

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

Appeal No. 63 of 2011

Dated: 5th January, 2012

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

In the matter of:

M/s Indowind Energy Limited
'Kothari Buildings', 4th Floor
114, M.G. Road, Nungambakkam
Chennai – 600 034

.... Appellant (s)

Versus

**1) Karnataka Electricity Regulatory
Commission**
6th & 7th Floor, Mahalaxmi Chambers
No.9/2, M.G. Road
Bangalore – 560 001

..... Respondent (s)

**2) Karnataka Power Transmission Corporation
Limited**
Kaveri Bhavan, K.G. Road
Bangalore – 560 009

3) State Load Dispatch Centre – Karnataka
Ananda Rao Circle
Bangalore – 560 009

- 4) **Hubli Electricity Supply Company Limited**
Navanagar, P.B. Road
HUBLI – 580 029

- 5) **Bangalore Electricity Supply Company Limited**
K.R. Circle
Bangalore – 560 001

- 6) **Chamundeshwari Electricity Supply Corporation**
No.927, LJ Avenue Commercial Complex
New Kantharaja Urs Road, Saraswathipuram
Mysore – 570 009

Counsel for the Appellant (s) : Mr. G. Joshi
Mr. Sanjeev Kr. Saxena

Counsel for the Respondent (s) : Mr. Raghavendra S. Srivatsa
Mr. Anand Verma
Mr. Venkat Subramanium T.R.

Appeal 100 of 2011

In the matter of:

RPG Cables Limited
Hootagalli Industrial Area
Belavadi Post
Mysore 571 186

.... Appellant (s)

Versus

- 1) Karnataka Electricity Regulatory Commission** Respondent (s)
6th & 7th Floor, Mahalaxmi Chambers
No.9/2, M.G. Road
Bangalore – 560 001
- 2) Karnataka Power Transmission Corporation Limited**
Kaveri Bhavan, K.G. Road
Bangalore – 560 009
- 3) State Load Dispatch Centre – Karnataka**
Ananda Rao Circle
Bangalore – 560 009
- 4) Gulbarga Electricity Supply Company Limited Station Road**
Gulbarga – 585 101
- 5) Bangalore Electricity Supply Company Limited**
K.R. Circle
Bangalore – 560 001

Counsel for the Appellant (s) : Mr. Shridhar Prabhu
Mr. D.S. Bhat
Mr. G. Joshi
Mr. Sanjeev Kr. Saxena

Counsel for the Respondent (s) : Mr. S. Sriranga S.
Mr. Venkat Subramaniam T.R.
Mr. Raghavendra S. Srivatsa
Mr. Anand Verma

JUDGEMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 63 of 2011 has been filed by M/s Indowind Energy Ltd. against the order dated 03.03.2011 in petition no.47 of 2009 passed by the Karnataka Electricity Regulatory Commission ("State Commission") in terms of its earlier order dated 06.01.2011 passed in the similar matter of M/s RPG Cables Limited Vs KPTCL and others. Appeal no. 100 of 2011 has been filed by M/s RPG Cables Limited against the State Commission's order dated 06.01.2011.

2. The appellants are wind energy generators availing wheeling and banking facilities from the distribution licensees for supplying electrical energy to the consumers in the licensed area of the distribution licensees. The first respondent is the State Commission.

The second respondent is KPTCL, the State transmission licensee. The third respondent is the State Load Dispatch Centre. The 4th to 6th respondents are the distribution licensees in the State of Karnataka.

3. The brief facts of the cases are described below:

Appeal No.63 of 2011

- 3.1 An agreement was entered into between the appellant and the State Government on 28.03.1998 under which the State Government permitted the appellant to set up a 5 MW wind energy project. According to the agreement, the appellant had to pay wheeling and banking charges, in kind, @ 2% of energy generated at the wind energy project for which a separate agreement

had to be signed between the appellant and the erstwhile Karnataka Electricity Board.

3.2 Accordingly, an agreement dated 25.04.1998 was signed between the State Electricity Board and the appellant under which the Electricity Board agreed for banking and wheeling of the energy generated by the appellant to the industrial consumers after the appellant finalized the energy selling agreement.

3.3 On 02.09.2000 KPTCL, the respondent no.2 herein enhanced the wheeling charges from 2% to 20%. The appellant aggrieved by the increase in wheeling charges filed a writ petition with the High Court of Karnataka. This writ petition was disposed of by the High Court by an order dated 01.09.2006 by which the appellant and the respondent no.2 were given an option to forward

their proposal-cum-agreement for approval of the State Commission.

