

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri V. S. Verma, Member

Shri M. Deena Dayalan, Member

Shri AK Singhal, Member

Date of Order: 21.2.2014

**Interlocutory Application No. 34 of 2013
In
Petition No. 155/MP/2012**

In the matter of

Mr. Pushpendra Surana

Applicant

Vs

Adani Power Limited, Ahmedabad & Others

Respondents

And

In the matter of

Adani Power Limited, Ahmedabad

.....Petitioner

Vs

Uttar Haryana Bijli Vitaran Nigam Limited, Panchkula & Ors

....Respondents

**Interlocutory Application No. 35 of 2013
In
Petition No. 159/MP/2012**

Mr. Pushpendra Surana

Applicant

Vs

Coastal Gujarat Power Ltd & Others

Respondents

And

In the matter of

Coastal Gujarat Power Ltd

Petitioner

Vs

Gujarat Urja Vikas Nigam Ltd, Vadodara & Others

Respondents



Following were present:

Shri Jayant Bhushan, Senior Advocate
Shri Amit Kumar, Advocate

ORDER

This application has been filed by Shri Pushpendra Surana seeking impleadment in the present petition in his capacity as a member of the community of consumers of electricity. The applicant has submitted that the petitioner in Petition No.155/MP/2012 seeks determination of tariff, thereby affecting the interest of consumers. Any relief granted to the petitioner would ultimately be binding on the consumers who would necessarily shoulder the burden of higher tariff and therefore, the right of hearing is implicit in the nature of present proceeding. It has been submitted that the present proceedings being sui generis, greater participation of the public would aid the adjudicatory process, the impact of which is not restricted to the parties involved and therefore, the consumers ought to be given wider representation in the present proceedings before the Commission. The applicant has further submitted that though the present case falls under Section 63 of the Act, with the offer of Compensatory Tariff, it has been relegated to determination of tariff under Section 62 of the Act. The statutory mandate of Section 61(d) of the Act requires the Commission to give due consideration to the interest of the consumers while fixing the tariff. Since the Commission is already hearing a representative body of consumers, no prejudice would be caused if the applicant is also heard on behalf of the consumers. The applicant has submitted that since adjudication of complex and factual issues is involved on account of the uniqueness of the present case, having more than one representative of the consumers

would be in aid of the adjudicatory process by providing adequate assistance to the Commission. The applicant has also enumerated some of the issues which the applicant has identified for presentation before the Commission based on the report submitted by the Committee pursuant to the Commission's order dated 2.4.2013. It has been submitted that this Commission in terms of its powers under Section 94(3) of the Act can authorize any person to represent the interest of consumers and the applicant representing the voice of consumers is required to be heard before passing any order in the matter. Accordingly, the applicant has prayed that the present application be allowed by impleading the applicant as a respondent in Petition No.155/MP/2012.

2. Learned senior counsel appearing on behalf of Shri Pushpendra Surana submitted that the applicant is a Chartered Accountant by profession and is a public spirited person. Since these proceedings are going affect the consumers, the applicant is seeking impleadment in the proceedings to represent the interest of consumers. Learned senior counsel submitted as under:

(a) The report of the Committee is on the website. The consumers have no public notice either before the order dated 2.4.2013 was passed, or when the Committee was formed or when the report was posted on the website. Even though the report is on the website, no notice has been given inviting comments on the report from the general public and consumers.

(b) The Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission Vs CESC Ltd {(2002) 8 SCC 715} has held that the consumers are required to be heard in the process of determination of tariff since the right has been recognized

in Section 26 of the Electricity Regulatory Commission Act, 1998. Since Section 94(3) of the Act is identical to Section 26 of the Electricity Regulatory Commission Act, 1998, the ratio of the judgment will apply and the Commission is obligated to give a notice to the consumers and hear their views before hearing and disposing of this petition.

(c) The Commission should have issued a public notice regarding the hearing of the petition. Section 61(d) of the Act provides that the Commission should protect the interest of the consumers and the interest of the consumers cannot be protected without hearing the consumers. It is implicit in Section 61(d) that a general public notice should be given for information of consumers before hearing the tariff petition.

(d) Regulation 18 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 provides for representation of the consumers.

(e) Section 64 of the Act requires publication of the application and consideration of the objections before passing the tariff order. Any modification of the tariff for supply of electricity is an exercise for determination of tariff under Section 62 and the procedure prescribed under Section 64 should have been followed.

(f) The Central Commission is required under Section 79(4) of the Act to ensure transparency while exercising its powers and discharging its functions.

3. Learned counsel for the petitioner opposed the IA on the ground that the applicant has no locus and submitted as under:

(a) As per the judgment of the Supreme Court in West Bengal Regulatory Commission supra, the representation of the consumers of Kolkata has to be regulated in accordance with the regulations. In this case the petitioner is neither a consumer of Gujarat nor of Haryana.

(b) The word 'consumer' has been defined in Section 2(15) of the Act as "any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the supply of electricity as per the provisions of this Act or any other law for the time being in force." Adani is not a licensee but a generating company and supplying power to the distribution licensees.

