

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 269 OF 2018

Dated: 24 January, 2024

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

In the matter of:

**INTERNATIONAL POWER CORPORATION
PRIVATE LIMITED**

*A Company incorporated under the provisions
of Companies Act, 1956*

Having its registered office at:

319, Shivashankar Plaza, 3rd Floor,
Lalbagh Road, Bengaluru – 560 027

*(Represented by its Managing
Director B P Ramesh)*

... Appellant

Versus

**1. KARNATAKA ELECTRICITY REGULATORY
COMMISSION**

Having its Office at No.16, C-1,
Millers Bed Area, Vasant Nagar,
Bengaluru – 560 052

(Represented by its Chairperson)

**2. BENGALORE ELECTRICITY SUPPLY
COMPANY LIMITED**

*A Company registered under the provisions
of the Companies Act, 1956*

Having its Registered Office at K.R. Road,

Bengaluru – 560 001
(Represented by its Managing Director)

3. STATE OF KARNATAKA

Department of Energy
Vikas Soudha,
Bengaluru – 560 001
(Represented by the Chief Secretary)

... Respondent(s)

Counsel for the Appellant(s) : Anand K Ganesan
Anantha Narayana M.G.
Shridhar Prabhu

Counsel for the Respondent(s) : Sumana Naganand
Tushar Kanti Mahendru
Medha M Puranik
Gayathri Sriram,
Garima Jain
Abhijeet Kumar Pandey for Res. 2
Joseph Aristotle.S for Res. 3

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The issue which comes up for consideration in this appeal is whether the 3 MW mini hydel power project of the appellant commissioned on 04.10.2017 is only an extension/addition to the existing 6 MW capacity mini hydel power project of the appellant commissioned in the year 2009, or it is to be treated as a new mini hydel power project, and whether the tariff for the said 3 MW mini hydel power project shall be Rs.2.80 per unit as per the tariff order dated 18.01.2005 of the respondent no.1 Commission or

Rs.4.16 per unit as per the subsequent order dated 01.01.2015 of the respondent no.1 Commission.

2. The Learned Commission i.e. respondent no.1 in its impugned order dated 05.04.2018 has held the said 3 MW mini hydel power project to be only an extension / addition to the existing 6 MW mini hydel power project of the appellant and accordingly has directed that tariff for the same shall be Rs.2.80 only per unit as per the tariff order dated 18.01.2005.

3. Briefly stated, the facts of the case are that M/s Prasanna Power Private Limited had established a 6 MW mini hydel power project across Aniyur Stream at Aniyur Village of Belthangadi Taluk in Dakshina Kannada District, Karnataka, which was commissioned in the year 2009. It has entered into a Power Purchase Agreement (PPA) dated 12.12.2006 with the respondent no.2 Bangalore Electricity Supply Company Limited (BESCOM) in respect of this project in which tariff for the same was fixed @ Rs.2.80 per unit as per the tariff order dated 18.01.2005 of the Commission. Subsequently, vide order dated 03.11.2010, the Government of Karnataka accorded permission to it to establish additional 3 MW capacity mini hydel power project across the Aniyur river in addition to the already existing 6 MW capacity mini hydel power project. Thereafter, the company, M/s Prasanna Power Private Limited got amalgamated with the appellant and the appellant sought extension of time to commission the additional 3 MW power project which was granted to it vide order dated 08.09.2016 of the Government of Karnataka, thereby extending the time for commissioning of the said additional power project till 02.11.2017. An agreement dated 06.09.2011 also had been executed between M/s

Prasanna Power Private Limited and the Government of Karnataka for establishing and operating the 3 MW mini hydel power plant. The appellant completed the construction of the 3MW power project and it was commissioned on 04.10.2017. The commissioning certificate dated 03.11.2017 has also been issued to the appellant. Meanwhile, the respondent no.1 Commission had issued generic tariff order dated 01.01.2015 applicable to the projects commissioned during the period 01.01.2015 and 31.03.2018, prescribing a tariff of Rs.4.16 per unit for these projects.

