

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 414 OF 2022

Dated : 13.08. 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

SOLAR ENERGY CORPORATION OF INDIA LIMITED

Through its Managing Director

6th Floor, Plate-B, NBCC Office Block Tower-2

East Kidwai Nagar

New Delhi – 110023

Email: corporate@seci.co.in

... Appellant

Versus

1. KERALA STATE ELECTRICITY REGULATORY COMMISSION

Through its secretary,

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Thiruvananthapuram 695010

Email: secretarykserc@gmail.com

2. KERALA STATE ELECTRICITY BOARD LIMITED

Through its Managing director

Vydyuthi Bhavanam, Pattom

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... Respondents

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:

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P.V. Dinesh
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Ashwini Kumar Singh for Res. 2

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. In this Appeal, the Appellant has assailed the order dated 15th November, 2021 passed by 1st Respondent – Kerala State Electricity Regulatory Commission (in short “Commission”) in OP No. 31 of 2020 filed by 2nd Respondent – Kerala State Electricity Board Limited (in short “KSEB”) seeking approval of the Commission in respect of (a) procurement of 300 MW Solar Power under ISTS Tranche-IX Solar Scheme initiated by the Appellant, Solar Energy Corporation India Limited (in short “SECI”) and (b) initialled Power Sale Agreement dated 20th September, 2021 between SECI and KSEB for procurement of such power.

2. While approving such procurement of power by KSEB as well as the PSA dated 20th September, 2021 executed between KSEB and SECI, the

Commission vide impugned order directed certain modifications in the PSA.

One of the modification is with regards to the definition of term “Commission”

under Article 1.1 of the PSA which, after modification, reads as :-

“Appropriate Commission :- Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission – Kerala State Electricity Regulatory Commission as the case may be”.

3. The Commission also made following clarifications in the impugned order :-

*“Hence, the Commission hereby clarify that **if the CERC adopts the tariff of the ‘ReNew Power’ at Rs 2.38/unit as per the auction results, the tariff payable by the ‘Buying Entity’ KSEB Ltd to the ‘Buyer’ SECI shall be limited to Rs 2.44/unit including trading margin.”***

4. The Appellant is aggrieved by the above noted clarification issued by the Commission as well as the modification directed to be carried out in Article 1.1 of the PSA, as noted hereinabove.

5. First, we discuss about the correctness and legality of the above referred clarification issued by the Commission in the impugned order.

6. It is vehemently argued on behalf of the Appellant that the Commission being a State Commission, had no jurisdiction to deal with the tariff or the trading margin of the inter-state trading licensee SECI, there being a composite scheme of generation and sale of electricity in more than one State.

7. On behalf of the 1st Respondent-Commission, it is contended that the Commission neither modified nor altered the tariff applicable to KSEB and has only recorded the submissions of SECI in this regard, to which the Appellant-SECI should not have any grievance.

8. In order to appreciate the submissions made on behalf of other parties, we find it necessary to reproduce the relevant portion of the impugned order herein below:-

“SECI also clarified during the hearing that, it had offered 300MW from the ReNew Power, whose quoted rate is Rs 2.38/unit. However, the rate applicable to KSEBL is Rs 2.44/unit, which is inclusive of the trading margin of Rs 0.06/unit.

22. *As per the Section 79 of the Electricity Act,2003 read along with the Section 63 of the EA-2003, in the present case, the tariff derived through the competitive bidding route as per the bidding guidelines notified by the Central Government has to be adopted by the Central Commission. It is learned that, though SECI had filed the petition before the CERC for adoption of tariff, CERC is yet to adopt the tariff as per the Section 63 of the Electricity Act, 2003.*

23. *The Commission however notes that, Article 5.1.1 of the initialed PSA specifies as follows.*

“5.1.1 From SCD and subject to the provision of the Article 6.7, the Buying Entity shall pay the fixed tariff of Rs2.37/kWh plus trading margin of Rs 0.07/kWh for the entire term of the Agreement.”

