

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

**Appeal No. 310 of 2013**

**Dated : 20<sup>th</sup> November, 2014**

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

**In the matter of :**

**M/s Gayatri Sugars Ltd.  
B-2, 2<sup>nd</sup> Floor, 6-3-1090, TSR Towers  
Raj Bhavan Road, Somajiguda,  
Hyderabad – 500 082**

**... Appellant(s)**

**Versus**

**1. APNPDCL**

**Represented by its  
Chief General Manager (Projects & RAC),  
OPP: NIT Petrol Bunk, Hanamkonda  
Warangal District – 506 001**

**2. Andhra Pradesh Electricity Commission**

**4<sup>th</sup> – 5<sup>th</sup> Floor, Singareni Bhawan,  
Red Hills,  
Hyderabad – 500 004**

**Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Mr. Angad Mehta  
Counsel for the Respondent(s): Mr. P. Shiva Rao for R.1  
Mr. K.V. Mohan**

Mr. K.V. Balakrishnan for R.2

**JUDGMENT**

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

M/s Gayatri Sugars Limited is the Appellant herein. Aggrieved by the Order dated 31.08.2012 passed by the Andhra Pradesh Electricity Regulatory Commission (for short 'the State Commission'), the Appellant has filed this Appeal.

1. The short facts are as follows:

- i) The Appellant is a Generating Company. The Appellant entered into a Power Purchase Agreement with Distribution Licensee (APNPDCL), the Respondent No.1 dated 12.05.2006 agreeing to generate and supply electricity from its 16.05 MW

Bagasse based Co-Generation Project at the tariff and on the terms and conditions contained in the said agreement. The Appellant strongly believed that the distribution licensee will treat all the power purchasers equally. With that hope, the Appellant made all arrangements to establish the Power Plant.

- ii) The State Commission prescribed the method for fixing the tariff and the distribution licensee fixed the tariff based on the said two-tier method prescribed by the State Commission.
- iii) The distribution licensee determined the fixed costs for ten years from the date of commercial operation i.e., from 16.05.2007 to 16.05.2017 and five years for the variable cost i.e., up to the year 2009-2010. However, the rates offered by the distribution licensee were much

lower than the tariff assessed based upon the guidelines determined by this Commission. Moreover, the distribution licensee also imposed ceiling limit for tariff i.e., Rs. 2.63 per KWH.

iv) The Appellant struggled to supply the power at the rates prescribed in the Agreement. Hence, the Appellant approached the distribution licensee requesting for revision of tariff as per the Commission's Order dated 20.03.2004 and 31.03.2009 and requested the distribution licensee to treat the Appellant at par with the other competitors in the market. But there was no response from the distribution licensee.

v) The State Commission by considering all the variable items determined in the variable cost payable to the

co-generation unit from the year 2009-2010 to 2013-2014 has directed the distribution licensee to implement the same through the Order dated 31.03.2009. But the distribution licensee refused to apply the said variable cost to the Appellant.

vi) The Appellant supplied about 4,21,01,000 units till date, but it received only Rs. 11,07,25,630/-, whereas the Appellant is entitled for Rs. 12,89,59,030/- as per the Commission guidelines. Due to this, the Appellant's cash flow was seriously affected due to the imposition of ceiling on tariff by the distribution licensee. Consequently, the Appellant is incurring loss every year and the same may lead to the closure of the Appellant's project.

vii) Therefore, the Appellant submitted a representation through the letter dated 01.04.2011 to the distribution licensee requesting to reconsider the tariff as well as reimburse the due amounts to the Appellant. But the distribution licensee failed to consider the above said request and rejected the Application without assigning the reasons.

viii) Aggrieved by the action of the distribution licensee, the Appellant filed a Petition under Article 11 of the PPA under Section 64 of the Electricity Act, 2003 before the State Commission. This Petition was admitted by the State Commission on 21.11.2011. Ultimately, the State Commission after hearing the parties had dismissed the above Petition by the Order dated 31.08.2012.