3.4 In the meantime, the State Commission by its order dated 09.06.2005 determined the transmission charges, wheeling charges and cross subsidy charges under open access at 66 KV and above. Further, the State Commission by its order dated 20.04.2006 determined the cross subsidy charges at 66 KV and above and at 33 KV level.

3.5 On 25.04.2007, the State Commission refixed the transmission charges, wheeling charges and cross subsidy surcharges for 33 KV and 11 KV levels and retained the charge for 66 KV level and above.

3.6 The appellant approached the State Commission praying for certain relief in petition no.13 of 2008. The State Commission vide its order dated 26.03.2009 disposed of the petition with the direction to the appellant and the respondents to discuss and arrive at an agreement and approach the State Commission for further orders within a period of six months.

3.7 However, no agreement could be reached between the appellant and the respondent. In the meantime, the respondent - distribution licensee started collecting the cross subsidy surcharge in terms of the various orders of the State Commission relating to charges applicable to open access consumers.

3.8 Thereafter, the respondents stopped wheeling and banking facility to the appellant w.e.f. 01.10.2009.

Consequently, the appellant on 03.12.2009 filed a petition with the State Commission numbered as OP 47 of 2009.

3.9 In another similar case filed before the State Commission in OP no.50 of 2009 by M/s RPG Cables, the appellant in appeal no.100 of 2011 herein, the State Commission by its order dated 06.01.2011 disallowed the claims of refund of cross subsidy charges collected by the respondent distribution licensees and charges for excess energy drawn at twice the rate at HT(2)(a) tariff.

3.10 Following the order dated 06.01.2011 passed in OP no.50 of 2009, the State Commission by order dated 03.03.2011 disposed of the petition filed by the appellant in OP no.47 of 2009, observing that the facts of both the cases were similar.

Appeal No.100 of 2011

- 3.11 On 26.02.1997 an agreement was executed between the appellant and the Government of Karnataka permitting the appellant to set up a wind energy project.
- 3.12 On 15.05.1997 an agreement for wheeling and banking was signed by the appellant with the erstwhile Karnataka Electricity Board.
- 3.13 The first respondent vide its communication dated 02.09.2000 increased the wheeling charges from 2% to 20%. Aggrieved by this increase, the appellant and other similarly placed project developers filed a writ petition no.6697 of 2002 with the High Court of

Karnataka. The High Court disposed of the writ petition by its order dated 16.10.2006.

3.14 Thereafter, the appellant approached the State Commission in OP 06 of 2008 praying for certain reliefs. The State Commission disposed of the petition in OP 06 of 2008 giving directions to the appellant and the respondents to discuss and arrive at a wheeling and banking agreement and approach the State Commission for further orders within a period of six months.

3.15 On 01.10.2009, the respondent - distribution licensees stopped the wheeling and banking facility to the appellant.

3.16 The appellant approached the State Commission by way of petition in OP no.50 of 2009 with request to issue

directions to the respondent distribution licensees to resume wheeling and banking arrangement and to refund the cross subsidy surcharge recovered by them, etc. Consequently, the State Commission passed the impugned order dated 06.01.2011 disallowing the claims of the appellant. Aggrieved by impugned order dated 06.01.2011, the appellant has filed this appeal.

3.17 As the issues and the order of the State Commission in both the appeals are the same, a common judgment is being rendered.

4. The appellants have submitted the following:-

4.1 The wheeling and banking transaction in the present case pertains to the period when the Electricity (Supply) Act, 1948 was in vogue. Hence, without permission

under section 43-A of the Supply Act, it was not permissible for the appellant to supply electricity to the consumers.

4.2 The permission granted by the State government under section 43-A of the 1948 Act continued even after the Karnataka Electricity Reforms Act, 1999 was enacted.

4.3 On 08.06.2005 the Ministry of Power, Government of India issued Electricity (Removal of Difficulties) (Second) order 2005 under section 42(2) of the Electricity Act, 2003 according to which the cross subsidy surcharge is not applicable to the wheeling transactions of the appellant.

4.4 The State Commission in the impugned order has also held that the open access charges could be collected

from open access customer, which includes a generator. Therefore, once it is settled that a generator is an open access customer, then if such surcharge has been collected illegally then it should be refunded.

4.5 The collection of electricity charges at two times the HT 2 (a) tariff from the appellant is also illegal. For the parties who had signed the new agreements in the new formats, the respondents were charging tariff at one and half times HT 2 (a) rates.

4.6 The State Commission has not considered the relief sought by the appellant to designate the second respondent as the single window nodal agency due to which the appellant is facing difficulties.

