

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO.103 OF 2020 &
IA NOS. 403 & 402 OF 2020

Dated: 16th July, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

- 1. Shree Cement Limited**
SB-187, Bapu Nagar,
Opp Rajasthan University, JLN Marg,
Jaipur, Rajasthan-302015 Appellant

Versus

- 1. Jodhpur Vidyut Vitaran Nigam Ltd.,**
(Through its Chairman & Managing Director),
New Power House, Industrial Area,
Jodhpur, Rajasthan – 342003
- 2. Rajasthan Electricity Regulatory Commission**
(Through its Secretary)
Vidhyut Viniyamak Bhawan,
Sahakar Marg,
Jaipur, Rajasthan 302001 ... Respondents

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Avedesh Mandloi

Counsel for the Respondent(s) : Mr. S. Vallinayagam for R-1
Mr. R.K. Mehta for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER (ORAL)

1. This matter was taken up for hearing by video conference, physical presence being not possible due to National Lockdown imposed for containing spread of coronavirus (Covid-19).

2. The appellant has brought this appeal, being Appeal No. 103 of 2020, under Section 111 of Electricity Act, 2003 feeling aggrieved by the imposition of Parallel Operation Charges (POCs) on all Captive Power Plant (CPP) consumers in the State of Rajasthan by its Order dated 06.02.2020 on Petition No. 1543/2019 of the first respondent/*Jodhpur Vidyut Vitaran Nigam Ltd.* (Distribution Licensee), the said levy having been imposed in the course of considering the Aggregate Revenue Requirement (ARR) and determination of tariff in respect of the said first respondent for the Financial Year 2019-2020.

3. The notice of the appeal was issued and both the respondents have entered appearance, the second respondent being Rajasthan Electricity Regulatory Commission or the Commission, (hereinafter referred to variously as "*RERC*" or "*the Commission*").

4. It is not in dispute that the appellant is a company existing under the provisions of the Companies Act, 2013. The appellant is engaged in the business of manufacture of cement, generation of power and also has Category II inter-state Trading License for power trading. The appellant having manufacturing premises at Beawar and Rasin Rajasthan is connected with the grid of the transmission licensee, Rajasthan Vidyut Prasaran Nigam Limited at the voltage level of 220 KV, through a LILO arrangement on the 220 KV Beawar-Merta line at RAS in the State of Rajasthan. The appellant is not connected to the grid of distribution licensee, first respondent. The appellant also maintains a contract demand of 13.5 MVA (1 MVA Regular and 12.5 MVA Standby) with the respondent no. 1, which electricity is supplied by the respondent no. 1 using the transmission network of transmission licensee. The appellant has also established, at Beawar and Ras, captive power plants with a total installed capacity of 310 MW. Out of these, major part is used captively for meeting power requirement of the co-located cement plant(s). The appellant also wheels upto 45 MW for captive purposes, to the cement grinding units located at Khushkhera, Suratgarh and Jobner in the State of Rajasthan, by utilizing open access of the transmission licensee. These CPPs occasionally sell surplus power to third parties, either on bilateral basis or through the power exchange.

5. It is not in dispute that Regulation 93 of the Tariff Regulations enables the State Commission, *inter-alia*, to impose parallel operation charges, the said clause reading thus:

“93. Parallel Operation Charges

(1) The connectivity of CPP to Grid or State transmission system shall be governed by the connection conditions stipulated under State Grid Code and Connectivity Regulations of Central Electricity Authority notified in accordance with sub-section (b) of Section 73 of the Act.

(2) The Commission may stipulate from time to time the 'parallel operation charges' to be applicable for parallel operation of the CPP with the grid separately.”

6. It is also not in dispute that when the afore-quoted Regulations were framed by the State Commission, in exercise of its power under Section 61 read with Section 181 of Electricity Act, 2003, no objections were raised by any quarter, the proposal for inclusion of such power having thus been accepted without any exception being taken thereto.

7. The learned counsel for the appellant, however, clarified that there is no challenge before us to the enabling legislative power of the State Commission, his focus primarily being on the exercise of tariff determination by the State Commission in terms of Section 64 of the Electricity Act, 2003 which, to the extent relevant, may be 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.”

xxx

8. It is clear from the above provision of law that, ordinarily speaking, for determination of tariff there would be a proposal by the licensee or the generating company (we are not excluding the power of the Regulatory Commission to *suo-motu* fix the tariff), which proposal has to be duly published so that various stakeholders may make their submissions or raise objections thereto and assist in the exercise this being followed by a time-bound consideration including of suggestions and objections received from public at large, the proposal made in the application by the licensee or the generating company to be either accepted or possibly accepted with modification or if so required even rejected for reasons to be recorded in writing. In this scheme of things, for the purposes of tariff determination under Section 64 of the Electricity

Act, the principles of natural justice are inherent and require to be followed. If this view requires any support, we may quote, with advantage, the decisions of this Tribunal in at least two cases viz. (i) Judgment dated 07.11.2012 in *Vodafone India Limited v. Maharashtra Electricity Regulatory Commission & Ors*, in Appeal No. 234 of 2012 and batch; and (ii) Judgment dated 12.02.2020 in *Bharti Airtel Limited v. Maharashtra Electricity Regulatory Commission & Ors*, in Appeal No. 337 of 2016 and batch.

