

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.142 of 2012

Dated:18th February. 2013

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON**

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

M/s. Nandi Sahakari Sakkare Karkhane Niyamita

**A Co-Operative Society registered under the provisions of
Karnataka Co-Operative Societies Act, 1959**

Krishna Nagar, Hosur Post

Bijapur District – 587 117

Karnataka State

...Appellant

Versus

- 1. Karnataka Electricity Regulatory Commission
6th & 7th Floor, Mahalaxmi Chambers,
No.9/2, M.G. Road
BANGALORE-560 001.**
- 2. Hubli Electricity Supply Company Limited
Navanagar, P.B. Road
Hubli – 580 025.**
- 3. State Load Dispatch Centre, Karnataka
Ananda Rao Circle, Race Course Road
Bangalore-560 009.**

.....Respondent(s)

Counsel for the Appellant(s) : Mr. Sridhar Prabhu
Mr. D.S. Bhat
Mr. Anantha Narayana H.G.
Mr. D. Manjunatha Rao
Mr. Lokesh R.Yadav
Mr. Vikas Mehta

Counsel for the Respondent(s): Mr. Anand K. Ganesan.

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. M/s Nandi Sahakari Sakkare Karkhane Niyamita is the Appellant herein.
2. The Appellant has filed the present Appeal challenging the impugned order dated 24.5.2012 passed by the Karnataka State Commission disposing of the petition filed by the Appellant claiming the compensatory tariff for the electricity supplied by the Appellant to the Karnataka Power Transmission Corporation Limited, the Respondent, for the period from 03.5.2010 to 13.01.2011.
3. The short facts of the case are as under:-
 - i) The Appellant is a Co-operative Society and it owns, operates and maintains a power plant of 18.14 MW

capacity and exportable capacity of 12.06 MW in District Bijapur in Karnataka State.

- ii) The Appellant had executed PPA on 9.5.2005 with the Karnataka Power Transmission Corporation Limited (KPTCL), the predecessor in interest of the Hubli Electricity Supply Company Limited, the 2nd Respondent herein, for off-take of energy generated from its Project.
- iii) From 10th June, 2005, the 2nd Respondent started making payment for the energy delivered from the Appellant's Project. Initially, payment was somewhat consistent. Later, the dues were not paid in time and as such there was a delay and dues started accumulating.
- iv) Hence, the Appellant issued default notice on 25.3.2010 to the 2nd Respondent for the payment default under the PPA. Despite that, the default was not remedied. Hence, the Appellant terminated the PPA by issuing a termination notice dated 03.5.2010. However, the above termination was disputed by the 2nd Respondent.
- v) Hence, the Appellant approached the State Commission seeking for declaratory orders with regard

to the termination of the PPA. Even during the pendency of the said petition before the State Commission, the Appellant supplied electricity to the 2nd Respondent. While the matter was taken up for final disposal, the 2nd Respondent contended that a valid PPA was existing and as such, it was binding on the parties.

- vi) The State Commission, ultimately, after hearing both the parties, passed order dated 13.1.2011 allowing the petition filed by the Appellant giving a declaration that the PPA was validly terminated by the Appellant by the termination letter dated 03.5.2010.
- vii) Even, thereafter, the Appellant supplied the power to the 2nd Respondent as the Appellant was not granted “No Objection Certificate” by the State Load Dispatch Centre, (3rd Respondent) for the sale of power under Inter State Open Access. However, later the 3rd Respondent granted the NOC for Open Access with effect from 12.3.2011. From then onwards, the Appellant has been supplying power through Open Access to third party.
- viii) Thereupon, the Appellant filed a petition before the State Commission for giving a direction to the 2nd Respondent to make the payment along with interest

for the energy delivered by the petitioner from the date of the execution of the PPA up to grant of Open Access on 12.3.2011.

