

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:2nd Sept, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

APPEAL NO.242 OF 2013

In the Matter of:

EDCL Power Projects Ltd.
Ullunkal SHP, Chittar PO
Pathanamthitta Distt.
Kerala-689 663

.... Appellant

Versus

- 1. Kerala State Electricity Regulatory Commission**
KPFC Bhavanam,
CV Raman Pillai road,
Vellayambalam,
Thiruvanthapuram-695 010
- 2. Kerala State Electricity Board (KSEB)**
Vydyuthi Bhavanam,
Pattom,
Thiruvananthapuram-695 004

...Respondent(s)

Counsel for the Appellant(s) : Mr. K G Raghavan, Sr Adv
Mr. Anirudh Krishnan
Mr. Vipul Sharma

Counsel for the Respondent(s):Mr. Ramesh Babu for R-1
Mr. M T George
Ms. Kavitha for R-2

J U D G M E N T

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

1. EDCL Power Project Limited is the Appellant herein.
2. Challenging the Impugned Order dated 30.7.2013, passed by the Kerala State Commission dismissing the Petition filed by the Appellant praying for the revision of tariff, the Appellant has filed this Appeal.
3. The short facts are as follows:
 - (a) The Appellant M/s. Energy Development Company Limited (EDCL), is a Special Purpose Vehicle. This is set-up pursuant to the implementation of the Agreement between the Government of Kerala and M/s. Energy Development Company on 19.6.2008 for the implementation of Ullunkal Small Hydro Project. This project was commissioned on 13.11.2008.
 - (b) M/s. Energy Development Company filed a Petition for tariff determination on 29.12.2008.
 - (c) The State Commission by the Order dated 28.2.2009, fixed the tariff at Rs.2.44 per unit on the

basis of the Power Procurement from Renewable Source Regulations, 2006 as amended by First Amendment Regulations, 2008 for a period of 25 years.

(d) Subsequently, the ownership of the project was taken over by the Appellant. Thereafter, on 20.9.2011, the Appellant filed a Review Petition seeking Review of the Tariff Order dated 28.2.2009. This was dismissed on 21.8.2012 by the State Commission.

(e) Thereupon, the Appellant filed a fresh Petition u/s 62 of the Electricity Act, 2003 for re-determination of tariff on 8.4.2013.

(f) In this Petition, the Appellant prayed to redetermine the tariff by taking into consideration all the existing facts, scenario and the factors on the basis of the Appellant's calculation and prayed for fixing the tariff at Rs.4.87 per unit for a period of 15 years.

(g) The said Petition was dismissed by the State Commission by the Order dated 30.7.2013.

(h) Aggrieved by this Order, the present Appeal has been filed.

4. The grounds raised by the Appellant in this Appeal are as follows:

(a) The Impugned order on the face of it, is contrary to the mandate of the Section 61 and 62 of the Electricity Act, 2003.

(b) Fixing the tariff for the project which is a project for generation of electricity from the Renewable Source without taking into account the actual cost involved and based on the assumption which may not apply to the project, is an abject disregard to the policy set out.

(c) The Regulations fixing an upper cap would be contrary to the provisions of the Electricity Act, 2003.

(d) The Rules framed contrary to the statutory enactment are not valid. Therefore, the delegatory legislation should be given such an interpretation which is in consonance with the parent act.

(e) The Regulations fixing the mandatory upper cap would be violative of Article 14 of the Constitution on

the basis that the classification made between the project commissioned prior to the Regulations, 2013 and subsequent to the Regulations 2013 would be arbitrary and without any nexus to the object of the 2013 Regulations.

(f) The plain reading of Clause 5 (6) of the Regulations would make it clear that if the proposed rate is less than or equal to Rs.2.44 per unit, the State Commission shall approve it and if the proposed rate is more than Rs.2.44 per unit, the State Commission can examine the proposal and decide it appropriately. Therefore, the above provision does not fix Rs.2.44 per unit as a binding upper cap. If these Regulations are not interpreted correctly, they would be rendered unconstitutional. In this case, the State Commission wrongly interpreted that these Regulations are mandatory.

