Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

REVIEW PETITION NO. 23 OF 2015 IN

APPEAL NO. 24 OF 2014

Dated: 14.10.2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of

1. Paschim Gujarat Vij Company Limited,)
Nana Mava Main Road,)
Laxminagar, Rajkot-360004.)

2. Dakshin Gujarat Vij Company Limited,)
Nana Varachha Road,)
Kapodara, Surat-395006.)

3. Uttar Gujarat Vij Company Limited,)
UGVCL Regd. & Corporate Office,)
Visnagar Road, Mehsana-384001.)

4. Gujarat Urja Vikas Nigam Limited,)
Sardar Patel, Vidyut Bhavan Race Course,)
Vadodara-390007.)

5. Gujarat Energy Transmission Corporation Limited)
Sardar Patel, Vidyut Bhavan Race Course,)
Vadodara-390007,)
Gujarat)

.....Appellants (s) / Petitioners

Versus

1. Gujarat Electricity Regulatory Commission)
6th Floor, GIFT ONE, Road 5C, Zone 5,)
GIFT City, Gandhinagar-382355.)

2. Surajbari Windfarm Development Pvt. Ltd.)
403-404, Venue Atlantis,)
Prahladnagar, Anandnagar Road,)
Ahmedabad – 380015)

3. Hi-Bond Cement (India) Pvt. Ltd.)
Gautam Chambers, Gondal Road,)
Rajkot - 360002.)

....Respondent(s)

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Akshi Seem
Mr. Isham Mukharji

Counsel for the Respondent(s) : Ms. Suparna Srivastava,
Ms. Anushka Arora for R-1

Mr. Sanjay Sen, Sr. Adv.,
Mr. C.K. Rai,
Mr. Paramhans for R.2

O R D E R

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. For convenience in this judgment, we shall refer to the Review Petitioners as the Appellants. Appellants No. 1 to 3 are distribution licensees. They have been vested with the functions of distribution and retail supply of electricity within their specified area of supply in the State of Gujarat. They are unbundled entities of the erstwhile Gujarat Electricity Board. Appellant No.4 is a trading

licensee in the State of Gujarat and undertakes the functions of bulk purchase of electricity from the generators and other sources of bulk supply of electricity to the distribution licensees in the State of Gujarat. Appellant No.5 is Gujarat Electricity Transmission Corporation Limited. It is engaged in the business of transmission of electricity in the State of Gujarat. It is also the State Transmission Utility and performs the functions of State Load Despatch Centre for the State of Gujarat.

2. Respondent no.1 is the Gujarat State Electricity Commission (the State Commission). Respondent no.2 is the generating company who has established wind based generating units in the State of Gujarat. Respondent No. 2 has chosen to sell the electricity generated from the generating units to third parties, namely, Respondent no.3 in the State of Gujarat by availing open access under the Open Access Regulations framed by the State Commission. Respondent no.2 has also registered the wind based generating stations under the Renewable Energy Certificate scheme, notified under the Central Electricity Regulatory Commission (Terms and conditions for Recognition and Issuance of Renewable

Energy Certificates for Renewable Energy Generation) Regulations, 2010 (hereinafter called the Renewable Energy Certificate Regulations) of the Central Commission.

3. The Appellants entered into a wheeling and transmission agreement with Respondent No.2 for wheeling of electricity to the premises of the consumers. Respondents Nos. 2 & 3 filed petition being Petition No.1360 of 2013 before the State Commission praying inter alia that clauses 5 to 8 of the Wheeling Agreement entered by Respondent no.2 with the appellants which are in violation inter alia of State Commission's Order No. 1 of 2010 dated 31.01.2010 and Order No.2 of 2012 dated 8.8.2012 and relevant regulations be declared void. There was a prayer for refund of the consequential amount. It was contended by Respondent no.2 that they are entitled to all the promotional and concessional measures as are applicable to renewable generators and at the same time they are also entitled to the Renewable Energy Certificates under the Renewable Energy Certificate Regulations of the Central Commission. The State Commission by Order dated 7.11.2013 disposed of the said petition. The State Commission inter alia held

that Respondent No.2 was entitled to take the benefit of promotional, wheeling and transmission charges and also Renewable Energy Certificates (RECs). The State Commission further held that Respondent No.2 should be paid 85 % of the Average Pooled Project Cost (APPC) for the excess energy injected by Respondent No.2 but not consumed by its consumers. The said order was challenged by the Appellant in Appeal No. 24 of 2014. By its judgment and order dated 24.2.2015, this Tribunal disposed of the said appeal. The Appellants have preferred the present review petition restricting it to the issue of the direction to pay to Respondent no.2, 85% of the APPC for the inadvertent electricity injected by Respondent No.2 but not consumed by its consumers.

