

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

O P NO.1 OF 2011

Dated: 31st May, 2013

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

Tariff Revision

(Suo-Motu action on the letter received from Ministry of Power)

Counsel for Appellant: 1. Mr. Amit Kapur, Amicus Curiae,
2. Mr. M.G. Ramachandran, Amicus Curiae,
3. Mr. R K Mehta, Amicus Curiae,
4. Mr. Buddy A. Ranganadhan, Amicus Curiae.

ORDER

The present proceedings were initiated at the instance of Secretary of the Power Ministry through his representation dated 21/01/2011 praying this Tribunal for Suo-Moto action for issuance of suitable directions to various State Electricity Regulatory Commissions, Joint Commissions and Central Commission, for

securing long term liabilities of the Electricity Sector by finally and appropriate revision of tariff in accordance with Electricity Act.

2. Accordingly, the Full Bench of this Tribunal initiated Suo-Moto proceedings and issued frequent orders to the Commissions by giving appropriate directions.

3. The final orders were passed in the above Suo-Moto proceedings on 11/11/2011. Thereafter, in the same proceedings we issued several orders on several dates to the Commissions as well as to the Secretary of Forum of Regulators to submit the periodical report with regard to the compliance of direction issued in the order dated 11/11/2011.

4. By our order dated 15.2.2013 we had issued some directions to the various State Commissions and directed the Secretary of Forum of Regulators to submit the consolidated status report along with the explanation furnished by the State Commission. In pursuance to our Order, the Secretary Forum of Regulators have submitted the Status Report on 15.4.2013. Amicus Curiae Counsel also after going through the Report filed notes giving suggestions for issuing further directions.

5. Having examined the status report submitted by Secretary of the Forum of Regulators and having considered suggestions and the submissions made by the Amicus Curiae counsel pursuant to this Tribunal's Orders dated 15.02.2013 and 30.04.2013, we feel

that we shall record our appreciation and satisfaction over the substantial compliance of the directions of this Tribunal. However, as pointed out by the Amicus Curiae Counsel, some areas remain outstanding which require issue of appropriate directions for compliance and reporting.

6. It was noticed that the Electricity Regulatory Commissions of Jharkhand and Nagaland had not filed the status reports with the FoR in time. Hence, they were required to explain the reasons for the delay and non-compliance.

7. Accordingly, the explanation was offered. The explanation has been given by the Jharkhand Commission to the effect that it was delayed in tendering its compliance report due to the fact that the format was misplaced and the report was filed after procuring the format with some delay.

8. The Counsel for the State Commissions has been advised to maintain records and comply with our directions with diligence in the future.

9. We also find that no input has been received from Nagaland Commission presumably because the sole member/chairperson of the said Commission demitted office on 31.12.2012 after completion of his tenure which vacancy arose as per the scheduled date of superannuation. But, the State Government has failed to take appropriate steps to ensure timely appointment of

the chairperson and member/s to the State Commission in accordance with Section 82(5) and 85 of the Electricity Act, 2003.

10. It is a very sorry state of affairs to note the statutory timelines are not being adhered to with diligence and that institutional vacuum is created bringing the regulatory processes to a grinding halt.

11. We deem it appropriate to bring this sad feature to the attention of the Secretary, Union Ministry of Power and the Chief Secretary, State Government of Nagaland with direction that they should take suitable and time bound action. The Registry is directed to forward the copy of this order to those officers as well as to the Forum of Regulators so that further action would be taken to cure the situation.

12. This Tribunal had directed all State Electricity Regulatory Commissions who have not framed the MYT Regulations in accordance with Section 61 of the Act to do so forthwith so that the same can be implemented with effect from 01.04.2014, and to report compliance. In this behalf, the Commission-wise status emerging from the filings of the FoR is set out below:-

- (a) Only two Regulatory Commissions seem to have responded. The Report is silent about the filings and compliance status by the other State and Joint Commissions.

