Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 03rd Feb. 2014

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

Appeal No. 86 of 2013

1. The Karnataka Power Transmission Corporation Ltd.,
   Cauveri Bhavan,
   Bangalore-560 001

2. The Chief Engineer
   State Load Dispatch centre
   28, Race Course Road,
   Bangalore – 560001.

3. Bangalore Electricity Supply Company Limited
   KR Circle,
   Bangalore - 560001

... Appellant(s)

Versus

1. Karnataka Electricity Regulatory Commission
   6th & 7th Floor,
   Mahalaxmi Chambers,
   9/2 M.G Road,
   Bangalore-560 001

2. Davangere Sugar Company Limited.,
   No. 73/1, P.B. No. 312,
   Shamanur Road,
   Davanagere - 560 001

Respondent(s)

Counsel for the Appellant (s): **Mr. Anand K Ganesan**
Ms. Swapna Seshadri
Mr. S. Vallinayagam

Counsel for the Respondent (s): **Mr. Prabhuling Navadgi,**
Ms. Vedanayagi Kiran D.

J U D G M E N T

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

1. Karnataka Power Transmission Corporation Limited, the State Load Dispatch Centre and BESCOM are the Appellants herein.

2. They have filed this Appeal challenging the order dated 14/2/2013 passed by Karnataka State Commission directing the SLDC (Appellant 2) to make the payment of Rs.3.90/- per unit for the unscheduled energy injected by the Generating Company between the period 17/12/2010 and 11/1/2011.

3. The short facts are as follows.

   (a) The Karnataka Power Transmission Corporation Limited, the 1st Appellant, is a Government of Karnataka Undertaking, engaged in the functions of the transmission of electricity in the State of Karnataka. The SLDC, the Appellant 2, is the organization which

manages the function of scheduling, load dispatch and settlement of accounts in the State of Karnataka.

(b) Bangalore Electricity Supply Company Ltd (BESCOM) the 3rd Appellant is one of the Distribution Licensees in the State of Karnataka.

(c) The State Commission is the 1st Respondent. Davenagere Sugar Company Limited, the Generating Company is the 2nd Respondent. This Company owns and operates a Cogeneration Plant in Karnataka.

(d) The Generating Company entered into a Power Purchase Agreement dated 17/1/2002 with the Transmission Company the 1st Appellant for the sale of power from Cogeneration Plant of the company. Subsequently, after the unbundling, the Power Purchase Agreement came to be assigned in favour of the Distribution Licensee BESCOM, the 3rd Appellant.

(e) Since, there were several defaults committed by the BESCOM; the Generating Company terminated the PPA on 8/7/2009, on the ground of breach of the terms of the PPA by BESCOM.

(f) Then, the Generating Company (R-2) applied to the SLDC for 'No Objection' to obtain Open Access for supply of power to third parties but, the Open Access was rejected by the SLDC on 12/6/2009.

(g) Being aggrieved by this rejection the Generating Company R-2 filed a petition before the Central Electricity Commission in O.P. No. 114 of 2009.

(h) The Central Commission allowed their Petition and directed the SLDC to grant Open Access in favour of the Generating Company by the order dated 14/7/2009. In the meantime, the 3rd Appellant, the Distribution Licensee filed the petition in O.P.No. 17 of 2009 challenging the Termination Notice dated 8.7.2009 issued by the Generating Company. This Petition was ultimately dismissed by the State Commission on 8/10/2009.

(i) At that stage, challenging the order of Central Commission dated 14.7.2009 granting Open Access to the Generating Company, the State of Karnataka filed a Writ Petition before the Karnataka High Court.

(j) The High Court of Karnataka granted stay of the order passed by Central Commission and directed the Generating Company to continue to supply power to the Appellants. By way of interim tariff, the High Court fixed Rs.5/- per unit for every unit of energy supplied by the Generating Company during pendency of the Writ Petition in the High Court.