4. This Tribunal confirmed the State Commission's view that Respondent No.2 should be paid 85% of the APPC for the excess energy injected by Respondent No.2 but not consumed by its customers with the following observations:-

> *"We are in agreement with the above findings of the State Commission. We find that there was a specific provision in the order no.1 or 2010 of the State Commission regarding sale of surplus power of wind energy generator supplying power to the third parties through open access. According to this order only excess generation (over and above that set off*

against consumption in each time block) will be treated as sale to the distribution licensee concerned at 85% of the tariff rate determined by the Commission for such renewable sources. The Appellant was required to keep provisions in the wheeling agreement as per the applicable generic order of the State Commission for wind energy generators. Keeping conditions which are contrary to the generic order of the State Commission passed under Section 61 (h) and 86 (1)(e) of the Act by the distribution licensee was violation of the order of the State Commission. Ruling in the PTC case will not be applicable to the present case. In the present case the State Commission passed generic order under Section 61(h) and 86(1)(c) of the Electricity Act, 2003 deciding preferential tariff and other terms and conditions in their wheeling agreements with RE generators. If the Appellants using their dominating position have kept different terms and conditions without the approval of the State Commission, the State Commission can strike down those conditions to align them with the generic order which governs the field for preferential tariff and other terms and conditions for RE generators decided under Section 61 (h) and 86 (1) (e) of the Electricity Act, 2003 for promotion of renewable sources of energy. There is no regulation governing the field for concessional benefits available to RE generators under Section 61(h) and 86(1)(e) of the Act. Therefore, the generic order will be applicable for such concessional benefits and is required to be followed by the distribution licensees".

5. It is submitted by the Appellants that this Tribunal has directed the payment of tariff as per the direction of the State Commission in Order No.1 of 2010 dated 30.01.2010 holding that there was a specific provision in the said order regarding sale of purchase power of wind energy generators supplying power to third

parties through open access at 85% of APPC of the REC generators. The appellants contention is that the impugned order needs to be reviewed to the extent it directs that Respondent No.2 should be paid 85% of the APPC as there is an error apparent on the face of the record.

6. Admittedly, the Appellants had challenged the impugned order in the Supreme Court. By order dated 3.8.2015, the Supreme Court dismissed the appeal keeping the review petition filed in this Tribunal alive. The order of the Supreme Court is as under:-

> *"Heard learned Senior Counsel appearing for the Parties.*
> *We have also gone through the concurrent findings of fact and law recorded by both the Central Electricity Regulatory Commission as also the Appellate Tribunal for Electricity.*
> *Hence, we do not find any substantial question of law to be decided in these appeals.*
> *These appeals are dismissed accordingly.*
> *Mr. L.N. Rao, learned Senior Counsel appearing for the appellants, submits that the review petition with regard to the fourth issue recorded by the Appellate Tribunal is pending consideration of the said Tribunal.*
> *It goes without saying that this order will not in any way, debar the appellants to pursue the review petition".*

7. We shall now go to the rival submissions. We have heard learned counsel for the parties at some length. Written submissions have been filed which we have carefully perused. Mr. Ganesan, learned counsel appearing for the Appellants contended that Respondent no.2 is governed by the Order No.1 of 2010 dated 30.01.2010, passed by the State Commission. In the said order, there was no provision for payment of consideration for inadvertent excess injection of electricity by wind generators supplying electricity to third parties and taking the benefit of RECs. There was only a stipulation that for renewable energy projects which are entitled to preferential benefits [Non-REC i.g. not taking RECs] such projects would be paid 85% of the preferential tariff for the inadvertent excess injection. It is submitted that the State Commission has also come to the conclusion that payment of 85% of the preferential tariff does not apply to Respondent no.2, who is taking the benefit of the RECs and that the subsequent order dated 8.8.2012 does not apply to Respondent no.2 who has commissioned the project prior to the applicability of the said order. It is submitted that the agreement entered into between the Appellant and Respondent No.2 specifically provides that no payment shall be

made for excess injection by Respondent no.2. Despite this and despite there being no provision in Order No.1 of 2010 dated 30.1.2010 the State Commission has held that 85% of the APPC is to be paid to Respondent no.2. Counsel for the Respondents on the other hand submitted that no case for review is made out and that the Appellants are in the garb of review application seeking to open the settled issues.

