

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

**Appeal No. 35 of 2011**

**Dated: 10<sup>th</sup> February, 2012**

**Present: HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON**  
**HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,**

**In The Matter Of**

**Konark Power Projects Ltd,  
Village Ballapura, Bugudanahalli  
Distric Tumkur  
Karnataka**

**... Appellant**

**Versus**

**1. Bangalore Electric Supply Company Ltd.  
K R Circle, Bangalore  
Karnataka**

**2. Karnataka Electricity Regulatory Commission  
Mahalaxmi Chambers  
Bangalore, Karnataka.**

**...Respondent(s)**

Counsel for Appellant(s): Mr. A Mariarputham Sr. Advocate  
Mr. T N Rao  
Mr. Yusuf Khan

Counsel for Respondent(s): Mr. S S Nagananda, Sr. Advocate  
Mr. Venkat Subramaniam  
Mr Raghavendra Srivastva for R-1

## **JUDGMENT**

### **PER HON'BLE MR. V J TALWAR TECHNICAL MEMBER**

1. Konark Power Project Limited, a Biomass based Generating Company is the Appellant here in.
2. The Bangalore Electric Supply Company Limited, a Distribution Licensee in the State of Karnataka is the first Respondent and Karnataka Electricity Regulatory Commission (the State Commission) is the second Respondent.
3. Aggrieved by the Order dated 16.9.2010 passed by the State Commission dismissing the Appellant's petition for revision of tariff, the Appellant, Konark Power Project Limited has filed this Appeal.
4. The brief facts of the case are as follows:
  - I. The Appellant Konark Power Project Ltd. (Generating Company) has established a 6 MW biomass based power generating plant at Ballapura village of Tumkur District in the State of Karnataka. On 4.4.2002 it entered into a Power Purchase Agreement (PPA) with Karnataka Power Transmission Corporation Limited (KPTCL) with tariff fixed as per prevalent MNES Guidelines.
  - II. The PPA dated 4.4.2002 was terminated by KPTCL in 2003 unilaterally. KPTCL then asked the all the Biomass based Generating Companies in the state of Karnataka to enter into fresh PPAs at reduced tariff.
  - III. In the mean time all PPAs entered into between the Generation Companies and KPTCL, a State Transmission Utility, were assigned to respective Distribution Licensees.

- IV. Since the project of the Appellant was already commissioned on 5.5.2005 and the Appellant had made huge investments, it was left with no choice but to enter into revised PPA with lower tariff. Thus PPA dated 4.4.2002 was revised with lower tariff and a supplemental PPA was entered into on 27.2.2006 for enhanced Capacity of 7.5 MW.
- V. Due to unforeseen increase in the price of Biomass fuel, the Appellant was not in a position to produce power and supply to the Licensee (R-1) with the lower tariff fixed. The Appellant, therefore, decided to stop the power generation by declaring lay off to employees and by suspension of all contracts and agreements. The generating plant of the Appellant remained closed from July 2009 to March 2010
- VI. Government of Karnataka vide GO No. EN 65 EEB dated. 6.4.2010 issued directions under Section 11 of 2003 Act to all the Biomass based generators in the state to supply Electricity to the grid at a 'Realistic Tariff' of Rs 5 per unit. Accordingly, the Appellant restarted generation and fed power in to the Grid during the period between April 2010 and June 2010 i.e. during imposition of State Government's Order under Section 11 of the 2003 Act. The generating plant was again shut down in July 2010.
- VII. In the mean time, the Appellant filed a petition before the State Commission seeking amendment to PPA dated 4.4.2002 and Supplemental PPA dated 27.2.2006 and prayed for fixing tariff for electricity at generated by its plant Rs 5.60 per unit as the cost of Biomass fuel had increased enormously and it had become

practically impossible for the Biomass Power Plants to generate power with the existing tariff.