(c) As per the judgment of the Supreme Court in West Bengal Electricity Regulatory Commission supra, the right of the consumer is neither indiscriminate nor unregulated but is regulated by regulations. Regulation 18 of the Conduct of Business Regulations regulates the representation of consumers before the Commission. Regulation 18 empowers the Commission to permit any association or forum or other bodies corporate any group of consumers to participate in any proceedings before the Commission. The applicant does not belong to any of the groups.

(d) An application under Section 64 of the petition applies to the petitions filed under Section 62 of the Act. Since this petition was not filed under Section 62 of the Act, the publication of the application is not required to be done.

4. After hearing the Learned Senior Counsel for the Applicant and the Learned Counsel for the petitioner, the Commission reserved the order on the applicant's prayer for impleadment and permitted the applicant to participate in the proceedings. The relevant para of the RoP is extracted as under:

"The Commission after hearing the learned counsel reserved order in the IA which will be issued separately. However, the Commission permitted the applicant to participate in the proceeding of the Commission in this matter and directed the petitioner to supply a copy of the petition within two days. The Commission directed that the applicant is at liberty to verify the records in accordance with Regulation 66 and 67 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 and obtain copy of any other documents filed in the petition to make its submission in the case. The Commission further directed that the applicant would be given an opportunity of hearing if the applicant or its counsel is present during the hearing after completion of the arguments of the petitioner and the respondents."

5. Pursuant to the above directions, the applicant has filed his objections and written submission in the matter and has participated in the proceedings through counsel.

6. In his comments/objections, the applicant has submitted that since the present petition involves determination of tariff, the applicant is entitled to be heard in terms of Section 61 (d) and Section 64 read with Section 93 (3) of the Act. The Applicant has submitted that in the matter of hearing the public, the Act does not restrict either expressly or by necessary implication the said right to the consumers of the area for which tariff determination is being undertaken. In Section 64, the hearing contemplated is in relation to the public and not restricted to the consumer of the affected area. Therefore, the judgment of the Supreme Court in WBERC case cannot be read to suggest that the public hearing contemplated under the Act is limited to the consumers of a particular area. The petitioner in his written submission has submitted that the

applicant is neither a necessary nor a proper party and hence cannot be impleaded as a party. The Applicant is neither a consumer of electricity in the State of Gujarat or Haryana and therefore, the applicant is not a consumer as per Section 2 (15) of the Act. In this connection, reliance has been placed on the Judgment of the Supreme Court in Grid Corporation of Orissa Ltd Vs. Gajendra Haldea and Others [(2008) 13 SCC 414]. The petitioner has submitted that Judgment of the Supreme Court in WBERC case does not support the case of the applicant for impleadment as in para 40 of the said Judgment, the Hon'ble Supreme Court has held that the right of the consumer is neither indiscriminate nor unregulated and the same is controlled by the regulations. In the present case, the relevant regulation is the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 ('Conduct of Business Regulations') and the appointment of any person to represent the consumers under Section 94 (3) of the Act has to be in accordance with the said regulation. The petitioner has relied upon the provisions of Regulation 18 and 41 of the Conduct of Business Regulations and has submitted that applicant is not representing in the form of recognized consumer association/forum or any other body corporate and the applicant not being a consumer of either Gujarat or Haryana cannot be considered as an affected party for the Commission to be issued notice. The petitioner has further submitted that in this petition, two consumers namely, Mr. Amarsinha Chavda and Mr. Prahlad Rao have made submissions and therefore, the applicant's contentions that the consumer are not being represented is not correct.

7. In the light of the above pleadings and considering the fact that the applicant has been allowed to participate in the proceedings before the Commission in the present

petition, the only question that remains for our consideration is whether the applicant has a right for impleadment as a party to the petition.

8. The petition has been filed under section 79 read with Articles 12, 13 and 17 of the PPA and Para 4.7 and 5.17 of the Competitive Guidelines. In the present case, tariff has been discovered through competitive bidding and adopted by the respective State Commissions. On account of emergence of a composite scheme for supply of electricity from the generating station to more than one State, the Commission in its order dated 17.10.2012 held that the generating station is covered under section 79(1)(b) of the Act and admitted the petition. Articles 12.13 and 17 of the PPAs and Para 4.7 and 5.17 of the Guidelines confer a right on the affected party to the PPA to approach the appropriate commission for resolution of dispute relating to tariff. The Commission after hearing the petitioner and respondents who are parties to the PPA came to a conclusion in the order dated 2.4.2013 that no relief can be granted under Article 12 or Article 13 of the PPA. However, considering the hardship faced by the petitioner due to Indonesian Regulations, the Commission in exercise of its regulatory power under section 79 of the Act decided to grant compensatory tariff during the period of hardship. For this purpose, a Committee was constituted with the representatives of the petitioner and respondents and Independent Financial Analyst and Eminent Banker and the Committee was assisted by technical, financial and legal experts. The Commission also posted the report of the Committee on its website for the information of the public at large. In response to the report posted on the website of the Commission, the applicant has filed the present application for impleadment.