5. On these grounds, the Impugned Order is sought to be set-aside.
6. In reply to the above submissions, the learned Counsel for the State Electricity Board while justifying the Impugned Order, has strenuously contended that the State Commission, based on the revised norms, has already

revised the levelised tariff for SHP for 25 years and hence, the prayer for enhancement of the tariff in violation of the relevant Regulations is not valid in law.

7. In the light of the above rival contentions, the following questions would arise for consideration:

(a) Whether the Impugned Order is contrary to Section 61 and 62 of the Electricity Act, 2003 and the Regulations framed thereunder?

(b) Whether the Regulations, 2006, 2010 and 2013 are to be treated as being directory in nature as opposed to being mandatory?

(c) Whether the Regulations have to be interpreted in such a manner so as to render them constitutional?

8. Since these issues are interconnected, let us discuss these issues altogether.

9. According to the Appellant, the State Commission has wrongly interpreted the relevant Regulations in the manner that they would render unconstitutional and consequently, the Regulations ultra-vires the powers conferred on the State Commission.

10. According to the Respondents, the Regulations have not only been correctly interpreted but also they are in consonance with Section 61 and 62 of the Electricity Act as well as the National Electricity Policy, Tariff Policy and the norms prescribed by the Central Commission. So long as the Regulations are holding the filed, the State Commission is bound to follow them and it cannot be interpreted according to the whims and fancies of the individual Generator. If the Appellant has got the grievance over the Regulations, the Appellant has to question the validity of the same before the Competent Court and not before this Forum.

11. Before dealing with the above issues, it would be appropriate to deal with the background of the case:

(a) In Kerala, the State Commission has originally notified the Renewable Energy Regulations during the year 2006. These Regulations were subsequently amended during the year 2010 vide Notification dated 22.11.2010 by revising certain norms for technical and financial parameters. Accordingly, the generic tariff for hydro projects to be commissioned after the Notification of the amended Regulations was determined. Again, the Regulations were revised by

the Regulations, 2013 from 1.1.2013. As per these Regulations, the State Commission has fixed the single part levelised tariff applicable for Small Hydro Projects commissioned during each tariff period.

(b) As per the power procurement from renewable source Regulations, 2006 which was issued on 24.6.2006, the State Commission has to follow the methodology for determination of tariff for electricity from renewable source.

(c) As per Regulation 5 of the 2006 Regulations, the State Commission had specifically taken parameters and financial norms including the escalable parameters for determining the levelized tariff of renewable power project for 25 years.

(d) The levelized tariff approved by the State Commission as per the Regulations, 2006 is Rs.2.44 per unit for Small Hydro Projects.

(e) The State Commission by the Notification dated 22.11.2010 has made certain amendments on the principal Regulations, 2006. The main changes were on technical and financial parameters considering the increase in Capital cost, inflation, interest rate etc.,

(f) Based on the revised norms, the State Commission revised the levelized tariff for Small Hydro Projects (SHP) as Rs.2.94 per unit for 25 years. As per these Regulations, the revised tariff of Rs.2.94 shall be applicable only for the project proposals submitted after the publication of the amendment Regulations dated 22.11.2010.

(g) Later on, the State Commission issued another Notification on 1.1.2013 making some more amendments. By this notification, the State Commission had totally revised the Regulations of power procurement from renewable sources and notified these Regulations, 2013. By this notification, the State Commission has revised the technical and financial norms adopted for tariff determination.

(h) The State Commission through the Regulations 6.6 (2) of the 2013 Regulations approved the levelized tariff for Small Hydro Project having capacity 5 to 25 MW as Rs.4.16 per unit. It also approved levelized tariff for the Small Hydro Projects having capacity below 5 MW as Rs.4.88 per unit.

