

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

**Appeal No. 22 of 2012**

**Dated: 29<sup>th</sup> March, 2012**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**In the matter of:**

**Saheli Export Private Limited  
New No.25, Old No.10,  
Madhavan Nair Road  
Mahalingapuram, Nungambakkam  
Chennai – 600 034**

**.... Appellant(s)**

**Versus**

- 1. Joint Electricity Regulatory Commission  
2<sup>nd</sup> Floor, HSIDC Office Complex  
Vanijya Nikunj Complex  
Udyog Vihar Phase – V  
Gurgaon – 122 016  
Haryana**
- 2. Electricity Department  
Government of Puducherry  
Chief Secretariat, Goubert Salai  
Puducherry – 605 001**
- 3. Renewable Energy Agency Pondicherry  
No.10, Second Main Road  
Elango Nagar  
Puducherry – 605 011**

**Counsel for the Appellant(s): Mr. M.G. Ramachandran,  
Mr. Anand K. Ganesan  
Ms. Sneha Venkataramani**

**Counsel for the Respondent(s): Mr. Dinesh Kapoor for R.1  
Mr. Aditya Kr. Singhal**

### **JUDGEMENT**

#### **MR. RAKESH NATH, TECHNICAL MEMBER**

Whether an enforceable Power Purchase Agreement between the rooftop solar power generator and the distribution licensee is a pre-requisite for the Joint Electricity Regulatory Commission to determine the tariff at which the energy is to be purchased by the distribution licensee is the issue that has been raised in the present Appeal.

2. Saheli Exports Pvt. Ltd, the Appellant herein, is engaged in the business of establishing, operating

and maintaining solar based generating stations in the country and has proposed setting up of 1 MW rooftop photo voltaic (PV) solar power project in the Union Territory of Puducherry. The Joint Electricity Regulatory Commission (hereinafter referred to as “Joint Commission”) is the 1<sup>st</sup> Respondent. The Electricity Department, Government of Puducherry, responsible for distribution and retail supply of electricity in the Union Territory of Puducherry is the 2<sup>nd</sup> Respondent. The third Respondent is the Renewable Energy Agency, the state nodal agency for development of renewable energy sources in the UT of Puducherry.

3. Aggrieved by the order of the Joint Commission dated 02.01.2012 by which it refused to

determine the tariff of the Solar Power Project for sale to the distribution licensee unless an enforceable PPA is entered into between the Appellant and the Respondent no.2, the Appellant has filed this Appeal.

4. The brief facts of the case are as under:-

4.1 Pursuant to the policy decision taken by the Government of India to promote solar based generating capacity in the country, the Ministry of New and Renewable Energy (“MNRE”), Government of India framed guidelines for the programme known as ‘Rooftop PV & Small Solar Power Generation Programme’, herein referred to as the ‘Scheme’, providing for selection of project proponents for development of solar power

projects to be connected to the distribution network at voltage level below 33 kV.

4.2 The Indian Renewal Energy Department Agency Ltd., hereinafter referred to as “IREDA”, an agency of the Government of India was appointed as the National Programme Administrator for the implementation of the guidelines issued by the MNRE. In terms of the guidelines, after complying with pre-registration formalities, the project proponents were required to apply for registration.

4.3 The scheme, *inter-alia* provided for the applicants fulfilling four conditions, viz., issuance of tariff order from the concerned Electricity Regulatory Commission, agreement with the local distribution utility for purchase of power, pre-

registration certificate from State Competent Authority and Commitment Guarantee of requisite account, to be eligible for registration.

4.4 The projects registered under the scheme would be eligible for the generation based incentive and substantial portion of the tariff determined by the concerned Electricity Regulatory Commission would be paid to the distribution licensee by the Government of India and the remaining portion of the tariff would be borne by the distribution licensee and passed on to the consumers in the retail supply tariff.