4. The appellant, by way of its communication dated 07.11.2016 had requested the 2nd respondent Bangalore Electricity Supply Company Limited (BESCOM) to enter into a PPA with it as per the terms of the tariff order dated 01.01.2015. Since the 2nd respondent refused to sign such PPA, the appellant approached the respondent no.1 Commission with its petition with the prayer for applicability of the tariff @ Rs.4.16 per unit as per the generic tariff order dated 01.01.2015 for its 3MW mini hydel power project and for a direction to the 2nd respondent BESCOM to enter into a PPA with it accordingly. The petition came to be decided vide impugned order dated 05.04.2018 determining the tariff for the said 3MW mini hydel power project with the appellant @ Rs.2.80 only per unit and not @ Rs.4.16 per unit as per the generic tariff order dated 01.01.2015.

5. We have heard Learned Counsel for the appellant as well as Learned Counsels appearing for the respondents and have perused the impugned order as well as the entire record.

6. It was argued by the Learned Counsel for the appellant that the generic tariff order dated 01.01.2015 does not make any distinction between the additional capacity or new greenfield project and it applies uniformly to all the power projects commissioned after 01.01.2015. He submitted that since the 3MW capacity power project of the appellant was commissioned in the year 2017, it is covered by the tariff order dated 01.01.2015. He would further argue that the generic tariff order is based on normative parameters only, and once the tariff is determined on adopting normative approach, there can be no comparison with actual parameters. He referred to the judgments of this Tribunal in *Haryana Power Generation Corporation Ltd. v. Haryana Electricity Regulatory Commission & Another* (Appeal nos. 42 & 43 of 2008 decided on 31.07.2009), and *NTPC Ltd. v. Central Electricity Regulatory Commission & Ors.*, 2007 ELR APTEL 828, to canvas that the principal of normative or actual, whichever is less, cannot be applied.

7. The Learned Counsel further argued that the State Commission has itself held specifically in the order dated 01.01.2015 that there would be no truing up of the capital cost and it was a conscious decision of the Commission to determine the tariff for projects commissioned after the said date @ Rs.4.16 per unit irrespective of the actual cost incurred for completion of the project. According to the Learned Counsel, even otherwise also the total cost incurred on construction of the 3MW hydel power project was Rs.6.68 crores per MW, for which documents were placed before the Learned Commission which have been ignored. He argued that thus the capital cost of the said project was much higher than

the capital cost of Rs.6.20 crores per MW prescribed in the tariff order dated 01.01.2015, and therefore, the tariff for the project should have been @Rs.4.16 per unit as per the said tariff order. It is the submission of the Learned Counsel that Learned Commission has erred in holding that while the tariff for the 6MW capacity of project @Rs.2.80 per unit is based on the normative tariff order, the tariff for the additional 3MW capacity power project would also be Rs.2.80 per unit as the capital cost is lower and normative tariff order cannot be applied. He submitted that the appellant ought to have been granted tariff for the additional 3MW capacity power project @Rs.4.16 per unit or else the capital cost for the entire capacity of 9MW ought to have been considered as actual cost and the tariff determined accordingly.

8. On behalf of the respondents, it is argued that the date of commissioning of the plant cannot be the sole criteria in the process of determination of the tariff and the tariff is determined upon considering various factors such as interest on term loan, depreciation, interest on working capital, capital cost per MW, operation and maintenance, annual escalation etc. during the particular control period. It is submitted that in the instant case, it is clear from the documents on record that construction of 3MW power plant was completed by the appellant in the year 2009 itself on the existing infrastructure of the 6MW power plant and only installation as well as electro-mechanical works were to be undertaken at a cost of Rs.5.00 crores as per the estimated cost given by the appellant itself, vide Letter of Award dated 26.12.2016 issued by appellants' E&M supplier, which is less than 30% of the total capital cost determined in the tariff order

