

APPELLATE TRIBUNAL FOR ELECTRICITY

Appellate Jurisdiction

Appeal No. 17 of 2006

**Present : Hon'ble Mr. Justice E. Padmanabhan – Judicial Member
Hon'ble Mr. H. L. Bajaj – Technical Member**

North-Eastern Electric Power Corpn. Ltd.
Brookland Compound,
Lower New Colony,
Shillong – 793 003,
Meghalaya

... Appellant

Versus

1. Tripura State Electricity Corporation Ltd.
Bidyut Bhawan,
North Banamalipur,
Agartala – 700 001,
Tripura
2. Assam State Electricity Board,
Bijulee Bhawan,
Paltan Bazar,
Guwahati, Assam – 781 001
3. Electricity Department
Government of Manipur,
Imphal – 794 001.
4. Meghalaya State Electricity Board,
Meter Factory Area, Short Round Road,
Integrated Office Complex,
Shillong – 793 001
Meghalaya
5. Power & Electricity Department
Government of Mizoram,
Aizawal – 796 001
6. Department of Power

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Government of Arunachal Pradesh,
Itanagar – 791 111

7. Department of Power
Government of Nagaland,
Kohima – 797 001
8. Power Grid Corporation of India Ltd.
Suadamani, Plot No. 2 Sector 29,
Gurgaon – 122 001,
Haryana
9. National Hydroelectric Power Corporation Ltd.
NHPC Office Complex, Sector-33,
Faridabad, Haryana – 121 003
10. North Eastern Regional Electricity Board
“Rosalina”,
Nongimbah Road,
Laithumkhra,
Shillong – 3.
11. Central Electricity Regulatory Commission
Core-3, 6th Floor, SCOPE Complex,
Lodhi Road, New Delhi – 110 003. ... Respondents

Counsel for the Appellant : Mr. M. G. Ramachandran with Ms. Taruna Singh Baghel Advocates

Counsel for the Respondent : Mr. Amit Kapur with Mr. Mansoor Ali Shoket & Ms. Namrata Kapur Advocates for TSECL, Mr. H.K.Sharma, RE, (ASEB), Mr. Dipak Ganguly, CMD TSECL, Mr. M. Debbarma, DGM (TSECL), Mr. Nilay Dutta with Mr. Manish Goswami, Mr. Hemanta Madhab Sarmau, Mr. Kumudeswar Goswami, Mr. Binoy Mohan Saikia, Advocates

Cntd...

J U D G M E N T

1. The present appeal has been preferred by North Eastern Electric Power Corporation, a Government of India Undertaking challenging the order dated the 13th September, 2005 passed in petition No. 5 of 2005 on the file of CERC, the 11th respondent herein. By the said impugned order the CERC revised the charges payable for Ranganadi and Doyang Hydro Electric Projects for the period 1.11.03 to 31.3.2004 at the instance of the first Respondent. The appellant also moved a review petition but it was rejected. The appellant contends that ex-facie order is without jurisdiction, illegal, suffers with errors apparent and a misdirection. The appellant has set out various grounds in the appeal memorandum.

2. Per contra on behalf of the respondents, it was contended that no interference is called for with the orders of CERC as substantial justice has been rendered on the facts of the case. It is also contended on behalf of the respondents that the contention advanced by the appellant is a misconception and appellant is not entitled to any relief.

3. The brief facts leading to the present appeal required to be summarized. The appellant is engaged in the business of generation and sale of electricity to respondent Nos. 1 to 7. The CERC introduced Availability Based Tariff (hereinafter refer to as "ABT") to all central generating

stations while directing implementation of ABT progressively in different regions. To the North Eastern Region, ABT was introduced on and after 1.11.2003. Therefore, ABT became applicable to the electricity generated and supplied by the appellant to the respondent No. 1 to 7 w.e.f. 1.11.2003.

4. The tariff period relate to 1.4.2003 to 31.3.04, comprising pre-ABT period viz. 1.4.2003 to 31.10.2003 and post-ABT period is 1.11.03 to 31.3.2004. For the tariff period 01.4.2003 to 31.3.2004, tariff was determined by CERC in terms of the CERC (terms and conditions of tariff) Regulations 2001. In terms of statutory tariff regulations the appellant is entitled to recover all its annual fixed charges, which it has legitimately incurred.
5. Pending determination of tariff, CERC allowed provisional tariff for the said two generating stations and such determination by CERC was on 11.4.02 and 6.10.03 respectively for Ranganadi and Doyang Hydro electric project. The tariff came to be implemented only after the introduction of ABT on 1.11.2003. In the mean while, the appellant and other beneficiaries had agreed to a single part tariff to be charged on a provisional basis at 152 paise/Kwh for Ranganadi generating station.