(k) In the mean time, the BESCOM Distribution Licensee, 3rd Appellant, filed an Appeal in Appeal No. 176 of 2009 challenging the dismissal order in OP. No. 17 of 2009 passed on 8/10/2009 affirming termination. However, this Appeal was dismissed by the Tribunal on 18/5/2010.

(l) As against this Judgment dated 18.5.2010, the BESCOM filed a civil Appeal before the Hon'ble Supreme Court. However, the Supreme Court dismissed the said Appeal by the order dated 4/10/2010. In view of the same, the Generating Company (R-2) filed the application before the SLDC seeking for grant of Open Access on 10/12/2010.

(m) At this stage, in view of the above development, the State of Karnataka sought for withdrawal of the Writ Petition on the reason that the issue does not survive. Accordingly, the Writ Petition was dismissed by the High Court on 16/12/2010 as withdrawn.

(n) In the mean time, the Respondent Generating Company continued to supply power to the State Grid managed by the SLDC. Ultimately, Generating Company got the Open Access on 11/1/2011.

(o) Thus, the Generating Company injected the power to the State Grid from 17/12/2010 and 11/1/2011

in which period SLDC failed to issue the Open Access. Thereafter, the Generating Company by letter dated 18/6/2011 requested SLDC for the payment for the energy received at the rate of Rs.5/- for every unit of energy for the period between 17/12/2010 and 11/1/2011.

(p) In response to the same the SLDC directed the Generating Company to approach the Distribution Company, the 3rd Appellant. Accordingly, Generating Company contacted the distribution company but the BESCOM directed the Generating Company to approach the State Commission for necessary directions.

(q) In pursuance of the same, the Generating Company (R-2) filed the Petition before the State Commission in OP. No. 4 of 2012 claiming for the payment for Rs. 5 as compensation for the every unit of energy supplied between 17/12/2010 and 11/1/2011.

(r) The State Commission after hearing the parties disposed of the Petition by Impugned Order dated 14/2/2013 holding that the Generating Company will be entitled for Rs.3.90/- per unit which is the generic tariff but not Rs.5/- per unit as claimed by the Generating company. This Impugned Order was passed by the Majority Members of the State Commission.

(s) However, one of the members of the State Commission held that following the judgment of this Tribunal dated 27.9.2012 in Appeal No.140 of 2012 the Generating Company should be paid the variable charges for injecting energy into the Grid without any schedule or having any PPA with Distribution Licensee.

(t) Aggrieved by the Impugned Order passed by the Majority Members of the State Commission, the Appellants namely (1)Transmission Company (2) SLDC and (3) BESCOM have filed this Appeal before this Tribunal.

4. The Learned Counsel for the Appellants has made the following submissions, while assailing the Impugned Order:

(a) The State Commission is wrong in holding that Generating Company is entitled to the Tariff of Rs.3.90/- per unit for the power injected during this specified period, when the power was injected by the Generating Company without any prior schedule or intimation and more particularly when there was no PPA between the parties.

(b) The State Commission while fixing the rate of Rs.3.90/-per unit has not followed the ratio laid down by this Tribunal in Appeal No. 123 of 2010 dated 16/05/2011 in Indo Rama Synthetics (I) Ltd. case and

the Appeal No. 140/2012 decided on 27/09/2012 in the case of Parrys Sugar Industries Limited. The State Commission ought to have held that the Generating Company was not entitled to the compensation as per the above judgments of this Tribunal and at least it ought to have fixed rate as variable costs as laid down in the Parry's Sugar Industries case.

(c) The State Commission is wrong in simply following the judgment in Appeal No. 228 of 2012 in the case of SJN Sugars Products Limited case dated 4/2/2013 and also the Judgment in Appeal No. 170 of 2012 dated 24/1/2013 in Bangalore Electricity Supply Company Ltd case as the facts of those cases would not apply to the present case.