(i) The State Commission, in these Regulations has specifically clarified that the tariff determination as

above shall be applicable for the projects commissioned on or after 1.1.2013 only. These details would show the following aspects:

- (aa) As per Regulations, 2006, Regulations, 2010 and Regulations, 2013, the levelized tariff applicable for the Small Hydro projects having capacity more than 5 MW shall be (i) Rs.2.44 per unit for Small Hydro Power Projects commissioned before 22.11.2010 for more than 25 years (ii) Rs.2.94 per unit for more than 25 years for the projects commissioned during the period from 22.11.2010 to 31.12.2010 and (iii) Rs.4.16 per unit for 35 years for the projects commissioned on or after 1.1.2013;
- (j) From the perusal of these Regulations, it is evident that the levelized tariff so arrived was duly factoring the inflation and other escalable parameters and these Regulations do not envisage re-determining the tariff of each Generator as and when the Regulations are revised by the State Commission. Similarly, the Central Commission's Regulations with regard to renewable energy source also do not envisage to re-determine the generic levelized tariff once approved.

(k) In other words, it does not propose to keep on modifying the preferential tariff available for different time period based on the requests of the individual Generators.

(l) As pointed out by the Respondent, the tariff norms applicable for a control period are finalized only after issuing public notice and inviting suggestions from all generators and stake holders.

(m) In view of the above, the preferential tariff under the tariff norms are arrived for control period by taking into consideration the project cost, debt equity ratio, cost of finances, return on equity, repair and maintenance charges and depreciation etc., prevailing during the tariff period and cost escalation for escalable parameters.

(n) Admittedly, the Appellant is a Special Purpose Vehicle set-up pursuant to implementation agreement between the Government of Kerala and the parent Company of the Appellant for implementation of Ullunkul Small Hydro Project (2x3.5 MW). The project is utilising the tail water from Kakkad Hydro Electric project of State Electricity Board which in

turn, the tail race project of the Electricity Board's at Sabarigiri Hydro Electric Project.

12. These factual aspects as referred to above have to be borne mind while deciding the issues raised in this Appeal.
13. The Appellant originally filed Petition on 29.12.2008 before the State Commission for fixing the tariff for its Small Hydro Projects at Rs.2.95 per unit. The State Commission through its order dated 28.2.2009 fixed the levelized tariff at Rs.2.44 per unit for 25 years. As per Sub Clause-6 of Clause 5 as amended through the Regulations, 2008 dated 18.11.2008.
14. In fact, the Appellant wrote a letter on 26.3.2009, acknowledging the tariff of Rs.2.44 per unit approved by the State Commission. Subsequently, the ownership of the project was changed from parent Company to the EDCL Power Projects, the Appellant. Thereupon, the Appellant filed a Review Petition on 20.9.2011 praying for the review of the Order dated 28.2.2009. The State Commission however, dismissed the said Petition filed by the Appellant by the Order dated 28.2.2009. This has not been challenged before the Appellate Forum.
15. In the meantime, the State Commission issued a Notification on 1.1.2013 revising Regulations and notifying the power

procurement from renewable source Regulations 2013. In this Regulation, the State commission fixed the revised normative levelized tariff for Small Hydro Projects having capacity less than 5 MW at Rs.4.88 per unit and above 5 MW as Rs.4.16 per unit. As per Regulations dated 1.1.2013, this Regulations would be applicable only for the projects commissioned on or after 1.1.2013.

16. Despite these Regulations, 2013 which would be applicable only to the projects commissioned later, the Appellant filed a Review Petition before the State Commission on 8.4.2013 praying for the re-determination of the tariff of the project on the basis of the Appellant's fresh calculations of capital cost and other expenses and it further prayed for fixing the tariff for the project at Rs.4.87 per unit for a period of 15 years.
17. These aspects have been taken into consideration by the State Commission while rejecting the prayer through the Impugned Order dated 30.7.2013.
18. The crux of the findings given in the Impugned Order are as follows:
 - (a) The Petitioner EDCL has actually misinterpreted the facts to achieve the aim of higher levelized tariff for the project commissioned in 2008 by boosting the cost of the project in violation of the Regulations.

(b) The tariff for the Petitioner's project has been determined only after taking into consideration the project cost, debt equity ratio, cost of finances etc., The cost of energy per unit has been worked out taking into consideration the PLF and total annual energy output from the project.