dated 01.01.2015. Thus, the parameters of the tariff order of the year 2015 would not apply to the additional 3MW capacity power plant. It is, further argued that the tariff determined in the order dated 01.01.2015 applies to the projects which have made investment in the control period commencing from 01.01.2015 and ending on 31.12.2018, and therefore, it does not apply to the appellant's 3MW power plant, for which major investment was done in the year 2009. It is further pointed out that the appellant had not raised any dispute before the Learned Commission with respect to the tariff determined for its already commissioned 6MW power project, and therefore, its petition before the Commission as well as the instant appeal relate to the tariff for the additional 3MW power plant only. Hence, there was no reason or occasion for the Commission to undertake project specific tariff fixation for the entire 9MW power plant. According to the Learned Counsels, the impugned order is based upon sound reasoning and no error or infirmity can be found in the same. They urged for dismissal of the appeal.

9. We may note here the relevant paragraphs of the impugned order of the Learned Commission in which they have given the reasons for holding against the appellant. These are:-

“(c) It is not disputed that the Petitioner has set up an additional 3 MW capacity Mini Hydel Power Project by utilizing the existing infrastructure already put up for the 6 MW capacity Mini Hydel Power Project, though the said fact is not specifically stated in the Petition. Further, it is also not in dispute that the amounts spent for carrying out the different electromechanical works was `3.90 Crores and for

the civil works the amount spent was `18,00,000/-. Therefore, one can say that the present 3 MW capacity Mini Hydel Power Project Is only an extension or addition to the existing 6 MW capacity Mini Hydel Power Project. During the pendency of the proceedings, it was reported that the 3 MW capacity Mini Hydel Power Project was commissioned on 04.10.2017.

(Emphasis supplied)

(d) The generic tariff in respect of any Renewable Energy Project is determined, considering the normative economical and technical parameters relating to the Project concerned. This generic tariff is determined for different Control Periods and it is made applicable to a Project that has entered into a PPA and commissioned during such Control Period. The generic tariff is reviewed during the next Control Period, taking into consideration the then prevailing normative economical and technical parameters. Therefore, the generic tariff determined for a Control Period is applicable to a Project entering into a PPA and getting commissioned during that Control Period. Such generic tariff is in the nature of a standing offer to a person, who is interested to commission a new Project during that Control Period. The Capital Cost is the main factor in determining the quantum of tariff for any Renewable Energy Project. Therefore, any addition or extension of an existing Project, mainly utilizing the existing infrastructures, cannot be treated as a new Project, for which the generic tariff cannot be made applicable. In the Generic Tariff Order dated 01.01.2015f for the Mini Hydel Power Projects, the Capital Cost adopted is `6.20 Crores per MW. This Capital Cost is

considered for establishing a new Project, which does not utilize any existing infrastructure.”

(Emphasis supplied)

10. Thus, even though the appellant’s 3MW mini hydel power project was commissioned on 04.10.2017 i.e. during the control period of the generic tariff order dated 01.01.2015, the Learned Commission has refused to apply the said tariff order to this power project of the appellant on the assumption that it was setup by utilizing the existing infrastructure already put up for the 6 MW capacity mini hydel power project, and thus, it is only an extension or addition to the said existing 6 MW power project.

11. Here, we find it apposite to reproduce Para 10 of the generic tariff order dated 01.01.2015:-

“10. Date of effect of this order:

i) The tariff as determined by the Commission in the present order shall be applicable to all the Mini-hydel, Bagasse based co-generation and Rankine cycle based Biomass power projects with water cooled condenser that get commissioned during the period between 01.01.2015 and 31.03.2018 for which PPAs have not been entered into prior to the date of this order. This tariff shall be applicable for the term of the PPA.

ii) The variable tariff determined by the Commission in its order for Bagasse based co-generation and Rankine cycle

based Biomass power plants with water cooled condenser will be reviewed after 31.03.2018.”