6. According to the appellant introduction of ABT system in the middle of tariff year should not in any way reduce the annual fixed charge payable in terms of tariff regulations 2001. In terms of tariff regulations 2001, the capacity index has to be worked out based on machine as well as water availability and the targeted capacity index, which is to be determined on an annual basis. It is the claim of the appellant that so long as appellant achieved targeted capacity index, it is entitled to recover the annual fixed charge.
7. The appellant billed respondents 1 to 7 in terms of tariff regulations 2001 and in terms of the tariff determined for 2003-2004 including the post-ABT period in accordance with the tariff regulations in force. While so, the first respondent moved CERC in petition No. 5 of 2005 complaining that there has been a phenomenal increase in the per unit charge for electricity supplied between 1.11.2003 to 31.3.2004, being the post ABT period.
8. The CERC after affording opportunity to the appellant and the contesting respondents herein by its order dated 30th September, 2005 while holding that the fixed charges for the period 1.11.03 to 31.3.04 can be determined in three different ways, namely (i) to go strictly by the provisions of the tariff Notification dt. 26/3/2001 (ii) to apportion AFC for the year 2003-04 according to design energy for the period and (iii) to

multiply the mutually agreed rate of 152 Paisa/Kwh by the saleable design energy for the period. The CERC having held that fixed charges could be determined in three ways, to the view that the first method will cause heavy burden on the beneficiaries, the second alternative may lead to substantial revenue loss to the appellant, but ultimately adopted the third alternative method for determining the annual fixed charges and energy charges. The appellant as well as beneficiaries had agreed to the rates at least for the pre-ABT period. The commission ultimately adopted the third alternative method to fix the annual fixed charges, which form part of the component of tariff. Being aggrieved, the present appeal has been preferred by NEEPCO.

9. The foremost contention advanced by the learned counsel for the appellant is that the commission is bound by the provisions of tariff Regulations and tariff notifications and it has neither the jurisdiction nor the authority to deviate or detour from the tariff Regulation and notification merely because hardship is complained by the first respondent. Per contra, it is contended that the view of the commission, which has taken into consideration of the overall situation, prevailing conditions and the effect on the beneficiaries, therefore it is not liable to be interfered in this appeal.

10. Though very many arguments were advanced on either side, it would be sufficient to decide the foremost legal contention as it relates to jurisdiction and authority of CERC. The point that arises for consideration in this appeal are;
- (i) whether the CERC has authority and jurisdiction to deviate from the tariff notification dated 26.3.2001?
 - (ii) whether the CERC's view in adopting the formula and course which runs counter to statutory regulations could be sustained?

To answer the points, it is not necessary to refer to the facts again, as we have already summarized the factual matrix leading to the present appeal. Concedingly the tariff Regulation and tariff order already notified is in force. In terms of Sec. 64(6) a tariff order shall, unless amended or revoked, continue to be in force for the period specified in the tariff order.

11. Concedingly the CERC tariff Regulation 2001, which apply to the period in question and only in terms of which only tariff was determined and tariff is payable. There is no enabling provisions in the CERC tariff notification much less an exemption has been provided in the CERC (Tariff Regulations) 2001, which would enable the CERC to deviate even in cases where it comes to the conclusion that unintended and hardship is caused to the beneficiary, namely the first respondent.

12. In exercise of power conferred under Sections 28 of the Electricity Regulatory Commission Act 1998, CERC framed the Central Electricity Regulatory Commission (Terms and conditions of the tariff) Regulations 2001. The said regulations came into force on 1.4.2001 and remained in force for a period of three years unless reviewed earlier or extended by CERC. There is no controversy that the said tariff notified and tariff regulations apply to the case on hand as well as for the tariff period 1.4.2003 to 31.3.2004 as per the provisions of The Electricity Act 2003.

13. Para 3.16 (iv) of Notification dt. 26.3.2001 prescribed that the capacity charges shall be paid by the beneficiaries including those outside the region to the generator in accordance with the formula prescribed therein. The said notification is binding on the parties. The said being a statutory regulation is binding on all parties including the commission.

Notification read thus:

“ When the month of change over to tariff as per this notification is (not) the first month of a financial year, then capacity index for the part of the year prior to switchover shall be “deemed capacity index” determined on the basis of actual generation plus backing down and weighted average of percentage allocated capacity share of the beneficiary shall be equal to its total drawal from station (as per regional energy accounting) expressed as percentage of total ex-bus generation. Payment of capacity charges for the period prior to switchover shall be regulated as per tariff applicable till the date of switchover and pro-rata incentive, as applicable shall be paid.