(d) The State Commission wrongly held that there was a delay in granting Open Access on the wrong premise that the Appellant 1 and 2 must have known about the order of the High Court dated 16/12/2010 dismissing the Writ Petition as withdrawn and even then, the 2nd Appellant had delayed further in granting Open Access up to 10/1/2011 and that therefore, the Appellants are liable to pay the compensation at the rate of Rs.3.90 per unit. This reasoning is erroneous since the Appellants were not the petitioners in the Writ Petition filed in the High court and the order dated

16/12/2010 dismissing the Writ Petition passed by High Court was not known to the Appellants. The Generating Company also did not intimate to the Appellant in regard to the nature of the order passed by the High Court. The certified copy of the High Court order dated 16/12/2010 was received by the Appellant only on 3/1/2011 and thereafter the process for granting Open Access was immediately started and then Open Access was granted to the Generating Company after observing the due procedure promptly on 10/1/2011.

(e) In the absence of the materials that the Appellant had the knowledge of the nature of the High Court order dated 16/12/2010, the State commission cannot conclude that the Appellants should have known about the order of the High Court on that day itself and even then the Open Access was granted only on 10.1.2011 and as such they were responsible for the delay.

(f) For the period 17/12/2010 to 3/1/2011 the Open Access could not be granted only on the reason that the Appellant had no knowledge of the terms of the order of the High Court dismissing the Writ Petition. In the absence of the knowledge about the orders and in the absence of any intimation about the nature of the order to the Appellant, they cannot be held responsible for the delay in granting Open Access.

(g) The dissenting view by the single Member has clearly held that the action of the Generating Company was not correct. However, the single member has expressed his view on the basis of Appeal No. 140 of 2012 that the Generating Company could be entitled only to have variable charges. This has been observed by the dissenting Member on the basis of the Judgment of this Tribunal. Under these circumstances, there is no justification for the State Commission to grant any tariff higher than the variable cost to the Generating Company.

(h) The order of the dissenting Member is consistent with the ratio laid down by this Tribunal in various judgments. Therefore, this order by the Minority Member shall be upheld even if this Tribunal comes to conclusion that there was some delay in granting Open Access by the Appellants after the disposal of the Writ Petition by the High court.

5. In reply to the above submissions of the Appellant, the Learned Counsel for the Respondent Company in support of the Impugned Order made a elaborate submissions to the effect that the State Commission through the majority order has given the correct finding after a detailed analysis, on the strength of the Judgment rendered by this Tribunal which would apply to the present case and other

decisions cited by the Appellant would not apply to the present facts of the case and that therefore, the majority order of the State Commission both with reference to the liability to pay the compensation as well as the rate of the compensation is, perfectly justified.

6. We have carefully considered the submissions of both parties.

7. The learned Counsel for the Appellants though initially has made an attempt to establish that the Appellants are not liable to pay any amount as compensation, ultimately, he confined himself with reference to the issue of rate fixed as the compensation as generic tariff charges instead of variable charges.

8. In the light of the rival contentions of both the parties, the only question to be decided in the present case is as follows:

> "Whether the State Commission is justified in law, in holding that the Generating Company is entitled to the tariff as per the generic tariff or variable charges payable when the injection of electricity by the Generating Company was without any schedule and in the absence of PPA with the BESCOM after ignoring the Judgment of this Tribunal in Appeal No.140 of 2012 wherein, it has been held that the

Generating Company should be paid only the variable charges?"

9. Thus, the limited issue involved in this Appeal is as to whether the Generating Company is entitled to generic tariff as held by Majority Members of the Commission or only variable tariff as held by the single Member of the Commission.

10. However, we shall deal with the claim for entitlement of the tariff during this period incidentally. It is not in dispute that the State Grid was in receipt of the supply of energy generated by the Generating Company between 17/12/2010 and 11/1/2011. There is also no dispute in the fact that the Hon'ble Supreme Court dismissed the Appeal filed by the BESCOM confirming the validity of termination as found by the State Commission and this Tribunal on 4.10.2010.

