

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**Appeal No. 128 of 2008 & IA No. 166 of 2008
and
Appeal No. 126 of 2008 & IA No. 165 of 2008**

Dated : 12th February, 2009

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

IN THE MATTERS OF:

Appeal No. 128 of 2008:

The Bihar Industries Association
Industry House,
Sinha Library Road,
Patna – 800 001

... Appellant

Versus

1. The Bihar Electricity Regulatory Commission
Ground Floor, Vidyut Bhawan-II,
Jawaharlal Nehru Marg,
Patna – 800 001.

2. The Bihar State Electricity Board,
Vidyut Bhawan,
Jawaharlal Nehru Marg,
Patna – 800 001

... Respondents

Appeal No. 126 of 2008:

Bihar Steel Manufacturer's Association
Shanti Kunj,
Chaujjubagh,
Patna-1, Bihar

... Appellant

Versus

1. Bihar Electricity Regulatory Commission
(Through its Chairman)
Ground Floor, Vidyut Bhawan-II,
Jawaharlal Nehru Marg,
Patna – 21, Bihar

2. The Secretary
Bihar Electricity Regulatory Commission
Ground Floor, Vidyut Bhawan-II,
Jawaharlal Nehru Marg,
Patna – 21, Bihar

3. Bihar State Electricity Board
(Through its Secretary)
Vidyut Bhawan, Jawaharlal Nehru Marg,
Patna – 21, Bihar

... Respondents

Counsels in Appeal No. 128/08:

For the appellant : Mr. M. G. Ramachandran,
Mr. Anil Kumar Jha and
Mr. Suraj Samdarshi

For the respondents : Mr. Kailash Vasdev, Sr. Advocate
Mr. Mohit Kumar Shah
Mr. Aabhas Parimal
Mr. R. B. Sharma

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Counsels in Appeal No. 126/08:

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Mr. R. N. Sharma
Mr. M. K. Choudhary

J U D G M E N T

Justice Manju Goel, Judicial Member

These are two appeals filed against the same impugned order dated 26.08.08, passed by the Bihar Electricity Regulatory Commission (hereinafter referred to as the Commission) by which the Commission fixed the tariff for the year 2008-09. The appellants in appeal No. 126 of 2008 are an association of induction furnace consumers, situated and operational in the State of Bihar and consumers of electricity in the category of HTSS of the Bihar State Electricity Board (Board for short). The appellants in appeal No. 128 of 2008 are an association of industries situated

within the State of Bihar and consumers of the Board under different categories namely High Tension (HT), Low Tension (LT) and Non-Domestic Services (NDS) category. The grounds taken by the appellants in the two appeals are similar. The appeals were heard together and are being disposed of by this common judgment.

2) The Commission is responsible for determining tariff for distribution of electricity in the State of Bihar as per the provisions of section 61, 62 and 63 of the Electricity Act, 2003 as well as Regulations framed by the Commission. The Board, the respondent No.3 herein, is the deemed distribution licensee in the State of Bihar. The Board filed a petition for acceptance of Aggregate Revenue Requirement (ARR) for the year 2006-07 on 10.04.06 and sought the revision of tariff to meet the ARR amounting to Rs.2870.60 Crores. The tariff petition had various deficiencies which the Board did not fulfill despite several directives from the Commission. Nonetheless, the Commission issued a tariff order for the FY 2006-07 and gave certain directives to the Board vide an order dated 29.11.06. The Commission thereafter framed (Terms and Conditions for determination of tariff), Regulations 2007 (hereinafter referred to as the Tariff Regulations) in April, 2007. As per the Regulations the Board was required to file its petition for approval of ARR and determination of retail tariff by 15.10.07. The Board, however, presented its petition on 18.12.07 for the FY 2007-

08 and on 14.02.08 the tariff petition for the FY 2008-09. The Board, *inter alia*, submitted incomplete data and un-audited annual accounts for the FY 2006-07. The Board submitted certain data on the demand of the Commission but failed to furnish the entire required data. The Commission, however, proceeded to fix the tariff for the FY 2008-09 and held public hearings on 8th & 9th July, 2008 and eventually passed the impugned order dated 26.08.08.

Grounds for challenge:

3) Grounds canvassed during hearing, on which the impugned tariff order is challenged in this appeal can be briefly enumerated as under:

- (i) The un-audited accounts for the FY 2006-07 of the Board showed a surplus of Rs. 56.28 Crores but the Commission did not take this surplus into account while fixing tariff for the FY 2008-09.
- (ii) The Commission allowed the Transmission and Distribution (T&D) loss of 38% against its own directive to maintain its loss at 34% and has thus created a deficit of Rs.160 Crores in the ARR for the FY 2008-09.

- (iii) The Commission has not taken into account the category-wise cost of supply (i.e. 303.05 paisa for HTSS) and instead has taken the combined average cost of supply (i.e. 486 paisa) which has resulted in higher subsidy and has failed to comply with the statutory requirement of progressively reducing the cross subsidy so as to bring the tariff within 20% of the average cost of supply by the FY 2010-11 for the appellants.
- (iv) The entire proceedings of determination of ARR for the FY 2008-09 and tariff based on such ARR are bad and erroneous as they were based on vague and non-specific data furnished by the Board.