8. We have perused the impugned order in light of the rival submissions. We fail to understand what is the error apparent on the face of record in this case for this Tribunal to undertake the review of the impugned order. The Review Petition is totally misconceived. We have carefully perused Order No.1 of 2010 dated 30.1.2010. In that order, State Commission has referred to its draft order and has stated that third party sales under open access transactions carried out using generation from renewable sources shall be exempted from levy of cross-subsidy under Section 42(2) of the Electricity Act, however, no banking facility shall be provided for supply from renewable sources under open access for third party sales. It is further observed that in third party sale, whenever the

transmission and distribution network is utilized, the person concerned has to pay open access charges as decided in paragraph 6.1 of the order. It is further stated that any excess generation (over and above that set off against consumption in each time block) will be treated as sale to the distribution licensees concerned at 85% of the tariff rate determined by the Commission for such renewable sources. So observations made by this Tribunal in the impugned order that in Order No. 1 of 2010 dated 30.1.2010, there was a specific provision regarding sale of surplus power of wind energy generator supplying power to third parties through open access and that only excess generation (over and above that set off against consumption in each time block) will be treated as sale to the distribution licensee concerned at 85% of the tariff rate determined by the Commission for such renewable sources is correct. We may reproduce paragraph 6.7 of the Order No.1 of 2010 dated 30.1.2010 which will clarify the issue.

> *"6.7 Third Party Sales and Cross Subsidy Surcharge*
>
> *The Commission had, in the draft order, proposed that Third Party Sales under Open access transactions carried out using generation from renewable sources shall be exempted from levy of cross-subsidy surcharge under section 42(2) of the Electricity Act, 2003. However, no banking*

facility shall be provided for supply from renewable sources under open access for third party sales. In third party sale, whenever the transmission and distribution network is utilized, the person concerned has to pay open access charges as decided in para 6.1 of this order. Further, ABT compatible interface metering system capable of energy accounting for each block of 15 minutes time shall be provided at both supplier as well as drawal point. Since energy generation from renewable sources such as Wind and mini hydro are exempted from the requirements of scheduling, for those WEGs who opt for third party sale, the generation from such sources in each 15-minute time block shall be set off against the open access consumer's consumption in the same 15-minute time block. Any excess generation (over and above that set off against consumption in each time block) will be treated as sale to the distribution licensee concerned at 85% of the tariff rate determined by the Commission for such renewable sources. Any excess consumption by a third party (consumer) up to contract demand will be treated as sale by the distribution licensee concerned at retail tariff rates applicable to that consumer category as determined by the Commission from time to time.

Objections have been raised regarding exemption from cross-subsidy charges on open access transactions from Wind Energy Projects. However, keeping in view the climate change issues, promotion of such renewable sources of energy has to be encouraged. As such, the Commission do not propose any amendment to the above, and decide to retain the provision of exemption from cross-subsidy charges in respect of open access use of wind energy".

9. The grievance of the Appellant is that in Order No.1 of 2010 dated 30.01.2010 there was no provision for payment of consideration of inadvertent excess injection of electricity by wind

generators supplying electricity to third parties and taking the benefit of RECs. There was only a stipulation that renewable energy projects which are entitled to preferential benefits and not taking the benefit of RECs would be paid 85% of the preferential tariff for the inadvertent excess injection.

10. In this connection it is rightly pointed out by learned counsel for the respondents that although Order No.1 of 2010 dated 30.01.2010 deals with the issue of sale of excess energy, it does not specifically deal with REC projects, because REC mechanism was introduced by the Central Commission on 14.01.2010 vide Notification No. L-1/12/2010-CERC. The said REC scheme/ mechanism was brought into force in the State of Gujarat by Gujarat Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations 2010 dated 17.04.2010. Therefore, the observations made by the State Commission in paragraph 6.7 of Order dated 30.01.2010 that any excess generation (over and above that set off against consumption in each time block) will be treated as sale to distribution licensee concerned at 85% of the tariff rate determined for such renewable sources has

to be examined keeping in mind the then existing regime. It is fully in accordance with the then existing regime.