- (b) The Joint Commission for Goa and the Union Territories have merely stated that at their nascent stage and with absence of adequate data, the Joint Commission “is to process framing of MYT Regulations”. The submission does not give the actual status of
- (i) The steps taken so far in formulating and notifying the Draft MYT Regulations for public consultation.
 - (ii) The proposed time table for finalizing and notifying the MYT Regulations as also its proposed effective date.
 - (iii) Taking steps to ensure that the utilities concerned are geared to prepare their regulatory filings consistent with the MYT Regulations so that the same are made effective from 01.04.2014.
- (c) Uttar Pradesh Commission has submitted that in terms of Regulation 2(1) of the Tariff Regulations, 2006, the Commission has to initiate benchmarking studies. No further status update has been provided regarding the issues.
- (i) Whether benchmarking studies have been initiated pursuant to the said Regulations dated 06.10.2006?
 - (ii) What was the outcome of such studies?
 - (iii) What is the status of implementation of the MYT framework and control period for the same?

13. All other State Commissions are directed to inform as to whether the MYT Regulations have been framed or not. In case MYT Regulations have not been framed so far, the Commissions are directed to frame the MYT Regulations without any further delay so as to make them operational from 1.4.2014.

14. In this view of the matter, we hereby deem it fit to direct that the Joint Commission for Goa and the Union Territories, and the Uttar Pradesh Commission shall comply with the directions of establishing/notifying the MYT Regulations forthwith and shall tender a specific and clear status update with respect to the shortcomings listed above within 4weeks of receipt of Order of this Tribunal.

15. This Tribunal had directed the Regulatory Commissions for 14 States and the Union Territories to furnish particulars regarding action taken against utilities who did not file the tariff petitions for FY 2012-13 in a timely manner, and to explain why the State Commission did not initiate suo-moto action against such utilities.

16. In this behalf, the Commission-wise status emerging from the filings of the FoR is set out below:-

(a) Out of the 14 Regulatory Commissions, suo-moto action was initiated only by the Assam Regulatory Commission on 24.07.2012 and the suo-moto order were issued on 28.02.2013.

- (b) All Commissions for Arunachal Pradesh, Chhattisgarh, Delhi, Gujarat, Goa, Himachal Pradesh, Karnataka, Kerala, Maharashtra, Manipur, Mizoram, Uttar Pradesh and West Bengal failed to take appropriate action in this behalf.
- (c) The State Commissions of Gujarat, Karnataka, Goa and the Union Territories have failed to explain
- (i) The delay in the filing of ARR and Tariff Petitions for FY 2012-13 by the utilities regulated by them resulting in delays in issuance of tariff orders.
 - (ii) What action was taken by them against the utilities for such delay as also explaining why suo-moto action was not initiated against the utilities?
- (d) The following Commissions have specifically stated that they found some difficulty in initiating suo-moto determination of tariff:-
- (i) Manipur and Mizoram identified the following problems:-
 - (1) Lack of audited data for FY 2010-11 in the last Petition.
 - (2) The first truing-up is yet to be carried out.
 - (3) Actual developments on losses, expenditure, power purchase and subsidiary components were not

known for the FY 2010-11 and 2011-12.

(ii) Uttar Pradesh Commission identified the following problems:-

- (1) Petitions of state owned licensees were filed after a delay of 5 months.
- (2) No true-up has been done since FY 2000-01.
- (3) No audited accounts are available since FY 2008-09.
- (4) Commission does not have sufficient data.

(e) The following 7 State Commissions have explained the reason for not initiating suo-moto action, being

(i) Arunachal Pradesh Commission submitted that since the Department of Power have filed tariff petitions which are being processed, no suo-moto action was initiated.

(ii) Delhi Commission explained that no tariff order could be issued for FY 2010-11 and tariff orders for FY 2011-12 and MYT period 2012-13 to 2014-15 due to the following reasons:-

- (1) A public interest litigation filed in Delhi High Court resulted in an order dated 22.12.2010 stating that tariff order should not be issued without leave of the

Court. The petition was disposed off in terms of order dated 23.05.2011 directing for tariff determination.

(2) Tariff Order for the true-up of FY 2008-09, 2009-10 and APR for FY 2011-12 was issued on 28.08.2011.

(3) All utilities sought extension of time to file ARR and MYT petition were filed in February 2012.

(iii) Chhattisgarh Commission stated that it did not initiate suo-moto action since:-

(1) For Jindal Steel and Power Limited, since it was supplying to consumers at a tariff that did not exceed the tariff of State Discom for the same consumer category and since JSPL undertook to absorb any loss.