(c) The proponents of the project commissioned many years ago while 2006 Regulations were in force, could not claim the increased tariff as and when the rates are revised for recent project based on escalation in cost and other relevant factors.

(d) As per Clause 6 (2) of the Regulations, 2013 "provided that the tariff given above, shall be applicable only for the projects commissioned on or after 1.1.2013 and this tariff shall be applicable for all the projects developed during the control period and the developers need not obtain approval from the State Commission for the tariff applicable for their individual projects".

19. These findings in our view would not suffer from any infirmity since the State Commission has followed the relevant Regulations and fixed the tariff to the various projects considering the date of the commissioning of the project.
20. The tariff of a Hydro Project is mainly dependent on the Capital Cost and availability of water inflows. A hydro project which has been commissioned in the year 2008, cannot claim parity in tariff with a project which is commissioned in the year 2013 due to difference in capital cost due to inflation. Accordingly, the Appellant cannot claim the tariff as per 2013 Regulations for its project which was commissioned in the year 2008 and whose tariff was fixed by the State Commission as per then prevailing 2006 Regulations by Order dated 28.2.2009.
21. The Appellant could not seek for the increased tariff by pleading that the Regulations are not valid and as such, they are not mandatory.
22. This argument could be advanced only before the appropriate forum in which the validity of the Regulations could be challenged. The Appellant cannot choose this Forum to pray for the finding with reference to the virus of the Regulations under the garb of different interpretation.

23. The power to fix the tariff is vested with the State Commission. This can be exercised only in the manner contemplated in the Regulations. The Regulations do not contemplate any escalation of price above the preferential tariff for the renewable energy generating company.
24. Even if the tariff for the only project is determined as requested by the Appellant u/s 62 of the Act, the norms for only projects have to be limited to the norms adopted for different time period in the Regulations since these norms are valid during the control period as per Regulations for preferential tariff valid for that time period. Therefore, the Appellant which has commissioned its project long back would not seek for enhancement of tariff under the Regulations, 2013 for increase in tariff.
25. The learned Senior Counsel for the Appellant has also filed additional affidavit giving various details with regard to the capital cost of the certification, certified by the statutory auditors and the balance sheet of the Company.
26. We are not able to accept the contention of the Appellant through this additional affidavit as we are concerned only with the question whether the State Commission has followed the Regulations in letter and spirit or not in the

Impugned Order. As indicated above, we are not called upon to go into the legality or validity of the Regulations.

27. In fact, the State Commission in the Impugned Order has followed the Regulations notified during the various control periods in letter and spirit.

28. Hence, there is no merit in the Appeal.

29. Summary of Our Findings

(a) **The Tariff Regulations of 2006 provides for the norms for determination of tariff for the hydro projects and the generic tariff determined on the basis of the specified norms. The Appellant's hydro Power Project was commissioned on 13.11.2008. Accordingly, the State commission, on application of the Appellant fixed tariff of Rs.2.44 per unit for a period of 25 years as per the Tariff Regulations prevalent at that time i.e. 2006 Tariff Regulations. The State Commission has subsequently notified the amended Regulations in 2010 and the generic tariff for the hydro projects to be commissioned from 22.11.2010 and 2013 Tariff Regulations and generic tariff applicable to hydro projects to be commissioned on or after 1.1.2013.**

The 2010 and 2013 Tariff Regulations would not be applicable to the Appellant's Power Plant which was commissioned on 13.11.2008.

(b) The Appellant whose hydro power project was commissioned during the year 2008 cannot claim parity in tariff with hydro power project commissioned in the year 2013 as the Capital Cost of the projects commissioned in different time periods are likely to be different due to inflation.

30. In the light of the above findings, we do not find any infirmity in the Impugned Order. Hence, the Appeal is dismissed as devoid of merit.

31. However, there is no order as to costs.

32. Pronounced on this 2nd day of September, 2014 in the Open Court.

(Rakesh Nath)
Technical Member
Dated: 2nd Sept, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

✓ ~~REPORTABLE/NON-REPORTABLE~~