Reply by Commission:

4) The Commission has filed a reply. Historically the Board had not metered the rural, residential and commercial services except for a few and also agricultural services. In its tariff order for the FY 2006-07 the Commission gave certain directives including metering of all services, metering of 11 kV feeders, distribution transformers for conducting energy audit to arrive at a realistic estimation of loss and adopt scientific method to assess consumption of consumers of un-metered services. The Board submitted that it could not comply

with these directives on account of resource constraints and that it had developed its own methodology of assessing consumption. The Commission further considered the assessment of the Board and wherever the Commission was not convinced it arrived at a more realistic assessment. So far as distribution losses are concerned, the Commission says that it considered the case of the Board and found that the trajectory fixed by the Commission could not be followed by the Board on account of inadequate resources, organizational deficiencies etc. and reviewed its directive on T&D loss levels and concluded that T&D loss of 38% was a reasonable target during the FY 2008-09. Coming to the question of surplus revenue for the FY 2006-07, the Commission contends that the annual account for the FY 2006-07 are not audited by Accountant General and that the accounts for the FY 2007-08 were not finalized and audited and therefore the surplus of Rs.56.28 Crores could not be carried over to 2008-09. The Commission contends that a surplus of 2006-07 might have got wiped out during 2007-08. So far as average cost of supply is concerned the Commission contends that the tariff regulations only refer to combined cost of supply and not category-wise cost of supply. The combined average cost of supply approved by the Commission for the FY 2008-09 is Rs.4.86/kWH. The Commission further submits that the Government of Bihar is providing resource gap of Rs.60 Crores per month i.e. Rs.720 Crores per annum and the resource gap at the

same level has been considered to be available for the FY 2008-09. The Commission says that almost every category of consumer is recipient of such subsidy from the State Government. The Commission contends that keeping in view the average cost of supply at Rs. 4.86/kWH the price band for the appellants could be Rs.3.89 to Rs.5.83 whereas the tariff fixed with assumed load factor of 70%, would require the appellants to pay only Rs.3.51/kWH. The Commission contends that the tariff fixed for HT Industrial consumers is below the average cost of supply i.e. Rs.4.86/kWH assuming load factor at 60%. The Commission further points out that there is no change in tariff in 2008-09 for the LT consumers and that change for the HT consumers is only marginal. According to the Commission, appellants have no cause for grievance.

Reply by Board:

5) On behalf of the Board replies have been filed. It is contended on behalf of the Board that the induction furnace consumers were found to be committing theft of electricity in large scale leading to filing of criminal cases. The Board has submitted a list of certain consumers in that category (i.e. HTSS) who have admitted tampering with the electricity meters. The Board has also filed a list of HTSS consumers against whom FIRs have been lodged.

6) The Board has stated that on behalf of the appellant association a proposal was mooted in 1999 for fixing demand charges at 650 per KVA and energy charges at Rs.1 per kWh and that following the proposal w.e.f. 01.09.99 the tariff for all consumers with a contract demand of 300 KVA and more for induction furnace demand charges were fixed at 650 per KVA per month and energy charge was fixed at 100 paisa per unit. In 2001, upon an understanding arrived at between the Board and the appellant association in appeal No. 126 of 2008 the demand charges were raised to 700 KVA per month and energy charges were raised to 1.20 per kWh as also the minimum monthly charges at 1012 per KVA. The Board contends that from 2001 tariff remained the same for the HTSS category till it was marginally revised in 2006-07 wherein the demand charges were fixed at 750 per KVA per month and energy charges at 135 per unit which was not challenged by any consumer. According to the calculation of the Board the load factor of the HTSS consumers which used to be in the vicinity of the 40% has increased to 80 to 90% and therefore the average unit rate has drastically come down. The Board says that for HTSS category the average unit rate is 4.69 per unit at 40% load factor but the same will come to only 3.27 per unit when the load factor is raised to 80%, for load factor 70% and above the effective unit rate has fallen below the 1999 rate.

7) The Board has also made some submissions about the alleged surplus of Rs.56.28 Crores. According to the board for the FY 2006-07 the Board incurred heavy losses. The Board says that despite the accounts having been submitted they have not been audited for long and therefore the surplus projected in the provisional accounts cannot be taken into consideration by the Commission.

8) Large number of consumers, in the State of Bihar, are consuming electricity without any meter. The number of meter-less consumers is estimated to be 9.6 Lacs and the investment in providing meters to these consumers has been estimated at 100 Crores. The Board says that the Board is trying to provide meters to these consumers in a phased manner. On account of large number of consumers being without meters coupled with large scale theft of electricity the average cost of supply is 4.86 per kWh. The Board contends that despite the average cost of supply being 4.86 per kWh the HTSS category is getting electricity at a much cheaper rate i.e. Rs. 4.69 per unit at load factor at 40% and 3.10 at load factor 90%. The Board contends that so far as consumers in the LT and NDS category are concerned there is no change in the tariff order for the FY 2008-09 as compared to the earlier tariff order of 2006-07 and hence they should have no grievance. The Board has given an outline of the renovation and modernization

work that it proposes to undertake or may already have undertaken.