- ix) The State Commission, after hearing the arguments of both the parties passed order dated 24.5.2012 holding that the Appellant is entitled to be paid for the electricity supplied from 3.5.2010, the date of termination letter to 13.1.2011, the date of the declaratory order by the State Commission at the rate of PPA and not at the rate claimed by the Appellant.
 - x) Aggrieved by the rate fixed by the State Commission for this period, the Appellant has filed this Appeal.
4. According to the Appellant, the rate fixed by the State Commission for the period from 3.5.2010, namely the date of issuance of the termination notice to 13.1.2011, namely the order holding that termination was valid should be not at the rate of PPA but at the rate of Rs.5.50 per unit for the said period considering the fact that the tariff determined by the State Commission for other generators under section 11(2) of the Electricity Act, 2003 would apply to the Appellant as well and hence even for the period from 13.1.2011 to date of grant of Open Access i.e. 12.3.2011, the same rate of Rs.5.50 per unit should be allowed.

5. On the other hand, the learned Counsel for the Respondent in justification of the impugned order contended that the State Commission has given valid reasons in the impugned order for coming to conclusion that the claim of the Appellant at the rate of Rs.5.50 per unit as per the earlier tariff in pursuance of the Government's order under section 11(2) of the Electricity Act,2003 would not apply to the present case since the Appellant would be entitled to the PPA rate only for the period from 3.5.2010 to 13.1.2011.
6. In the light of the rival contentions urged by the parties, the questions that would arise for our consideration are:
 - (a) **“Whether the price that the Appellant is entitled to for the period from 3.5.2010 to 13.1.2011 for the electricity supplied by the Appellant and consumed by the Respondent is at the PPA rate?**
 - (b) **What rate should be applicable for the period 14.1.2011 to 12.3.2011 i.e. from the date of the impugned order up to grant of Open Access?**
7. Let us consider these issues in detail. According to the Appellant, since PPA was terminated by the Appellant with effect from 03.5.2010 which has been subsequently confirmed by the State Commission, the Appellant would be entitled to be paid not at the rate of PPA but at the rate of

Rs.5.50 per unit as determined by the State Government through its order for procurement of power under Section 11 of the Act.

8. This contention can not be accepted in view of the fact that the Appellant is not entitled to claim the electricity charges at the rate other than what is fixed in the PPA as the very validity of the termination of the PPA was pending before the State Commission at the instance of the Appellant during the said period. The Appellant can not seek to claim any other rate other than the PPA rate. Though the Appellant terminated the PPA on 3.5.2010, the said termination was upheld by the State Commission only by the order dated 13.01.2011. Therefore, that date alone has to be governed for fixing the rate for the said period.
9. Admittedly, the Appellant has not produced any material in support of its claim for higher rate, except stating that the rate determined by the State Commission in its earlier order i.e. Rs.5.50 per unit would apply to its case.
10. As pointed out by the learned Counsel for the Respondent and as mentioned in the impugned order, the rates determined in the cases covered by the order of the State Government under section 11(2) of the Electricity Act, 2003 were in different circumstances and it has no application to the present case. The circumstances under which the supply

of electricity was made by the Appellant in the present case is not by invocation of the section 11 of the Electricity Act,2003 by the Government of Karnataka but by virtue of PPA entered into between the Appellant and Respondent.

11. As indicated above, when the Appellant claimed increased rate that is other than the PPA rate, it is for the Appellant to furnish further material to establish the actual cost and expenditure incurred by the Appellant and the actual loss caused to the Appellant. Admittedly, the Appellant did not produce any evidence whatsoever before the State Commission so as to claim for higher rate other than the PPA rate.
12. The Appellant having failed to show any justification to substantiate its claim for a higher rate, there can not be any question of granting higher tariff to the Appellant. In this context, it is appropriate to refer to the findings of the State Commission. The relevant observation is as follows:-

“12. In our considered view, the claim of the Petitioner for payment of the charges from the date of termination, till the date of Commission upholding the termination, viz., 13.1.2011, has to be governed by the rates fixed in the PPA, though it was terminated on 3.5.2010, as the said rate was the rate agreed between the parties in the PPA and was also fixed considering the cost of generation. The Petitioner has not produced any material in support of its claim for higher rate, except stating that the rate

