

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

Appeal No. 56 of 2010

Dated : September 29, 2010

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson.
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

**Bihar State Hydro-Electric Power Corporation Ltd.,
2nd Floor Sone Bhawan, Birchand Patel Marg,
Patna-800 001**

.....Appellants

Vs

**Bihar Electricity Regulatory Commission,
Vidyut Bhawan-II, Bailey Road, Patna-110021.**

.....Respondent

**Counsel for Appellant(s) : Mr. Suresh Ch. Tripathi &
Mr. B.K. Behera**

Counsel for Respondent(s): Mr. Gopal Singh for R-I

J u d g m e n t

Per Hon'ble Shri Rakesh Nath, Technical Member:

1. This Appeal has been filed by Bihar Hydro Electric Power Corporation against the order of Bihar Electricity Regulatory Commission dated 13.1.2009 refusing to determine the Annual

Revenue Requirement and tariff of the Appellant for the FY 2008-09 on the ground that the annual accounts duly audited by the statutory auditors were not available.

2. The Appellant, Bihar Hydro Electric Power Corporation is a generating Company responsible for operation and maintenance and development of hydro power projects in the state of Bihar. The State Commission is the Respondent responsible for determination of tariff of the Appellant.
3. The background of the case is described in the following paras.
4. The Appellant generating company filed an application before the State Commission on 04.06.2008 for approval of Annual Revenue Requirement and determination of the tariff for the FY 2008-09. The State Commission on several occasions directed the Appellant to remove the deficiencies in the documents submitted by the Appellant/petitioner and to submit the annual accounts for the past year duly audited by the statutory Auditors. Several correspondence ensued between the Appellant and the Commission between August, 2008 and January, 2009. Finally, the Commission passed an order on 13.01.2009, the impugned order, deciding not to determine the tariff for the FY 2008-09 due to non-submission of the required data and the annual accounts duly audited by the statutory auditors of the Appellant, despite its directions. The Commission added that as the required data and annual accounts audited by statutory Auditors had not been

submitted till January 2009, the determination of tariff for FY 2008-09 had lost its meaning. However, the Commission directed the Appellant to file tariff petition for FY 2009-10 alongwith the audited accounts for past years.

5. The Appellant thereupon filed a Review petition on 19.06.2009 which was dismissed by the Commission on 17.09.2009. The Appellant again filed another Review petition on 06.10.2009 which was also dismissed by the Commission on 14.12.2009.
6. Aggrieved by the main order dated 13.1.2009 of the Commission not approving the ARR and the generation tariff for the FY 2008-09, the Appellant has filed this appeal.
7. The learned Counsel for the Appellant in support of his plea challenges the impugned order and submitted as under:
 - a) The tariff of the Appellant was fixed way back in 1997 by a Tariff Committee of Government of Bihar. Since 1998, the tariff fixed at Rs. 2.00 per kWh has been continuing without any change.
 - b) All the queries raised by the Commission during the proceedings of Application for determination of tariff for the year 2008-09 were replied and required informations were provided by the Appellant. However, the Commission rejected the ARR proposal of the Appellant merely because the statutory audit of the annual accounts had not been submitted.

- c) The Commission has erred in not approving the ARR and determining the tariff on the ground of non-availability of statutory audit as it was not a condition precedent for deciding the matter. There is no such requirement as per the Electricity Act, 2003. The tariff could have been determined with the assistance of internal audit of annual accounts that was made available to the Commission.
- d) Statutory audit is required for truing up and not for tariff determination. In fact for the subsequent year 2009-10 the Commission determined the tariff of the Appellant without the support of the statutory audit.
- e) In the second Review filed before the Commission, the Appellant had brought to the notice of the Commission that the Hon'ble Supreme Court had granted stay to the prosecution proceedings initiated by the Registrar of Companies for not carrying out the statutory audit. However, the Commission despite the above development did not agree to determine the tariff.
- f) The statutory audit has to be conducted by Comptroller and Auditor General of India, an external agency on which the Appellant has no control. Despite writing several letters to the CAG, their accounts could not be audited in view of the non-cooperation of the auditors appointed by the CAG.
- g) The generating company was facing severe financial constraints due to non-determination of the tariff which may affect the projects that are underway.