4.5 The scheme has been made applicable by the Government of India for the projects to be commissioned till 31.03.2013.

4.6 In pursuance of the above scheme, the Respondent no.3 which is the competent agency for issuance of pre-registration certificate in respect of Puducherry, issued an invitation for Expression of Interest (EOI) for pre-registration for setting up of 100 kW to 2 MW small solar power projects. The Appellant, accordingly, submitted its application for pre-registration on 07.07.2010 for setting up a 1 MW solar power project at Devanpuram village, Puducherry. The Respondent no.3 on being satisfied about the eligibility of the Appellant, issued a pre-registration certificate to the Appellant on 14.07.2010.

4.7 The Appellant also entered into a Memorandum of Understanding (“MOU”) dated 21.07.2010 with

the Respondent no.2. Subsequently, the Appellant submitted an application for registration with the IREDA. However, according to the Scheme, determination of tariff by the concerned Commission for a duration of 25 years is a pre-requisite for registration. The Joint Commission has so far not determined any generic tariff for procurement of power by the distribution licensee (R-2) from Solar Power Projects.

4.8 Aggrieved by the guidelines of the Government of India insisting upon the tariff determination as a pre-requisite for registration, the Appellant challenged the said provision of the scheme by way of Writ Petition being WP no.16983 of 2010 before the Madras High Court. The High Court

injunctioned the Respondents in the Writ Petition from rejecting the Appellant's application.

4.9 Another Writ Petition being no. WP 19943 of 2010 was filed by the Appellant challenging the stipulation in the scheme regarding execution of PPA for being entitled for further participation in the selection process. By an interim order dated 31.08.2010, the Respondents in the Writ Petition were injunctioned by the High Court from rejecting the application of the Appellant on the ground of non-execution of the PPA.

4.10 The Appellant also filed Writ Petition no.16984 of 2010 seeking directions of Madras High Court on the determination of tariff by the Joint Commission. The High Court by its order dated

12.04.2011 directed the Appellant to file a tariff petition before the Joint Commission for purchase of energy from the solar power project by the Respondent no.2.

4.11 In the meantime, the Respondent no.2 filed a petition before the Joint Commission for approval of the PPA to be signed with the Appellant for purchase of electricity under the Scheme. By order dated 19.10.2010, the Joint Commission rejected the said petition, *inter-alia*, on the ground that under the scheme the tariff determination was a pre-requisite and there was no tariff determined by the Joint Commission.

4.12 In pursuance of the order dated 12.04.2011, passed by the High Court, the Appellant filed a petition before the Joint Commission for determination of tariff for its 1 MW rooftop solar PV project. The Joint Commission vide order dated 02.01.2012, dismissed the petition of the Appellant on the ground that the Appellant had not executed a binding PPA with the distribution licensee (R-2).

4.13 Aggrieved by the impugned order dated 02.01.2012 of the Joint Commission, the Appellant has filed this Appeal.

5. Ld. Counsel for the Appellant has submitted as under:

5.1 The Joint Commission has failed to consider the terms and conditions of the Scheme under which the Central Government is expected to provide generation based incentive for promotion of rooftop solar power generation. Determination of tariff by the Joint Commission is one of the pre-conditions for registration under the scheme.

5.2 There is no mandate under the Electricity Act for the PPA to be signed before the determination of tariff. On the other hand the PPA cannot be executed without the knowledge of the tariff. The project developer cannot commit for sale of electricity for 25 years at a levelised tariff without having knowledge of tariff at the time of execution of the PPA.

6. We also heard Ld. Counsel for the Joint Commission who argued vehemently that the signing of a binding PPA was a pre-requisite for the Joint Commission to determine the tariff.

7. Considering the above contentions of the parties, the only issue that is to be decided by us is:

Whether the Joint Commission has erred in not determining the tariff of the solar PV power project of the Appellant for purchase of energy by the distribution licensee for want of a binding PPA between the Appellant and the Respondent distribution licensee?

8. Let us first examine the key features of the RPSSGP Scheme, which are reproduced below:

- The solar power project has to be connected to the distribution network at voltage levels below 33 kV.
- The project should be designed for completion before 31.03.2013.
- The local distribution licensee would sign a PPA with the project proponent at a tariff determined by the appropriate State Electricity Regulatory Commission. Only project scheme from states where tariff for duration of 25 years with tariff structure on levelised basis has been determined by the Regulatory Commission

would alone be considered to be eligible to participate in the programme.

