

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. **Shri Ashok Basu, Chairman**
2. **Shri K.N.Sinha, Member**

**IAs No.28/2003 and 39/2003 in
Petition No.94/2002**

In the matter of

Approval of Tariff of Gandhar GPS for the period from 1.4.2000 to 31.3.2001

And in the matter of

National Thermal Power Corporation Ltd.

.....**Petitioner**

Vs

1. Madhya Pradesh State Electricity Board, Jabalpur
2. Maharashtra State Electricity Board, Mumbai
3. Gujarat Electricity Board, Vadodara
4. Chhattisgarh State Electricity Board, Raipur
5. Electricity Deptt., Govt. of Goa, Panaji
6. Electricity Deptt., Admn. of Daman & Diu, Daman
7. Electricity Deptt., Admn. of Dadra and Nagar Haveli, Silvassa ... Respondents

**IAs No.27/2003 and 42/2003 in
Petition No.96/2002**

And in the matter of

Approval of tariff for Farakka STPS for the period from 1.4.2000 to 31.3.2001

And in the matter of

National Thermal Power Corporation Ltd.

..... **Petitioner**

Vs

1. West Bengal State Electricity Board, Calcutta
2. Bihar State Electricity Board, Patna
3. Jharkhand State Electricity Board
4. Grid Corporation of Orissa Ltd., Bhubaneswar
5. Damodar Valley Corporation, Calcutta
6. Power Deptt., Govt. of Sikkim, Gangtok
7. Assam State Electricity Board, Guwahati
8. APTRANSCO, Hyderabad

9. Madhya Pradesh State Electricity Board, Jabalpur
10. Tamil Nadu State Electricity Board, Chennai
11. Kerala State Electricity Board, Trivandrum
12. Karnataka Power Transmission Corporation Ltd., Bangalore
13. Uttaranchal Power Corporation Ltd., Dehradun
14. Gujarat Electricity Board, Vadodara
15. Union Territory of Pondicherry, Pondicherry
16. Rajasthan Rajya Vidyut Prasaran Nigam Ltd, Jaipur
17. Haryana Vidyut Prasaran Nigam Ltd, Panchkula
18. Power Department, Union Territory of Chandigarh, Chandigarh..Respondents

**IAs No.29/2003 and 40/2003 in
Petition No.99/2002**

And in the matter of

Approval of tariff of Kawas GPS for the period from 1.4.1998 to 31.3.2001

And in the matter of

National Thermal Power Corporation Ltd.

.....**Petitioner**

Vs

1. Madhya Pradesh State Electricity Board, Jabalpur
2. Maharashtra State Electricity Board, Mumbai
3. Gujarat Electricity Board, Vadodara
4. Chhattisgarh State Electricity Board, Raipur
5. Electricity Deptt., Govt. of Goa, Panaji
6. Electricity Deptt., Admn. of Daman & Diu, Daman
7. Electricity Deptt., Admn. of Dadra and Nagar Haveli, Silvassa ...**Respondents**

The following were present:

1. Shri Amit Kapur, Advocate, NTPC
2. Shri K.K. Garg, GM(Comml.), NTPC
3. Shri M.S. Chawla, AGM(Comml.), NTPC
4. Shri V.B. Jain, GM(Comml.), NTPC
5. Shri S.K. Sharma, Sr. Manager (C), NTPC
6. Shri Sandeep Mehta, NTPC
7. Shri Balaji Dube, Sr. Law Officer, NTPC
8. Shri Visnu Sudharshan , Advocate, NTPC
9. Shri R. Mazumdar, NTPC
10. Ms. Ranjana Gupta, NTPC
11. Shri B. Arya, NTPC
12. Shri R.K. Balachandran, KSEB
13. Dr. S.C. Bhattacharya, WBSEB
14. Shri P.C. Saha, WBSEB
15. Shri K.J. Alva, KPTCL
16. Shri T.P.S.Bawa, SE, PSEB

17. Shri R.K. Mehta, Advocate, GRIDCO
18. Shri K.K. Panda, GRIDCO
19. Shri R. Mishra, GRIDCO
20. Ms. Suman Kukreti, GRIDCO
21. Shri S.K. Chowdhry, GRIDCO
22. Shri S.S. Nayak, GRIDCO
23. Shri Jayant Mehta, GEB
24. Shri D. Khandelwal, S.E., MPSEB
25. Shri T.K. Srivastava, S.E., UPPCL
26. Shri R.K. Arora, XEN, HVPNL
27. Shri D.D. Chopra, Advocate, UPPCL