9. The present petition has arisen out of the dispute between the petitioner and the respondents with regard to tariff in terms of the PPA on account of a subsequent event i.e. Indonesian Regulations. The petitioner not being a party to the PPA cannot be said to be aggrieved by any decision in a dispute arising out of the PPA. Moreover, the petitioner is not a consumer either in the State of Gujarat or in the State of Haryana. The term 'consumer' has been defined in section 2(15) of the Act as under:

"(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;"

As per the above definition of consumer, the applicant needs to be supplied with the electricity for his own use by the distribution licensee located in the State of Gujarat or Haryana in order to be considered as consumer.

10. The petitioner has submitted that the procedure prescribed under Section 64 should be applicable in this case. The provisions of Section 64 of the Act are not applicable in this case. Section 64 of the Act is extracted as under:-

"64. Procedure for tariff order:-1) An application for determination of tariff under Section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public:-

(a) Issue a tariff order accepting the application, with such modifications or such conditions as may be specified in that order;

- (b) Reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application."

11. It is evident from the above that the procedure under Section 64 of the Act is applicable only in case of determination of tariff under Section 62 of the Act. Since, the Commission has held in its order dated 2.4.2013 that the sanctity of the tariff discovered through the competitive bidding shall be maintained and the compensatory tariff is being granted for the period of hardship over and above the tariff agreed through the PPA, the process of deciding the compensatory tariff cannot convert the process of tariff discovery under Section 63 of the Act into a process of tariff determination under Section 62 of the Act. In our view, the process of quantification of the amount of compensatory tariff which is being undertaken by the Commission after receipt of the report of the Committee cannot be said to be determination of tariff under Section 62 of the Act.

13. The petitioner has relied upon the judgment of the Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission Vs. CESC Ltd [(2002) 8 SCC 715] and has submitted that as per the said judgment, the consumers are required to be given opportunity of hearing before determination of tariff. The Hon'ble Supreme Court in the said judgment has ruled that the consumers do not have right for indiscriminate hearing but same has to be regulated in terms of the procedure evolved by the Commission. Under Section 94(3) of the Act, the Commission has been empowered to authorize a person as it deems fit to represent the interest of the consumers in the proceedings

before it. The Commission has specified the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. Regulation 18 of the Conduct of Business Regulations provides as under:

" Recognition of Consumer Associations

18. (1) It shall be open to the Commission to permit any association/forum or other bodies corporate or any group of consumers to participate in any proceedings before the Commission.

(2) It shall be open to the Commission for the sake of timely completion of proceedings, to direct grouping of the associations/forums referred to above, so that they can make collective affidavits.

(3) The Commission may, as and when considered appropriate, notify a procedure for recognition of association, group, forum or bodies corporate as registered consumer association for purposes of representation before the Commission"

In accordance with this provision, the Commission has recognized certain consumer association to represent the interest of the consumers. One of the consumer association, M/s Prayas Energy Group has participated in the proceedings of the Commission. The Act and the Conduct of Business Regulations permit opportunity for participation and hearing the consumer groups and the consumers and do not mandate that the consumers should be impleaded as respondents in the petitions before the Commission. Therefore, the I.A of the applicant for impleadment is rejected.

14. It is also pertinent to refer to para 6 of the applicant's application for impleadment which is extracted as under:

"6. That moreover, this Hon'ble Commission is already hearing a representative body of consumers and hence no prejudice would be caused to the petitioner or respondents if the Applicant is also heard on behalf of consumers. It is submitted that since adjudication of complex legal and factual issues is involved on account of the uniqueness of the present case, having more than one representative of the consumers would be in aid of the adjudicatory process by providing adequate assistance to this Hon'ble Commission"

From the above, it is apparent that the applicant was interested in being given an opportunity of hearing in the matter. Keeping in view the mandate under Section 79(3) of the Act to ensure transparency while exercising its powers and discharging its functions, the Commission has allowed the applicant to participate in the proceedings by permitting access to the pleadings in the petition and for filing its objections. The applicant has accordingly filed its objections on merit and has also participated in the proceedings before the Commission. In our view, the applicant has been given sufficient opportunity of hearing in the matter to represent the views of the consumers, in addition to the representation of the M/s Prayas Energy Group, a recognized consumer group, in the matter. Accordingly, the prayer of the applicant in this I.A for impleadment is disposed of.

I.A.No.35/2013

15. The applicant has filed a similar application for impleadment in Petition No. 159/MP/2012. In the light of our decision in I.A.No. 34/2013 in Petition No.155/MP/2012 above, the said I.A. is disposed of accordingly.

Sd/-
(A.K. Singhal)
Member

Sd/-
(M. Deena Dayalan)
Member

Sd/-
(V. S. Verma)
Member

Sd/-
(Gireesh B. Pradhan)
Chairperson