(Emphasis supplied)

12. A bare reading of the above noted Paragraph of the generic tariff order dated 01.01.2015 would reveal that it has been made applicable to all the mini hydel, Bagasse based co-generation and Biomass power projects which are commissioned during the period between 01.01.2015 and 31.03.2018 for which PPAs have not been entered into prior to date of the said order. Therefore, the relevant date for applicability of this tariff order for mini hydel power project is the date when it gets commissioned, and not the date when its construction is commenced or completed. The tariff order nowhere provides that it would apply to only those power projects, the construction of which has been commenced or completed during the period between 01.01.2015 and 31.03.2018. Therefore, the argument that the said tariff order dated 01.01.2015 would apply to only those power projects regarding which investment was made in the control period between 01.01.2015 and 31.12.2018, is absolutely fallacious. That being the position emerging from meaningful perusal of the relevant provisions of the generic tariff order dated 01.01.2015, it has to be held applicable to the 3 MW mini hydel power project of the appellant also for the reason that the same was admittedly commissioned on 04.10.2017 within this control period and no PPA had been executed regarding it prior to 01.01.2015, even if it was built by utilizing the existing infrastructure already put up for the 6 MW mini hydel power project of the appellant which had been completed as well as commissioned in the year 2009.

13. Moreover, the contention of the respondents that the construction of additional 3 MW power project also had been completed in 2009 itself is absolutely incorrect. Perusal of record would show that only some portion of building, hydromechanical works and *Kakkanje* switching station of the existing 6 MW power plant had been utilized in setting up of the additional 3 MW power plant. So, it may be said that provision for additional 3 MW power plant was there but its completion and commissioning required various further tasks including civil and electromechanical works. Completion of a power project indicates that nothing more remains to be done except its commissioning, which is not the case here. Even in the year 2016 also, the additional 3 MW power plant was not complete and for this reason extension of time for its completion was sought by the appellant, which was granted on 08.09.2016. Hence, we are unable to hold that the construction of said additional 3 MW power plant also had been completed in the year 2009 itself.

14. A reference to the order dated 03.11.2010 issued by the Government of Karnataka, vide which the appellant was accorded permission to set up the 3 MW mini hydel power project, is also necessary. The relevant portion of the said order is reproduced hereinunder: -

“In addition to the already existing 6 MW capacity Mini Hydro Project across the Aniyur River in belthangadi Taluk in Dakshina Kannada District, permission to establish above 3 MW unit has been granted to Ms Prasanna Power Ltd.”

(Emphasis supplied)

15. Manifestly, permission accorded by the Government to the appellant vide above noted letter dated 03.11.2010 was to establish additional 3 MW unit and not for extension of the existing 6 MW capacity mini hydel power project. Therefore, the newly setup 3MW power unit cannot be termed as an extension of the existing 6 MW power project merely for the reason that it was established by utilizing some infrastructure which had already been put up for the previous 6 MW mini hydel power project.

16. We may also note that the Learned Commission has not carried out any examination regarding the exact extent of the assets / infrastructure of the existing 6 MW power plant which was utilized for setting up of the additional 3 MW capacity power plant. It is also seen that the Learned Commission has not carried out any cost analysis of the project which was necessary for the Commission to determine the tariff under the Cost-Plus methodology. Without doing such exercise / examination, it was not proper for the Learned Commission to come to conclusion that the 3 MW capacity power project is only an extension or addition to the existing 6 MW capacity power project.

17. The Learned Commission has also denied the claim of the appellant for applicability of the generic tariff order dated 01.01.2015 to the power generated from newly setup 3 MW hydel power project on the ground that the capital cost incurred for setting up of the said project was only Rs.3.90 crores per MW which was much below the benchmark of Rs.6.20 crores per MW fixed in the said tariff order. In our opinion, the Commission has erred on this count also. It has, for unknown reasons, failed to consider the

details of the expenditure incurred by the appellant on setting up of the 3 MW power plant, given in the rejoinder filed by the appellant before the Commission. Para nos.8, 9 and 10 of the rejoinder are material in this regard and are reproduced hereunder:

*“8. Without prejudice to what is stated above, the Petitioner submits that it has established a 6 MW Minihydel Power Project across Aniyur stream at Aniyur village of Belthangadi Taluk in Dakshina Kannada District, which was commissioned in the year 2009. The Petitioner has entered into a Power Purchase Agreement with the Respondent No. 1 on 12.12.2006 in respect of this project. In so far as the plant under the present petition is concerned, provision for this unit of 3 MW was made along with the earlier 6 MW plant only in respect of Civil, Hydro Mechanical and Transmission Line works. The total Project cost as per Fixed Asset Schedule of the approved balance sheet for the Financial year 2012-2013 (Kindly see **Annexure L** to the main petition) for provision of the above facilities for the entire 9 MW is as under:*

