of the appellant. The order dated 15.09.07 has to be read as an order amending the standard format issued on 01.03.07 and therefore can be given effect to only from 15.09.07. The respondent No.2 in its petition No. 166 of 2007 had prayed that the order dated 15.09.07 be declared as operative retrospectively from the effective date of agreement i.e. 01.05.06. This prayer could not at all have been allowed because even the format as issued on 01.03.07 could not be given retrospectivity from 01.05.06. The parties had agreed in the original agreement to abide by any change in the terms and conditions of open access notified by the Commission. This does not mean every time there is a change, notified by the Commission, the change will relate back to the effective date of the agreement. Every change can have only prospective effect. Therefore, the change brought about by the order dated 01.03.07 would be effective only from 01.03.07. Similarly, the change brought about by order dated 15.09.07 could be effective from 15.09.07. The petition No. 166 of 2007 presented by respondent No.2 before the Commission only deserved to be dismissed.

17) Accordingly, we allow the appeal and set aside the impugned order and dismiss the petition No. 166 of 2007 filed before the Commission.

18) IA No. 147 of 2008 also stands disposed of.

Pronounced in the open court on this **03rd day of February, 2009.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member