Hence, the Commission hereby clarify that if the CERC adopts the tariff of the ‘ReNew Power’ at Rs 2.38/unit as per the auction results, the tariff payable by the ‘Buying Entity’ KSEB Ltd to the ‘Buyer’ SECI shall be limited to Rs 2.44/unit including trading margin.”

9. Perusal of the above noted portion of the impugned order clearly reveals that the Commission has not only recorded the submissions of the

SECI but also has, by way of clarification, put an upper seal to the tariff payable by KSEB by limiting it to Rs.2.44 per unit including the trading margin.

10. Undisputedly, as noted by the Commission also in paragraph No. 32 of the impugned order, the SECI is an inter-state trading licensee and it procures power from the solar power developers under composite scheme of generation and sale of electricity in more than one State. Therefore, the Regulation of tariff payable to SECI by KSEB or any other Distribution Licensee falls within the jurisdiction of Central Commission as per Section 79(1) of the Electricity Act, 2003. Hence, it was not within the power or competence of the State Commission to regulate such tariff by prescribing the higher cap @Rs.2.44 per unit including trade margin. Since the nature of transaction involved in the present case is inter-state sale of electricity procured under a composite scheme, the State Commission has no jurisdiction at all to deal with or otherwise limit the tariff or the trading margin payable by KSEB to SECI.

11. In view thereof, we are of the considered opinion that the Commission has erred in issuing the clarification regarding the tariff as well as trading margin payable by KSEB to SECI, in the impugned order.

12. Now, we proceed to examine the correctness and legality of the direction given by the Commission to modify the definition of the term “Appropriate Commission” in Article 1.1 of the PSA.

13. Article 1.1. of the draft PSA between the KSEB and SECI defined the term “Appropriate Commission” as under :-

“Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission”

14. Upon modification directed by the Commission vide impugned order, the definition of the term “Appropriate Commission” in Article 1.1 reads as under :-

“Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission / Kerala State Electricity Regulatory Commission as the case may be”.

15. The discussion of the Commission on this aspect is found in paragraph Nos. 8 to 10 of the impugned order on the same quoted herein below :-

“(8) The Commission is of the view that, the scheme of the Electricity Act, 2003 clearly spelt out the jurisdiction of the Central Commission and State Commissions. The power, authority and functions of both the Commissions are totally independent. The EA-2003 does not envisage any supervisory role for the Central Commission over the State Commissions. As per the Scheme of the EA-2003, approval of the power purchase and the power to regulate the power purchase through agreements fall within the sole jurisdiction of the State Commissions. Once a PSA/PPA containing terms and conditions of the Agreement is approved by a quasi-judicial body like SERC, any legal interpretation / dispute resolution of its terms and conditions have to be carried out by a higher judicial forum and not by CERC. Hence it naturally flows that all disputes will have to be referred to the PSA/PPA approving SERC for its resolution.

However, when the distribution licensee purchases power from generating companies with composite scheme of generation which supplies power to more than one State, the power to regulate the Tariff and Tariff related matters shall be governed by Section 79(1)(b) of the EA-2003 by the Central Commission. **All other matters of the PSA/PPA to be signed by the distribution licenses with the generating companies/intermediary procurer with composite scheme of generation for supplying power to more than one State is vested with the State Commission.**

- (9) With the above observation and views, the Commission has re- examined the Clause 12.3 of the of the PSA submitted by SECI, which is extracted below.

“12.3 Dispute Resolution

12.3.1 Dispute Resolution by the Appropriate Commission

i. Where any Dispute (i) arises from a claim made by any Party for any change in or determination of Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could results in the Change in the Tariff, or **(ii) relates to any matter agreed to be referred to the Appropriate Commission., such Dispute shall be submitted to adjudication by the Appropriate Commission.** Appeal against the decision of the Appropriate Commission shall be made only as per the provisions of the Electricity Act,2003, as amended from time to time’.

The clause 12.3.1(i) of the PSA provides to types of disputes between the SECI and KSEB Ltd.