- VIII. The State Commission vide its Impugned Order dated 16.9.2010 dismissed the petition on the ground that adequate material had not been placed before it by the Appellant to justify its claim for revision of tariff.
- IX. Aggrieved by the said order, the Appellant has filed this Appeal No. 35 of 2011 with the prayer to set aside the impugned Order dated 16.9.2010 and to suitably amend the PPA dated 4.4.2002 read along with the Supplemental PPA dated 27.2.2006 by fixing tariff at Rs 5.60 per unit.
- X. During the pendency of this Appeal the Appellant filed an Interlocutory Application bearing no. 82 of 2011 on 8.4.2011 with a following alternative prayers.
- i. To grant open access to sell power to third party during the pendency of the Appeal OR
  - ii. To direct the Respondent Distribution licensee to purchase power at least at a rate of Rs 4.27 being paid to other power companies OR
  - iii. To direct the Respondent to permit the Appellant to Claim Renewable Energy Certificates (REC) component at existing tariff.
- XI. The said IA was listed and heard together along with the main Appeal and the same is being disposed off.

5. The Learned Senior Counsel for the Appellant has urged the following contentions:
  - I. The original PPA dated 4.4.2002 had a provision for tariff based on MNRE recommendations and which was quite remunerative. The Respondent – 1 Distribution Licensee unilaterally terminated the valid PPA and coerced the Appellant Generating Company to enter in to a revised PPA at much less tariff. Since the Appellant Generating Company had invested huge amount of money in the project it had no option but to accept the revised PPA.
  - II. The rate negotiated by the Appellant with the Respondent -1 worked out to Rs.3.348 for 6 MW and Rs.3.07 for the remaining 1.5 MW for the year 2010-11. This rate has become unworkable and uneconomical in view of the steep increase in the cost of production of electricity. The cost of biomass has gone up abnormally because of the scarcity of the material and competition among the biomass power plants.
  - III. The other similarly situated biomass generators in the State are paid at a higher tariff by Distribution Licensees. The table submitted before the Tribunal reveals that the higher rates at which the other Biomass based Generating Companies are being paid for the electricity being supplied to Distribution Licensees in the State, whereas the Appellant is being given the lesser tariff.
  - IV. One of the Generators viz., M/s R K Power Gen did not agree with the tariff but approached the Commission against illegal unilateral termination of original PPA by the Respondent. In that case the Commission held that the termination was illegal and restored the PPA. This was confirmed by the Hon'ble Supreme Court as well.

Accordingly, the said Generating Company is getting much higher tariff as per original PPA i.e. determined as per MNRE guidelines. The Appellant on the other hand accepted the revised PPA and thus being penalised by getting only lower Tariff.

- V. Maharashtra Electricity Regulatory Commission has increased the tariff of Biomass units considerably taking into account the increase in the cost of fuel, limited availability of biomass and the high cost incurred in procuring the same.
  - VI. Under the provisions of Electricity Act, 2003, the Commission has ample power to modify and increase the tariff.
  - VII. Two judgments of the Hon'ble Supreme Court, one in the case of the Transmission Corporation of Andhra Pradesh Vs. Sai Renewable Power Private Limited (Civil Appeal No.2976/2006) and the second in the case of M/s PTC India Limited Vs. CERC (2010 4 SCC 603) would support the plea of the Appellant.
6. Per contra, the Learned Senior Counsel for the Respondent Distribution Licensee opposed the contentions of the Appellant by submitting that the Appeal has no merits and the same is liable to be dismissed. In elaboration of this point, he has submitted the following reply:
- I. Once there is a PPA which is valid and subsisting, there is no right for either of the parties to seek modification of the same including the rates unless mutually agreed upon and approved by the Commission.
  - II. The submissions made in support of the increase in tariff cannot be considered, as the PPA doesn't contemplate any increase in tariff for any reason whatsoever.

- III. Similar plants getting higher rates cannot be a ground for the Appellant to seek increase in the rates for his plant, as in each case the sale and purchase of electricity and the rate would depend upon the terms of the PPA and one PPA cannot be compared with another.
- IV. The contention on behalf of the Appellant that the tariff is liable to be increased on account of higher prices being paid to other suppliers is completely misconceived. In the case of R.K. Power Gen, their PPA of 18.10.2001 was terminated on 5.7.2003 (in a similar manner the Appellant's PPA was also terminated) but the said Company questioned the termination and the termination was held to be bad upto the Supreme Court and therefore, they would be governed by the terms of their PPA which provides for higher tariff. As such the other power producers are not comparable to the Appellant
- V. The State Commission, on 27.9.2004, has notified Regulations for Power Procurement from Renewable Sources of Energy by Distribution Licensee (2004 Regulations). Clause 5.1 of these Regulations provide that the State Commission shall determine the tariff for purchase of electricity from renewable sources by the Respondent. It also provided that the PPAs approved by the Commission including the PPAs deemed to have been approved under Section 27(2) of the Karnataka Electricity Reforms Act 1999, prior to notification of these Regulations shall continue to apply for such period as mentioned in those PPAs. Clause 5.2 of these regulations provided that the State Commission shall determine the tariff separately for each category of renewable source of energy.