9. The impugned directive on imposition of parallel operation charges is based on two decisions of this Tribunal, certain portions whereof have been quoted by the State Commission in paras 4.24.2 and 4.24.3, they being (i) judgment dated 12.09.2006 in Appeal No.99 of 2006 and (ii) judgment dated 18.02.2011 in Appeal No. 120 of 2009. We need not extract the relevant portions of the said judgments but only note that they do give an elaborate justification for captive power plants to be subjected to parallel operation charge, mainly on account of various advantages that accrue to them owing to parallel operation which justification by itself, however, will not turn the decision on the present appeal.

10. The relevant portion of the impugned order, to the extent necessary, may, however, be quoted as under:

“4.24 Parallel Operation Charges

4.24.1 Regulation 93 of RERC Tariff Regulation, provides for Determination of parallel operation charges” for parallel operation of the CPP with the grid separately, as per conditions stipulated under State Grid Code and Connectivity Regulations of Central Electricity Authority notified in accordance with sub-section (b) of Section 73 of the Act.

...

4.24.4 Parallel operation charges in other States are as under:

State	POC
Chhattisgarh	Rs. 21/KVA / month
Gujarat	Rs. 26.50/KVA/month
Madhya Pradesh	Rs. 20/KVA/month
Tamil Nadu	Rs. 30,000/month for each MW

4.24.5 In view of aforesaid benefits of Parallel Operation to the Captive Power Plant (CPP), the Commission is introducing the Parallel Operation Charges for all the CPP Consumers in the State. However it is clarified that levy of parallel operation charge is without prejudice to provisions of Regulations related to grid operation, DSM, Forecasting or open access and any injection/drawal shall be dealt in accordance with relevant Regulations. Accordingly, Commission approves the Parallel Operation Charges as under:

Table 102: Parallel Operation Charges

All CPP Consumers	Rs.20/- per KVA per month
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...”

11. There is no dispute over the fact that parallel operation charge has been levied on captive power plants in the State of Rajasthan for the first time by the impugned order. There is also no dispute to the extent that there was no proposal made by the respondent Discom in the application on which the impugned order was passed. This necessarily also confirms the fact that there was no occasion for any stakeholder to raise any objection or give any suggestion or make any comment on the proposal which was possibly added *suo-motu* by the Commission to impose parallel operation charges on captive power plants in the State

of Rajasthan. It is also clear, and the learned counsel for the respondents are unable to refute this as a fact, that there is no scientific study or survey made or undertaken, nor any data called for or gathered, there being nothing before the State Commission in the nature of information as to cost incurred on which there could be legitimate return quantified for the purposes of determining the rate of parallel operation charge to be imposed.

12. Though the impugned order has been challenged by the appellant on various grounds including on the ground that since it is not connected to the system of the distribution licensee, it being dependent only on the transmission licensee's system for surplus power generated by it to be wheeled to the location of its other manufacturing units for own consumption within the State of Rajasthan, it cannot be subjected to any parallel operation charge, there being no element of parallel operation undertaken, the learned counsel for the appellant submitted that he would primarily focus on the primary objection that there has been a serious breach of the principles of natural justice and the legislative scheme of Section 64, as extracted above.

13. Having heard the learned counsel on all sides and having gone through the pleadings and the impugned order, we are of the view that

the appellant must succeed in this appeal on the preliminary objection only. We may say here, at the cost of repetition, that since there was no proposal in the application on which impugned order was passed neither the appellant nor any other similarly placed entity including public or stakeholders at large had any occasion to make any comment, give suggestion or raise any objection or even assist by bringing in such necessary data as may be relevant for appropriate determination of rate of parallel operation charge to be imposed on the captive power plants, if a case for such imposition was duly made out. The impugned order is shorn of all reasons and does not go beyond the justification for the captive power plants to be subjected to such levy on account of the advantages gained by such connectivity. The justification for such levy is important but only the starting point. To impose such charge, there has to be a consideration as to which entities would be liable followed by determination of the rate. Such exercise required something more to be done at the end of the Commission. The scrutiny on the subject by the Commission in the impugned order is clearly deficient. Since we are inclined to allow the appeal on preliminary issue of breach of the procedural requirements of Section 64 and principles of natural justice, we refrain from making any further comment on the other contentions of the appellant or the contention to the contrary of the respondents lest it prejudices either side in the exercise that must follow our decision.

14. Thus, the direction of levying parallel operation charge as contained in para 4.24.5 of the impugned order is liable to be set aside. The matter relating to imposition of such parallel operation charges on the captive power plants is remitted to the State Commission for fresh consideration and determination in accordance with law. Ideally, the Commission should invite a proposal to be moved for such purposes by the concerned stakeholder (here, the distribution licensee) which shall be considered by the Commission after duly following the procedure envisaged under Section 64 of the Electricity Act, 2003. For removal of doubts, we add that the appellant or for that matter other similarly placed stakeholders, upon being duly notified of the proposal upon it being published will have the opportunity to raise objections, give suggestions, make comments or present relevant scientific data or inputs (to which material the Commission, within its own wisdom and discretion may also add by undertaking survey or study or any such other exercise as may be required). Tariff determination to the extent a proposal is mooted for levy of parallel operation charge on captive power plants in the State of Rajasthan will be finalized by the State Commission, as expeditiously as possible, following the law and letter & spirit of the regulations governing the said subject.

15. Ordered accordingly.

16. As observed earlier, the other contentions in this appeal of the appellant on the plea of inapplicability of the levy of parallel operation charge to it, and of course, the contentions to the contrary of the respondents are kept open.

17. The instant appeal, and applications pending, if any, are disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING
ON THIS 16TH DAY OF JULY, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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