(i) Dispute type-1

Dispute (i) arises from a claim made by any Party for any change in or determination of Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could results in the Change in the Tariff, or

(ii) Dispute type-2

Dispute relates to any other matter included in the PSA and agreed to be referred to the Appropriate Commission.

This Commission is of the considered view that, the adjudication of disputes cited as type-1 above, which relates to tariff and all matters

affecting the tariff may be referred to the Central Commission, and accordingly the Appropriate Commission for adjudicating such disputes may be the Central Commission and all its decisions shall be binding on both the contracting parties

However, when the disputes arises on matters other than the tariff related matters of the PSA cited as type-2 above, such issues shall be dealt by this Commission by virtue of the powers conferred on it as per the Section 86(1) of the EA-2003, read along with the Rule-8 of the Electricity Rules, 2005, clarifications issued by the Central Government on 28th August 2006 regarding the approval of PPA for Inter-State projects, read along with the Regulation 76 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2018.

Accordingly, the Appropriate Commission for adjudicating the disputes other than disputes related to tariff and all tariff related matters shall be the State Commission.

- (10) *Considering these aspects in detail, the Commission hereby order to modify the definition of ‘Appropriate Commission’ under Article 1.1 of the PSA as follows.*

“Appropriate Commission : Unless otherwise stated, Appropriate Commission shall mean Central Electricity Regulatory Commission / Kerala State Electricity Regulatory Commission as the case may be”.

16. Thus, the commission has held that the disputes arising with regards to the matters other than the tariff related matters of the PSA, shall be dealt with by it by virtue of powers conferred on it as per Section 86(1) of the Electricity, Act, 2003 read with Rule 8 of Electricity Rules 2005 and Regulations 76 of KSERC (Terms and Conditions for Determination of Tariff), Regulations, 2018.

17. Learned Counsel for the Appellant vehemently argued that despite knowing that there is a composite scheme of generation and sale of electricity

in more than one State, the Commission has erred in holding that it has jurisdiction to adjudicate disputes other than those related tariff under the PSA to be executed between the Appellant-SECI and 2nd Respondent-KSEB. It is his submission that the entire transaction of generation and sale of electricity under the PPA to be signed between Solar Power Developer and SECI as well as the PSA to be executed between SECI and KSEB is clearly governed by Section 79 of the Electricity Act, 2003 for the reason that these would arise out of a composite scheme of generation and sale of electricity in more than one State and therefore, the State Commission would not have jurisdiction to deal with those transactions. It is argued that the jurisdiction of the State Commission under Section 86(1)(b) of the Electricity Act refers to only the initial stage when approval is granted to the PPA providing for purchase of power as per the terms and conditions specified therein and the provision is not for further regulation of the implementation of the PPA as well as for dealing/adjudicating the disputes with regards to the generating company covered under Section 79(1)(a) or (b) of the Electricity Act selling power to KSEB. It is submitted that the jurisdiction to regulate tariff in such cases lies with the Central Commission and as a corollary jurisdiction to over-see implementation of the PPA and adjudication of disputes also lies with the

Central Commission. It is further argued by the Learned Counsel that the PSA and the PPA are back to back agreements, forming part and parcel of one single transaction and, therefore, it would be anomalous to hold that disputes under PPA can be regulated by one body and disputes under PSA can be regulated by another body.

18. On behalf of the Respondent-Commission, it is argued that the impugned order concerning the issue under determination is perfectly legal and in consonance with the relevant provisions of the Electricity Act, 2003 and, therefore, does not call for any interference from this Tribunal.

19. The issue which arises for our consideration is whether, in case of a composite scheme of generation of sale and electricity in more than one State, the disputes arising on a matter other than tariff related matter, as specified in the Power Sale Agreement, fall within the jurisdiction of State Electricity Commission.