VI. The Power to modify the tariff is vested with the State Commission. This has to be exercised only in the manner contemplated by the Regulations. The Regulations do not contemplate any modification of the price payable to an individual Generating Company. It can only be done for a class of generators. It is not the role of the State Commission to keep on modifying the tariff agreed by the parties in a PPA.

7. In the light of the rival contentions urged by the Learned Counsel for the parties, the only question would arise for our consideration as to Whether the Commission has the power to modify the tariff contained in a subsisting PPA.

8. Before we proceed further, let us examine the findings of the State Commission on this issue which are reproduced below:

*“Under Section 86 of the Electricity Act, 2003 read with sections 62 & 64, the Commission has the power to determine the tariff of the generating companies including NCE projects who supply electricity to the Distribution Licensees. In exercise of its powers under these provisions, the Commission has passed two orders, one during 2005 and another on 11.12.2009, and has also approved the PPAs. Once this Commission has powers to fix and approve the tariff, in our considered view, the same includes the power to modify the same in case there are circumstances warranting such modification.”*

9. The main objection raised by the learned Senior Counsel for the 1<sup>st</sup> Respondent before us is that under the 2004 Regulations framed by the State Commission, the State Commission would fix the normative tariff for energy generated from different types of Renewable Sources of energy and sold to distribution Company. Accordingly, the State Commission, vide its Order dated 18.1.2005, fixed generic tariff for Biomass based plants. The tariff so fixed can be modified generally and

not in individual cases. The Ld. Counsel for the Respondent -1 further submitted that if the argument of the Appellant that the power to modify tariff also enables the State Commission to take individual grievances and facts in to account to modify normative tariff is accepted, it would lead to utter chaos as the State Commission will have to decide thousands of applications by power consumers in regard to the supply of tariff and innumerable generators in regard to the tariff payable to the generating companies and this would render the normative tariff a dead letter apart from the whole exercise being impractical.

10. This above argument of the 1<sup>st</sup> Respondent Distribution Licensee is not tenable for the following reasons:

I. The State Commission has framed the KERC (Power Procurement from Renewable Sources by Distribution Licensee and Renewable Energy Certificate Framework) Regulations, 2011. These Regulations has repealed the 2004 Regulations. Regulation 9 of the new Regulations deals with determination of tariff for electricity from renewable sources of energy. Regulation 9(1) is relevant:

*“9. Determination of Tariff for electricity from Renewable sources of energy:-*

*(1) The Commission may determine at any time the tariff for purchase of electricity from Renewable sources of energy by Distribution Licensees either suo motu or **on an application either by generator or by Distribution Licensee;***

*Provided that the tariff approved by the Commission including the PPAs deemed to have been approved under sub-Section (2) of Section 27 of the Karnataka Electricity Reforms Act, 1999, prior to the coming into force of these regulations shall continue to apply for such period as mentioned in those PPAs.*

...

Bare reading of clause 9.1 of these Regulations would reveal that the State Commission has power to determine at any time tariff for purchase of energy from renewable sources of energy by Distribution Licensee either suo motu or on an application by generator or by Distribution Licensee.

- II. It is incorrect to state that in case the plea of the Appellant is accepted and its tariff is fixed individually, then the State Commission would have to determine tariff for each consumer. The State Commission is required to determine the tariff under Section 62 of the 2003 Act. Section 62 of the 2003 Act reads as under:

**62. Determination of tariff.**—(1) *The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for—*

*(a) supply of electricity by a generating company to a distribution licensee:*

...

*(b) transmission of electricity;*

*(c) wheeling of electricity;*

*(d) retail sale of electricity:*

...

*(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.*

*(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical*

*position of any area, the nature of supply and the purpose for which the supply is required.*

...

*(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.*

...