- Generation Based Incentive (GBI) would be payable to the distribution utility for power purchased from solar power project selected under the scheme.

9. Admittedly, the Appellant has obtained a pre-registration certificate for setting up a solar power project under the Scheme from the Respondent no.3, the State Competent Authority on 14.07.2010. The Appellant has also entered into an MOU with the Respondent no.2 for sale of electricity from its solar project to be developed under the Scheme on 21.07.2010. Under the MOU, the Appellant and the Respondent no.2

have agreed to enter into a PPA for a period for 25 years, at a tariff to be notified by the Joint Commission.

10. It is also noticed that the Central Commission has determined a generic levelised tariff for solar power projects by its order dated 26.04.2010, on suo moto basis. A number of State Commissions have also determined the generic tariff at which the distribution licensees could procure power from Solar Projects.

11. The Joint Commission in exercise of power conferred under Section 61, 66, 88(1)(e) and 181 of the Electricity Act, 2003, has also notified on 30.11.2010 its Regulations for development of power generation for renewable energy sources and for procurement of energy from renewable

sources by the distribution licensee. Under the Regulations, the Respondent no.2 is under obligation to purchase electricity from renewable energy sources at a specified minimum percentage of the total consumption of its consumers during a year. Out of the total Renewable Purchase Obligation of the Respondent no.2, part of the energy to be procured from solar energy sources has also been specified. The Renewable Purchase Obligation specified by the Joint Commission for the Respondent no.2 is as under:-

**Minimum generation of purchase (in %) from renewable energy sources**

<b>Year</b>	<b>Total</b>	<b>Solar</b>	<b>Non-solar</b>
2010-11	1%	0.25%	0.75%
2011-12	2%	0.30%	1.70%
2012-13	3%	0.40%	2.6%

12. It is noticed that the Respondent no.2 had submitted a petition for approval of the PPA proposed to be entered into with the Appellant for approval of the Joint Commission.

The Joint Commission on 19.10.2010 rejected the petition with the following observation:

*“The draft PPA does not mention the tariff which is a pre-requisite of RPSSGP Scheme and that EDP has not even applied to the Commission for fixation of tariff for the above project.*

*The Project proponent has since applied for final registration as is clear from the acknowledgement of on-line submission of documents for generation based incentives enclosed with the petition which shows date of signing of PPA as 13.8.2010. Further EDP in their petition has mentioned that it is given to notice that aforesaid project proponent has participated in the final registration process and secured the sixteenth rank, even without signing the PPA with EDP (ref. Para 10 of the petition).*

*The Commission feels that Considering the PPA for approval at this stage does not serve the purpose for which it is intended.*

*The petition is rejected.”*

Thus the petition for approval of the PPA was rejected by the Joint Commission as the draft PPA did not mention the tariff and the Respondent no.2 had not applied to the Commission for fixation of tariff for the above project.

13. Subsequently, in pursuance of the Madras High Court's order dated 12.04.2011 the Appellant filed a petition before the Joint Commission on 23.06.2011 for determination of the tariff for its 1 MW solar based rooftop PV project for sale to the Respondent no.2. The Respondent no.2 and 3 were also made Respondents in the Petition. The Respondent no.3 submitted to the Joint Commission to fix generic tariff for Solar Power Projects in exercise of the Commission's suo moto

power under the Regulations. The Respondent no.2 also submitted its comments and requested the Joint Commission to determine the tariff for the Appellant's solar power project.

14. The Joint Commission by its order dated 12.12.2011 which has been reproduced in the impugned order, observed as under:

i) In the opinion of the Commission, for fixation of tariff under Section 62, there has to be a valid agreement before the generator and the distribution licensee.

ii) The Commission has to determine tariff under Section 62 and it is also responsible for the

approval of the PPA as per section 86(1)(b) of the 2003 Act.

iii) In the absence of the agreement, if after fixation of tariff, the utility for some reason pulls out, the Commission no longer remains the competent authority to determine the tariff and the tariff determined by the Joint Commission would become infructuous. It is, therefore, essential that the agreement has to be executed between the generator and the distribution licensee before determination of tariff.

iv) The contention of the Appellant that the PPA can be executed after determination of tariff,

giving reference to the RPSSGP scheme, is not acceptable to the Commission.