20. The operations of the Central Commission and the State Commission are prescribed in Sections 79 and 86 of the Electricity Act, 2003 respectively. Bare reading of these Sections would reveal that they operate in different fields and are totally independent of each other. It would be advantageous to note the comparative provisions of these two Sections by way of the table mentioned below :-

Section 79: Functions of Central Commission	Section 86: Functions of State Commission
<p>(1) The Central Commission shall discharge the following functions, namely:--</p> <p>(a) to regulate the tariff of generating companies owned or controlled by the Central Government;</p> <p>(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;</p> <p>(c) to regulate the inter-State transmission of electricity;</p> <p>(d) to determine tariff for inter-State transmission of electricity;</p> <p>(e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;</p> <p>(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;</p> <p>(g) to levy fees for the purposes of this Act;</p> <p>(h) to specify Grid Code having regard to Grid Standards;</p> <p>(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;</p> <p>(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;</p> <p>(k) to discharge such other functions as may be assigned under this Act.</p> <p>(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely :- (a) Advise the Central Government on all or any of the following matters, namely:- (i) formulation of National electricity Policy and tariff policy: (ii) promotion of competition, efficiency and economy in</p>	<p>(1) The State Commission shall discharge the following functions, namely:--</p> <p>(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:</p> <p>PROVIDED that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;</p> <p>(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;</p> <p>(c) facilitate intra-State transmission and wheeling of electricity;</p> <p>(d) issue licenses to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;</p> <p>(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;</p> <p>(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;</p> <p>(g) levy fee for the purposes of this Act;</p> <p>(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;</p> <p>(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;</p> <p>(j) fix the trading margin in the intra-State</p>

<p><i>activities of the electricity industry; (iii) promotion of investment in electricity industry; (iv) any other matter referred to the Central Commission by that Government.</i></p> <p><i>(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.</i></p> <p><i>4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.</i></p>	<p><i>trading of electricity, if considered, necessary;</i></p> <p><i>(k) discharge such other functions as may be assigned to it under this Act.</i></p> <p><i>(2) The State Commission shall advise the State Government on all or any of the following matters, namely :- (i) promotion of competition, efficiency and economy in activities of the electricity industry; (ii) promotion of investment in electricity industry; (iii) reorganization and restructuring of electricity industry in the State; (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.</i></p> <p><i>(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.</i></p> <p><i>(4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.</i></p>
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21. Section 79(1)(f) of the Act empowers the Central Commission to adjudicate upon the disputes involving generating companies or transmission licensees in the matters connected with clauses (a) to (d) of the said Section. Therefore, any dispute involving a generating station or a transmission licensee covered under Clauses (a)(b) & (c) will fall within the jurisdiction of the Central Commission. It appears that since the generating companies owned by Central Government and the generating companies having a composite scheme for generation and sale of Electricity in more than one State have Pan India presence, the Parliament found it proper and prudent to subject such companies to a special treatment and, therefore, have been

brought under the jurisdiction of the Central Commission vide Section 79 of the Act. The primary object for such exercise appears to be uniformity of tariff amongst more than one State beneficiaries and prescribing uniform terms and conditions of supply of electricity to more than one State.

22. It is notable that Clauses (a) (b) & (c) of Section 79 (1) of the Act begin with the expression “to regulate”. It is only the clause (d) which begins with the term “to determine tariff”. “Regulation of Tariff” is totally distinct from “Determination of tariff”. Regulation of Tariff includes all the necessary terms and conditions relating to the tariff such as billing, consequences of delay in payment of electricity charges, rebate, termination, suspension of electricity supply, payment of security, etc.

23. Section 86(1)(b) of the Act, provides for regulating the role of Distribution Licensees in the procurement of power and 86(1)(f) relates to adjudication upon the disputes between the licensees and generating companies by the State Commission. These are general provisions and have to be read subject to Section 79(1) (a) to 79(1)(d) of the Act. In so far as the generating companies who have a composite scheme for generation and sale of electricity in more than one State, the role of the State Commission would be only to decide whether the PPA to be entered into by them and a distribution

company for sales/purchase of electricity at the tariff determined by Central Commission, has to be approved or not. In doing so, the State Commission would take into consideration various factors including the availability of power from other sources at a cheaper or in a more economical manner to be supplied to the consumers in the State. Thus, the State Commission has a limited role to play with regards to the sale of electricity under a composite scheme and it has no power to suggest any modifications to the terms and conditions of the PPA/PSA to be executed between a generating company, a distribution company and an inter-mediary.