11. Similarly, the fact that application for grant of Open Access was filed by Generating Company before the SLDC on 10.12.2010 after the dismissal of civil Appeal by the Hon'ble Supreme Court is also not disputed. In fact, both the parties were the parties before the Hon'ble Supreme Court.

12. On the basis of the Supreme Court order dismissing the Appeal filed by the BESCOM, State of Karnataka sought to

withdraw the Writ Petition filed before the High Court on 16/12/2010. In this Writ Petition, the order of the Central Commission directing for the grant of Open Access in favour of the Generating Company was challenged and the said order was stayed. This petition was dismissed as withdrawn. In this Writ Petition, both State of Karnataka and the present Appellants were the parties.

13. From the above, it is clear that from 16.12.2010 i.e. the date of order dismissing the Writ Petition, there was no bar for the SLDC to grant Open Access in obedience to the directions given by the Central Commission as the stay order by the High Court was vacated. But, in the present case, the Open Access was granted only on 11.1.2011 with delay though the stay was vacated and Writ petition was dismissed on 16.12.2010 itself.

14. The explanation for this delay by the Appellants is that the Appellants came to know about the dismissal order of the Writ Petition only on 3/1/2011.

15. It is specifically submitted by the Generating Company 2nd Respondent that all the parties including the present Appellants were present before the High Court through their Lawyers when Writ Petition was dismissed as withdrawn by the Advocate General on 16.12.2010. This statement of the Generating Company has not been

disputed by the Appellants in their counter before the State Commission.

16. Hence, the Appellants cannot contend now that they were not aware of the order on 16.12.2010 and they were aware of the order only on 3.1.2011 and thereafter on 11.1.2011, they issued Open Access. This belated explanation cannot be accepted as credible. Not only that, the present Appellants were the Appellants in the Appeal filed by them in the Hon'ble Supreme Court and the said Appeal was dismissed on 4.10.2010 by the Hon'ble Supreme Court. Thereafter, the Generating Company the 2nd Respondent filed an Application before the SLDC for the grant of Open Access on 10.12.2010. At that stage on 16.12.2010, the Advocate General withdrew the Writ Petition.

17. Therefore, after the disposal of the Civil Appeal i.e. on 4.10.2010 or at least after entertaining the application for the grant of Open Access dated 10.12.2010, the Appellants should have taken immediate steps for granting Open access. Admittedly, this was not done in this case.

18. Therefore, the Appellant's explanation that they were not aware of the disposal of the Writ Petition cannot be countenanced. The delay on the part of the Appellant has been dealt with in both Majority Members as well as the Minority Member in the impugned order and the same was

not accepted by both. That is the reason as to why the findings that the delay was caused on the part of the Appellants has not seriously been challenged in this Appeal. Therefore, there is no difficulty in concluding that the said delay was not properly explained and as such, the Appellants must be held responsible for the delay and consequently, the Generating Company is entitled to claim the compensation.

19. Let us now deal with the issue relating to quantum of the rate fixed by the State Commission.

20. The main ground urged by the learned Counsel for the Appellants is that the State Commission has not followed the judgment in Appeal No.123 of 2010 in the case of Indo Rama Synthetics (I) Ltd case and Appeal No.120 of 2012 in the case of Parrys Sugar Industries Limited case while fixing the tariff payable.

21. In the Indo Rama Case, it was held that the Generating Company was not entitled for any compensation in the light of the facts of that case. Therefore, that case is not applicable to this case since we are dealing with the different issue.

22. The main thrust by the learned Counsel for the Appellant is that the State Commission in the majority order should have followed the Parrys Sugar Industries Limited case in

Appeal No.140 of 2012 and ought to have held that the Generating Company should be entitled to the variable charges only and not the generic tariff and as such the order of the Single member fixing the variable charges on the strength of the Parrys Sugar Industries Limited case has to be confirmed and the order of the majority members of the Commission has to be set aside.