Subsequent to the above order, the Appellant filed an affidavit before the Joint Commission stating that it could not enter into a binding PPA without the knowledge of the tariff at which the distribution licensee would purchase the power from the Appellant's solar plant.

15. Let us now examine the findings of the Joint Commission in the impugned order, which are reproduced below:-

*“The Appropriate Commission ensures that the tariff determined under section 62 in view of the provisions of section 61, is reasonable. Even if an appropriate Commission has not specified any terms and conditions, still while determining the tariff under section 62 the Commission shall be guided by the provisions of section 61, thereby ensuring a reasonable tariff and that the tariff so determined by the Commission is binding. The apprehensions of the petitioner as mentioned in*

*their affidavit dated 22.12.11 under para 10 and 13 are therefore unfounded and without any basis. In case the Generator is not satisfied with the tariff as fixed by the Commission, he has the option to make any appeal as per the Act for a remedy.*

*In view of above Commission observes as follows:*

*An agreement as approved by the Commission has essentially to be executed between generator and the licensee to whom electricity is to be supplied before tariff of generator is determined under section 62 of the act, as ruled by the Commission in their order dated 12.12.11. The responsibility of determining reasonable tariff lies with the Appropriate Commission, under section 62.*

*As the petitioner has not agreed to sign an agreement with the licensee (respondent No.1) as stipulated in Commission order dated 12.12.11.*

*The petition is hereby dismissed.”*

Thus the State Commission dismissed the petition of the Appellant for determination of tariff as the Appellant had not executed a valid agreement with the Respondent no.2.

16. In view of above background let us now examine whether the Joint Commission has erred in not determining the tariff of Appellant's project.

17. Let us first examine Section 62 of the Act under which the Appellant had filed its application before the Joint Commission for determination of tariff. The relevant portion of the section is reproduced below:

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

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

18. Let us also examine Section 86 of the Act relating to the functions of the State Commission. The relevant Sub Sections are reproduced below:-

**“86. Functions of State Commission.** - (1) *The State Commission shall discharge the following functions, namely: -*

- (a) *determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:.....*
- (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;*
- (c) *.....*
- (d) *.....*
- (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;.....”*

19. The State Commission has to regulate the electricity purchase and procurement process of the distribution licensee through PPAs. However, we agree with the contention of the Appellant that the generator can not be expected to execute a binding PPA unless the tariff and the terms and conditions of the PPA are approved by the Commission. The Joint Commission has also not framed any Tariff Regulations for procurement of power by the distribution licensee for Solar Projects. In view of the uncertainty of tariff, the Appellant could not be blamed for not executing a binding PPA. If the tariff determined by the Commission is not found commercially viable by the generator, it should have the option of not taking up the project. It is unreasonable to force the generator to enter into an enforceable PPA

without determination of tariff or tariff Regulations.

20. The Joint Commission has noted in the impugned order that even if the Commission has not specified any terms and conditions, while determining the tariff under Section 62 it will be guided by the provisions of Section 61, thereby ensuring a reasonable tariff. We find that the Section 61 only lays down general guiding principles which are not adequate for the purpose of taking investment decisions by the developer, particularly in emerging technology like Solar Power where the Joint Commission itself has noted in its order that the market conditions are changing. The Joint Commission's contention in the impugned order that if the generator is not

satisfied with the tariff fixed by the Commission subsequent to the signing of a valid PPA, he has the option to file the Appeal, can hardly provide any comfort to the Appellant to take the investment decision for the project. There is no provision in the Act to establish that the binding PPA between the generator and the distribution licensee is a pre-requisite for the determination of tariff. An MOU or an initialled draft PPA should be adequate for the Commission to determine the tariff. However, it is open to the parties to voluntarily enter into a PPA and submit unconditionally to the jurisdiction of the Commission for approval of the PPA and tariff. In this case the parties have not agreed to do so.