- ix) The Appellant, on advice, preferred a Writ Petition before the High Court of Andhra Pradesh, Hyderabad, against this Order, but when the Respondent objected to the maintainability of the Writ Petition on the ground of availability of alternative remedy, the Appellant withdrew the Writ Petition with the liberty to file an Appeal before this Tribunal. Since the liberty has been given to the Appellant to approach this Appellate Tribunal, the Appellant has filed this Appeal before this Tribunal.
2. The crux of the arguments advanced by the Appellant is as follows:
- i) “The Appellant entered into a Power Purchase Agreement with the distribution licensee on 12.05.2006 agreeing to generate and supply the electricity from its

16.5 MW Bagasse based Co-Generation Project at the tariff and on the terms and conditions contained in the said agreement.

- ii) As per the Agreement, the terms and conditions contained in the Agreement are subject to the provisions of the Electricity Act, 2003 as amended from time to time and also subject to the Regulations notified by the Andhra Pradesh State Commission.
- iii) The State Commission by the Order dated 31.03.2009 determined the tariff including the variable cost admissible for Bagasse Non-Conventional Project at Rs. 950/- per MT as appropriate fuel cost. By the Order dated 16.05.2014, the State Commission determined the revised variable cost for the period 2014-2019. However, the State Commission in the impugned Order

has not permitted the Appellant's project to be treated at par with other generators, on the ground that Schedule 1 A of the Power Purchase Agreement provided for a ceiling tariff of Rs.2.63 KWH. This is quite wrong.

- iv) The State Commission ought not to have discriminated the Appellant from others on the ground that the Appellant has agreed to the ceiling tariff in the Power Purchase Agreement and the Power Purchase Agreement had been arrived at by mutual consent with the approval of the State Commission especially when the Appellant was not permitted to sell electricity to any other third party.
  
- v) The State Commission having regulatory powers ought to have rectified the position in relation to the variable

cost claimed by the Appellant. As a matter of fact, this Tribunal has held in several cases that the State Commission can in exercise of regulatory powers modify the tariff agreed to in the Power Purchase Agreement.

- vi) In the present case, the State Commission in the Order dated 31.03.2009 had noted the general opinion on the ceiling of tariff by stating that the objective of encouraging the renewable purchase will be defeated if scope for a negotiated tariff is made available by prescribing the ceiling concept.
- vii) Having held so, it is unjust on the part of the State Commission to enforce ceiling tariff only in the case of the Appellant while allowing the tariff as determined in the Order dated 31.03.2009 for others.

viii) The State Commission has committed wrong in holding that the PPA entered into by the parties with mutual consent cannot be altered by the State Commission with regard to the tariff. On these grounds, the impugned Order is sought to be set aside.

3. In reply to the above submissions, the learned Counsel for the Respondents submitted in justification of the impugned Order that this case cannot be compared to that of the other Appeals like Appeal No. 247 of 2013, in which the finding had been rendered in favour of the Generator. However, it is submitted by the learned Counsel for the distribution licensee alternatively that applying the law laid down by this Tribunal in Appeal No. 247 of 2013, the State Commission may be directed to decide the issue by way of revision of tariff afresh and that further the State

Commission may be directed to determine the variable tariff not exceeding the generic tariff and that the same shall be applied from the date of such revision prospectively.

4. In short, the distribution licensee submits that the claim of the Appellant to revise the tariff retrospectively from 2009 together with claim of arrears may be rejected since the Appellant until 2011 did not dispute the tariff and even after 2011, the Appellant went on supplying the power at the specified tariff in PPA while canvassing for revision of tariff.
5. In the light of the above contentions of the parties, the main questions, which may arise for consideration is as follows:

***“i) Whether the tariff of Rs.2.63/- as stated in the schedule of extent P.P.A. dt. 12.05.2006 for entire period of PPA is valid?”***

***ii) Whether the Judgment of this Tribunal in Appeal No. 247 of 2013 in toto applies to this case?***

***iii) Whether tariff afresh need to be decided for the future period. If so from what date need to be applied?***

***iv) Whether the generic tariff payable to other bagasse projects mutatis – mutandis applies to the petitioner for the future period?”***

6. Since all the issues are inter-related, we will take up all those issues together.
7. At the threshold, it must be pointed out that though the learned Counsel for the distribution licensee initially ventured to justify the Order on the ground that the Judgment rendered by this Tribunal in Appeal No. 247 of 2013 would

not apply to the present case, but ultimately the learned Counsel for the Respondent alternatively submitted that as per the law laid down by this Tribunal in several Appeals including the Appeal No. 247 of 2013, the tariff may be directed to be decided by way of revision of tariff by the State Commission afresh prospectively, but not retrospectively.

