

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 135 OF 2024 & IA No. 437 OF 2024 & IA No. 1285 OF 2024

Dated: 29th November, 2024

Present: Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

Damodar Valley Corporation

.... Appellant(s)

Versus

Jharkhand State Electricity Regulatory Commission & Anr.

.... Respondent(s)

Counsel on record for the Appellant(s)

: Shri Venkatesh
Shryeshth Ramesh Sharma
Ashutosh Kumar Srivastava
Bharath Gangadharan
Abhishek Nangia
Nihal Bhardwaj
Siddharth Nigotia
Shivam Kumar
Kartikay Trivedi
Mohit Gupta
Manu Tiwari
Aashwyn Singh
Punyam Bhutani
Priya Dhankar
Anant Singh
Himangi Kapoor
Vineet Kumar
Aditya Tiwari
Nehal Jain
Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary
Harsh Vardhan
Suhael Buttan for App. 1

Counsel on record for the Respondent(s) : Aditya Kumar Choudhary for Res. 1
Rajiv Yadav for Res. 2

ORDER

Heard Mr. Shri Venkatesh, Learned Counsel for the Appellant, Mr. Aditya Kumar Choudhary, Learned Counsel for the 1st Respondent-Commission, and Mr. Rajiv Yadav, Learned Counsel for the 2nd Respondent.

This Appeal is preferred against the true-up order passed by the Jharkhand State Electricity Regulatory Commission in Case (Tariff) Nos. 07 of 2022 & 08 of 2022 dated 22.01.2024 whereby a true-up order was passed for FY 2020-21, Annual Performance Review for FY 2021-22 and Aggregate Revenue Requirement & Tariff for FY 2022-23. Mr. Rajiv Yadav, Learned Counsel for the 2nd Respondent, would point out, in our view rightly so, that the Respondent-Commission had confined its order only to true-up for FY 2020-21 and had not undertaken the Annual Performance Review for FY 2021-22 and the Aggregate Revenue Requirement for FY 2022-23 as is clear from their observations in Chapter-6 of the said order.

While several contentions were raised, in challenge to the said order, in the present Appeal, Mr. Shri Venkatesh, Learned Counsel for the Appellant, would submit that it would suffice for this Tribunal to examine the Appellant's contention regarding non-tariff income; in case his submissions are found to merit acceptance, and this Tribunal is inclined to remand the Appeal for consideration by the JSERC, it may, as it did in its earlier order, grant the Appellant liberty to file a fresh Appeal challenging the other issues raised in the present Appeal.

By the impugned order, the JSERC had rejected the Appellant's claim that their non-tariff income was only with respect to the delayed payment surcharge of Rs.90.38 crores, and had instead held their non-tariff income, for FY 2020-21, was Rs. 1355.48 crores. In support of its conclusion, the JSERC observed that it had, in its true-up order for FY 2006-07 to FY 2013-14, observed that no adjustment of non-tariff income attributable to the Appellant's generation and transmission had been undertaken in the input cost for FY 2019-24, as well as the period prior thereto; such non-tariff income ultimately impacted the end consumers (i.e. retail consumers of Jharkhand) as cost for the generation and transmission business became the input cost which drives up the retail ARR/ Tariff; since, Section 61 of the Electricity Act, 2003 only mandates reasonable recovery of cost, it was necessary that that the entire non-tariff income, as per the audited accounts, may be adjusted in the retail supply tariff of Jharkhand; as such, the Commission was of the view that, throughout the years, the non-tariff income of the Appellant had been left un-accounted in the retail supply tariff of Jharkhand; and consumer interest, in terms of Section 61, needed to be safeguarded by providing for the legitimate deductions in the ARR as per the regulatory framework in place. The Commission, therefore, treated the entire non-tariff income, as per the Audited Accounts, as the non-tariff income relating to the retail supply business of the Appellant.

As noted hereinabove, the impugned order was passed by the JSERC on 22.01.2024. Less than a month thereafter, this Tribunal had, in its order in Appeal No. 845 of 2023 dated 05.02.2024, considered the tariff order passed by the JSERC in Case No. 9 of 2020 dated 31.10.2023 for FY 2006-07 to FY 2011-12 and had observed as under:

“The 1st Respondent Commission’s jurisdiction to determine the tariff is confined only to the retail supply business of the Appellant within the State of Jharkhand, and not beyond. Consequently, the 1st Respondent Commission lacked jurisdiction to include the non-tariff income of the Appellant arising from its generation, transmission and other businesses as its non-tariff income with respect of its distribution business. The tariff of the Appellant, with respect to its generation and transmission business, is determined by the CERC in terms of its Regulations; determination of the tariff for its distribution business in the State of West Bengal falls within the jurisdiction of WBERC, and in the State of Jharkhand within the jurisdiction of the 1st Respondent Commission. Even if the CERC had not taken into consideration the non-tariff income derived by the Appellant from its generation, transmission and other businesses, in determining its tariff, such an error could only have been corrected by the CERC; and the mere fact that it may have a bearing on the input cost, while determining the tariff of the Appellant’s distribution business in the State of Jharkhand, would not confer jurisdiction on the 1st Respondent to reduce such non-tariff income from the annual revenue requirement of the Appellant for its distribution business in State of Jharkhand.

... ..

We consider it appropriate, in such circumstances, to set aside the impugned order and remand the matter to the 1st Respondent Commission to ascertain the break-up of the non-

tariff income of the Appellant, as reflected in the audited accounts for FY 2006-07 to FY 2011-12, between its generation, transmission, distribution and other businesses; and treat only the non-tariff income, relating to the Appellant's distribution business in the State of Jharkhand, as its nontariff income which is required to be reduced from its ARR for FY 200607 to FY 2011-12, and then pass an order afresh in accordance with law."

This Tribunal had, while setting aside the impugned order and remanding the matter to the Respondent-Commission, directed them to ascertain the break-up of the non-tariff income of the Appellant, as reflected in the audited accounts for FY 2006-07 to FY 2011-12, between its generation, transmission, distribution and other businesses; and treat only the non-tariff income, relating to the Appellant's distribution business in the State of Jharkhand, as its non-tariff income which was required to be reduced from its ARR for FY 2006-07 to FY 2011-12, and then pass an order afresh in accordance with law.

While an order, similar to the one passed by this Tribunal in Appeal No. 845 of 2023 dated 05.02.2024, may be required to be passed in the present Appeal also, it is necessary for us to also take note of the submission of Mr. Rajiv Yadav, Learned Counsel for the 2nd Respondent, that determination of the non-tariff income of the Appellant, in terms of the earlier order passed by this Tribunal, should be directed to be undertaken by the JSERC, along with the issue of interest on temporary financial accommodation as submitted by the Appellant and approved by the Commission. While the Appellant had claimed interest on temporary financial accommodation of Rs.371.66 crores in relation to their claim that

their non-tariff income was Rs.90.38 crores, the Commission had granted them interest on temporary financial accommodation of Rs.735.61 crores on its having increased their non-tariff income from delayed payment surcharge as Rs.1136.56 crores. The submission of Mr. Rajiv Yadav, Learned Counsel is that, in case the Commission were to hold that the non-tariff income of the Appellant should be suitably reduced, it would then be required to consider reduction in the quantum of interest on temporary financial accommodation also, along with the said issue. We find force in this submission urged on behalf of the 2nd Respondent.

In the light of the earlier order passed by this Tribunal in Appeal No. 845 of 2023 dated 05.02.2024, the order under Appeal is set aside and the matter is remanded to the JSERC directing it to determine the Appellant's non-tariff income only to the extent of its retail supply business in the State of Jharkhand, and not beyond. While so determining the Appellant's non-tariff income, the JSERC shall also re-examine the issue of interest on temporary financial accommodation, since the said issue is intrinsically connected with the Appellant's claim with respect to non-tariff income.

While Mr. Shri Venkatesh, Learned Counsel for the Appellant, would contend that other income, as referred to in Table 15 in Para 5.47 of the impugned order, also relates to its non-tariff income from its generation, transmission and other business, we see no reason to undertake such an examination in the present Appeal, since we are, in any event, remanding the matter for the JSERC's consideration afresh and in accordance with law.

Suffice it to make it clear that both the Appellant and the 2nd Respondent are entitled to put-forth their respective submissions on both the

afore-said issues relating to non-tariff income and interest on temporary financial accommodation, and the JSERC shall, in terms of the earlier order passed by us in Appeal No. 845 of 2023 dated 05.02.2024, consider both these issues and pass an order afresh in accordance with law. We have no reason to doubt that the JSERC shall consider the matter at the earliest, and with utmost expedition.

Since the impugned is being set aside, and the matter is being remanded, the Appellant is granted liberty to file an Appeal afresh on the other issues which form part of the present Appeal, and which were not considered by us in the light of the order of remand being passed today.

The impugned order is set aside. The Appeal and the I.As therein stand disposed of.

Seema Gupta
Technical Member (Electricity)

Justice Ramesh Ranganathan
Chairperson

tpd/tc/skj