21. We also notice that the respondent no.2 had filed a petition for approval of the draft PPA proposed to be entered with the Appellant but the Joint Commission by its order 19.10.2010 did not approve the same as the tariff was yet to be decided. However, when the Appellant approached the Joint Commission for approval of the tariff, the Commission insisted on a valid PPA. We agree with the contention of the Appellant that they cannot be forced to enter into an enforceable agreement till the tariff and the terms and conditions of the agreement are approved by the Joint Commission.

22. Admittedly, the Commission has so far not determined a generic tariff for solar projects. The Commission has also not approved any tariff

regulations for procurement of power by the respondent no.2 from solar projects. It is the duty of the Joint Commission to promote generation of electricity from renewable sources of energy particularly solar which is an emerging technology and needs to be promoted due to abundance of sunshine and large potential available in the country.

23. Admittedly, in pursuance of its function under 86 (1)(e), the State Commission has issued regulations specifying purchase of electricity from the renewable sources by the distribution licensees as a percentage of its total consumption. We also notice that the Commission, in order to promote solar energy generation, has specifically specified a percentage of total energy consumption

of the distribution licensee to be met from solar energy sources. However, specified Renewable Purchase Obligation cannot be achieved by the distribution licensee unless the Joint Commission determines tariff for procurement of energy from renewable sources including solar.

24. Ld. Counsel for the State Commission has referred to the judgment of the Tribunal dated 31.03.2010 in Appeal No.106 and 107 of 2009 in the matter of BSES Rajdhani Power Ltd Vs. DERC and others and BSES Yamuna Power Ltd Vs. DERC & others. In this case the Appellants had challenged the order of the State Commission approving the PPA for procurement of power by NDPL, another distribution licensee, from a generator. In this case NDPL, the distribution

licensee, and the generator had agreed to enter into a PPA which was submitted to the State Commission for approval. The State Commission approved the PPA subject to incorporation of Rule 8 of the Indian Electricity Rules, 2005 stating that the PPA could be effective only after the tariff has been fixed by the Central Commission. The Tribunal had upheld the approval granted by the State Commission subject to various conditions. In our opinion this judgment is not relevant to the present case.

25. Ld. Counsel for the Joint Commission has also referred to the judgment of the Hon'ble Supreme Court reported as VII (2010) SLT 342 in the matter of Transmission Corporation of Andhra Pradesh and Anr. Vs. Sai Renewable Power Ltd &

batch of civil appeals. The findings of the Hon'ble Supreme Court in paragraph 30 of the judgment referred to by the Ld. Counsel for the Joint Commission only indicate the functions and powers of the Commission under Sections at 61, 62 and 86(1) (a) and (b) of the Act. These powers and functions of the Commission are not under dispute in the present Appeal. Hence, this judgment is not relevant to the present case.

26. The Government of India in order to promote solar energy generation has notified a Scheme under which the Central Government would provide generation based incentive to the distribution licensee for the energy procured from solar energy sources developed under the Scheme. The Appellant has already been shortlisted for

execution of project under the Scheme by the concerned nodal agency. The Appellant has to set up the power project by 31<sup>st</sup> March, 2013 to enable the Respondent no.2 to avail the benefits out of the Scheme. We, therefore, direct the Joint Commission to determine the tariff for procurement of energy by respondent no.2 from the Appellant's solar project proposed to be set up in UT of Puducherry within 45 days from the date of this judgment.

27. To conclude, our findings are that the signing of a valid PPA between the generator and the distribution licensee is not a pre-condition for determination of tariff by the Joint Commission. An MOU or initialled draft PPA would suffice. Accordingly, the Joint Commission is directed to

determine the tariff for sale of energy from the Solar Project of the Appellant to the Respondent no.2 within 45 days from the date of this judgment.

28. Accordingly, the Appeal is allowed. The Joint Commission is directed to pass a consequential order in the matter. No order as to costs.

**29. Pronounced in open court on 29<sup>th</sup> day of March, 2012.**

**(Rakesh Nath)  
Technical Member**

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

**REPORTABLE/NON-REPORTABLE**

**mk**