8. The learned Counsel for the Commission, the Respondent herein, justified the order of the Commission and submitted the following:
- a) Submission of annual accounts duly audited by the statutory auditors for tariff determination has been mandated under the Electricity Act 2003 and the Tariff Regulations of the Commission. Instead of audited accounts duly audited by statutory auditors, the Appellant/Petitioner submitted the annual accounts audited by a private Chartered Accountant.
 - b) As per provisions of the Tariff Regulations, 2007, the Appellant/Petitioner's application for fixation of tariff for 2008-09 should have been filed on or before 15.11.2007 accompanied with the annual accounts for FY 2006-07 duly audited and certified by the statutory auditor i.e. CAG, with Revised Budget Estimate for FY 2007-08 duly approved by the Board of Directors of the Appellant and estimated projection for FY 2008-09 on the basis of above mentioned accounts of two years. However, Appellant/Petitioner submitted the application without the requisite documents. A large number of deficiencies were noticed. Therefore, the Commission on several occasions directed the Appellant to remove the shortcomings and to furnish the audited accounts for the period FY 2003-04 to FY 2007-08. The same has not been complied with.
 - c) The Appellant/Petitioner kept on asking for extension of time for one reason or other and submitted only the annual accounts audited by a private Chartered Accountant without certificate of statutory audit.

- d) As the financial year 2008-09 was coming to an end and the complete information had not been furnished, the Commission felt that the determination of tariff for 2008-09 was losing its meaning and accordingly directed the Appellant/Petitioner vide impugned order dated 13.01.2009 to file the petition for FY 2009-10 alongwith the relevant documents.
 - e) Hon'ble Supreme Court's order in the SLP in the matter of prosecution proceedings initiated by the Registrar of Companies against the Appellant is limited to stay the criminal proceedings and did not deal with requirement of audited accounts for tariff determination.
 - f) The Commission had determined the tariff for subsequent year 2009-10 on the basis of the tariff proposal and balance sheet and profit and loss account for FY 2007-08 duly approved by the Board of Directors of the Appellant. No such approval of the Board of Directors was obtained by the Appellant for the year 2008-09.
9. Taking into consideration of the contentions of the Learned counsel for the parties, the following questions may arise for consideration.
- i) Whether the State Commission was correct in asking for annual audited accounts certified by the CAG for the previous year for determination of tariff of the Appellant generating company?
 - ii) Was the Commission justified in not determining the tariff for the FY 2008-09 of the Appellant only due to

failure to submit the annual audited accounts by the statutory auditors?

10. Let us take up the first question relating to requirement of audited accounts by statutory Auditors for determination of tariff.
11. Section 61(a) of the Electricity Act, 2003 envisages that the Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating Companies and transmission licensees. Regulation 5 of Central Commission's Tariff Regulations, 2004 applicable for the period 1.4.2004 to 31.3.2009 provide for the generating company to submit the capital expenditure incurred duly audited and certified by the statutory Auditors.
12. The State Commission is expected to determine the tariff on commercial principles and to ensure recovery of the cost of electricity in a reasonable manner according to section 61(b) and 61 (d) of the Act. Actual costs form the basis for determination of various components of tariff and future projections. Therefore, availability of authenticated data of costs is an essential requirement for determination of tariff. The authenticated data of costs incurred could be only obtained from the accounts audited by the statutory Auditors.
13. According to Section 62(2) of the Act, the Commission may require a licensee or generating company to furnish separate

details, as specified for generation, transmission and distribution for determination of tariff.