Decision with reasons:

9) The response of the Board as narrated above portrays a dismal picture of electricity sector in the State of Bihar. Nearly 50% of electricity consumers of electricity are without any meter. This would obviously lead to loss in revenue for the Board. Coupled with this instances of theft by powerful consumers also show a sorry picture. The Commission had initially approved 41.4% T&D losses for the financial year 2007 but the preliminary data showed an actual T&D loss level of 46.44% for the year. The Commission found that the Board could not meet the trajectory fixed by the Commission due to inadequate resources and organizational deficiencies. The Board accordingly revised the T&D losses and approved a loss level of 38% for the year 2008-09. The aggregate technical and commercial losses for the State were as high as 66.01% in 2004-05. Board's functioning in the past was certainly not conducive to growth. So far as the Commission is concerned, it has to regulate the electricity sector of the State and also has to fix tariff. The Board may not have fulfilled all the requirements regarding data. However, the Commission nonetheless has to proceed to fix the tariff. The appellants could certainly have grievance if they had been made to pay more than the average cost

of supply. As it turns out from the replies of the respondents, both the associations are beneficiaries of Government subsidies. No cross subsidy has been loaded on them. In fact both of them are paying less than the average cost of supply. It may be pointed out that the Tariff Regulations provide only for combined average cost of supply and not for category-wise cost of supply. In this situation it would be unfair on our part to interfere with the tariff order and direct the Commission to reduce their tariff further on account of the pleas taken by the appellants.

10) The most important plea taken by the appellants is surplus of Rs.56.28 Crores. This surplus was shown in the accounts for 2006-07. The accounts are still un-audited. Neither party has disclosed the position of surplus / deficit for the FY 2007-08. The Commission has an apprehension that the aforesaid surplus may have been completely wiped out in 2007-08. It appears that accounts for the FY 2007-08 have not been finalized and audited. The sector being in such a precarious state, the Government has provided large scale subsidy. It would not have been fair on the part of the Commission to reduce tariff further on account of the surplus in the un-audited accounts of 2006-07 as that would have further increased the requirement of subsidy from the Government.

11) The appellants did not challenge the tariff fixed in 2006-07. It is not disputed that between 2001 and 2006 there was no increase in tariff. Between 2006-07 and 2008-09 the increase in tariff for the consumers before us has been only marginal. The Commission itself has furnished a tabular statement showing how the tariff has increased for different categories of consumers between the years 2006-07 and the years 2008-09. As per this statement the HTSS consumers at 70% load factor has to bear an increase of only .81%. The HTSS-1 category with 60% load factor has suffered an increase of only .6% whereas HTS-2 category only .4% and HTS-3 category only .6%.

12) The task before the Board is arduous and the road ahead is rough. As stated above, even providing metering to consumers is going to cost an additional amount of Rs.100 Crores. To make the entire electricity sector economically viable we need to overcome the requirement for Government subsidy. Keeping in view the above picture, it is unjust for the appellants to crib over the tariff fixed by the impugned order which gives them marginal or no increase in for the electricity consumed by them. The Commission has to fix the tariff realistically and cannot go by unachievable targets. Despite the deficiencies in the working of the Board it has to fix the tariff at which the Board can supply electricity to its consumers. The deficiencies in the records and data have to be filled by

practical assumptions. The Commission therefore had to do with whatever data was supplied to it by the Board. The impugned order cannot be disturbed simply because certain data were not available or because in a particular year there was a surplus in the unaudited figures. The impugned order does not call for any interference. Both the appeals are accordingly dismissed.

13) IA No. 166 of 2008 in 128/08 and IA No. 165 of 2008 in 126/08 stand disposed of.

14) Before parting with the order we would direct that the Commission draws a road map for drastic reduction of Transmission and Distribution Losses and the Board should implement the same. Inadequate resources and organizational deficiencies of the Board cannot be an excuse for increase in tariff due to excessive T&D Losses. The Commission is not powerless to ensure that its instructions are carried out by the Board meticulously. Allowing the T&D Losses of over 46% is nothing short of criminal wastage of scarce energy source and is, therefore, deprecated. The Board has to set its house in order. The consumers at large cannot be made to bear the brunt of inefficiency

and mismanagement of the Board. The Commission is directed to monitor the T&D Loss reduction programme of the Board quarterly and send report to this Tribunal with its own evaluation of the progress made by the Board. First such report should be submitted on July 01, 2009.

15) We also note with concern that whereas the Act requires 100% metering, the Commission in its reply has stated that historically the Board has not metered the rural & agricultural load, domestic and commercial consumption except in a few cases. This is a case of blatant violation of Section 55 of the Act. The Commission is directed to monitor progress on the trajectory projected by it to achieve 100% metering and report the same to this Tribunal along with the report on T&D losses.

Pronounced in the open court on this **12th day of February, 2009.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member.