4.7 The appellant is liable for the refund of the excess wheeling charges in terms of the High Court order but the State Commission has decided not to pass any order in this regard.

5. On the above issues the Ld. Counsel for the appellants argued assailing the impugned order. On the other hand, the Ld. Counsel for the respondents 2 to 5 extended arguments supporting the findings of the State Commission.

6. On considering the rival contentions of the parties, the following issues would arise for our consideration:

(i) Whether the State Commission was wrong to hold that excess energy drawn has been correctly billed

at two times the HT 2-A tariff for the period prior to entering into the new wheeling agreement between the appellant and the distribution licensees?

- (ii) Whether the State Commission was right in not passing specific orders with regard to enforcement of the directions issued by the High Court of Karnataka regarding refund of excess wheeling charges?
- (iii) Whether the appellant is exempted from levy of the cross subsidy surcharge as contemplated under section 42 (2) of the 2003 Act?

We do not want to go into the issue of designation of the second respondent as the single window nodal agency as raised by the appellants, as the State Commission in

the impugned order has not gone into this issue and no provision of law has been placed by the appellants before us to press their claim.

7. The first issue is regarding excess energy charges.

7.1 According to the Ld. Counsel for the appellants, the excess energy should have been charged by the respondent - distribution licensees at one and a half times instead of twice the HT 2-A tariff.

7.2 According to Ld. Counsel for the respondents 2 to 6, the standard format of wheeling agreement could not be applied for the period prior to the date of entering into new wheeling and banking agreement.

7.3 Let us first examine the findings of the State Commission regarding collection of excess energy charges. The relevant paragraphs of the impugned order are reproduced below:

“13 It is contended by the petitioner’s counsel that collection of electricity charges at two times the HT(2)(a) tariff for the excess energy drawn by the petitioner is contrary to the orders of this Commission issued in the standard Format of Banking and Wheeling Agreement and in particular Clause 6.2(4) of the Standard Format of Wheeling Agreement. This has been refuted by the respondents.

14. In our considered view, the claim of the petitioner that he is not required to pay twice the rate of HT(2)(a) tariff for excess energy drawn is not correct as the Clause 5.3 of the Agreement comes into operation only from the date the petitioner executes the banking and wheeling agreement and not till then. Admittedly, the petitioner has signed the banking and wheeling agreement on 22.3.2010 and therefore any excess energy drawn prior to 22.3.2010 has to be billed not as per the agreement but at the rates applicable to any other general consumer. Accordingly this issue is answered against the petitioner.”

7.4 We agree with the findings of the State Commission that for the period prior to signing of the agreement the excess energy charges have to be levied as applicable to any other consumer.

8. The second issue is regarding enforcement of the directions of the High Court of Karnataka.

8.1 In this connection the State Commission in the impugned order has recorded as under:

“9. In our considered view, the orders of the Hon’ble High Court have to be respected and implemented promptly. No orders need be passed by this Commission on this.”

8.2 We do not find any reason to interfere with the order of the State Commission in this regard. The appellant is at liberty to seek the remedy for the alleged non-

implementation of the directions of the High Court at the appropriate forum. This issue is decided accordingly.

9. The third issue is regarding the corss-subsidy surcharge.

9.1 According to the Ld. Counsel for the appellants, the approval for wheeling and banking was granted by the State government prior to the enactment of the 2003 Act. Thus, according to order dated 08.06.2005 of the Ministry of Power for removal of difficulties issued in terms of section 42(2) of the 2003 Act, the cross subsidy surcharge decided by the State Commission would not be applicable to the wheeling transactions of the appellants.

9.2 According to Ld. Counsel for the respondents, the agreement entered into between the appellant and the State government dated 26.02.1997 permitted the appellant to enter into wheeling and banking agreement with the erstwhile Karnataka State Electricity Board. The agreement dated 15.05.1997 entered into between the appellant and the Electricity Board pursuant to the above agreement, makes it clear that the laws enacted from time to time and rules, etc, would apply to the agreement. Thus, new provision of law increasing a fee or surcharge would apply to the agreement in question. Further, the tenure of the agreement was 10 years from 15.05.1997. Thus, the wheeling agreement executed pursuant to the agreement entered into with the State government had expired in the year 2007. The period in question involved in the present appeal is December, 2008 to October, 2009.