14. Regulation 5 of the “Terms and Conditions for Determination of Tariff Regulations 2007” of the State Commission dated 24.04.2007 stipulates that for determination of tariff, the generating company is required to make an application accompanied with annual accounts of the financial year prior to the date of application, duly audited and certified by the statutory auditors. The Regulations also stipulate submission of the application by 15th November of the previous year. However, in this case the application was submitted only on 04.06.2008 by the Appellant that too without the requisite audited accounts and other informations.
15. Admittedly the annual accounts duly audited and certified by the statutory auditors were not submitted till the disposal of petition by the Commission. The Appellant, however, submitted the annual accounts audited by a private Chartered Accountant and therefore the Commission ought to have accepted their account.
16. Let us now discuss the requirement of audit of annual accounts of the Appellant as per the provisions of the Companies Act. The Auditor of the Appellant, being a Company owned by the State Government, have to be appointed by the Comptroller & Auditor General of India as per Section 619(2) of the Companies Act, 1956. After the audit, the Auditors have to submit a copy of the

audit report to the CAG who has right to comment upon or supplement the audit report in such manner as he may think fit. The audit report alongwith the certificate of the CAG have to be put up before the Annual General Meeting of the Company. Admittedly this has not been done by the Appellant for last many years resulting in initiation of prosecution proceedings against the Appellant by the Registrar of Companies, Bihar. Thus audited accounts by a private Chartered Accountant appointed by the Appellant is not acceptable both as per the provisions of the Companies Act and as per the Regulations framed by the Commission in accordance with the provisions of the Electricity Act, 2003. The first question is thus answered against the Appellant.

17. The second question is as to whether the Commission was justified in not determining the tariff only because the annual accounts duly audited by the statutory Auditors were not made available.
18. The learned counsel for the Commission has submitted on this question as follows:

“A large number of deficiencies/shortcomings were noticed in the documents submitted by the Appellant in support of its tariff application for the year 2008-09. The Appellant was directed vide letter dated 11.07.2008 by the Commission to remove the deficiencies/shortcomings and for furnishing the annual accounts audited and certified for FYs 2003-04 to 2007-08. The Appellant

sought time to furnish the information/documents till 25.08.2008 but on 25.08.2008 instead of submitting annual accounts duly audited by the statutory auditors submitted a revised proposal for tariff alongwith the annual accounts for FY 2003-04 to 2006-07 audited by a private Chartered Accountant. Even a certificate regarding adoption of the annual accounts by the Board of Directors of the Appellant was not submitted. The Commission again pointed out that the required data had not been furnished and even the data and information furnished had variance at many places. The Appellant kept on requesting for time but failed to furnish the desired information till January, 2009.”

19. It is clear from the submissions made by the Learned Counsel for the Commission that the annual accounts pertaining to year 1995-96 are yet to be finalized and the report from CAG is yet to be issued and the accounts have not been placed and passed in the Annual General Meeting of the shareholders of the Appellant.
20. In fact the Registrar of Companies, Bihar had initiated prosecution proceedings against the Appellant as per the Companies Act. The Appellant filed a petition before the High Court of judicature at Patna against the said proceedings initiated by the Registrar of Companies, Bihar. But the same was dismissed. The Appellant thereupon filed a SLP before the Hon'ble Supreme Court. The Apex court vide its order dated 3.4.2006 granted stay of prosecution. The learned Counsel for the Appellant has argued that in view of the stay granted by the Hon'ble Supreme Court,

which was brought to the notice of the Commission during the second review petition, the Commission should have determined the tariff on the basis of the available documents.

21. We feel that the stay granted by the Hon'ble Supreme Court was limited to the prosecution proceedings initiated by the Registrar of Companies as per the provisions of the Companies Act and the same could not be relied upon in the matter of tariff determination by the Commission as per the Regulations framed under the Electricity Act, 2003.

22. The Ld. Counsel for the Appellant argued that they had appointed a consultant for filing data/information to the Commission and they had no control over the delay in compiling of the information/data by the Consultant. Regarding statutory audit, he argued that they had written letters to CAG for expediting the statutory audit. CAG being an external agency, they had no control over delay on its part in carrying out the statutory audit. These contentions are not tenable. The responsibility for timely submission, accuracy and contents of the documents/data by the Consultant of the Appellant and for arranging statutory audit is solely that of the Appellant. There is no justification for non-completion of the statutory audit since 1995-96. This clearly shows the callous attitude of the Appellant on a very important matter.