Payment of the Capacity Charges for the month after the switchover to tariff shall be as per the formula given above”.

14. Therefore, it follows that the cost is to be determined only in terms of the notified tariff and tariff regulations and not by any other method, procedure or formula, which cannot be read into the Regulation. Admittedly, the appellant has billed the first respondent only in terms of the tariff notified and as per existing statutory regulations and therefore the interference by the CERC with respect to the billing procedure adopted by appellant is not at all called for nor it is authorized by law.
15. The CERC had considered three possible alternatives for determining the fixed charges for the period commencing from 01.11.2003 to 31.03.2004 giving a go by to Tariff Regulations dated 26.03.2001, which is impermissible. Merely because in the view of the CERC, the provisions of Tariff Regulations 2001 dated 26.03.2001, may cause hardship, no deviation is permissible nor the binding Regulations could be re-written at the sweet will and discretion of CERC. Further adopting a different method for part of the year is neither permissible nor it could be resorted to when the Tariff Regulation is binding not only on the parties but also on the CERC. That apart why such a deviation is not resorted to Pre ABT and why to Post ABT period has not been explained. According to appellant the third formula should not have been adopted for a selective period, which is not permissible in law. If the third alternative has been

adopted for the whole year, which includes pre ABT, different consequence may flow in respect of the two hydro generation projects, viz. Ranganadhi and Doyang.

16. The CERC failed to note that the two part tariff determined by it in terms of its order dated 11.04.2002 and 06.10.2003 came to be implemented after the introduction of ABT on 01.11.2003. That apart CERC by its order dated 17.04.2003 had allowed provisional tariff for Doyang. All the above orders are as a result of exercise of statutory power conferred on CERC and it cannot be whittled down by a side wind as the statutory Regulations and orders has the same efficacy and authority as that of a statutory Rule or notification.
17. Hence without amendment of the Regulations in a manner known to law, CERC has neither the authority nor jurisdiction to erase the statutory Rule and notification even though it is the Rule making authority and the authority who had fixed the tariff and issued statutory notification. Such an action of CERC is impermissible in law and it is against all canons of legal principles. At any rate introduction of ABT in the middle of the year is no ground to reduce the annual fixed charges payable according to Tariff Regulation 2001. So long as the tariff Regulations remain in force the CERC has neither the authority nor jurisdiction to deviate from the binding Tariff Regulation and tariff order.

18. It is well settled law that a statutory notification as well as regulations cannot be deviated nor the field covered by the statutory regulations and notification can be deviated at the discretion of the CERC merely because in its view hardship is caused to the beneficiaries. Statutory Regulations framed by CERC is not an executive instruction but it is a law by the legislature and it derives sanction from the legislative power vested in the legislature. CERC, a statutory authority having framed regulations and issued notification shall not refuse to follow the regulations or notification or it can adopt a new formula not provided nor contemplated by Regulations in its application to any given situation or case. A Statutory Rule or Regulation or notification shall be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act. The Statutory Rules made pursuant to the power entrusted by Parliament are law made by Parliament as has been held by the Supreme Court in State of Tamil Nadu Vs. Hind Stone reported in 1981 (2) SCC 205.
19. By an ad-hoc approach the statutory rule and tariff notification cannot be whittled down nor by such an approach, right which has crystallized in favour of appellant, could be defeated or taken away. When once Notification and regulations have prescribed the tariff, which rate of tariff the CERC is bound to implement and it has no authority or discretion to deviate and resort to any other ad-hoc procedure not found in the regulations. This is what actually, has been resorted to by CERC and it

is impermissible in law. In Sube Singh Vs. Lt. of Governor of Delhi reported in AIR. 2004 S.C. 3821, at Para 29, the Supreme Court held thus:

“29. In Anjum M. H. Ghaswala a Constitution Bench of this Court reaffirmed the general rule that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. (See also in this connection Dhanajaya Reddy v. State of Karnataka)”

In Bhavnagar University Vs. Palitana Sugar Mill reported in 2003(2) SCC 111, the Supreme Court held thus:

“40. The statutory interdict of use and enjoyment of the property must be strictly construed. It is well settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the said Act are only creature of statute. They must act within the four corners thereof.”

20. In the light of these pronouncements which apply on all fours, the appeal deserves to be allowed and the order of CERC is liable to be reversed.

21. Both the points are answered, as above, and on this short ground, the appeal deserves to be allowed. The impugned order passed by CERC is

quashed. We further hold that the appellant is entitled to collect charges in terms of the bill prepared by it and served on Respondent No.1 for the period in dispute. The parties are directed to bear their respective cost in this appeal.

Pronounced in open court on October 13, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E. Padmanabhan)
Judicial Member