determined by this Commission in its order under Section 11 determines the rate at Rs.5.50 per unit, duly considering all the factors. According to us, the rates determined in the cases covered by Section 11 Order of the Government were in different circumstances. Under the Government Order, Generators had no option except to sell the power to the State Grid only and to generate to the maximum capacity. Whereas, during the period in which Section 11 Order was not there, the Petitioner had the option of either to generate or not to generate electricity, or to generate fully or partly. Further, the Petitioner itself was not sure of the validity of its action of termination of the PPA and therefore sought for a declaration from the Commission on the validity of its action. It cannot now say that the termination was valid with effect from 3.5.2010 and therefore the PPA rates cannot be applied to the supply made. If termination date has to be taken for payment, the Petitioner can not claim any amount, as there was no right with the Petitioner to pump electricity and demand charges. In our view, till the declaratory Order was passed by this Commission on the validity of termination of the PPA, the Petitioner has continued to supply electricity to the Respondents and its, therefore, to be paid of the rate fixed in the PPA. Considering the facts placed before us, we are of the view that the Petitioner has to be paid at the rate of PPA till the termination of the PPA was upheld”

13. This observation would make it clear that the rate as applicable under Section 11(2) of the Act, would not apply to the present case. In this case, till the declaratory order was

passed by the State Commission i.e. on 13.01.2011 on the validity of the termination of the PPA, the Appellant has continued to supply electricity to the 2nd Respondent. Therefore, the Appellant would be entitled to the rate fixed in the PPA for that period and not any other rate.

14. The above analysis and decision made by the State Commission on this issue would not suffer from any infirmity. Therefore, there is no merit in the ground raised in the Appeal.
15. One other claim of the Appellant is for the interest for the tariff claim for the said period. The above claim for the interest is also misconceived. Interest is payable only when the amounts are due and payable to the Appellant. The amount can be said to be due and payable only after the invoices are raised by the Appellant on the 2nd Respondent when the 2nd Respondent had failed to pay the amount within the stipulated time. In this case, no amount can be said to be due as no invoices have been raised by the Appellant on the 2nd Respondent. Therefore, there is no merit in this contention also.
16. As regards the rate for the period 14.1.2011 to 12.3.2011, involving the second issue, the Appellant has contended that there was delay in communication of the order dated 13.1.2011 to them and consequently, the Appellant applied

for No Objection Certificate for Open Access only on 14.2.2011. According to the Appellant, the Open Access was granted by the SLDC only on 12.3.2011, instead of within 3 days, the date of application, that too after filing a representation on 1.3.2011. We find that the material now placed by the Appellant before us regarding delay in communication of the order dated 13.1.2011 was not referred to before the State Commission in their petition. The Petition filed before the State Commission only states that soon after the order dated 13.1.2011, they applied for the grant of 'No Objection Certificate' on 14.2.2011 but the same was granted after delay on 12.3.2011. For the period subsequent to 13.1.2011, the State Commission has held that the Appellant has to take recourse to the remedy provided under the Central Commission's Open Access Regulations, 2008.

17. We feel that if there was a delay in granting Open Access to the Appellant, they are entitled to be compensated by the Respondent No.2 for the power injected by them during the period. We, therefore, grant liberty to the Appellant to approach the Commission regarding the payment for energy supplied to the Respondent No.2 from 14.1.2011 to 12.3.2011 and the Commission shall consider the same and pass orders according to law.

18. TO SUM UP

- i) The finding of the State Commission that the Appellant is entitled to the tariff for the period from 3.5.2010 to 13.1.2011 for the electricity supplied by the Appellant and consumed by the 2nd Respondent, which shall be only at the rate of the PPA and not at the rate claimed by the Appellant is perfectly justified.**
- ii) The Appellant can not claim interest for the amount due payable for this period in this case since invoices were not raised.**
- iii) For the energy supplied to the Respondent No.2 from 14.1.2011 to 12.3.2011, we feel that the Appellant is required to be compensated by the Respondent No.2 if there was any delay in granting Open Access to the Appellant. The Appellant has been given the liberty to approach the State Commission and the State Commission shall consider the same and decide the matter according to law.**

19. In view of our above findings, there is no merit in this Appeal. Hence, the Appeal is dismissed with the liberty to the Appellant to approach the State Commission for

compensation for the energy supplied from 14.1.2011 to 12.3.2011. However, there is no order as to costs.

20. Pronounced in the open court on the day 18th of February, 2013.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:18th February, 2013

√REPORTABLE/~~NON-REPORTABLE~~