9.3 For sake of brevity we are discussing below the facts relating to Appeal No.100 of 2011.

9.4 Let us first examine the agreement dated 26.02.1997 entered into between the State government and the appellant. The relevant clauses of the agreement are reproduced below:

“1 The ownership of the unit would vest with the Company for a period of 30 years from the date of commencement of power generation. This lease period will however, be subject to obtaining and renewal of approval of lease of land, in case the project land is forest land. This lease shall be subsequently renewable for a further period of 20 years at the option of the Company. The Company undertakes that it shall not hypothecate the sites and the structures, installations, machinery, building etc., thereon for any period longer than the period for which the sites are leased to it by the Government/Karnataka Renewable Energy Development Limited or 30 years plus the period of construction which ever is lower.”

- “3. *The Company shall pay statutory levies applicable to Karnataka Electricity Board/Karnataka Renewable Energy Development Limited from time to time.*”
- “4. *The Company shall pay wheeling and banking charges to Karnataka Electricity Board at 2% of generation at Wind Energy Project. A separate agreement will be entered into between the Company and the Karnataka Electricity Board, in respect of wheeling and banking, sale of energy, minimum demand, power cut etc. The banking arrangements will be on water year basis with one month grace period.*”

Thus, the agreement provided for payment of applicable statutory levies by the appellant to the Electricity Board from time to time and signing of a separate agreement with the Electricity Board for wheeling and banking, etc. The above agreement envisaged lease of land in which the wind generating plant of the appellant is located, for a period of 30 years.

9.5 In pursuance to the above, an agreement was signed between the appellant and the erstwhile Electricity Board, on 15.05.1997 for wheeling and banking of the energy generated at the appellant's wind energy plant to its exclusive consumers and partly exclusive consumers or for its own use. This agreement was valid for a period of 10 years from the date of execution, i.e. upto 14.05.2007, and was extendable by mutual consent. Article 12.1 of the agreement stipulated that the provisions of law as amended from time to time would apply.

9.6 Let us examine now the order dated 08.06.2005 of the Ministry of Power, Government of India issued in exercise of its power conferred by Section 183 of the 2003 Act. The relevant clause of the order is reproduced below:

“No surcharge would be required to be paid, in terms of sub-section (2) of section 42 of the Act on the electricity being sold by the generating companies with consent of the competent government under clause (c) of sub-section (1) of section 43A of the Electricity Act, 1948 (now repealed by the Act), and on the electricity being supplied by the distribution licensee on the authorization by the State Government under section 27 of the Indian Electricity Act, 1910 (now repealed by the Act), till the current validity of such consent or authorizations.”

9.7 We find that the State Government under the agreement dated 26.02.1997 had allowed lease of land for a period of 30 years and signing of a separate wheeling and banking agreement with the State Electricity Board. The agreement did not stipulate any consent of the State Government relating to specific consumers to whom the supply was to be made by the appellant or to the agreements for such supply. The agreement only envisaged an agreement for wheeling and banking to be

entered into by the appellant with the erstwhile State Electricity Board. The agreement also provided for payment of applicable levies by the appellant to the Electricity Board. Accordingly, the appellant and the Electricity Board entered into an agreement dated 15.05.1997 for wheeling and banking for a period of 10 years. This agreement has since expired in May, 2007.

9.8 In view of the above we do not find any reasons to accept the argument of the Ld. Counsel for the appellants that the wheeling and banking transaction would be exempted from cross subsidy surcharge and other levies decided by the State Commission for open access customers from time to time. Even if the plea of the appellants is to be accepted for the sake of argument in light of the order dated 08.06.2005 of the

Ministry of Power, the wheeling and banking agreement entered into between the appellant and the erstwhile Electricity Board pursuant to the agreement with the State Government, the said agreement had since expired in May, 2007 and the dispute is relating to the cross subsidy surcharge levied by the distribution licensees after the expiry of the agreement. .

9.9 We also reproduce below the clause relating to surcharge for open access customer in the State Commission's Open Access Regulations, 2006.

“The open access customer shall be liable to pay the surcharge as determined by the State Commission from time to time. The Commission would determine the surcharge as per the formula indicated below,”

The definition of the open access customers also includes a generating company who has availed of open access. Thus, the appellants are open access customers

according to the Regulations and are liable to pay surcharge levied by the State Commission.

9.10 In view of the above, we do not find any substance in the argument of the appellants that the cross subsidy surcharge would not be applicable in the wheeling transactions of the appellant for supply of power to the consumers under open access. In our opinion the cross subsidy surcharge and other open the access charges as determined by the State Commission would also be applicable to the open access transaction of the appellant.

9.11 Accordingly this issue is decided against the appellants.

10. In view of the above we find both the appeals to be devoid of any merit and dismiss the same without any cost.

11. Pronounced in open court on 5th day of January, 2012.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE/NON-REPORTABLE

mk