8. In the light of the alternative submission made by the learned Counsel for the Respondent, let us discuss the issue now.
9. Admittedly, by the Order dated 31.03.2009, the State Commission determined the tariff including variable cost admissible for Bagasse Non-Conventional Project at Rs.950/- per MT as appropriate fuel cost. Similarly, by the Order dated 16.05.2014, the State Commission determined the revised variable cost for the period 2014-19. In the

impugned Order, the State Commission has not permitted the Appellant's Project to be treated at par with other generators only on the ground that Schedule 1A of the Power Purchase Agreement entered into between the parties provided for a ceiling of tariff of Rs.2.63 per Kwh. This finding is not in line with the generic tariff determined by the State Commission in the earlier Orders.

10. It should be pointed out that the State Commission could not discriminate the Appellant on the ground that the Appellant has agreed to the ceiling tariff in the Power Purchase Agreement, which was entered into by the parties with mutual consent. The State Commission has got the regulatory powers to be exercised and it ought to have rectified the position in relation to the variable cost claimed by the Appellant.

11. Admittedly, this Tribunal has rendered a detailed Judgment in M/s SLT Power & Infrastructure Projects Pvt. Limited Vs. Andhra Pradesh Electricity Regulatory Commission in Appeal No. 247 of 2013 deciding the issue. In that Appeal, the question arose was whether the State Commission is empowered to modify the existing long term concluded PPA and especially with the object of promotion of generation of electricity from renewable sources of energy in terms of Section 61 (h) and 86 (1) (f) of the Electricity Act, 2003.
  
12. In fact, this Tribunal affirmed the power of the State Commission to modify the terms of existing long term concluded PPA, especially where the tariff of a renewable project agreed to between the parties is unviable. According to the Appellant the production of electricity is commercially unviable by showing various circumstances. The variable

cost insofar as the present case is concerned had been determined by the State Commission by the Order dated 31.03.2009 for the period 2009-2014 and for the period 2014-2019, the State Commission determined the same on 16.05.2014. Thus, the variable rates as determined by the State Commission from time to time coupled with the fixed cost exceed tariff ceiling in Schedule 1A of the PPA. Moreover, the cost of production of electricity far exceeds the rate at which it is being sold to the distribution licensee.

13. The only issue for determination of the present Appeal is a legal issue. The relevant question is whether the State Commission has the power to modify a concluded long term PPA to give impetus to companies generating electricity using renewable resources. This issue is squarely covered

in Appeal No. 247 of 2013. However, the Respondent submits that the same can be revised prospectively and not retrospectively.

14. In Appeal No. 247 of 2013 the Appellant Company therein operated its plant only for January 2008 and February 2008 i.e., for two months. It was in those circumstances this Tribunal had held in the said Judgment that the tariff as determined by the State Commission from time to time could only be prospectively applicable.
15. As pointed out by the learned Counsel for the Appellant in the present Appeal, the Appellant has admittedly been operating the plant since the date of Commissioning in 2007 and has been operating at a loss. This loss is further continued by the fact that the Appellant is not permitted to sell electricity to any other party except the distribution

company in A.P. Therefore, the Appellant was constrained to sell the electricity only to APTRANSCO and also only at the rates stipulated in the PPA.

16. Hence, the issue of only prospective application of the rates determined by the State Commission would not apply to the present case. Therefore, we hold that the Appellant would be entitled to be paid as per the rates determined by the State Commission pursuant to the various generic tariff Orders dated 31.03.2009 and 16.05.2014 with effect from the date of filing of the Petition before the State Commission which resulted in passing of the Impugned Order.

17. **TO SUM UP**

**The Tribunal's finding allowing of the generic tariff as determined by the State Commisison in Appeal No.247 of 2013 will apply to the present case. However, the**

**revised tariff has to be allowed to the Appellant with effect from the date of filing the Petition before the State Commission which resulted in passing of the Impugned Order.**

18. In view of the above findings, we set aside the impugned Order and remand the matter to the State Commission for considering the revision of tariff in terms of the observation made in the above Judgment.

19. Accordingly, the Appeal is allowed. No order as to costs.

**(Rakesh Nath)**  
**Technical Member**

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

**Dated:20<sup>th</sup> November, 2014**

**V** REPORTABLE/NON-REPORTABLE