

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

Appeal No. 167 of 2010

Dated : October 27, 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

**Counsel for Respondent(s): Mr. Gopal Singh with
Mr. Md. Samiul**

J u d g m e n t

Per Hon'ble Shri Rakesh Nath, Technical Member:

1. This Appeal has been filed by Bihar State Hydroelectric Power Corporation Ltd. against the order dated 28.06.2010 of the State Commission refusing to determine the Annual Revenue Requirement and Tariff of the Appellant for the FY 2010-11 on the ground that the annual accounts for the previous year duly audited by the Statutory Auditors have not been submitted.
2. The Appellant is a State Government Undertaking of the Government of Bihar and is in the business of operation and maintenance and development of hydroelectric power projects. Bihar Electricity Regulatory Commission is the Respondent.
3. The background of the case is given in the following paras.

The Appellant had filed a Petition before the State Commission on 26.04.2010 for approval of ARR and tariff for the FY 2010-11.

4. Earlier the Appellant/Petitioner had filed a Petition before the State Commission on 4.6.2008 for approval of ARR and tariff

determination for the FY 2008-09. After prolonged correspondence between the State Commission and the Appellant/Petitioner and inspite of a number of adjournments, the complete data in support of the tariff proposal as required was not furnished nor the annual accounts duly audited by the Statutory Auditors/CAG were placed before the State Commission. The State Commission, therefore, refused to approve ARR and determine the tariff for the FY 2008-09 vide order dated 13.01.2009.

5. However, the State Commission determined the provisional tariff for the FY 2009-10 vide order dated 22.12.2009 with riders that the Appellant/Petitioner would take immediate steps to get the annual accounts audited by the Statutory Auditors/AG within a time bound programme.
6. The directions issued by the State Commission while approving the provisional tariff for the FY 2009-10 were never carried out by the Appellate/Petitioner when the Tariff Petition for the FY 2010-11 was filed. On being dis-satisfied with the conduct of the Appellant/Petitioner, the State Commission this time refused to determine the tariff for the FY 2010-11 and rejected the petition of the Appellant/Petitioner by the order dated 28.06.2010. Aggrieved

by the order dated 28.06.2010 of the Commission, the Appellant/Petitioner has filed this appeal.

7. The Appellant has argued that the State Commission should have decided the tariff on the basis of audit report of the internal auditors without insisting on the accounts audited by the Statutory Auditors. The statutory audit is to be carried out by Comptroller & Auditor General of India, an agency beyond the control of the Appellant. The Appellant despite writing several letters to CAG could not have the accounts audited in view of the non-cooperation of the Auditors appointed by the CAG.

8. The main issue in this case is whether the State Commission was justified in not determining the tariff for the FY 2010-11 of the Appellant due to failure to submit the annual accounts audited by the Statutory Auditors. This issue has already been decided by this Tribunal in its judgment dated 29.9.2010 in Appeal No. 56 of 2010 filed by the Appellant against the refusal of the State Commission to determine the Tariff/ARR for the FY 2008-09 due to non-submission of the annual accounts duly audited by the Statutory Auditors/CAG. In Appeal No. 56 of 2010, the Appellant had raised very same grounds and pleadings. Learned Counsel for the Appellant and the Respondent admitted that in this appeal their

arguments were the same as given in Appeal No. 56 of 2010. Therefore, we think it fit to decide that this may be decided at the admission stage itself. Accordingly, we propose to decide the matter.

9. We would reproduce the relevant extracts from the judgment dated 29.9.2010 as under:

“ 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.

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.....*
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.

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.”*

10. We find from the impugned order dated 28.06.2010 that the Appellant has not complied with the directions of the State Commission. The dis-satisfaction of the State Commission is clear from the following para in the impugned order:

“ Least said is better about Petitioner turning volteface on direction of the Commission, as there has been total disregard of the directives issued by the Commission within the timeframe determined by the Commission”

11. It has been observed by us in our earlier order that the Appellant is yet to place the audited accounts even for the FY 1995-96 before the Annual General Meeting of the Company as per the provisions of the Companies Act, 1956. Further as on 31.3.2010, the annual accounts from the FY 1996-97 to FY 2008-09 are yet to be approved by the Statutory Auditors. The Appellant, instead of meeting the requirement of statutory audit as per the Companies Act 1956 and as per the Regulations of the State Commission, is time and again insisting on approval of the tariff based on the internal audit.

12. In view of above, we conclude that the State Commission is justified in not approving the ARR/Tariff for the FY 2010-11 due to Appellant/Petitioner not submitting the accounts duly audited by the Statutory Auditors/CAG. Accordingly the Appeal is dismissed as devoid of merits. However, we do not propose to impose any costs.

13. Pronounced in the open court on this 27th day of October, 2010.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

INDEX : REPORTABLE / NON-REPORTABLE.

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