1. Buildings	Rs. 25,58,83,699
2. Hydromechanical works	Rs. 11,47,94,384
3. Kakkanje Switching Station	<u>Rs. 7,05,36,625</u>
	<u>Rs. 44,12,14,708</u>

Therefore, it could be seen that the total project cost towards buildings, hydromechanical works and Kakkanje Switching Station for 9 MW is Rs. 44,12,14,708/-, which works out to be Rs. 4,90,23,856/- per MW.

9. The Petitioner Company has incurred a sum of Rs. 4.5 crores inclusive of tax towards cost of Electro Mechanical Equipments for the fresh 3 MW plant. (Kindly see **Annexure H and J** to the main Petition-the Supplies Contract and the Installation Services Contract for a sum of Rs.3,69,00,000/- and Rs. 18,00,000/- respectively). The Company has incurred a sum of Rs. 35,00,000/- towards additional civil works (2nd and 3rd stage concrete) and further a sum of Rs.50,00,000/- towards Consultancy, liaison and Statutory fees.

Therefore, the total cost of project considering the above parameters for the 3 MW plant is as follows:

1. Building, hydro Mechanical Works, Kakkanje Switching Station	(Rs. 4,90,23,856 x 3) =Rs. 14,70,71,568
2. E & M equipments	Rs. 4,50,00,000
3. Addl. civil works	Rs. 35,00,000
4. Consultancy, liaison And Statutory fees	Rs. 50,00,000
	<u>Rs. 20,05,71,568/-</u>

10. Considering the above computation, cost per MW for additional unit of 3 MW works out to be Rs.6,68,57,189/-, which is much higher than cost of Rs.6,20,00,000/- considered by this Hon'ble Commission in its Generic Tariff order 2015. This being the case, the Respondent No.1 BESCO is not justified in

asking the Petitioner to offer a lesser price than that of the tariff fixed in the Generic order 2015, given the fact that the Petitioner has incurred much more cost than the one mentioned in the said order and also as the Plant is getting commissioned in the control period mentioned under the said Generic Tariff order 2015.”

18. It is, thus, evident that the provision for setting up of additional unit of 3 MW power plant was made by the appellant along with the earlier 6 MW power plant only with respect to certain items of Civil, Hydro-mechanical, and Transmission line works. Therefore, the comparative cost of these works have to be included in the total capital cost incurred by the appellant in setting up of the 3 MW power plant and by doing so, one would find that the cost per MW for the said additional unit of 3 MW works out to be Rs.6,68,57,189/- (as explained by the appellant in the relevant paragraphs of the rejoinder reproduced hereinabove) which is much above the benchmark of Rs.6.20 crores fixed under the generic tariff order dated 01.01.2015.

19. Hence, we find the impugned order of the Learned Commission totally erroneous and not sustainable. Accordingly, the same is hereby set aside and the appeal stands allowed.

20. Consequently, we hold the 3 MW power plant of the appellant not a mere extension of the earlier 6 MW power plant of the appellant, even though it was set up by utilizing some of the existing infrastructure of the 6 MW power plant, as it was commissioned on 04.10.2017 within the control

period of the generic tariff order dated 01.01.2015, and therefore, the said tariff order applies to it. The appellant is entitled to tariff of Rs.4.16 per unit for the said 3 MW power plant as per the generic tariff order dated 01.01.2015. Accordingly, the 2nd Respondent shall enter into a PPA with the Appellant for the said 3 MW power plant at a tariff of Rs.4.16 per unit for the delivered energy which shall be effective from the date of commissioning of the power plant.

21. The appeal is disposed of in above terms.

Pronounced in the open court on this 24th day of January, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / ~~NON-REPORTABLE~~

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