Thus as per Section 62(1)(a) of the Act, State Commission is required to determine tariff for a **generating station**. State Commission is also required to determine tariff for retail supply of electricity in terms of Section 62(1)(d). Supply has been defined in Section 2(70) as sale of electricity. Thus a consumer cannot approach State Commission to determine its tariff.

- III. In this context it would be appropriate to refer to a case came before this Tribunal in Appeal No. 50 of 2008. In this case the Himachal Pradesh Electricity Regulatory Commission had determined generic tariff based on normative parameters for all small hydro power stations in its Order dated 12.8.2007. This Order of Himachal Pradesh Electricity Regulatory Commission was challenged before this Tribunal in Appeal No. 50 of 2008 in the matter of Techman Vs Himachal Pradesh Electricity Regulatory Commission. The relevant portion of the judgment of this Tribunal in this Appeal is reproduced below:

*“The promoters of hydro-power generation in the State of Himachal Pradesh as well as the Himachal Pradesh State Electricity Board shall be entitled to apply to the Commission for fixing project specific capital cost for any project in case the normative capital cost is not suitable to either of them. Similarly, if Capacity Utilisation Factor (CUF) of 45% for a specific project is contested by either party, it may approach the Commission with the site specific CUF.”*

11. Thus from the above judgment of this Tribunal in Appeal No. 50 of 2011 and Section 62 of the 2003 Act, it would be clear that the State Commission has powers to determine the tariff for any generator supplying electricity to distribution licensee even if the concerned the State Commission had determined the generic tariff for certain class of generators.
12. It is the undisputed fact that the generating plant of the Appellant remained shut down from July 2009 to March 2010 due to high procurement price of Biomass and plant becoming unviable to operate at the prevailing tariff. The State of Karnataka was reeling under acute power shortage and in order to mitigate the shortage, the Government of Karnataka vide its Order dated 6.4.2010 approved purchase of power at Rs 5.00/kWh and directed all Biomass based generators to feed power into the grid at this rate. Relevant portion of Government of Karnataka GO No. EN 29 EEB 2010 dated 6.4.2010 read as under:

*“1 Karnataka State has been reeling under acute power shortage for some time. The state has faced severe power shortage in the year 2008-09 as there was huge gap between demand –supply in the State. To protect the interest of the consumers, Government decided to purchase power from various sources available including from Biomass Projects units in 2008-09 after negotiations held with Biomass Projects firms for working out a cost, and the realistic rate at Rs 5.02 per unit was arrived. Accordingly, the Government Order read at (1) above (GO No EN 65 2008 dated 27.01.2009}, it was decided to purchase power round the clock from Biomass Projects Units, which were supplying power under Power Purchase Agreement was subject to approval of KERC and all State ESCOMs to submit a Memorandum on the circumstances warranting higher price and need of State to procure more power before KERC*

*2 The State has faced a severe power deficit situation even in 2009-10 and adverse energy deficit is likely to continue till June 2010. In order to overcome the severe demand supply gap for the*

*coming summer months, action has been taken to purchase power from ... Biomass and other sources, keeping in view the public interest.*

*3 The proposal to purchase power for the short term in view of the critical shortage in the state and the need to augment short term capacity from co-generation Sugar Factories was placed before the State Cabinet on 29.3.2010. In the said Cabinet Meeting, purchasing power from Biomass projects Units has also been discussed, keeping in view the severe power shortage in summer months of 2010.*

*4 Based on the Above, Government has reviewed to purchase power from Biomass Projects Units for summer months for April & May 2010 to tide over the power crisis at rate of Rs 5/- per kWh as fixed last year, subject to approval of KERC including cost calculations as under:*

<i>Considering Biomass per MT in Rs</i>	<i>Cost per KWh in Rs</i>
<i>1280</i>	<i>3.66</i>
<i>1500</i>	<i>3.95</i>
<i>1800</i>	<i>4.34</i>
<i>2000</i>	<i>4.60</i>
<i>2200</i>	<i>4.86</i>
<i>2400</i>	<i>4.99</i>

*Accordingly this order*

**GOVERNMENT ORDER NO. EN 29 EEB 2010**

**Bangalore Dated 6<sup>th</sup> April 2010**

*1 Under the circumstances explained above, Government are pleased to accord approval to purchase power as short term arrangement for the period from April and 2010 from Biomass projects units at Rs 5.00 (Rs Five only) per kWh*