24. In view of the scheme of the Act, as specified more particularly in Section 79 & 86, it would be anomalous to permit State Commission to claim concurrent jurisdiction along with the Central Commission in any dispute arising out of a composite scheme for generation and sale of electricity in more than one State, which is covered by Section 79(1) (b) of the Act. The jurisdiction of the Central Commission would be only in respect of the matters other than those which fall within the jurisdiction of the State Commission under Section 79 of the Act. In other words, if any matter falls under the scheme of 79(1)(a) to 79(1)(d) of the Electricity Act, 2023, the provisions of Section 86(1)(f) are of no application. In this context, we find it apposite to

quote the observations of the Hon'ble Supreme Court in Energy Watchdog Vs. CERC & Ors., (2017) 14 SCC 80.

*“24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). This being the case, **it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission.** The State Commission's jurisdiction is only where generation and supply takes place within the State. **On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.***

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*26. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that the expression “composite scheme” does not have some special meaning — **it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.**”*

25. We are further of the opinion that a close and meaningful interpretation of the provisions of Section 79 & 86 of the Act, would indicate that the adjudicatory powers of the Central Commission under 79(1)(f) are not restricted to only determination of tariff as well as the Regulation of tariff but include the other disputes or differences between generating companies and transmission licenses which necessarily impact the regulation of tariff. This would include fulfillment/non-fulfillment of conditions precedent as well as conditions subsequent, claim for extension of time in commissioning all projects on the ground of Force Majeure events etc. Even though disputes on these subjects do not specifically relate to determination or the regulation of tariff but these would necessarily have a direct bearing upon the regulation of tariff and, therefore, would come under the purview of the Central Commission under Section 79 of the Act.

26. We may also note that Section 61 of the Electricity Act empowers the Appropriate Commission i.e. Central Commission or State Commission as the case may be, to specify the terms and conditions for determination of tariff upon consideration of various factors as stated therein. When the provisions of Section 61 are read in conjunction with Section 79, it would become manifest that these two provisions do not deal merely with tariff but all the

terms and conditions to be kept in mind for determination of tariff. Section 178 of the Electricity Act empowers the Central Commission to make regulations relating to inter alia, the terms and conditions for determination of tariff under Section 61. Therefore, the Central Commission has the power not only to notify the regulations with reference to the terms and conditions of the tariff but also to implement such regulations in all respects.

27. On the other hand, the jurisdiction of the State Commission under Section 86(1)(b) of the Act refers only to initial stage where approval is to be granted or not to be granted to the Power Purchase Agreement providing for purchase of power at the price and other terms and conditions specified therein. This provision does not empower the State Commission to regulate implementation of Power Purchase Agreement for all times to come in future also and to adjudicate upon the disputes arising between the parties therein. Holding otherwise would tantamount to permit the State Commissions to make inroads with the functioning of the Central Commission which would militate against the very scheme of Act, as discussed hereinabove.

Conclusion

28. We, therefore, hold that the State Commission has no jurisdiction to entertain and adjudicate upon any dispute between the Appellant and the 2nd

Respondent as the same relates to a composite scheme for generation and sale of electricity in more than one State falling within the jurisdiction of the Central Commission. Hence, the Commission has gone beyond its jurisdiction to direct modification in Article 1.1 of the PSA, as noted herein above.

29. In view of the above discussion, we are unable to sustain the impugned order to the extent it has been assailed in this appeal. We hereby quash and set aside the impugned clarification issued by the Commission as well as the impugned direction issued by it vide modification of Article 1.1 of the PSA. Consequently, the appeal stands allowed.

Pronounced in the open court on this 13th day of August, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

Js