23. Though the learned Counsel for the Appellant forcefully argued this point at length we are unable to accept this argument for the following reasons:

(a) The Parrys Sugar Industries case was the one where the State Commission rejected the claim for any tariff. The Parry Company being aggrieved by the said rejection has approached the State Commission for the grant of Open Access. The period of claim was between 15.10.2011 and 31.10.2011. During that period there was no generation of electricity by the Generating Company.

(b) Thereafter, on 3.11.2011, without any intimation the power was injected into the Grid. In that case, the Appellant was not aware of the injection of the energy. In fact, the injection of the energy was more than one month and thereafter, the application for grant of Open Access was filed.

(c) Though in that case the State Commission felt that no compensation was payable, this Tribunal felt that suitable compensation is required to be paid to M/s. Parry Sugars since the energy was consumed by the Distribution Licensee and therefore directed that at least variable charges are required to be paid. In fact, while deciding the said Appeal, this Tribunal specifically held that the said order was passed in the light of the facts and circumstances of that case.

(d) Therefore, the said decision cannot be made applicable to the present case for the following reasons.

(i) The injection of the energy by the Generating Company was known to the Appellants since, the injection had been continued for the past more than a year and the generating companies was being paid Rs.5 as per the order of the High court.

(ii) The Respondent Generating Company as an abundant caution has filed an Application for the grant of Open Access on 10/12/2010 itself, just 6 days before the disposal of the Writ Petition.

(iii) The Generating Company, being a co-generation unit, has no other option but to

generate electricity and inject into the grid in the absence of the Open Access granted by SLDC.

(e) That apart, the Appellants cannot have any grievance because they were already directed by the High Court to pay Rs.5/- per unit to the Generating Company. Now, they have been asked to pay only Rs.3.90/- per unit. Hence, it is not appropriate for the Appellants to claim that they are liable to pay only variable charges.

24. The State Commission has relied upon Appeal No.170 of 2012 by this Tribunal in Electricity Supply Company Limited Vs Reliance Company Limited. The facts of that case are more akin to the present case.

25. In this case, this Tribunal while rejecting the claim of the Reliance, the Appellant in the said Appeal, the PPA rate for the relevant period on the strength of the Indo Rama case has fixed the rate at Rs.3.40/- per unit after deducting the Wheeling and Bank Charges by distinguishing the Indo Rama Case. The specific findings in that Appeal rendered by this Tribunal is as follows:

"29. *Summary of Our Findings*

(a) RInfra is entitled for compensation for the energy injected from its Wind Energy

Generator from 30.09.2009 to 10.01.2010 i.e. between the date of expiry of the period of the PPA and the date of execution of the Wheeling and Banking Agreement by the Appellant at the rate determined by the State Commission which is the rate of energy fixed by the State Commission for supply of energy by Wind Energy Generators to the Appellant.

(b) The findings of the Tribunal in the judgment dated 16.5.2011 in Appeal No.123 of 2010 in the matter of Indo Rama Syntehtics (I) Ltd Vs Maharashtra Electricity Regulatory Commission & Others would not apply to the present case in view of the facts and circumstances of the case. We have distinguished the present case from the Indo Rama case."

26. Thus, the finding given by this Tribunal in Appeal No.170 of 2012 would apply to the present case in all fours.

27. So, the grant of Tariff at the rate of Rs.3.90 per unit based on the generic tariff order is just and reasonable, in the light of the facts and circumstances of this case.

28. Summary of Our Findings

The Generating Company the Respondent No.2 is entitled for payment of the charges at the rate of Rs.3.90 per unit for the period from 17.12.2010 to 11.1.2011 when the energy was supplied to the State grid during the pendency of the application for open

access before the State Load Dispatch Centre as correctly held by the State Commission.

29. In view of the above findings, there is no merit in the Appeal. Accordingly, the Impugned Order is confirmed and the Appeal is dismissed.

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

31. Pronounced in the open court on 03.2.2014.

(Rakesh Nath) **Technical Member**

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

Dated:03rd Feb.2014
√REPORTABLE/~~NON REPORTABLE~~