***2 Payment of this rate to Biomass projects units, which are supplying the above power under Power Purchase Agreement is subject to approval by the Karnataka Electricity regulatory Commission, with reference to the applications filed by Electricity Supply Companies (ESCOMs) in this behalf***

**3 For biomass Projects Units without Power Purchase Agreement, the above rate is provisional and is subject to approval of KERC.**

*4 All ESCOMs shall submit a Memorandum on the circumstance and need of the State to procure power from Biomass Projects Units before the KERC immediately.*

*5 This order shall come into immediate effect and the above rates will be in force till 31<sup>st</sup> May 2010 or until further orders whichever is earlier.*

13. Perusal of this Government Order would clearly bring out three important aspects related to the present case. These are:

- a) The above referred Order of Government of Karnataka relates to Biomass based generators having concluded PPA. This fact would indicate that quite a few Biomass based generators were shut down at relevant time which made Government of Karnataka to issue such an Order.
- b) The price of Rs 5.00 per unit was realistic in the year 2008-09 and the same had been adopted by the State Commission vide its Order dated 11.12.2009.
- b) The tariff for concluded PPA can be modified by the State Commission, if situation so warrants. One of such situation could be to revive closed generating station(s) in larger consumer interest.

14. Again Section 61 of the 2003 Act mandates the State Commission to frame Tariff Regulations and while doing so the Commission shall be guided by the following:

- (i) *The Principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (ii) *The generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (iii) *The factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (iv) *Safeguarding of consumer's interest and at the same time, recovery of the cost of electricity in a reasonable manner;"*

15. The above guidelines would indicate that the Commission has to maintain a balance of interests so that the generators also may not suffer unnecessarily. It is not disputed that unit of the Appellant was shut down due to its becoming unviable at the existing tariff. The State as well as the Country has been facing power shortage and this fact has been accepted by the Government of Karnataka in its GO mentioned above. Under such circumstances it should be our endeavour to produce energy to the extent possible. It would not be desirable to keep any generating unit out of service for want of 'just' tariff more so when 70% of investment is funded by Public Sector Banks or Financial Institutions as loan. In the context of prevailing power scenario in the country, it is well said that "No power is expensive power". In other words power at any cost is acceptable as the Cost of unserved energy (loss due load shedding) could be very high.

16. In view of the above findings that the rate of Rs 5.00/kWh was realistic in the year 2008-09 and Commission has powers to modify the tariff for concluded PPA and the tariff under Section 62 should be so designed that the generator should not suffer unnecessarily, the question is answered in favour of the Appellant.

17. It would be pertinent to note that the State Commission in the impugned Order while holding that it has powers to modify the tariff had also made the following observations before dismissing the petition:

*“4 We have gone through the material placed before us and the reasons urged in support of the revision by the petitioner. The main reason pleaded by the petitioner in support of its prayer for increase in tariff is that the rate of fuel has gone up abnormally and the tariff paid under the PPA is too low affecting the very viability of the plant. The petitioner in support of its contention has produced certain invoices of purchase of biomass. In our view, mere production of some invoices will not be enough to justify the increase in rates. **The petitioner has not produced details of its actual costs supported by material evidence to substantiate the effect of the present tariff on the viability of the unit.** Therefore, we hold that the petitioner has not made out a case for revision of the tariff contained in the PPA. Accordingly this petition is liable to be rejected and hence dismissed.”*

18. Summary of our findings:
- a) The State Commission as indicated in the impugned order has power to modify the tariff for concluded PPA in larger public interest.
  - b) The guiding principles laid down in Section 61 of the 2003 Act would indicate that the Commission has to maintain a balance so that the generators also may not suffer unnecessarily. In the context of prevailing power situation in the country, it would not be desirable to keep any generating unit out of service for want of ‘just’ tariff.
19. In view of the observations of the State Commission, that enough material had not been placed before it by the Appellant to justify its claim, we remand back the matter to the State Commission with the direction to the Appellant to place all the material before the State

Commission to enable it to decide the issue in the proper perspective. Accordingly, the impugned Order is set aside and we direct the State Commission to refix the tariff for the Appellant keeping in view our observations made above.

20. The Appeal is allowed. However, there is no order as to costs.

**(V J Talwar )**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 10<sup>th</sup> February, 2012

REPORTABLE/NOT REPORTABLE