(2) For Bhilai Steel Plant, since it was supplying power to its own employee township and undertook that if any loss occurs by such supply it shall absorb the same.

(iv) For Himachal Pradesh Regulatory Commission stated that in spite of delay in filing, it issued the Tariff Order on 24.04.2012 and the delay had been due to information gaps.

(v) Kerala Regulatory Commission has stated that though

the petition was filed on 31.01.2011, since the Board submitted tariff petition with proposal to bridge the revenue gap on 30.03.2012, no action was taken.

(vi) Maharashtra Regulatory Commission has stated that it had power to exempt determination of tariff under the MYT framework and had granted deferment of applicability of MYT Regulations, 2011. It also stated that it issued Tariff Orders during August and September 2012. The submissions appears not to give utility-wise status of delay and action taken.

(vii) West Bengal Regulatory Commission stated that

(1) Under the Tariff Regulations, 2011 the date of submission of tariff petition was 29.05.2011. However, due to difficulties faced, time was extended till 15.07.2011.

(2) While other utilities submitted, West Bengal State Discom was granted further extension of time.

(3) The State Discom's tariff for FY 2010-11 was re-determined on 30.12.2011 pursuant to directions of this Tribunal dated 04.04.2011. Thereafter, State Discom submitted MYT application on 30.03.2012. Hence, there was no occasion to initiate action

against the State Discom.

17. In view of the above position, we direct the State Commissions for Gujarat, Karnataka, Goa and Union Territories, to submit specific and issue-wise status within 4 weeks of receipt of the order of this Tribunal. We notice with some concern that 7 State Commissions have resorted to justifications for non-compliance/delays which are in the teeth of specific directions contained in paragraph 65 of the judgment dated 11.11.2011 delivered in O.P. No.1 of 2011 reported as *2011 ELR APTEL 1742*.

18. In this regard, the Secretary of Forum of Regulators is directed to take up the implications of the directions issued, undertake a detailed discussion and dissemination exercise amongst the various Appropriate Commissions to enable them to appreciate the directions and findings contained in the judgement disposing O.P. No.1 of 2011 reported as *2011 ELR APTEL 1742*, and help them to develop methodologies and techniques in order to comply with the directions. Suffice it to state here that the difficulties pointed out by the State Commissions for Manipur and Mizoram and Uttar Pradesh are not justifiable.

19. This Tribunal had directed the Electricity Regulatory Commissions of Delhi, Uttar Pradesh, West Bengal and Punjab to explain as to why they could not pass the tariff order within 120

days of the submission of complete ARR and Tariff Petitions. In this behalf, the Commission-wise status emerging from the filings of the FoR is set out below:-

- (a) Delhi Regulatory Commission submitted that they received the MYT Petition from the utilities only in the months of January and February 2012 which were admitted subject to clarifications/additional information. Hence, they completed the tariff determination process between 125 to 140 days.
- (b) Punjab Regulatory Commission submitted that:
 - (i) Petition was filed by PSPCL on 30.11.2011 whereupon views of State Government were sought.
 - (ii) State Government's views were received only on 13.06.2012.
 - (iii) After determining the tariff the Commission again sought views of the State Government regarding subsidy, which was received on 11.07.2012.
 - (iv) Tariff Order was issued on 16.07.2012.
- (c) Uttar Pradesh Regulatory Commission submitted that:
 - (i) Petitions were admitted on 25.06.2012.
 - (ii) In terms of Regulation 2.3.1 of the UPERC Distribution Tariff Regulations, 2006, the period of 120 days as

provided in Section 64(3) of the Electricity Act, 2003 will be counted from the date of acceptance of ARR. Hence, the Tariff Orders were to be issued by 23.10.2012 and they were issued on 19.10.2012.

- (d) West Bengal Regulatory Commission submitted that:
- (i) The Commission was in the process of amending the WBERC (Terms and Conditions Tariff) Regulations, 2011 which took appreciable time.
 - (ii) The MYT Order for the 3rd control period FY 2011-12 to 2013-14 was taken up post amendment to the Tariff Regulations.
 - (iii) MYT Order on the ARR and Tariff petitions for FY 2011-12 and 2012-13 have been issued, and the MYT petitions for FY 2011-12 to 2013-14 have been accepted.