23. The Commission is expected to carry out prudent check of the expenses incurred by the Appellant while determining the tariff. The authenticity of the data for costs incurred is very important for this exercise. The audited accounts of the previous years by the statutory Auditors are necessary for authenticity of the cost data. The cost incurred on the capital works is also required to be certified by the statutory auditors for the capitalization of assets. It is not possible for Commission to go into details regarding authenticity of the accounts. The authenticity of the accounts is established only if the accounts are duly audited and certified by the statutory Auditors.
24. The learned Counsel for the Appellant has further argued that for the subsequent year 2009-10, the Commission had determined the tariff without the support of statutory audit, therefore, there was no reason for not determining the tariff for the previous year. The Learned Counsel for the Commission informed that the Appellant had submitted tariff proposal for 2009-10 alongwith balance sheet and profit and loss accounts for FY 2007-08 duly approved by the Board of Directors and on that basis the tariff was fixed by the Commission. No such approval was obtained by the Appellant in case of tariff proposal for FY 2008-09.
25. The Commission might have given some relaxation to the Appellant in tariff determination for the year 2009-10 in the following year with regard to requirement of audited accounts by statutory auditors. However, this could not be taken as a

justification for directing the Commission to determine the tariff for the previous year without submission of the requisite documents as laid down in the Regulations.

26. Section 64 of the Act describes the procedure to be followed for tariff order. According to Section 64(1), the generating company or licensee has to submit the application for determination of tariff in a manner as determined by Regulations. Section 64 (3)(b) authorizes the Commission to reject the application for reasons recorded in writing if such application is not in accordance with the provisions of the Act and the rules and regulations made thereunder. In our view adequate time and opportunity has been provided by the Commission to the Appellant to furnish the desired documents but the Appellants failed to submit the same.

27. In view of above, the prayer of the Appellant in the second point is also rejected.

28. Summary of our findings:

- a) The Tariff Regulations of the State Commission stipulate that the application for determination of tariff is required to be accompanied with annual accounts of the financial year prior to the date of application, duly audited and certified by the statutory auditors.
- b) The Appellant failed to submit the accounts in the manner prescribed in the Regulations despite adequate time and opportunity provided to the Appellant by the Commission.

- c) The State Commission is expected to determine the tariff on commercial principles and to ensure recovery of cost of electricity in a reasonable manner. Data on actual costs incurred by the Appellant forms the basis for future projections and for determination of various components of tariff. Availability of authenticated data of costs incurred is essential pre-requisite for determination of tariff.
 - d) The Commission is expected to do prudent check of the costs incurred by the Appellant for which the authenticity of data is essential. The authenticity of data is only established by accounts audited by the statutory Auditors. Audited accounts by a private Chartered Accountant appointed by the Appellant are not acceptable both as per the provisions of the Companies Act and as well as Tariff Regulations.
 - e) The Commission under Section 64(3)(b) is authorized to reject the application for determination of tariff for valid reasons recorded in writing if the application is not in accordance with the Regulations. In this case, the Commission has given valid and correct reasons to dismiss the application filed by the Appellant, after giving adequate opportunity to the Appellant.
29. In view of the above findings, we are to conclude that the appeal has no merits and the same is dismissed
30. Before parting with this case, we are to record about the conduct of the Appellant in not complying with directions of the Commission inspite of several opportunities and in filing Review

after Review by abusing the process of law. As we held above, the Appellant failed to submit the annual accounts duly audited by the statutory auditors as required under the Tariff Regulations. Instead of taking action to get the accounts audited from the statutory auditors which is also a requirement of the Companies Act, the Appellant has moved two review petitions before the Commission on irrelevant grounds and after dismissal of the same, the Appellant has filed this Appeal before this Tribunal that too with delay. This process which the Appellant has adopted has caused un-necessary inconvenience to the statutory fora.

31. Therefore, we are of the view that this is a fit case to impose exemplary costs on the Appellant. Accordingly we direct the Appellants to pay a cost of Rs one lakh and the same may be paid as Donation to some Charitable Organization as suggested by the learned counsel for the Commission. The said amount of Rs. One lakh shall be paid by the Appellant to “SEVAC Mental Health & Human Right Resource Centre”, 135/A, Vivekanand Sarani, Thakurpukur, Kolkata 700 063 as Donation within one months from this date.
32. Pronounced in the open court on this 29th day of September, 2010.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

INDEX : REPORTABLE / NON-REPORTABLE.