ORDER
(DATE OF HEARING : 9.9.2003)

Two issues arise in the interlocutory applications filed in these petitions. The question raised in one set of the applications that needs our decision is regarding condonation of delay in filing of the amended petitions after obtaining leave of the Commission. The other set of applications raises the question in regard to recall, or what has been termed in the applications is for modification and "deletion", of order calling upon the petitioner to file the details of actual operational parameters achieved in respect of the generating stations owned by the petitioner. As both these questions are common to all the three petitions, we will be considering them by referring to facts in Petition No.94/2002, which are representative of the facts in other two petitions.

IA No.28/2003 for Condonation of Delay

2. In petition No.94/2002, the petitioner sought approval for fixed charges components of tariff for the period from 1.4.2000 to 31.3.2001. As regards the variable charges, it was stated in the petition that variable charges billed by the petitioner to the beneficiaries based on notifications issued by Ministry of Power would remain unchanged. However, as their non-determination will have impact on fixed charges through interest on working capital, at the hearing of the petition on 28.11.2002 it was prayed on behalf of the petitioner that the Commission may re-

determine the variable charges as well, while determining the fixed charges. The prayer was granted. The petitioner by order dated 13.12.2002 was directed to take steps for formally amending the petition. The amended petition has been filed on 12.6.2003, along with the application (IA No.28/2003) for condonation of delay, presently under consideration. It has been stated that the petitioner did not file the amended petition duly modifying the prayer clause since it was under a bonafide impression that the petition was for determination of tariff, which included the fixed as well as the variable charges. Respondent No.1 in its reply has opposed the prayer for condonation of delay in filing of the amended petition. None of the other respondents has filed any reply to the application. While opposing the prayer for condonation of delay, Respondent No.1 has urged that the petitioner was guilty of laches and unconscionable delay. It has been averred that the amendment sought is irrelevant and unnecessary and it has not been filed bonafide.

3. The Electricity Act, 2003, which presently governs the procedure applicable to the proceedings before the Commission and its predecessor Act, namely, the Electricity Regulatory Commissions Act, 1998 are silent on the issue. Therefore, the Code of Civil Procedure (for short, the Code) is the relevant mariner's compass to guide our path.

4. Order VI Rule 17 of the Code provides for amendment of pleadings. According to these provisions, the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Order VI, Rule 18 of the Code

lays down the consequences of failure of a party to amend his pleadings after the order. It has been provided that "if a party who has obtained an order for leave to amend does not amend accordingly within the time limited for the purpose by the order, or if no time is thereby limited, then within 14 days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such 14 days, as the case may be, unless the time is extended by the court." In the case before us, the time for filing of amended petition was not limited by the Commission's order dated 13.12.2002. Therefore, in accordance with the provisions of Order VI, Rule 18 of the Code, the petitioner in the normal course could file the amended petition within 14 days. However, as is noticed above, the amended petition was not filed within the statutorily mandated period of 14 days but was filed nearly six months of the order dated 13.12.2002. Therefore, the application for condonation of delay has been filed on behalf of the petitioner. Meanwhile, affidavits were filed on behalf of the petitioner wherein the petitioner made repeated pleas for determination of variable charges along with fixed charges.

5. A bare reading of Rule 18 reveals that the Court, the Commission in the present case, has the power in appropriate cases to extend the time for filing of amended petitions. In the interest of justice, a party may be permitted to amend its pleadings despite its default to amend within the time previously allowed. It is a settled position of law that where the amendment has not been carried out by the party after obtaining leave of the court within time limited by the order or within 14 days of the date of the order where time is not specified, extension of time to amend can be granted under the inherent powers of the court. In *Pahali Raut Vs Khulana Bewa* (AIR 1985 Orissa 165), the question to extend time to enable one of the defendants whose

application for amendment of written statement had been allowed, to carry out the amendment "long after expiry of the period of fourteen days prescribed under Order VI, Rule 18 of the Code" was considered. The Orissa High Court held that:

"The aforesaid discussion shows that it is the obligation of the party to carry out the amendment where leave to amend has been granted, within the time specified by the order or, within fourteen days from the date of the order where time is not so specified. Lest the party be indifferent or rest on his oars the embargo is put that unless the amendment is carried out aforesaid, the party shall be debarred from amending his pleadings. But the harshness of the provision is mellowed by clothing the Court with jurisdiction to extend time in fit cases; even otherwise there is the saviour provision in S.151 of the Code of Civil Procedure. However, extension should not be a matter of course but would depend upon facts and circumstances."