20. In view of the above position, we hereby clarify that in terms of Sections 62 and 64 of the Electricity Act:-

- (a) The stage for a Regulatory Commission to consult the State Government in tariff determination is on the issue of subsidy under Section 65 which would arise only after approval of the annual revenue requirement is complete and cost of supply based tariff has been determined.

- (b) The fact that the existing tariff regulations are being amended or are expected to be amended would not ordinarily justify delaying the issue of a tariff order.
- (c) A Regulatory Commission may not wait for a long time for this consultation and should not delay the issue of the tariff order in this behalf.

21. This Tribunal had directed the Electricity Regulatory Commissions of Delhi, Punjab, Rajasthan, Uttar Pradesh and West Bengal to explain why they have not issued true-up order for FY 2010-11. In this behalf, the Commission-wise status emerging from the filings of the FoR is set out below:-

- (a) Delhi Commission has clarified that the true-up for FY 2010-11 was filed alongwith the MYT petition for FY 2012-13 to 2014-15, and that the true up order was issued alongwith the ARR Order.
- (b) Punjab Commission has stated that due to the Transfer Scheme dated 16.04.201 for unbundling PSEB and hence the opening balance sheets of the successor companies being provisional at the time of issue of the tariff order for FY 2012-13, true-up for FY 2010-11 can be undertaken once the balance sheets are final and audited.
- (c) Rajasthan Commission has clarified that:

- (i) It had in terms of its orders dated 08.09.2011 and 08.08.2012 asked the Discoms to get their accounts finalized and submitted alongwith the next APR/tariff petition.
 - (ii) The Discoms did not submit their APR/True-up proposals for FY 2010-11 alongwith the tariff petition for FY 2012-13
 - (iii) Audited accounts were communicated to Commission on 18.03.2012 which in turn has directed the Discoms to file petitions for true-up of ARR for FY 2010-11 and 2011-12 latest by 15.04.2013 failing which it shall determine the true-up suo-moto and initiate punitive action under section 142.
- (d) Uttar Pradesh Commission has clarified that:
- (i) The state owned licensees had not submitted their audited accounts hence true up could not be done for FY 2010-11.
 - (ii) Presently, for FY 2000-01 to 2007-08 is being carried out pursuant directions dated 15.10.201 by this Tribunal.
 - (iii) State Discoms are shortly going to file true-up petitions for FY 2008-09 and 2009-10.
- (d) West Bengal Commission has clarified that:

- (i) The Commission was in the process of amending the WBERC (Terms and Conditions Tariff) Regulations, 2011 which took appreciable time.
- (ii) After amending the Regulations in August 2012, it has processed the and true-up petitions for FY 2010-11 and issued the order.

22. In view of the above position, we reaffirm the principles and directions laid down in the judgement dated 11.11.2011 delivered in O.P. No.1 of 2011 reported as *2011 ELR APTEL 1742* with respect to importance of timely true-up and what ground can form the basis for justifiable delay in true-up, as also the hidden additional financial burden caused to the sector and the consumers by such delay. In this context, we hope and expect that the Forum of Regulators shall provide a suitable platform for all regulators to evolve methodologies and techniques to ensure due compliance in a timely manner.

23. This Tribunal had directed the Regulatory Commissions of Gujarat, Karnataka, Kerala, Meghalaya, Tripura, West Bengal; the Joint Commission for Goa and Union Territories and the Joint Commission for Manipur and Mizoram to furnish the actual date of issuing the true-up order for FY 2010-11 and filing of ARR and Tariff petitions for FY 2013-14 and issue of tariff orders for FY 2013-14. All State Commissions were to submit compliance report

in this behalf.

24. Accordingly, we direct the Secretary of FoR to submit an updated summary statement after consulting with the Regulators to this Tribunal on or before 31st July, 2013. The Registry is directed to send copies of this order to all the Commissions and Forum of Regulators and all the Amicus Curiae as well as to the Secretary of the Power Ministry, on whose letter, this suo-moto proceedings were initiated by this Tribunal. We once again record our appreciation for the services rendered by the Secretary, FoR and all the learned Amicus Curiae Counsel.

25. Post the matter for reporting compliance on 5.8.2013.

(Rakesh Nath) (V.J. Talwar) (Justice M. Karpaga Vinayagam)
Technical Member Technical Member Chairperson

Dated: 31st May, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~