11. In this connection, it would be advantageous to read the relevant extracts from Order No. 2/2012 dated 8.8.2012 which pertains to the subsequent control period. The specific findings in relation to REC project made in this Order obviously take into account REC Regulations notified by the Central Commission on 17.4.2010. The relevant extracts could be quoted:-

> *"Commission's Decision*
>
> *Quantum of surplus power available after consuming under captive use or third-party sale is uncertain and this could lead to uncertainty in planning by utilities for utilization of the same. Further, linking the tariff for purchase of surplus power with the fulfilment of RPO by the utilities will lead to implementation issues, and hence, the Commission decides not to link the same with RPO.*
>
> *The Commission clarifies that in case of wind power projects availing OA for captive use / third party sale but not opting for REC, the surplus power after set off will be purchased by the distribution licensee at the rate of 85% of the tariff determined by the Commission in this order.*
>
> *In case of wind power projects availing OA for captive use / third-party sale and opting for REC, the surplus power after set off will be purchased by the distribution licensee at Average Power Procurement Cost (APPC) applicable for that year".*

12. We must also refer to order dated 7.11.2013 in relation to REC projects commissioned during the control period of Order No.1 of 2010 dated 30.1.2010. Following clarification made in that order is relevant.

> *"8.25 Now we deal with the issue as to whether the surplus energy available after the set-off under third party sale by the WTGs in 15 minute block is eligible for any tariff / price for it or not. The Petitioner referred the clause 6.7 of the Order No.1 of 2010 dated 30.01.2010 and clause 4.7 of the Order No.2 of 2012 dated 08.08.2012 and submitted that the energy available after set-off at consumer place for it he is entitled for the amount as decided by the Commission. Moreover, the clause in the wheeling agreement incorporated by the respondents under duress and also against the Order of the Commission. Hence the same is void ab-initio. While the Respondents disputed the same on a ground that the (i) Petitioner is not eligible for the same as it is availing after set off, be considered as inadvertent flow of energy, applicable in the case of open access consumer availing power supply from conventional sources for which no payment be done by the distribution licensee and (ii) in the wheeling agreement the petitioner agreed that he will not claim any amount for the surplus energy available after the set-off. It is therefore necessary to refer the provisions of the order and clauses of the wheeling and transmission agreement.*
>
> *8.26 In this regard first we refer clause 6.7 of the Order No.1 of 2010 of 2010 dated 30.01.2010 as stated in para 8.17 above. The above para states that for any surplus power the WTGs owners are entitled to receive payment @ 85% of the tariff rate determined by the Commission for such renewable sources. A simple reading of this clause would imply that for the surplus power, the distribution licensee must pay at a rate equal to*

85% of the preferential tariff determined by the Commission under the relevant order. However, no mention was made regarding projects availing the REC benefit. Any RE generators selling power to the distribution licensee at the preferential tariff rates is not entitled for REC. On the other hand, for availing REC benefit, the maximum rate payable by the distribution licensee is the Average Pooled purchase Cost (APPC). It is, therefore, logical that for the purpose of RE generator registered under REC scheme, the relevant tariff rate is the APPC and not the preferential tariff".

13. We agree with the counsel for the Respondents that reading of Order No.1 of 2010 dated 30.1.2010 passed by the State Commission clearly indicates that while holding that for surplus power, the distribution licensee must pay at a rate equal to 85% of tariff determined by the State Commission, no mention was made regarding project availing of REC benefits. The State Commission in order dated 7.11.2013 clarified that any RE generators selling power to the distribution licensee at the preferential tariff are not entitled for REC. The State Commission further clarified that for availing of the REC benefit, the maximum rate payable by the distribution licensee is the APPC and, therefore, it is logical that for the purpose of RE generators, registered under REC scheme, the relevant tariff rate is the APPC and not the preferential tariff. This Tribunal in the impugned order confirmed this view. We do not find

any error apparent on the face of record for us to interfere with the impugned order. The Appellant is merely trying to reagitate the issue which has been finally decided. The review petition is therefore dismissed.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√**REPORTABLE/~~NON-REPORTABALE~~**