6. In our opinion, determination of variable charges in the present petition is necessary since variable charges are an input for computation of interest on working capital, an element of the fixed charges. The Commission under Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (for short, the Regulations) is clothed with same inherent powers as are vested in a civil court under Section 151 of the Code. We are not convinced by the contention of the Respondent No.1 that the petitioner is guilty of laches or unconscionable delay or the amended petition is not bonafide. The petitioner in its affidavits has pleaded for determination of variable charges. We may also take note of the fact that Respondent No.1, MPSEB in the affidavits filed before the Commission and other respondents as well have been pleading for determination of variable charges also. Therefore, this respondents cannot be permitted to oppose the adjudication or determination of variable charges, prayed for in the amended petition. On consideration of the facts and circumstances of the case in the light of the provisions of law and by invoking powers under Regulation 111 *ibid*, and in the interest of justice and fair play, we

condone the delay and extend time for filing of the amended petition till date of its actual filing, that is, 12.6.2003, in the case before us.

7. Accordingly, IA No.28/2003 is allowed. We direct that the amended petition be taken on record. Copy of the amended petition has already been served on the respondents, who may file their reply by 31.10.2003 with advance copy to the petitioner. The petitioner may file its rejoinder, if any, within two weeks thereafter.

8. Our decision in IA No.28/2003 in Petition No.94/2002 shall also govern IA No.27/2003 in Petition No.96/2003 and IA No.29/2003 in Petition No.99/2003, which are also allowed in the same terms as IA No.28/2003.

9. List all the three petitions for hearing on 25.11.2003.

IA No.39/2003, Modification and Deletion of Directions in Para 6 of the Order dated 13.12.2002

10. At the time of hearing of the petition on 28.11.2002, it was submitted on behalf of the respondents that operating parameters for determination of variable charges were to be considered, based on actuals or normative, whichever was lower, as prescribed by the Central Government and, therefore, the petitioner should submit the details of actuals of operating parameters for the purpose of determination of variable charges. Based on the submission made on behalf of the respondents, a direction was issued to the petitioner by order dated 13.12.2002 to file the details of operating parameters achieved during the tariff period under consideration in respect of each of the stations. The details of operating parameters achieved have not been filed by the petitioner.

11. Now the application has been filed seeking modification of the order dated 13.12.2002 and deletion of the particular direction for filing of actual operational data on the ground that the details asked for are not relevant for the purpose of determination of tariff claimed in the petition. According to the petitioner, the tariff for the period from 1.4.2000 to 31.3.2001 is to be determined based on Ministry of Power notification 28.4.1997, which does not contain any provisions for fixation of variable charges by considering operational data on actual or normative basis, whichever is lower.

12. A reply to the application has been filed on behalf of Respondent No.1, MPSEB. According to the respondent, tariff is to be re-determined considering the letter and spirit of the provisions of Section 13 and 28 of the Electricity Regulatory Commissions Act, 1998 read with Ministry of Power notification dated 28.4.1997. It is urged that one of the functions of the Commission is to safeguard the interest of the consumers and by fixing the variable charges by considering the lower of the actuals or normative operational data, the Commission would be advancing the objectives of the statute. According to Respondent No.1 any deviation from the provisions of Section 13 and 28 of the Electricity Regulatory Commissions Act, 1998 would defeat the very objective of enactment of the Statute and establishment of the Commission. This respondent has also placed reliance on Ministry of Power notification dated 30.3.1992, issued under Section 43A (2) of the Electricity (Supply) Act, 1948, laying down the terms and conditions of tariff and, in particular, the explanation below Clause 1.1 of the said notification which provides as under :

"Explanation: - For removal of doubts it is clarified that the norms laid down by the Authority are the ceiling norms and this shall not preclude the Board's and the Generating Companies from agreeing to accept improved norms."

13. Reliance has also been placed on the provisions of Regulation 82 of the CERC (Conduct of Business) Regulations, 1999. It has been argued that as provided in Clause (b) of Regulation 82, one of the objectives of the Commission is to rationalise tariff on the basis of actual cost of generation and transmission. These arguments were reiterated at the hearing by Shri D. Khandelwal, SE, appearing on behalf of Respondent No.1, MPSEB. The arguments of Shri Khandelwal were adopted by Shri D.D. Chopra, Advocate, appearing for Uttar Pradesh Power Corporation Limited, one of the respondents in the connected petition.

14. We have considered the rival submissions. Before actually dealing with the issues raised on behalf of parties, it necessary to go back into the background against which the petition for approval of tariff for the period from 1.4.2000 to 31.3.2001 has been filed. The petitioner had initially filed Petition No.77/2000 for approval of revised fixed charges due to additional capitalisation and foreign exchange rate variation for the years 1997-98 to 2000-01 in respect of Gandhar GPS, based on Ministry of Power notification dated 28.4.1997, valid up to 31.3.2000. The Commission vide its order dated 10.4.2002 approved the revised fixed charges for the period up to 31.3.2000, corresponding to the period of validity of the notification. It was observed by the Commission that in case the petitioner claimed revised fixed charges for the year 2000-01 it was required to file a fresh petition for re-determination of tariff for the period from 1.4.2000 to 31.3.2001 "based on the terms and conditions of tariff as notified by Ministry of Power on 28.4.1997, as amended from time to time" (emphasis

added) and the petition has been filed in view of these observations. The Commission in its order of 10.4.2002 in Petition No.77/2002 had made its intention clear that determination of tariff was to be based on the terms and conditions contained in Ministry of Power notification 28.4.1997. We have very carefully perused the notification dated 28.4.1997. We do not find any stipulation therein providing for determination of variable charges by considering the operating parameters based on norms or actuals, whichever is lower. The said notification dated 28.4.1997 lays down the operational norms for determination of variable charges. Therefore, there is no force in the first contention raised on behalf of the respondents, as urged at the hearing on 28.11.2002 that the operating parameters for determination of variable charges were to be considered based on actuals or normative, whichever is lower.

15. A reliance was placed on behalf of the respondents on Ministry of Power notification dated 30.3.1992 which, inter alia, laid down that for the purpose of calculating the tariff, operating parameters, that is, "station heat rate", "secondary fuel oil consumption" and "auxiliary consumption" shall be determined on the basis of actuals or norms, whichever is lower. According to the respondents, the notification dated 30.3.1992 being the principal notification and source of all project-specific notifications issued by Ministry of Power, it should govern the determination of tariff in respect of Gandhar GPS. This contention too is without any merit. Para 3.3 of the notification dated 30.3.1992, as amended, specifically provides that the notification shall be applicable for determining the tariff for sale of electricity from such generating stations whose financial package for investment is approved by CEA on or after the date of its publication in the official gazette (emphasis added). It has not been disputed that the financial package for Gandhar GPS was approved before 30.3.1992.

Therefore, the terms and conditions of tariff contained in the said notification dated 30.3.1992 do not apply in the case of Gandhar GPS. The respondents' contention by referring to Regulation 82(b) also merits summary rejection. As we have noted above, the tariff petition has been filed pursuant to the Commission's observations contained in its order dated 10.4.2002 in Petition No.77/2000 which specifically holds that tariff is to be determined based on the terms and conditions as notified by Ministry of Power notification dated 28.4.1997. The Commission's order the dated 13.12.2002, wherein the direction for filing of actual operational parameters was given also refers to this fact by stating that "the tariff in respect of these stations is to be determined based on norms contained in the notification for respective station issued by Ministry of Power". Therefore, any reference to Regulation 82 at this stage is unwarranted. It is part of the judicial prudence to decide an issue arising in a specific context by confining the focus within the compass and facts of the law in the context of which the question arises. A diffusion into wider jurisprudential areas is fraught with conflict and confusion and should be avoided. We, therefore, refrain ourselves from venturing into the issue raised on behalf of the respondents by reference to consumer welfare or safeguarding of interests of the consumer.

16. In the light of position stated above, we are satisfied that for the purpose of determination of tariff in the present petition, actual operational parameters are not required to be looked into and the variable charges need to be determined in the light of norms contained in Ministry of Power notification dated 28.4.1997. The actual parameters achieved are not necessary. Accordingly, we recall the particular direction to the petitioner for filing of actual parameters achieved. IA No.39/2003 is accordingly allowed.

17. For similar reasons, IA No.42/2003 in Petition No.96/2002 and IA No.40/2003 in Petition No.99/2002 are also allowed.

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRMAN

New Delhi dated 1st October, 2003